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THE EARLY HISTORY OF INSTITUTIONS

LECTURES ON THE EARLY HISTORY OF INSTITUTIONS

BY SIR HENRY SUMNER MAINE
K.C.S.I., LL.D., F.R.S., AUTHOR OF "ANCIENT LAW"

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TO

WHITLEY STOKES, ESQ.

SECRETARY TO THE GOVERNMENT OF INDIA IN THE LEGISLATIVE DEPARTMENT

THIS VOLUME IS DEDICATED

IN RECOLLECTION OF A LONG OFFICIAL CONNECTION

AND STILL LONGER FRIENDSHIP

PREFACE

TO

THE FOURTH EDITION.

SINCE the first edition of this work was published, the materials for opinion on the extremely obscure subject of the ancient Irish Family and its divisions (discussed at pp. 208 *et seq.*) have been increased by the publication of an additional volume (the fourth) of Brehon Law Tracts, translated into English. The late lamented editor, Dr. Alexander George Richey, has printed in this new volume a very valuable preface, in which the whole of the evidence bearing on the difficult questions at issue is considered. It may be consulted with much advantage.

H. S. M.

October 5, 1885.

PREFACE

TO

THE FIRST EDITION.

In the Lectures printed in this Volume an attempt is made to carry farther in some particulars the line of investigation pursued by the Author in an earlier work on 'Ancient Law.' The fortunes of the legal system which then supplied him with the greatest number of his illustrations have been strikingly unlike those of another body of law from which he has now endeavoured to obtain some new materials for legal and social history. The Roman Law has never ceased to be spoken of with deep respect, and it is in fact the source of the greatest part of the rules by which civil life is still governed in the Western World. The Ancient Irish Law, the so-called Brehon Law, has been for the most part bitterly condemned by the few writers who have noticed it; and, after gradually losing whatever influence it once possessed in the country in

which it grew up, in the end it was forcibly suppressed. Yet the very causes which have denied a modern history to the Brehon Law have given it a special interest of its own in our day through the arrest of its development; and this interest, the Author hopes, is sufficient to serve as his excuse for making the conclusions it suggests the principal subject of the Lectures now published, except the last three.

The obligations of the Author to various Gentlemen for instruction derived from their published writings or private communications are acknowledged in the body of the work, but he has to express his especial thanks to the Bishop of Limerick, and to Professor Thaddeus O'Mahony, for facilities of access to the still unpublished translations of Brehon manuscripts, as well as for many valuable suggestions.

The Lectures (with the omission of portions) have all been delivered at Oxford.

27 CORNWALL GARDENS, LONDON, S.W.
November 1874.

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LECTURES

ON THE

EARLY HISTORY OF INSTITUTIONS.

LECTURE I.

NEW MATERIALS FOR THE EARLY HISTORY OF INSTITUTIONS.

THE SOURCES of information concerning the early history of institutions which have been opened to us during the last few years are numerous and valuable. On one subject in particular, which may be confidently said to have been almost exclusively investigated till lately by writers who had followed a false path, the additions to our knowledge are of special interest and importance. We at length know something concerning the beginnings of the great institution of Property in Land. The collective ownership of the soil by groups of men either in fact united by blood-relationship, or believing or assuming that they are so united, is now entitled to take rank as an ascertained primitive phenomenon, once universally characterising those communities of mankind between whose civilisation and our own there is any distinct

connection or analogy. The evidence has been found on all sides of us, dimly seen and verifiable with difficulty in countries which have undergone the enormous pressure of the Roman Empire, or which have been strongly affected by its indirect influence, but perfectly plain and unmistakeable in the parts of the world, peopled by the Aryan race, where the Empire has made itself felt very slightly or not at all. As regards the Sclavonic communities, the enfranchisement of the peasantry of the Russian dominions in Europe has given a stimulus to enquiries which formerly had attractions for only a few curious observers, and the amount of information collected has been very large. We now know much more clearly than we did before that the soil of the older provinces of the Russian Empire has been, from time immemorial, almost exclusively distributed among groups of self-styled kinsmen, collected in cultivating village-communities, self-organised and self-governing; and, since the great measure of the present reign, the collective rights of these communities, and the rights and duties of their members in respect of one another, are no longer entangled with and limited by the manorial privileges of an owner-in-chief. There is also fresh evidence that the more backward of the outlying Sclavonic societies are constituted upon essentially the same model; and it is one of the facts with which the Western world will some day assuredly have to reckon, that the political

ideas of so large a portion of the human race, and its ideas of property also, are inextricably bound up with the notions of family interdependency, of collective ownership, and of natural subjection to patriarchal power. The traces of the ancient social order in the Germanic and Scandinavian countries are, I need scarcely say, considerably fainter, and tend always to become more obscured; but the re-examination of the written evidence respecting ancient Teutonic life and custom proceeds without intermission, and incidentally much light has been thrown on the early history of property by the remarkable work of Sohm ('Fränkische Reichs-und Gerichtsverfassung'). The results obtained by the special method of G. L. Von Maurer have meantime been verified by comparison with phenomena discovered in the most unexpected quarters. The researches of M. de Laveleye, in particular, have been conducted over a field of very wide extent; and, although I dissent from some of the economic conclusions to which he has been led, I cannot speak too highly of the value of the materials collected by him, and described in the recently published volume which he has entitled 'La Propriété et ses Formes Primitives.' I have not observed that the vestiges left on the soil and law of England and of the Scottish Lowlands by the ancient Village-Community have been made the subject of any published work since the monograph

of Nasse on the 'Land Community of the Middle Ages' was given to the world, and since the lectures delivered in this place three years since appeared in print. Nobody, however, who knows the carefulness with which an English Court of Justice sifts the materials brought before it will wonder at my attaching a special importance to the judgment of Lord Chancellor Hatherley, given in a difficult case which arose through a dispute between different classes of persons interested in a manor, Warrick against Queen's College, Oxford (reported in 6 Law Reports, Chancery Appeals, 716). It appears to me to recognise the traces of a state of things older than the theoretical basis of English Real Property Law, and, so far as it goes, to allow that the description of it given here was correct. Meanwhile, if I may judge from the communications which do not cease to reach me from India, and from various parts of this country, the constitution of the Village-Community, as it exists, and as it existed, is engaging the attention of a large number of industrious observers, and the facts bearing upon the subject, which I hope will some day be made public, prove to exist in extraordinary abundance.

There was no set of communities which until recently supplied us with information less in amount and apparent value concerning the early history of law than those of Celtic origin. This was the more remarkable, because one particular group

of small Celtic societies, which have engrossed more than their share of the interest of this country—the clans of the Scottish Highlands—had admittedly retained many of the characteristics, and in particular the political characteristics, of a more ancient condition of the world, almost down to our own day. But the explanation is, that all Celtic societies were until recently seen by those competent to observe them through a peculiarly deceptive medium. A veil spread by the lawyers, a veil woven of Roman law and of that comparatively modern combination of primitive and Roman law which we call feudalism, hung between the Highland institutions and the shrewd investigating genius of the Scottish Lowlanders. A thick mist of feudal law hid the ancient constitution of Irish society from English observation, and led to unfounded doubts respecting the authenticity of the laws of Wales. The ancient organisation of the Celts of Gaul, described by Cæsar with the greatest clearness and decisiveness, appeared to have entirely disappeared from France, partly because French society was exclusively examined for many centuries by lawyers trained either in Roman or in highly feudalised law, but partly also because the institutions of the Gallic Celts had really passed under the crushing machinery of Roman legislation. I do not, indeed, mean to say that this darkness has not recently given signs of lifting. It has been re-

cognised that the collections of Welsh laws published by the Record Commission, though their origin and date are uncertain, are undoubtedly bodies of genuine legal rules; and, independently of the publications to which I am about to direct attention, the group of Irish scholars, distinguished by remarkable sobriety of thought, which has succeeded a school almost infamous for the unchastened license of its speculations on history and philology, had pointed out many things in Irish custom which connected it with the archaic practices known to be still followed or to have been followed by the Germanic races. As early as 1837 Mr. W. F. Skene, in a work of much value called 'The Highlanders of Scotland,' had corrected many of the mistakes on the subject of Highland usage into which writers exclusively conversant with feudal rules had been betrayed; and the same eminent antiquary, in an appendix to his edition of the Scottish chronicler, Fordun, published in 1872, confirms evidence which had reached me in considerable quantities from private sources to the effect that village-communities with 'shifting severalties' existed in the Highlands within living memory. Quite recently, also, M. Le Play, Mr. Cliffe Leslie, and others have come upon plain traces of such communities in several parts of France. A close re-examination of the Custumals or manuals of feudal rules plentiful in French legal literature, led farther to some highly interesting

results. It clearly appeared from them that communities of villeins were constantly found on the estates of the French territorial nobility. The legal writers have always represented these as voluntary associations, which were rather favoured by the lord on account of the greater certainty and regularity with which their members rendered him suit and service. As a rule, when a tenant holding by base tenure died, the lord succeeded in the first instance to his land, a rule of which there are plain traces in our English law of copyhold. But it is expressly stated that, in the case of an association of villeins, the lord did not resume their land, being supposed to be compensated by their better ability to furnish his dues. Now that the explanation has once been given, there can be no doubt that these associations were not really voluntary partnerships, but groups of kinsmen; not, however, so often organised on the ordinary type of the Village-Community as on that of the House-Community, which has recently been examined in Dalmatia and Croatia. Each of them was what the Hindoos call a Joint Undivided Family, a collection of assumed descendants from a common ancestor, preserving a common hearth and common meals during several generations. There was no escheat of the land to the lord on a death, because such a corporation never dies, and the succession is perpetual.

But much the most instructive contribution to

our knowledge of the ancient Celtic societies has been furnished by the Irish Government, in the translations of the Ancient Laws of Ireland, which have been published at its expense. The first volume of these translations was published in 1865; the second in 1869; the third, enriched with some valuable prefaces, has only just appeared. No one interested in the studies which are now occupying us could fail to recognise the importance of the earlier volumes, but there was much difficulty in determining their exact bearing on the early history of Celtic institutions. The bulk of the law first published consisted in a collection of rules belonging to what in our modern legal language we should call the Law of Distress. Now, in very ancient bodies of rules the Law of Distress, as I shall endeavour to explain hereafter, is undoubtedly entitled to a very different place from that which would be given to it in any modern system of jurisprudence; but still it is a highly special branch of law in any stage of development. There is, however, another more permanent and more serious cause of embarrassment in drawing conclusions from these laws. Until comparatively lately they were practically unintelligible; and they were restored to knowledge by the original translators, Dr. O'Donovan and Dr. O'Curry, two very remarkable men, both of whom are now dead. The translations have been carefully revised by the

learned editor of the Irish text; but it is probable that several generations of Celtic scholars will have had to interchange criticisms on the language of the laws before the reader who approaches them without any pretension to Celtic scholarship can be quite sure that he has the exact meaning of every passage before him. The laws, too, I need scarcely say, are full of technical expressions; and the greatest scholar who has not had a legal training—and, indeed, up to a certain point when he has had a legal training—may fail to catch the exact excess or defect of meaning which distinguishes a word in popular use from the same word employed technically. Such considerations suggest the greatest possible caution in dealing with this body of rules. In what follows I attempt to draw inferences only when the meaning and drift of the text seem reasonably certain, and I have avoided some promising lines of enquiry which would lead us through passages of doubtful signification.

The value which the Ancient Laws of Ireland, the so-called Brehon laws, will possess when they are completely published and interpreted, may, I think, be illustrated in this way. Let it be remembered that the Roman Law, which, next to the Christian Religion, is the most plentiful source of the rules governing actual conduct throughout Western Europe, is descended from a small body of Aryan customs re-

duced to writing in the fifth century before Christ, and known as the Twelve Tables of Rome. Let it farther be recollected that this law was at first, expanded and developed, not at all, or very slightly, by legislation, but by a process which we may perceive still in operation in various communities—the juridical interpretation of authoritative texts by successive generations of learned men. Now, the largest collection of Irish legal rules, which has come down to us, professes to be an ancient Code, with an appendage of later glosses and commentaries; and, if its authenticity could be fully established, this ancient Irish Code would correspond historically to the Twelve Tables of Rome, and to many similar bodies of written rules which appear in the early history of Aryan societies. There is reason, however, to think that its claims to antiquity cannot be sustained to their full extent, and that the Code itself is an accretion of rules which have clustered round an older nucleus. But that some such kernel or perhaps several such kernels of written law existed, is highly probable, and it is also probable that the whole of the Brehon law consists of them and of accumulations formed upon them. It is farther probable that the process by which these accumulations were formed was, as in the infancy of the Roman State, juridical interpretation. According to the opinion which I follow, the interesting fact about

the ancient Irish law is, that this process was exclusive, and that none of the later agencies by which law is transformed came into play. The Brehon laws are in no sense a legislative construction, and thus they are not only an authentic monument of a very ancient group of Aryan institutions; they are also a collection of rules which have been gradually developed in a way highly favourable to the preservation of archaic peculiarities. Two causes have done most to obscure the oldest institutions of the portion of the human race to which we belong: one has been the formation throughout the West of strong centralised governments, concentrating in themselves the public force of the community, and enabled to give to that force upon occasion the special form of legislative power; the other has been the influence, direct and indirect, of the Roman Empire, drawing with it an activity in legislation unknown to the parts of the world which were never subjected to it. Now, Ireland is allowed on all hands to have never formed part of the Empire; it was very slightly affected from a distance by the Imperial law; and, even if it be admitted that, during certain intervals of its ancient history, it had a central government, assuredly this government was never a strong one. Under these circumstances it is not wonderful that the Brehon law, growing together without legislation upon an original body of Aryan custom, and formed

beyond the limit of that cloud of Roman juridical ideas which for many centuries overspread the whole Continent, and even at its extremity extended to England, should present some very strong analogies to another set of derivative Aryan usages, the Hindoo law, which was similarly developed. The curious and perplexing problems which such a mode of growth suggests have to be grappled with by the student of either system.

The ancient laws of Ireland have come down to us as an assemblage of law-tracts, each treating of some one subject or of a group of subjects. The volumes officially translated and published contain the two largest of these tracts, the Senchus Mor, or Great Book of the Ancient Law, and the Book of Aicill. While the comparison of the Senchus Mor and of the Book of Aicill with other extant bodies of archaic rules leaves no doubt of the great antiquity of much of their contents, the actual period at which they assumed their present shape is extremely uncertain. Mr. Whitley Stokes, one of the most eminent of living Celtic scholars, believes, upon consideration of its verbal forms, that the Senchus Mor was compiled in or perhaps slightly before the eleventh century; and there appears to be internal evidence which on the whole allows us to attribute the Book of Aicill to the century preceding. The Senchus Mor, it is true, expressly claims for itself a far earlier

origin. In a remarkable preface, of which I shall have much to say hereafter, it gives an account, partly in verse, of the circumstances under which it was drawn up, and it professes to have been compiled during the life and under the personal influence of St. Patrick. These pretensions have been ingeniously supported, but there is not much temerity, I think, in refusing to accept the fifth century as the date of the Senchus Mor. At the same time it is far from impossible that the writing of the ancient Irish laws began soon after the Christianisation of Ireland. It was Christianity, a 'religion of a book,' which for the first time introduced many of the ruder nations outside the Empire to the art of writing. We cannot safely claim for the Celts of Ireland, in the fifth century of the Christian era, precisely the same degree of culture which Cæsar attributes to the Celts of the Continent in the first century before Christ; but, even if we could do so, Cæsar expressly states of the Gauls that, though they were acquainted with writing, they had superstitious scruples about using written characters to preserve any part of their sacred literature, in which their law would then be included. Such objections would, however, necessarily disappear with the conversion of the Irish people to Christianity. On the whole there is no antecedent improbability in the tradition that, soon after this conversion, the usages of the Irish began to be stated in writing, and

Celtic scholars have detected not a little evidence that parts of these more venerable writings are imbedded in the text of the Book of Aicill and of the Senchus Mor.

It is extremely likely that the most ancient law was preserved in rude verse or rhythmical prose. In the oldest Irish traditions the lawyer is distinguished with difficulty from the poet, poetry from literature. Both in the Senchus Mor and in the Book of Aicill the express statement of the law is described as 'casting a thread of poetry' about it, and the traditional authors of the Senchus Mor are said to have exhibited 'all the judgment and poetry of the men of Erin.' Modern Irish scholarship has, in fact, discovered that portions of the Senchus Mor are really in verse. The phenomenon is not unfamiliar. Mr. Grote, speaking of the Elegiacs of Solon, and of the natural priority of verse to prose, says (History of Greece, iii. 119), 'the acquisitions as well as the effusions of an intellectual man, even in the simplest form, (then) adjusted themselves not to the limitations of the period and semicolon, but to those of the hexameter and pentameter.' There is no question, I conceive, that this ancient written verse is what is now called a survival, descending to the first ages of written composition from the ages when measured rhythm was absolutely essential, in order that the memory might bear the vast burdens placed upon it

It is now generally agreed that the voluminous versified Sanscrit literature, which embraces not only the poetry of the Hindoos, but most of their religion, much of what stands to them in place of history, and something even of their law, was originally preserved by recollection and published by recitation ; and even now, in the Sanscrit schools which remain, the pupil is trained to exercises of memory which are little short of miraculous to an Englishman.

The tracts are of very unequal size, and the subjects they embrace are of very unequal importance. But all alike consist of an original text, divided into paragraphs. Above or over against the principal words of the text glosses or interpretations are written in a smaller hand, and a paragraph is constantly followed by an explanatory commentary, also in a smaller hand, written in the space which separates the paragraph from the next. The scarcity of material for writing may perhaps sufficiently account for the form taken by the manuscripts; but the Celts seem to have had a special habit of glossing, and you may have heard that the glosses written by early Irish monks between the lines or on the margin of manuscripts belonging to religious houses on the Continent had much to do with the wonderful discoveries of Zeuss in Celtic philology. A facsimile of part of two Brehon manuscripts, one in the British Museum, and the other in the Library of Trinity

College, Dublin, may be seen at the beginning of the second published volume of the translations. It seems probable that each tract was the property, and that it sets forth the special legal doctrines, of some body of persons who, in modern legal phrase, had perpetual succession, a Family or Law School; there is ample evidence of the existence of such law schools in ancient Ireland, and they are another feature of resemblance to the India of the past and in some degree to the India of the present.

The text of each of the published tracts appears to have been put together by one effort, no doubt from pre-existing materials, and it may have been written continuously by some one person; but the additions to it must be an accumulation of explanations and expositions of various dates by subsequent possessors of the document. I quite agree with the observation of the Editors, that, while the text is for the most part comparatively consistent and clear, the commentary is often obscure and contradictory. Precisely the same remark is frequently made by Anglo-Indian Judges on the Brahminical legal treatises, some of which are similarly divided into a text and a commentary. As regards the ancient Irish law, the result of the whole process is anything but satisfactory to the modern reader. I do not know that, in any extant body of legal rules, the difficulty of mastering the contents has ever been so seriously aggravated by the

repulsiveness of the form. One of the editors has unkindly, but not unjustly, compared a Brehon tract to the worst kind of English law-book, without even the moderate advantage of an alphabetical arrangement.

The exact date at which the existing manuscripts were written cannot be satisfactorily settled until they are all made accessible, which unfortunately they are not at present. But we know one MS. of the Senchus Mor to be at least as old as the fourteenth century, since a touching note has been written on it by a member of the family to which it belonged: 'One thousand three hundred two and forty years from the birth of Christ till this night; and this is the second year since the coming of the plague into Ireland. I have written this in the 20th year of my age. I am Hugh, son of Conor McEgan, and whoever reads it let him offer a prayer of mercy for my soul. This is Christmas night, and on this night I place myself under the protection of the King of Heaven and Earth, beseeching that he will bring me and my friends safe through the plague. Hugh wrote this in his own father's book in the year of the great plague.'

The system of legal rules contained in these law-tracts is undoubtedly the same with that repeatedly condemned by Anglo-Irish legislation, and repeatedly noticed by English observers of Ireland down to the early part of the seventeenth century

It is the same law which, in 1367, a statute of Kilkenny denounces as 'wicked and damnable.' It is the same law which Edmund Spenser, in his 'View of the State of Ireland,' describes as 'a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeareth a great show of equity, in determining the right between party and party, but in many things repugning quite both to God's law and man's.' It is the same 'lewd' and 'unreasonable' custom which Sir John Davis contrasts with the 'just and honourable law of England,' and to which he attributes such desolation and barbarism in Ireland, 'as the like was never seen in any country that professed the name of Christ.' It is not our business in this department of study to enquire now far this violent antipathy was politically justifiable. Even if the worst that has been said by Englishmen of the Brehon law down to our own day were true, we might console ourselves by turning our eyes to spheres of enquiry fuller of immediate promise to the world than ours, and observing how much of the wealth of modern thought has been obtained from the dross which earlier generations had rejected. Meanwhile, happily, it is a distinct property of the Comparative Method of investigation to abate national prejudices. I myself believe that the government of India by the English has been rendered appreciably easier by the discoveries which have brought home to the educated of both races the common Aryan parent-

age of Englishman and Hindoo. Similarly, I am not afraid to anticipate that there will some day be more hesitation in repeating the invectives of Spenser and Davis, when it is once clearly understood that the 'lewd' institutions of the Irish were virtually the same institutions as those out of which the 'just and honourable law' of England grew. Why these institutions followed in their development such different paths it is the province of History to decide; but, when it gives an impartial decision, I doubt much its wholly attributing the difference to native faults of Irish character. We, who are able here to examine coolly the ancient Irish law in an authentic form, can see that it is a very remarkable body of archaic law, unusually pure from its origin. It has some analogies with the Roman law of the earliest times, some with Scandinavian law, some with the law of the Sclavonic races, so far as it is known, some (and these particularly strong) with the Hindoo law, and quite enough with old Germanic law of all kinds, to render valueless, for scientific purposes, the comparison which the English observers so constantly institute with the laws of England. It is manifestly the same system in origin and principle with that which has descended to us as the Laws of Wales, but these last have somehow undergone the important modifications which arise from the establishment of a comparatively strong central authority. Nor does the Brehon law alto-

gether disappoint the expectations of the patriotic Irishmen who, partly trusting to the testimony of Edmund Spenser, the least unkind of the English critics of Ireland, though one of the most ruthless in his practical suggestions, looked forward to its manifesting, when it was published, an equity and reasonableness which would put to shame the barbarous jurisprudence of England. Much of it—I am afraid I must say, most of it—is worthless save for historical purposes, but on some points it really does come close to the most advanced legal doctrines of our day. The explanation—which I will hereafter give at length—I believe to lie in the method of its development, which has not been through the decisions of courts, but by the opinions of lawyers on hypothetical states of fact.

I think I may lay down that, wherever we have any knowledge of a body of Aryan custom, either anterior to or but slightly affected by the Roman Empire, it will be found to exhibit some strong points of resemblance to the institutions which are the basis of the Brehon law. The depth to which the Empire has stamped itself on the political arrangements of the modern world has been illustrated of late years with much learning; but I repeat my assertion that the great difference between the Roman Empire and all other sovereignties of the ancient world lay in the activity of its legislation, through the Edicts of the Prætor and the Constitutions of the

Emperors. For many races, it actually repealed their customs and replaced them by new ones. For others, the results of its legislation mixed themselves indistinguishably with their law. With others, it introduced or immensely stimulated the habit of legislation; and this is one of the ways in which it has influenced the stubborn body of Germanic custom prevailing in Great Britain. But wherever the institutions of any Aryan race have been untouched by it, or slightly touched by it, the common basis of Aryan usage is perfectly discernible; and thus it is that these Brehon law-tracts enable us to connect the races at the eastern and western extremities of a later Aryan world, the Hindoos and the Irish.

The Lectures which follow will help, I trust, to show what use the student of comparative jurisprudence may make of this novel addition to our knowledge of ancient law. Meantime, there is some interest in contrasting the view of its nature, origin, and growth, which we are obliged to take here, with that to which the ancient Irish practitioners occasionally strove hard to give currency. The Senchus Mor, the Great Book of the Ancient Law, was doubtless a most precious possession of the law-school or family to which it belonged; and its owners have joined it to a preface in which a semi-divine authorship is boldly claimed for it. Odhran, the charioteer of St. Patrick—so says this preface—had been killed,

and the question arose whether Nuada, the slayer, should die, or whether the saint was bound by his own principles to unconditional forgiveness. St. Patrick did not decide the point himself; the narrator, in true professional spirit, tells us that he set the precedent according to which a stranger from beyond the sea always selects a legal adviser. He chose 'to go according to the judgment of the royal poet of the men of Erin, Dubhthach Mac ua Lugair,' and he 'blessed the mouth' of Dubhthach. A poem, doubtless of much antiquity and celebrity, is then put into the mouth of the arbitrator, and by the judgment embodied in it Nuada is to die; but he ascends straight to heaven through the intercession of St. Patrick

'Then King Laeghaire said, "It is necessary for you, O men of Erin, that every other law should be settled and arranged by us as well as this." "It is better to do so," said Patrick. It was then that all the professors of the sciences in Erin were assembled, and each of them exhibited his art before Patrick, in the presence of every chief in Erin. It was then Dubhthach was ordered to exhibit all the judgments and all the poetry of Erin, and every law which prevailed among the men of Erin. . . . This is the Cain Patraic, and no human Brehon of the Gaedhil is able to abrogate anything that is found in the Senchus Mor.'

The inspired award of Dubhthach that Nuada must die suggests to the commentator the following remark: "What is understood from the above decision

which God revealed to Dubhthach is, that it was a middle course between forgiveness and retaliation; for retaliation prevailed in Erin before Patrick, and Patrick brought forgiveness with him; that is, Nuada was put to death for his crime, and Patrick obtained heaven for him. At this day we keep between forgiveness and retaliation; for as at present no one has the power of bestowing heaven, as Patrick had at that day, so no one is put to death for his intentional crimes, so long as 'eric' fine is obtained; and whenever 'eric' fine is not obtained, he is put to death for his intentional crimes, and placed on the sea for his unintentional crimes." It is impossible, of course, to accept the statement that this wide-spread ancient institution, the pecuniary fine levied on tribes or families for the wrongs done by their members, had its origin in Christian influences; but that it succeeded simple retaliation is in the highest degree probable, and no doubt in its day it was at least as great an advantage to the communities among whom it prevailed as was that stern royal administration of criminal justice to which the Englishmen of the sixteenth century were accustomed, and on which they so singularly prided themselves. But by the sixteenth century it may well have outlived its usefulness, and so may have partially justified the invectives of its English censors, who generally have the 'eric'-fine for homicide in view when they denounce the Brehon law as 'contrary to God's law and man's.'

LECTURE II.

THE ANCIENT IRISH LAW.

THE great peculiarity of the ancient laws of Ireland, so far as they are accessible to us, is discussed, with much instructive illustration, in the General Preface to the Third Volume of the official translations. They are not a legislative structure, but the creation of a class of professional lawyers, the Brehons, whose occupation became hereditary, and who on that ground have been designated, though not with strict accuracy, a caste. This view, which is consistent with all that early English authorities on Ireland have told us of the system they call the Brehon law, is certainly that which would be suggested by simple inspection of the law-tracts at present translated and published. The Book of Aicill is probably the oldest, and its text is avowedly composed of the dicta of two famous lawyers, Cormac and Cennfaeladh. The Senchus Mor does, indeed, profess to have been produced by a process resembling legislation, but the pretension cannot be supported; and, even if it could, the Senchus Mor would not less consist of the opinions of famous Brehons. It describes the legal rules embodied in its

text as formed of the 'law of nature,' and of the 'law of the letter.' The 'law of the letter' is the Scriptural law, extended by so much of Canon law as the primitive monastic Church of Ireland can be supposed to have created or adopted. The reference in the misleading phrase 'law of nature,' is not to the memorable combination of words familiar to the Roman lawyers, but to the text of St. Paul in the Epistle to the Romans: 'For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves.' (Rom. ii. 14.) The 'law of nature' is, therefore, the ancient pre-Christian ingredient in the system, and the 'Senchus Mor' says of it: 'The judgments of true nature while the Holy Ghost had spoken through the mouths of the Brehons and just poets of the men of Erin, from the first occupation of Ireland down to the reception of the faith, were all exhibited by Dubhthach to Patrick. What did not clash with the Word of God in the written law and the New Testament and the consciences of believers, was confirmed in the laws of the Brehons by Patrick and by the ecclesiastics and chieftains of Ireland; for the law of nature had been quite right except the faith, and its obligations, and the harmony of the Church and people. And this is the "Senchus Mor."'

Dr. Sullivan, on the other hand, whose learned and exhaustive Introduction to O'Curry's Lectures

forms the first volume of the 'Manners and Customs of the Ancient Irish,' affirms, on the evidence of ancient records, that the institutions which in some communities undoubtedly developed into true legislatures had their counterparts in the Ireland to which the laws belonged, and he does not hesitate to designate certain portions of the Irish legal system 'statute-law.' In the present state of criticism on Irish documents it is not possible to hold the balance exactly between the writers of the Introduction and of the General Preface; but there is not the inconsistency between their opinions which there might appear to be at first sight. In the infancy of society many conceptions are found blended together which are now distinct, and many associations which are now inseparable from particular processes or institutions are not found coupled with them. There is abundant proof that legislative and judicial power are not distinguished in primitive thought; nor, again, is legislation associated with innovation. In our day the legislator is always supposed to innovate; the judge never. But of old the legislator no more necessarily innovated than the judge; he only, for the most part, declared pre-existing law or custom. It is impossible to determine how much new law there was in the Laws of Solon, or in the Twelve Tables of Rome, or in the Laws of Alfred and Canute, or in the Salic Law which is the oldest of the so-called Leges Bar-

barorum, but in all probability the quantity was extremely small. Thus, when a body of Brehon judgments was promulgated by an Irish Chief to a tribal assembly, it is probable that convenience was the object sought rather than a new sanction. A remarkable poem, appended to O'Curry's Lectures, tells us how certain Chiefs proceeded every third year to the 'Fair of Carman' and there proclaimed 'the rights of every law and the restraints;' but it does not at all follow that this promulgation had any affinity for legislation in the modern sense. The innovating legislatures of the modern world appear to have grown up where certain conditions were present which were virtually unknown to ancient Ireland—where the primitive groups of which society was formed were broken up with some completeness, and where a central government was constituted acting on individuals from a distance coercively and irresistibly.

There are, moreover, some independent reasons for thinking that, among the Celtic races, the half-judicial, half-legislative, power originally possessed by the tribal Chief, or by the tribal Assembly, or by both in combination, passed very early to a special class of learned persons. The Prefaces in Irish found at the commencement of some of the law-tracts, which are of much interest, but of uncertain origin and date, contain several references to the order in Celtic

society which has hitherto occupied men's thoughts more than any other, the Druids. The word occurs in the Irish text. The writers of the prefaces seem to have conceived the Druids as a class of heathen priests who had once practised magical arts. The enchanters of Pharaoh are, for instance, called the Egyptian Druids, in the Preface to the Senchus Mor. The point of view seems to be the one familiar enough to us in modern literature, where an exclusive prominence is given to the priestly character of the Druids; nor do the Brehon lawyers appear to connect themselves with a class of men whom they regard as having belonged altogether to the old order of the world. I am quite aware that, in asking whether the historical disconnection of the Brehons and the Druids can be accepted as a fact, I suggest an enquiry about which there hangs a certain air of absurdity. There has been so much wild speculation and assertion about Druids and Druidical antiquities that the whole subject seems to be considered as almost beyond the pale of serious discussion. Yet we are not at liberty to forget that the first great observer of Celtic manners describes the Celts of the Continent as before all things remarkable for the literary class which their society included. Let me add that in Cæsar's account of the Druids there is not a word which does not appear to me perfectly credible. The same remark may be made of Strabo. But the

source of at all events a part of the absurdities which have clustered round the subject I take to be the Natural History of Pliny, and they seem to belong to those stories about plants and animals to which may be traced a great deal of the nonsense written in the world.

You may remember the picture given by Cæsar of the Continental Celts, as they appeared to him when he first used his unrivalled opportunities of examining them. He tells us that their tribal societies consisted substantially of three orders, two privileged and one unprivileged, and these orders he calls the Equites, the Druids, and the Plebeians. Somebody has said that this would be a not very inaccurate description of French society just before the first Revolution, with its three orders of Nobles, Clergy, and unprivileged Tiers-État; but the observation is a good deal more ingenious than true. We are now able to compare Cæsar's account of the Gauls with the evidence concerning a Celtic community which the Brehon tracts supply; and if we use this evidence as a test, we shall soon make up our minds that, though his representation is accurate as far as it goes, it errs in omission of detail. The Equites, or Chiefs, though to some extent they were a class apart, did not stand in such close relation to one another as they stood to the various septs or groups over which they presided. 'Every chief,'

says the Brehon law, 'rules over his land, whether it be small or whether it be large.' The Plebeians, again, so far from constituting a great miscellaneous multitude, were distributed into every sort of natural group, based ultimately upon the Family. The mistake, so far as there was error, I conceive to have been an effect of mental distance. It had the imperfections of the view obtained by looking on the Gangetic plains from the slopes of the Himalayas. The impression made is not incorrect, but an immensity of detail is lost to the observer, and a surface varied by countless small elevations looks perfectly flat. Cæsar's failure to note the natural divisions of the Celtic tribesmen, the families and septs or subtribes, is to me particularly instructive. The theory of human equality is of Roman origin; the comminution of human society, and the unchecked competition among its members, which have gone so far in the Western Europe of our days, had their most efficient causes in the mechanism of the Roman State. Hence Cæsar's omissions seem to be those most natural in a Roman general who was also a great administrator and trained lawyer; and they are undoubtedly those to which an English ruler of India is most liable at this moment. It is often said that it takes two or three years before a Governor-General learns that the vast Indian population is an aggregate of natural groups and not the mixed mul-

titude he left at home; and some rulers of India have been accused of never having mastered the lesson at all.

There are a few very important points of detail to be noticed in Cæsar's description of what may be called the lay portion of Celtic society. I shall afterwards call your attention to the significance of what he states concerning the classes whom he calls the clients and debtors of the Equites, and respecting the increased power which they give to the Chief on whom they are dependent. It is, however, remarkable that, when he speaks of the Druids, his statements are greatly more detailed. Here there were no home associations to mislead him, but, beyond that, it is plain that his interest was strongly roused by the novel constitution of this privileged order whom he places by the side of the Chiefs. Let me recall, then, to you the principal points of his description, from which I designedly omit all statements concerning the priestly office of the class described. He tells us that the Druids were supreme judges in all public and private disputes; and that, for instance, all questions of homicide, of inheritance, and of boundary were referred to them for decision. He says that the Druids presided over schools of learning, to which the Celtic youth flocked eagerly for instruction, remaining in them sometimes (so he was informed) for twenty years at a time. He states that the pupils in these

schools learned an enormous quantity of verses, which were never committed to writing; and he gives his opinion that the object was not merely to prevent sacred knowledge from being popularised, but to strengthen the memory. Besides describing to us the religious doctrine of the Druids, he informs us that they were extremely fond of disputing about the nature of the material world, the movements of the stars, and the dimensions of the earth and of the universe. At their head there was by his account a chief Druid, whose place at his death was filled by election, and the succession occasionally gave rise to violent contests of arms (B. G. vi. 13, 14).

There are some strong and even startling points of correspondence between the functions of the Druids, as described by Cæsar, and the office of the Brehon, as suggested by the law-tracts. The extensive literature of law just disinterred testifies to the authority of the Brehons in all legal matters, and raises a strong presumption that they were universal referees in disputes. Among their writings are separate treatises on inheritance and boundary, and almost every page of the translations contains a reference to the 'eric'-fine for homicide. The schools of literature and law appear to have been numerous in ancient Ireland, and O'Curry is able to give the course of instruction in one of them extending over

twelve years. All literature, including even law, seems to have been identified with poetry. The chief Druid of Cæsar meets us on the very threshold of the Senchus Mor, in the person of Dubhthach Mac ua Lugair, the royal poet of Erin, the Brehon who was chosen by St. Patrick to arbitrate in a question of homicide, and whose 'mouth' the saint 'blessed.' The mode of choosing the chief Druid, by election, has its counterpart in the institution of Tanistry, which within historical times determined the succession to all high office in Ireland, and which was hateful to the English, as affording smaller security for order than their own less archaic form of primogeniture. Nor is this all. The Prefaces in Irish to the tracts contain a number of discussions on subjects which are in no way legal, or which are forced into some connection with law by the most violent expedients. They leave on the mind the impression of being a patchwork of materials, probably of very various antiquity, which happen to have been found in the archives of particular law-schools. Now, the Preface to the Senchus Mor actually contains disquisitions on all the matters about which Cæsar declares the Druids to have been specially fond of arguing. It in one place sets forth how God made the heaven and the earth, but the account is not the least like the Mosaic account. It goes off, as Cæsar's Druids did, into a number of extraordinary statements.

'*de sideribus atque eorum motu*,' '*de mundi ac terrarum magnitudine*.' Among other things, it declares that God fixed seven divisions from the firmament to the earth, and that the distance he measured from the moon to the sun was 244 miles. 'And the first form of the firmament was ordained thus: as the shell is about the egg, so is the firmament round the earth in fixed suspension . . . . there are six windows in each part through the firmament to shed light through, so that there are sixty-six windows in it, and a glass shutter for each window; so that the whole firmament is a mighty sheet of crystal and a protecting bulwark round the earth, with three heavens, and three heavens about it; and the seventh was arranged in three heavens. This last, however, is not the habitation of the angels, but is like a wheel revolving round, and the firmament is thus revolving, and also the seven planets, since the time when they were created.' Parts of the passage reflect the astronomical notions known to have been current in the Middle Ages, but much of it reads like a fragment of a heathen cosmology, to which a later revision has given a faint Christian colouring. The same Preface contains also some curious speculations on the etymology of law-terms, and the Preface to the Book of Aicill enters, among other things, into the question of the difference between genus and species.

I suggest, therefore, that the same tendencies

which produced among the Celts of the Continent the class called the Druids produced among the Celts of Ireland the class known to us as the Brehons; nor does it seem to me difficult to connect the results of these tendencies with other known phenomena of ancient society. There is much reason to believe that the Tribe-Chief, or King, whom the earliest Aryan records show us standing by the side of the Popular Assembly, was priest and judge as well as captain of the host. The later Aryan history shows us this blended authority distributing or 'differentiating' itself, and passing either to the Assembly or to a new class of depositaries. Among the Achæans of Homer, the Chief has ceased to be priest, but he is still judge; and his judicial sentences, θέμιστες, or 'dooms,' however much they may be drawn in reality from pre-existing usage, are believed to be dictated to him from on high. Among the Celts both of Gaul and of Ireland he has ceased to be priest, and also probably to be judge, although some measure of judicial authority may still belong to his office as a 'survival.' The order of change thus departs from that followed in Athenian history, where the institution of kingship survived only in the name of the King Archon, who was a judicial functionary, and from that followed in Roman history, where the Rex Sacrificulus was a hierophant or priest. The Popular Assembly, meanwhile, which

virtually attracted to itself the whole civil and criminal jurisdiction of the Kings among the Athenians, and which at Rome engrossed the whole administration of criminal justice through the commissions it appointed, seems to lose all judicial authority among the Celts. Perhaps I may be permitted thus to describe the change I conceive to have taken place among the Celts of Ireland. Themis, who in Homer is the assessor of Zeus and the source of judicial inspiration to kings, has (so to speak) set up for herself. Kings have delegated their authority to a merely human assessor, and we see by the story which begins the Senchus Mor that, even when a Saint is supposed to be present, the inspiration of which he is the source does not find expression through his lips, nor does it descend on the King; it descends on the professional judge. When we obtain our last glimpse of the class which has received this inheritance from Chief or King—the Brehons, Judges, or Authors of Judgments—they have sunk to the lowest depth of misery and degradation through the English conquest. At an earlier date they are seen divided into families or septs, the hereditary law-advisers of some princely or powerful house. Hugh McEgan, who wrote the note 'in his own father's book,' which I read in the last Lecture, was one of the hereditary Brehons attached to the McCarthys. But, in the earliest Irish traditions,

the functions of the Brehon and the King run very much into one another. The most ancient Brehons are described as of royal blood, sometimes as king's sons. The Tanaists of the great Irish Chiefs, the successors elected out of the kindred of each Chief to come after him on his death, are said to have occasionally officiated as judges; and one of the law-tracts, still unpublished, contains the express rule that it is lawful for a king, though himself a judge, to have a judge in his place. Cormac MacAirt, one of the traditional authors of the Book of Aicill, was a King in retirement. Apocryphal as his story may be, it is one of much significance to the student of ancient institutions. He had been accidentally blinded of one eye, and is said to have been deposed from his regal office or chieftaincy on account of the blemish. Coirpri, his son and successor (says the Book of Aicill), 'in every difficult case of judgment that came to him used to go and ask his father about it, and his father used to say to him, "My son, that thou mayest know"'—and then proceeded to lay down the law.

If, without committing ourselves to any specific theory concerning the exact extent of the correspondence, we can assume that there was substantial identity between the literary class which produced the law-tracts and the literary order attributed to the Celtic races by Cæsar, we not only do something to establish an historical conclusion perhaps more curious

than important, but we remove some serious difficulties in the interpretation of the interesting and instructive body of archaic law now before us. The difference between the Druids and their successors, the Brehons, would in that case be mainly this: the Brehons would be no longer priests. All sacerdotal or religious authority must have passed, on the conversion of the Irish Celts, to the 'tribes of the saints' —to the missionary monastic societies founded at all points of the island—and to that multitude of bishops dependent on them, whom it is so difficult to reconcile with any of our preconceived ideas as to ancient ecclesiastical organisation. The consequence would be that the religious sanctions of the ancient laws, the supernatural penalties threatened on their violation, would disappear, except so far as the legal rules exactly coincided with the rules of the new Christian code, the 'law of the letter.' Now, the want of a sanction is occasionally one of the greatest difficulties in understanding the Brehon law. Suppose a man disobeyed the rule or resisted its application, what would happen? The learned writer of one of the modern prefaces prefixed to the Third Volume of the Ancient Laws contends that the administration of the Brehon system consisted in references to arbitration; and I certainly think myself that, so far as the system is known, it points to that conclusion. The one object of the Brehons was to force disputants to

refer their quarrels to a Brehon, or to some person in authority advised by a Brehon, and thus a vast deal of the law tends to run into the Law of Distress, which declares the various methods by which a man can be compelled through seizure of his property to consent to an arbitration. But then one cannot help perpetually feeling that the compulsion is weak as compared with the stringency of the process of modern Courts of Justice; and besides that, why should not the man attempted to be distrained upon constantly resist with success? Doubtless the law provides penalties for resistance; but where is the ultimate sanction? Cæsar supplies an answer, which must, I think, contain a portion of the truth. He says that if a Celt of Gaul refused to abide by a Druid judgment he was excommunicated: which was esteemed the heaviest of penalties. Another example which I can give you of the want or weakness of the sanction in the Brehon law is a very remarkable one, and I shall recur to it hereafter. If you have a legal claim against a man of a certain rank and you are desirous of compelling him to discharge it, the Senchus Mor tells you to 'fast upon him.' 'Notice,' it says, 'precedes distress in the case of the inferior grades, except it be by persons of distinction or upon persons of distinction; fasting precedes distress in their case' ('Ancient Laws of Ireland,' vol. i. p. 113). The institution is unquestionably identical

with one widely diffused throughout the East, which is called by the Hindoos 'sitting *dharna*.' It consists in sitting at your debtor's door and starving yourself till he pays. From the English point of view the practice has always been considered barbarous and immoral, and the Indian Penal Code expressly forbids it. It suggests, however, the question—what would follow if the debtor simply allowed the creditor to starve? Undoubtedly the Hindoo supposes that some supernatural penalty would follow; indeed, he generally gives definiteness to it by retaining a Brahmin to starve himself vicariously, and no Hindoo doubts what would come of causing a Brahmin's death. We cannot but suppose that the Brehon rule of fasting was once thought to have been enforced in some similar way. Cæsar states that the Druids believed in the immortality and transmigration of the soul, and considered it the key of their system. A Druid may thus very well have taught that penal consequences in another world would follow the creditor's death by starvation; and there is perhaps a pale reflection of this doctrine in the language of the Senchus Mor: 'He who does not give a pledge to fasting is an evader of all; he who disregards all things shall not be paid by God or man.' But an Irish Brehon could scarcely make any distinct assertion on the subject, since fasting had now become a specific ordinance of the Christian Church, and its conditions and spiritual

effects were expressly defined by the Christian priesthood. Theoretically, I should state, a person who refused unjustly to yield to fasting had his legal liabilities considerably increased, at least, according to the dicta of the Brehon commentators; but such provisions only bring us to the difficulty of which I first spoke, and raise anew the question of the exact value of legal rules at a period when Courts of Justice are not as yet armed with resistless powers of compelling attendance and submission.

If we are justified in tracing the pedigree of the Brehon Code to a system enforced by supernatural sanctions, we are able to contrast it in various ways with other bodies of law in respect of its mode of development. It closely resembles the Hindoo law, inasmuch as it consists of what was in all probability an original basis of Aryan usage vastly enlarged by a superstructure of interpretation which a long succession of professional commentators have erected; but it cannot have had any such sacredness, and consequently any such authority, as the Brahminical jurisprudence. Both the Brahmins and the Brehons assume that Kings and Judges will enforce their law, and emphatically enjoin on them its enforcement; but, while the Brahmin could declare that neglect or disobedience would be followed by endless degradation and torment, the Brehon could only assert that the unlearned brother who pronounced a false judg-

ment would find blotches come on his cheeks, and that the Chief who allowed sound usage to be departed from would bring bad weather on his country. The development of the Brehon law was again parallel to that which there is strong reason for supposing the Roman law to have followed in early times. The writer of the Preface to the Third Volume, from which I have more than once quoted, cites some observations which I published several years ago on the subject of the extension of the Roman jurisprudence by the agency known as the Responsa Prudentum, the accumulated answers (or, as the Brehon phrase is, the judgments) of many successive generations of famous Roman lawyers; and he adopts my account as giving the most probable explanation of the growth of the Brehon law. But in the Roman State a test was always applied to the 'answers of the learned,' which was not applied, or not systematically applied, to the judgments of the Brehons. We never know the Romans except as subject to one of the strongest of central governments, which armed the law courts with the force at its command. Although the Roman system did not work exactly in the way to which our English experience has accustomed us, there can, of course, be no doubt that the ultimate criterion of the validity of professional legal opinion at Rome, as elsewhere, was the action of Courts of Justice enforcing rights and duties in conformity with such opinion.

But in ancient Ireland it is at least doubtful whether there was ever, in our sense of the words, a central government; it is also doubtful whether the public force at the command of any ruler or rulers was ever systematically exerted through the mechanism of Courts of Justice; and it is at least a tenable view that the institutions which stood in the place of Courts of Justice only exercised jurisdiction through the voluntary submission of intending litigants.

Perhaps, however, from our present point of view, the strongest contrast is between the ancient law of Ireland and the law of England at a period which an English lawyer would not call recent. The administration of justice in England, from comparatively early times, has been more strongly centralised than in any other European country; but in Ireland there was no central government to nerve the arm of the law. The process of the English Courts has for centuries past been practically irresistible; the process of the Irish Courts, even if it was compulsory, was at the utmost extremely weak. The Irish law was developed by hereditary commentators; but we in England have always attributed far less authority than does any European Continental community to the unofficial commentaries of the most learned writers of text-books. We obtain our law, and adjust it to the needs of each successive generation, either through legislative enactment or through the decisions of our

judges on isolated groups of facts established by the most laborious methods. But, as I have already stated, the opinion to which I incline is, that no part of the Brehon law had its origin in legislation. The author of innovation and improvement was the learned Brehon, and the Brehon appears to have invented at pleasure the facts which he used as the framework for his legal doctrine. His invention was necessarily limited by his experience, and hence the cases suggested in the law-tracts possess great interest, as throwing light on the society amid which they were composed; but these cases seem to be purely hypothetical, and only intended to illustrate the rule which happens to be under discussion.

In the volume of my own to which I referred a few moments ago I said of the early Roman law that 'great influence must have been exercised (over it) by the want of any distinct check on the suggestion or invention of possible questions. When the data can be multiplied at pleasure, the facilities for evolving a general rule are immensely increased. As the law is administered among ourselves (in England) the judge cannot travel out of the sets of facts exhibited before him or before his predecessors. Accordingly, each group of circumstances which is adjudicated upon receives, to employ a Gallicism, a sort of consecration. It acquires certain qualities which distinguish it from every other case, genuine

or hypothetical.' I do not think it can be doubted that this English practice of never declaring a legal rule authoritatively until a state of facts arises to which it can be fitted, is the secret of the apparent backwardness and barrenness of English law at particular epochs, as contrasted with the richness and reasonableness of other systems which it more than rivals in its present condition. It is true, as I said before, even of the Brehon law, that it does not wholly disappoint the patriotic expectations entertained of it. When they are disencumbered of archaic phrase and form, there are some things remarkably modern in it. I quite agree with one of the Editors that, in the ancient Irish Law of Civil Wrong, there is a singularly close approach to modern doctrines on the subject of Contributory Negligence; and I have found it possible to extract from the quaint texts of the Book of Aicill some extremely sensible rulings on the difficult subject of the Measure of Damages, for which it would be vain to study the writings of Lord Coke, though these last are relatively of much later date. But the Brehon law pays heavily for this apparent anticipation of the modern legal spirit. It must be confessed that most of it has a strong air of fancifulness and unreality. It seems as if the Brehon lawyer, after forming (let us say) a conception of a particular kind of injury, set himself, as a sort of mental exercise, to devise all

the varieties of circumstance under which the wrong could be committed, and then to determine the way in which some traditional principle of redress could be applied to the cases supposed. This indulgence of his imagination drew him frequently into triviality or silliness, and led to an extraordinary multiplication of legal detail. Four pages of the Book of Aicill (a very large proportion of an ancient body of law) are concerned with injuries received from dogs in dog-fights, and they set forth in the most elaborate way the modification of the governing rule required in the case of the owners—in the case of the spectators—in the case of the 'impartial interposer'—in the case of the 'half-interposer,' *i.e.* the man who tries to separate the dogs with a bias in favour of one of them—in the case of an accidental looker-on—in the case of a youth under age, and in the case of an idiot. The same law-tract deals also with the curious subjects of injuries from a cat stealing in a kitchen, from women using their distaffs in a woman-battle, and from bees, a distinction being drawn between the case in which the sting draws blood and the case in which it does not. Numberless other instances could be given; but I repeat that all this is mixed up with much that even now has juridical interest, and with much which in that state of society had probably the greatest practical importance.

It is not, perhaps, as often noticed as it should be

by English writers on law that the method of enunciating legal principles with which our Courts of Justice have familiarised us is absolutely peculiar to England and to communities under the direct influence of English practice. In all Western societies, Legislation, which is the direct issue of the commands of the sovereign state, tends more and more to become the exclusive source of law; but still in all Continental countries other authorities of various kinds are occasionally referred to, among which are the texts of the Roman Corpus Juris, commentaries on Codes and other bodies of written law, the unofficial writings of famous lawyers, and other branches of the vast literature of law holding at most a secondary place in the estimation of the English Judges and Bar. Nowhere, however, is anything like the same dignity as with us attributed to a decided 'case,' and I have found it difficult to make foreign lawyers understand why their English brethren should bow so implicitly to what Frenchmen term the 'jurisprudence' of a particular tribunal. From one point of view English law has doubtless suffered through this reluctance to invent or imagine facts as the groundwork of rules, and it will continue to bear the marks of the injury until legislative re-arrangement and re-statement fully disclose the stores of common sense which are at present concealed by its defects of language and form. On the other hand, these habits of the English Courts

seem to be closely connected with one of the most honourable characteristics of the English system, its extreme carefulness about facts. Nowhere else in the world is there the same respect for a fact, unless the respect be of English origin. The feeling is not shared by our European contemporaries, and was not shared by our remote ancestors. It has been said—and the remark seems to me a very just one—that in early times questions of fact are regarded as the simplest of all questions. Such tests of truth as Ordeal and Compurgation satisfy men's minds completely and easily, and the only difficulty recognised is the discovery of the legal tradition and its application to the results of the test. Up to a certain point no doubt our own mechanism for the determination of a fact is also a mere artifice. We take as our criterion of truth the unanimous opinion of twelve men on statements made before them. But then the mode of convincing, or attempting to convince, them is exactly that which would have to be followed if it were sought to obtain a decision upon evidence from the very highest human intelligence. The old procedure was sometimes wholly senseless, sometimes only distantly rational; the modern English procedure is at most imperfect, and some of its imperfection arises from the very constitution of human nature and human society. I quite concur, therefore, in the ordinary professional opinion that its view of facts and its modes of ascertaining

them are the great glory of English law. I am afraid, however, that facts must always be the despair of the law reformer. Bentham seems to me from several expressions to have supposed that if the English Law of Evidence were re-constructed on his principles questions of fact would cease to present any serious difficulty. Almost every one of his suggestions has been adopted by the Legislature, and yet enquiries into facts become more protracted and complex than ever. The truth is that the facts of human nature, with which Courts of Justice have chiefly to deal, are far obscurer and more intricately involved than the facts of physical nature; and the difficulty of ascertaining them with precision constantly increases in our age, through the progress of invention and enterprise, through the ever-growing miscellaneousness of all modern communities, and through the ever-quickening play of modern social movements. Possibly we may see English law take the form which Bentham hoped for and laboured for; every successive year brings us in some slight degree nearer to this achievement; and consequently, little as we may agree in his opinion that all questions of *law* are the effect of some judicial delusion or legal abuse, we may reasonably expect them to become less frequent and easier of solution. But neither facts nor the modes of ascertaining them tend in the least to

simplify themselves, and in no conceivable state of society will Courts of Justice enjoy perpetual vacation.

I have been at some pains to explain what sort of authority the Irish Brehon law did *not*, in my opinion, possess. The 'law of nature' had lost all supernatural sanction, except so far as it coincided with the 'law of the letter.' It had not yet acquired, or had very imperfectly acquired, that binding power which law obtains when the State exerts the public force through Courts of Justice to compel obedience to it. Had it, then, any authority at all; and if so, what sort of authority? Part of the answer to this question I endeavoured to give three years ago ('Village Communities, in the East and West,' pp. 56, 57); and though much more might be said on the subject, I defer it till another opportunity. So far as the Brehon law declared actual ancient and indigenous practices, it shared in the obstinate vitality of all customs when observed by a society distributed into corporate natural groups. But, besides this, it had another source of influence over men's minds, in the bold and never-flagging self-assertion of the class which expounded it. A portion of the authority enjoyed by the Indian Brahminical jurisprudence is undoubtedly to be explained in the same way. The Brehon could not, like the Brahmin, make any such portentous assertion as that his order sprang from the head of Brahma,

that it was an embodiment of perfect purity, and that the first teacher of its lore was a direct emanation from God. But the Brehon did claim that St. Patrick and other great Irish saints had sanctioned the law which he declared, and that some of them had even revised it. Like the Brahmin, too, he never threw away an opportunity of affirming the dignity of his profession. In these law-tracts the heads of this profession are uniformly placed, where Cæsar placed the Druids, on the same level with the highest classes of Celtic society. The fines payable for injury to them, and their rights of feasting at the expense of other classes (a form of right which will demand much attention from us hereafter), are adjusted to those of Bishops and Kings. It is more than likely that the believing multitude ended by accepting these pretensions. From what we know of that stage of thought we can hardly set limits to the amount of authority spontaneously conceded to the utterances of a sole literary class. It must have struck many that the influence of the corresponding class in our own modern society far exceeds anything which could have been asserted of it from the mere consideration of our social mechanism. There is, perhaps, an impression abroad that the influence it exerts increases as history goes on, an impression possibly produced and certainly strengthened by the brilliant passages in which Lord

Macaulay contrasted the well-paid literary labour of his own day with the miseries of the literary hack of Grub Street a century before. I think that this opinion, if broadly stated, is at the very least doubtful. The class which, to use a modern neologism, 'formulates' the ideas dimly conceived by the multitude—which saves it mental trouble by collecting through generalisation, which is an essentially labour-saving process, the scattered fragments of its knowledge and experience—has not always consisted of philosophers, historians, and novelists, but had earlier representatives in poets, priests, and lawyers. It is not at all a paradoxical opinion that these last were its most powerful members. For, nowadays, it has to cope with the critical faculty, more or less found everywhere, and enormously strengthened by observation of the methods of physical discovery. No authority of our day is possibly comparable with that of the men who, in an utterly uncritical age, simply said of a legal rule, 'So it has been laid down by the learned,' or used the still more impressive formula, 'It is thus written.'

While, however, I fully believe that the Brehon law possessed great authority, I think also that it was in all probability irregularly and intermittently enforced, and that partial and local departures from it were common all over ancient Ireland. Anybody who interested himself in the question of its practical

application would have to encounter the very problems which are suggested by the Brahminical Hindoo law. The student of this last system, especially if he compares it with the infinity of local usage practised in India, is constantly asking himself how far was the law of the Brahmin jurists observed before the English undertook to enforce it through their tribunals? The Editor of the Third Volume of the Ancient Laws of Ireland has given a very apposite example of a problem of the same kind (iii. 146), by extracting from the Carew Papers the story of a famous dispute as to the headship of the great Irish house of O'Neill. Con O'Neill, its chief, had two sons, Matthew and Shane. Matthew O'Neill was heir to Con O'Neill's earldom of Tyrone, according to the limitations of the patent. Shane O'Neill urged on the English Government that these limitations were void, because the King, in granting the earldom, could not have been aware that Matthew O'Neill was an adulterine bastard, having been in truth born of the wife of a smith in Dundalk. Shane O'Neill has been regarded as the champion of purely Irish ideas (see Froude, 'English in Ireland,' I. 43); but though the rule of legitimacy upon which he insisted conforms to our notions, it is directly contrary to the legal doctrine of the Book of Aicill, which in one of its most surprising passages lays down formally the procedure by which the natural father could bring into

his family a son born under the alleged circumstances of Matthew O'Neill, on paying compensation to the putative parent. Unless Shane O'Neill's apparent ignorance of this method of legitimation was merely affected for the purpose of blinding the English Government, it would seem to follow that the Book of Aicill, though its authorship was attributed to King Cormac, had not an universally recognised authority.

I do not know that the omission of the English, when they had once thoroughly conquered the country, to enforce the Brehon law through the Courts which they established, has ever been reckoned among the wrongs of Ireland. But if they had done this, they would have effected the very change which at a much later period they brought about in India, ignorantly, but with the very best intentions. They would have given immensely greater force and a much larger sphere to a system of rules loosely and occasionally administered before they armed them with a new authority. Even as it was, I cannot doubt that the English did much to perpetuate the Brehon law in the shape in which we find it. The Anglo-Norman settlement on the east coast of Ireland acted like a running sore, constantly irritating the Celtic regions beyond the Pale, and deepening the confusion which prevailed there. If the country had been left to itself, one of the great Irish tribes would

almost certainly have conquered the rest. All the legal ideas which, little conscious as we are of their source, come to us from the existence of a strong central government lending its vigour to the arm of justice would have made their way into the Brehon law; and the gap between the alleged civilisation of England and the alleged barbarism of Ireland during much of their history, which was in reality narrower than is commonly supposed, would have almost wholly disappeared.

Before I close this chapter it is necessary to state that the Brehon law has not been unaffected by the two main influences which have made the modern law of Western Europe different from the ancient, Christian morality and Roman jurisprudence. It has been modified by Roman juridical ideas in some degree, though it would be hazardous to lay down with any attempt at precision in what degree. I have trustworthy information that, in the tracts translated but not yet published, a certain number of Roman legal maxims are cited, and one Roman jurisconsult is mentioned by name. So far as the published tracts afford materials for an opinion, I am inclined to think that the influence of the Roman law has been very slight, and to attribute it not to study of the writings of the Roman lawyers, but to contact with Churchmen imbued more or less with Roman legal notions. We may be quite sure that the Brehons were indebted

to them for one conception which is present in the tracts—the conception of a Will; and we may probably credit the Church with the comparatively advanced development of another conception which we find here—the conception of a Contract. The origin of the rules concerning testamentary bequest which are sometimes found in Western bodies of law otherwise archaic has been much considered of late years; and the weight of learned opinion inclines strongly to the view that these rules had universally their source in Roman law, but were diffused by the influence of the Christian clergy. This assertion cannot be quite so confidently made of Contracts; but the sacredness of bequests and the sacredness of promises were of about equal importance to the Church, as the donee of pious gifts; and, as regards the Brehon law, it is plain upon the face of the published sub-tract which is chiefly concerned with Contract, the Corus Bescna, that the material interests of the Church furnished one principal motive for its compilation. The Corus Bescna, in which, I may observe, a certain confusion (not uncommon in ancient law) may be remarked between *contracts* and *grants*, between the promise to give and the act or operation of giving, contains some very remarkable propositions on the subject of Contract. Here, and in other parts of the Senchus Mor, the mischiefs of breach of contract are set forth in the strongest language. 'The

world would be in a state of confusion if verbal contracts were not binding.' 'There are three periods at which the world dies: the period of a plague, of a general war, of the dissolution of verbal contracts.' 'The world is worthless at the time of the dissolution of contracts.' At first sight this looks a good deal liker the doctrine of the eighteenth century than of any century between the sixth and the sixteenth. Let us see, however, what follows when the position thus broadly stated has to be worked out. We come, in the Corus Bescna, upon the following attempt at classification, which I fear would have deeply shocked Jeremy Bentham and John Austin: 'How many kinds of contracts are there?' asks the Brehon text-writer. 'Two,' is the answer. 'A valid contract, and an invalid contract.' This, no doubt, is absurd, but the explanation appears to be as follows. The principle of the absolute sacredness of contracts was probably of foreign origin, and was insisted upon for a particular purpose. It was therefore laid down too broadly for the actual state of the law and the actual condition of Irish Celtic society. Under such circumstances a treatise on Contract takes necessarily the form in great measure of a treatise on the grounds of invalidity in contracts, on the manifold exceptions to an over-broad general rule. Anciently, the power of contracting is limited on all sides. It is limited by the rights of your family, by the rights of your

distant kinsmen, by the rights of your co-villagers, by the rights of your tribe, by the rights of your Chief, and, if you contract adversely to the Church, by the rights of the Church. The Corus Bescna is in great part a treatise on these archaic limitations. At the same time some of the modern grounds of invalidity are very well set forth, and the merit may possibly be due to the penetration of Roman doctrine into the Brehon law-schools.

Something must be said on the extent to which Christian opinion has leavened these Brehon writings. Christianity has certainly had considerable negative influence over them. It became no longer possible for the Brehon to assert that the transgressor of his rules would incur a supernatural penalty, and the consequences of this were no doubt important. But still, as you have seen, in the case of 'fasting on a man,' or 'sitting *dharna*,' the heathen rule remained in the system, though its significance was lost. Again, one positive result of the reception by the Brehons of the so-called 'law of the letter' appears to have been the development of a great mass of rules relating to the territorial rights of the Church, and these constitute a very interesting department of the Brehon law. But there has certainly been nothing like an intimate interpenetration of ancient Irish law by Christian principle. If this kind of influence is to be looked for anywhere, it must be in the law of Marriage, and the

cognate branches of Divorce, Legitimacy, and Inheritance. These, however, are the very portions of the Brehon law which have been dwelt upon by writers convinced that, as regards the relations of the sexes, the primitive Irish were near akin to those Celts of Britain of whose practices Cæsar had heard. (B. G., v. 14.) The 'Book of Aicill' provides for the legitimation not only of the bastard, but of the adulterine bastard, and measures the compensation to be paid to the putative father. The tract on 'Social Connections' appears to assume that the temporary cohabitation of the sexes is part of the accustomed order of society, and on this assumption it minutely regulates the mutual rights of the parties, showing an especial care for the interests of the woman, even to the extent of reserving to her the value of her domestic services during her residence in the common dwelling. One remark ought, however, to be made on these provisions of the Brehon law. It is not inconceivable that, surprising as they are, they may be the index to a social advance. Cæsar plainly found the Celts of the Continent polygamous, living in families held together by stringent Paternal Power. He, a Roman, familiar with a Patria Potestas as yet undecayed, thinks it worthy of remark that the head of a Gallic household had the power of life and death over his wives as well as his children, and notices with astonishment that, when a husband died under sus-

picious circumstances, his wives were treated with the same cruelty as a body of household slaves at Rome whose master had been killed by an unknown hand. (B. G., vi. 19.) Now, though very much cannot be confidently said about the transition (which, nevertheless, is an undoubted fact) of many societies from polygamy to monogamy under influences other than those of religion, it may plausibly be conjectured that here and there it had its cause in liberty of divorce. The system which permitted a plurality of wives may have passed into the system which forbade more than one wife at a time, but which did not go farther. The monogamy of the modern and Western world is, in fact, the monogamy of the Romans, from which the license of divorce has been expelled by Christian morality. There are hardly any materials for an opinion upon the degree of influence exercised by the Church over the transformation of marriage-relations in Ireland, but there are several indications that the ecclesiastical rules as to the conditions of a valid marriage established themselves very slowly among the ruder races on the outskirts of what had been the Roman Empire. Mr. Burton ('History of Scotland,' ii. 213), in speaking of the number of illegitimate claimants who brought their pretensions to the Crown of Scotland before Edward the First, observes: 'That they should have pushed their claims only shows that the Church had not yet absolutely established the rule that from

her and her ceremony and sacrament could alone come the union capable of transmitting a right of succession to offspring.' The tract on 'Social Connexions' notices a 'first' wife, and the recognition may be attributable to the Church, but on the whole my impression certainly is that the extremely ascetic form under which Christianity was introduced into Ireland was unfavourable to its obtaining a hold on popular morality. The common view seems to have been that chastity was the professional virtue of a special class, for the Brehon tracts, which make the assumptions I have described as to the morals of the laity, speak of irregularity of life in a monk or bishop with the strongest reprobation and disgust. At the present moment Ireland is probably the one of all Western countries in which the relations of the sexes are most nearly on the footing required by the Christian theory; nor is there any reasonable doubt that this result has been brought about in the main by the Roman Catholic clergy. But this purification of morals was effected during the period through which monks and monasticism were either expelled from Ireland or placed under the ban of the law.

I will take this opportunity of saying that the influence of Christianity on a much more famous system than the Brehon law has always seemed to me to be greatly overstated by M. Troplong and other

well-known juridical writers. There is, of course, evidence of Christian influence on Roman law in the disabilities imposed on various classes of heretics and in the limitations of that liberty of divorce which belonged to the older jurisprudence. But, even in respect of divorce, the modifications strike me as less than might have been expected from what we know of the condition of opinion in the Roman world; and, as regards certain improvements said to have been introduced by Christianity into the Imperial law of slavery, they were probably quickened by its influence, but they began in principles which were of Stoical rather than of Christian origin. I do not question the received opinion that Christianity greatly mitigated and did much to abolish personal and predial slavery in the West, but the Continental lawyers of whom I spoke considerably antedate its influence, and take far too little account of the prodigious effects subsequently produced by the practical equality of all men within the pale of the Catholic priesthood. But I principally deprecate these statements, which in some countries have almost become professional commonplaces, for two reasons. They slur over a very instructive fact, the great unmalleability of all bodies of law; and they obscure an interesting and yet unsettled problem, the origin of the Canon law. The truth seems to be that the Imperial Roman law did

not satisfy the morality of the Christian communities, and this is the most probable reason why another body of rules grew up by its side and ultimately almost rivalled it.

LECTURE III.

KINSHIP AS THE BASIS OF SOCIETY.

THE most recent researches into the primitive history of society point to the conclusion that the earliest tie which knitted men together in communities was Consanguinity or Kinship. The subject has been approached of late years from several different sides, and there has been much dispute as to what the primitive blood-relationship implied, and how it arose; but there has been general agreement as to the fact I have stated. The caution is perhaps needed that we must not form too loose a conception of the kinship which once stood in the place of the multiform influences which are now the cement of human societies. It was regarded as an actual bond of union, and in no respect as a sentimental one. The notion of what, for want of a better phrase, I must call a moral brotherhood in the whole human race has been steadily gaining ground during the whole course of history, and we have now a large abstract term

answering to this notion—Humanity. The most powerful of the agencies which have brought about this broader and laxer view of kinship has undoubtedly been Religion, and indeed one great Eastern religion extended it until for some purposes it embraced all sentient nature. All this modern enlargement of the primitive conception of kinship must be got rid of before we can bring it home to ourselves. There was no brotherhood recognised by our savage forefathers except actual consanguinity regarded as a fact. If a man was not of kin to another there was nothing between them. He was an enemy to be slain, or spoiled, or hated, as much as the wild beasts upon which the tribe made war, as belonging indeed to the craftiest and the cruellest order of wild animals. It would scarcely be too strong an assertion that the dogs which followed the camp had more in common with it than the tribesmen of an alien and unrelated tribe.

The tribes of men with which the student of jurisprudence is concerned are exclusively those belonging to the races now universally classed, on the ground of linguistic affinities, as Aryan and Semitic. Besides these he has at most to take into account that portion of the outlying mass of mankind which has lately been called Uralian, the Turks, Hungarians, and Finns. The characteristic of all these races, when in the tribal state, is that the tribes themselves,

and all subdivisions of them, are conceived by the men who compose them as descended from a single male ancestor. Such communities see the Family group with which they are familiar to be made up of the descendants of a single living man, and of his wife or wives; and perhaps they are accustomed to that larger group, formed of the descendants of a single recently deceased ancestor, which still survives in India as a compact assemblage of blood-relatives, though it is only known to us through the traces it has left in our Tables of Inheritance. The mode of constituting groups of kinsmen which they see proceeding before their eyes they believe to be identical with the process by which the community itself was formed. Thus the theoretical assumption is that all the tribesmen are descended from some common ancestor, whose descendants have formed sub-groups, which again have branched off into others, till the smallest group of all, the existing Family, is reached. I believe I may say that there is substantial agreement as to the correctness of these statements so long as they are confined to the Aryan, Semitic, and Uralian races. At most it is asserted that, among the recorded usages of portions of these races, there are obscure indications of another and an earlier state of things. But then a very different set of assertions from these are made concerning that large part of the human race which cannot be classed as Aryan, Semitic, or Uralian. It is, first of all, alleged that

there is evidence of the wide prevalence among them of ideas on the subject of Consanguinity which are irreconcileable with the assumption of common descent from a single ancestor. Next, it is pointed out that some small, isolated, and very barbarous communities—perhaps long hidden in inaccessible Indian valleys, or within the ring of a coral reef in the Southern Seas—still follow practices which it would be incorrect and unjust to call immoral, because, in the view we are considering, they are older than morality. The suggestion is finally made that if these practices were, in an older stage of the world's history, very much more widely extended than at present, the abnormal, non-Aryan, non-Semitic, non-Uralian notions about kinship of which I have spoken would find their explanation. If, indeed, the conclusion here pointed at expresses the truth, and if these practices were really at one time universal, it would be an undeserved compliment to the human race to say that it once followed the ways of the lower animals, since, in point of fact, all the lower animals do not follow the practices thus attributed to them. But, whatever be the interest of such enquiries, they do not concern us till the Kinship of the higher races can be distinctly shown to have grown out of the Kinship now known only to the lower, and even then they concern us only remotely. No doubt several recent writers do believe

in the descent of one form of consanguinity from the other. Mr. Lewis Morgan, of New York, the author of a remarkable and very magnificent volume on 'Systems of Consanguinity and Affinity in the Human Family,' published by the Smithsonian Institute at Washington, reckons no less than ten stages (p. 486) through which communities founded on kinship have passed before that form of the family was developed out of which the Aryan tribes conceive themselves to have sprung. But Mr. Morgan also says of the system known upon the evidence actually to prevail among the Aryan, Semitic, and Uralian divisions of mankind that (p. 469) it 'manifestly proceeds upon the assumption of the existence of marriage between single pairs, and of the certainty of parentage through the marriage relation.' 'Hence,' he adds, 'it must have come into existence after the establishment of marriage between single pairs.'

A remark of considerable importance to the student of early usage has now to be made respecting the bond of union recognised by these greater races. Kinship, as the tie binding communities together, tends to be regarded as the same thing with subjection to a common authority. The notions of Power and Consanguinity blend, but they in nowise supersede one another. We have a familiar example of this mixture of ideas in the subjection of the smallest group, the Family, to its patriarchal head. Wherever

we have evidence of such a group, it becomes difficult to say whether the persons comprised in it are most distinctly regarded as kinsmen, or as servile or semi-servile dependants of the person who was the source of their kinship. The confusion, however, if we may so style it, of kinship with subjection to patriarchal power is observable also in the larger groups into which the Family expands. In some cases the Tribe can hardly be otherwise described than as the group of men subject to some one chieftain. This peculiar blending of ideas is undoubtedly connected with the extension (a familiar fact to most of us) of the area of ancient groups of kindred by artifices or fictions. Just as we find the Family recruited by strangers brought under the paternal power of its head by adoption, so we find the Tribe, or Clan, including a number of persons, in theory of kin to it, yet in fact connected with it only by common dependence on the Chief. I do not affect to give any simple explanation of the subjection of the various assemblages of kindred to forms of power of which the patriarchal power of the head of the family is the type. Doubtless it is partly to be accounted for by deep-seated instincts. But Mr. Morgan's researches seem to me to have supplied another partial explanation. He has found that among rude and partially nomad communities great numbers of kindred, whom we should keep apart in mind, and distinguish from one another in language,

are grouped together in great classes and called by the same general names. Every man is related to an extraordinary number of men called his brothers, to an extraordinary number called his sons, to an extraordinary number called his uncles. Mr. Morgan explains the fact in his own way, but he points out the incidental convenience served by this method of classification and nomenclature. Though the point may not at first strike us, kinship is a clumsy basis for communities of any size, on account of the difficulty which the mind, and particularly the untutored mind, has in embracing all the persons bound to any one man by tie of blood, and therefore (which is the important matter) connected with him by common responsibilities and rights. A great extension and considerable relaxation of the notion of kinship gets over the difficulty among the lower races, but it may be that, among the higher, Patriarchal Power answers the same object. It simplifies the conceptions of kinship and of conjoint responsibility, first in the Patriarchal Family and ultimately in the Clan or Tribe

We have next to consider the epoch, reached at some time by all the portions of mankind destined to civilisation, at which tribal communities settle down upon a definite space of land. The liveliest account which I have read of this process occurs in an ancient Indian record which has every pretension to authenticity. In a very interesting volume published by the

Government of Madras, and called 'Papers on Mirasi Right' (Madras, 1862), there are printed some ancient Memorial Verses, as they are called, which describe the manner in which the Vellalee, a possibly Aryan tribe, followed their chief into Tondeimandalam, a region roughly corresponding with a state once famous in modern Indian history, Arcot. There the Vellalee conquered and extirpated, or enslaved, some more primitive population and took permanent possession of its territory. The poetess—for the lines are attributed to a woman—compares the invasion to the flowing of the juice of the sugar-cane over a flat surface. ('Mirasi Papers,' p. 233.) The juice crystallises, and the crystals are the various village-communities. In the middle is one lump of peculiarly fine sugar, the place where is the temple of the god. Homely as is the image, it seems to me in one respect peculiarly felicitous. It represents the tribe, though moving in a fused mass of men, as containing within itself a principle of coalescence which began to work as soon as the movement was over. The point is not always recollected. Social history is frequently considered as beginning with the tribal settlement, and as though no principles of union had been brought by the tribe from an older home. But we have no actual knowledge of any aboriginal or autochthonous tribe. Wherever we have any approximately trustworthy information concerning the tribes which we discern

in the far distance of history, they have always come from some more ancient seat. The Vellalee, in the Indian example, must have been agriculturists somewhere, since they crystallised at once into village-communities.

It has long been assumed that the tribal constitution of society belonged at first to nomad communities, and that, when associations of men first settled down upon land, a great change came over them. But the manner of transition from nomad to settled life, and its effects upon custom and idea, have been too much described, as it seems to me, from mere conjecture of the probabilities ; and the whole process, as I have just observed, has been conceived as more abrupt than such knowledge as we have would lead us to believe it to have been. Attention has thus been drawn off from one assertion on this subject which may be made, I think, upon trustworthy evidence—that, from the moment when a tribal community settles down finally upon a definite space of land, the Land begins to be the basis of society in place of the Kinship. The change is extremely gradual, and in some particulars it has not even now been fully accomplished, but it has been going on through the whole course of history. The constitution of the Family through actual blood-relationship is of course an observable fact, but, for all groups of men larger than the Family, the Land on which they

live tends to become the bond of union between them, at the expense of Kinship, ever more and more vaguely conceived. We can trace the development of idea both in the large and now extremely miscellaneous aggregations of men combined in States or Political Communities, and also in the smaller aggregations collected in Village-Communities and Manors, among whom landed property took its rise. The barbarian invaders of the Western Roman Empire, though not uninfluenced by former settlements in older homes, brought back to Western Europe a mass of tribal ideas which the Roman dominion had banished from it; but, from the moment of their final occupation of definite territories, a transformation of these ideas began. Some years ago I pointed out ('Ancient Law,' pp. 103 *et seq.*) the evidence furnished by the history of International Law that the notion of territorial sovereignty, which is the basis of the international system, and which is inseparably connected with dominion over a definite area of land, very slowly substituted itself for the notion of tribal sovereignty. Clear traces of the change are to be seen in the official style of kings. Of our own kings, King John was the first who always called himself King of England. (Freeman, 'Norman Conquest,' I. 82, 84.) His predecessors commonly or always called themselves Kings of the English. The style of the king reflected the older tribal sovereignty for a much

longer time in France. The title of King of France may no doubt have come into use in the vernacular soon after the accession of the dynasty of Capet, but it is an impressive fact that, even at the time of the Massacre of St. Bartholomew, the Kings of France were still in Latin 'Reges Francorum;' and Henry the Fourth only abandoned the designation because it could not be got to fit in conveniently on his coins with the title of King of Navarre, the purely feudal and territorial principality of the Bourbons. (Freeman, *loc. cit.*) We may bring home to ourselves the transformation of idea in another way. England was once the country which Englishmen inhabited. Englishmen are now the people who inhabit England. The descendants of our forefathers keep up the tradition of kinship by calling themselves men of English race, but they tend steadily to become Americans and Australians. I do not say that the notion of consanguinity is absolutely lost; but it is extremely diluted, and quite subordinated to the newer view of the territorial constitution of nations. The blended ideas are reflected in such an expression as 'Fatherland,' which is itself an index to the fact that our thoughts cannot separate national kinship from common country. No doubt it is true that in our day the older conception of national union through consanguinity has seemed to be revived by theories which are sometimes called generally theories of

Nationality, and of which particular forms are known to us as Pan-Sclavism and Pan-Teutonism. Such theories are in truth a product of modern philology, and have grown out of the assumption that linguistic affinities prove community of blood. But wherever the political theory of Nationality is distinctly conceived, it amounts to a claim that men of the same race shall be included, not in the same tribal, but in the same territorial sovereignty.

We can perceive, from the records of the Hellenic and Latin city-communities, that there, and probably over a great part of the world, the substitution of common territory for common race as the basis of national union was slow, and not accomplished without very violent struggles. 'The history of political ideas begins,' I have said elsewhere, 'with the assumption that kinship in blood is the sole possible ground of community in political functions; nor is there any of those subversions of feeling which we emphatically term revolutions so startling and so complete as the change which is accomplished when some other principle—such as that, for instance, of local contiguity —establishes itself for the first time as the basis of common political action.' The one object of ancient democracies was, in fact, to be counted of kin to the aristocracies, simply on the ground that the aristocracy of old citizens, and the democracy of new, lived within the same territorial circumscription. The goal was

reached in time both by the Athenian Demos and by the Roman Plebs; but the complete victory of the Roman popular party was the source of influences which have not spent themselves at the present moment, since it is one of the causes why the passage from the Tribal to the Territorial conception of Sovereignty was much more easy and imperceptible in the modern than in the older world. I have before stated that a certain confusion, or at any rate indistinctness of discrimination, between consanguinity and common subjection to power is traceable among the rudiments of Aryan thought, and no doubt the mixture of notions has helped to bring about that identification of common nationality with common allegiance to the King, which has greatly facilitated the absorption of new bodies of citizens by modern commonwealths. But the majesty with which the memory of the Roman Empire surrounded all kings has also greatly contributed to it, and without the victory of the Roman Plebeians there would never have been, I need hardly say, any Roman Empire.

The new knowledge which has been rapidly accumulating of late years enables us to track precisely the same transmutation of ideas amid the smaller groups of kinsmen settled on land and forming, not Commonwealths, but Village-Communities. The historian of former days laboured probably under no greater disadvantage than that caused by his

unavoidable ignorance of the importance of these communities, and by the necessity thus imposed upon him of confining his attention to the larger assemblages of tribesmen. It has often, indeed, been noticed that a Feudal Monarchy was an exact counterpart of a Feudal Manor, but the reason of the correspondence is only now beginning to dawn upon us, which is, that both of them were in their origin bodies of assumed kinsmen settled on land and undergoing the same transmutation of ideas through the fact of settlement. The history of the larger groups ends in the modern notions of Country and Sovereignty; the history of the smaller in the modern notions of Landed Property. The two courses of historical development were for a long while strictly parallel, though they have ceased to be so now.

The naturally organised, self-existing, Village-Community can no longer be claimed as an institution specially characteristic of the Aryan races. M. de Laveleye, following Dutch authorities, has described these communities as they are found in Java ; and M Renan has discovered them among the obscurer Semitic tribes in Northern Africa. But, wherever they have been examined, the extant examples of the group suggest the same theory of its origin which Mr. Freeman ('Comparative Politics,' p. 103) has advanced concerning the Germanic village-community or Mark ; 'This lowest political unit was at first,

here (*i. e.* in England) as elsewhere, formed of men bound together by a tie of kindred, in its first estate natural, in a later stage either of kindred natural or artificial.' The evidence, however, is now quite ample enough to furnish us with strong indications not only of the mode in which these communities began, but of the mode in which they transformed themselves. The world, in fact, contains examples of cultivating groups in every stage, from that in which they are actually bodies of kinsmen, to that in which the merest shadow of consanguinity survives and the assemblage of cultivators is held together solely by the land which they till in common. The great steps in the scale of transition seem to me to be marked by the Joint Family of the Hindoos, by the House-Community of the Southern Sclavonians, and by the true Village-Community, as it is found first in Russia and next in India. The group which I have placed at the head, the Hindoo Joint Family, is really a body of kinsmen, the natural and adoptive descendants of a known ancestor. Although the modern law of India gives such facilities for its dissolution that it is one of the most unstable of social compounds, and rarely lasts beyond a couple of generations, still, so long as it lasts, it has a legal corporate existence, and exhibits, in the most perfect state, that community of proprietary enjoyment which has been so often observed, and (let me add) so often misconstrued, in

cultivating societies of archaic type. 'According to the true notion of a joint undivided Hindoo family,' said the Privy Council, 'no member of the family, while it remains undivided, can predicate of the joint undivided property that he, that particular member, has a certain definite share. . . . The proceeds of undivided property must be brought, according to the theory, into the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family.' (Per Lord Westbury, Appovier *v.* Rama Subba Aiyan, 11 Moore's Indian Appeals, 75.) While, however, these Hindoo families, 'joint in food, worship, and estate,' are constantly engaged in the cultivation of land, and dealing with its produce 'according to the modes of enjoyment of an undivided family,' they are not village-communities. They are only accidentally connected with the land, however extensive their landed property may be. What holds them together is not land, but consanguinity, and there is no reason why they should not occupy themselves, as indeed they frequently do, with trade or with the practice of a handicraft. The House-Community, which comes next in the order of development, has been examined by M. de Laveleye (*P. et s. F. P.*, p. 201), and by Mr. Patterson ('Fortnightly Review,' No. xliv.), in Croatia, Dalmatia, and Illyria, countries which,

though nearer to us than India, have still much in common with the parts of the East not brought completely under Mahometan influences; but there is reason to believe that neither Roman law nor feudalism entirely crushed it even in Western Europe. It is a remarkable fact that assemblages of kinsmen, almost precisely the counterpart of the House-Communities surviving among the Sclavonians, were observed by M. Dupin, in 1840, in the French Department of the Nièvre, and were able to satisfy him that even in 1500 they had been accounted ancient. These House-Communities seem to me to be simply the Joint Family of the Hindoos, allowed to expand itself without hindrance and settled for ages on the land. All the chief characteristics of the Hindoo institution are here—the common home and common table, which are always in theory the centre of Hindoo family life; the collective enjoyment of property and its administration by an elected manager. Nevertheless, many instructive changes have begun which show how such a group modifies itself in time The community is a community of kinsmen; but, though the common ancestry is probably to a great extent real, the tradition has become weak enough to admit of considerable artificiality being introduced into the association, as it is found at any given moment, through the absorption of strangers from outside. Meantime, the land tends to become the

true basis of the group; it is recognised as of pre-eminent importance to its vitality, and it remains common property, while private ownership is allowed to show itself in moveables and cattle. In the true Village-Community, the common dwelling and common table which belong alike to the Joint Family and to the House-Community, are no longer to be found. The village itself is an assemblage of houses, contained indeed within narrow limits, but composed of separate dwellings, each jealously guarded from the intrusion of a neighbour. The village lands are no longer the collective property of the community; the arable lands have been divided between the various households; the pasture lands have been partially divided; only the waste remains in common. In comparing the two extant types of Village-Community which have been longest examined by good observers, the Russian and the Indian, we may be led to think that the traces left on usage and idea by the ancient collective enjoyment are faint exactly in proportion to the decay of the theory of actual kinship among the co-villagers. The Russian peasants of the same village really believe, we are told, in their common ancestry, and accordingly we find that in Russia the arable lands of the village are periodically re-distributed, and that the village artificer, even should he carry his tools to a distance, works for the profit of his co-villagers. In India, though the villagers are

still a brotherhood, and though membership in the brotherhood separates a man from the world outside, it is very difficult to say in what the tie is conceived as consisting. Many palpable facts in the composition of the community are constantly inconsistent with the actual descent of the villagers from any one ancestor. Accordingly, private property in land has grown up, though its outlines are not always clear; the periodical re-division of the domain has become a mere tradition, or is only practised among the ruder portions of the race; and the results of the theoretical kinship are pretty much confined to the duty of submitting to common rules of cultivation and pasturage, of abstaining from sale or alienation without the consent of the co-villagers, and (according to some opinions) of refraining from imposing a rack-rent upon members of the same brotherhood. Thus, the Indian Village-Community is a body of men held together by the land which they occupy: the idea of common blood and descent has all but died out. A few steps more in the same course of development—and these the English law is actually hastening—will diffuse the familiar ideas of our own country and time throughout India; the Village-Community will disappear, and landed property, in the full English sense, will come into existence. Mr. Freeman tells us that Uffington, Gillingham, and Tooting were in all probability English village-communities originally

settled by the Uffingas, Gillingas, and Totingas, three Teutonic joint-families. But assuredly all men who live in Tooting do not consider themselves brothers; they barely acknowledge duties imposed on them by their mutual vicinity; their only real tie is through their common country.

The 'natural communism' of the primitive cultivating groups has sometimes been described of late years, and more particularly by Russian writers, as an anticipation of the most advanced and trenchant democratic theories. No account of the matter could in my judgment be more misleading. If such terms as 'aristocratic' and 'democratic' are to be used at all, I think it would be a more plausible statement that the transformation and occasional destruction of the village-communities were caused, over much of the world, by the successful assault of a democracy on an aristocracy. The secret of the comparatively slight departure of the Russian village-communities from what may be believed to have been the primitive type, appears to me to lie in the ancient Russian practice of colonisation, by which swarms were constantly thrown off from the older villages to settle somewhere in the enormous wastes; but the Indian communities, placed in a region of which the population has from time immemorial been far denser than in the North, bear many marks of past contests between the ancient brotherhood of kinsmen and a

class of dependants outside it struggling for a share in the land, or for the right to use it on easy terms. I am aware that there is some grotesqueness at first sight in a comparison of Indian villagers, in their obscurity and ignorance, and often in their squalid misery, to the citizens of Athens or Rome; yet no tradition concerning the origin of the Latin and Hellenic states seems more trustworthy than that which represents them as formed by the coalescence of two or more village-communities, and indeed, even in their most glorious forms, they appear to me throughout their early history to belong essentially to that type. It has often occurred to me that Indian functionaries, in their vehement controversies about the respective rights of the various classes which make up the village-community, are unconsciously striving to adjust, by a beneficent arbitration, the claims and counter-claims of the Eupatrids and the Demos, of the Populus and the Plebs. There is even reason to think that one well-known result of long civil contention in the great states of antiquity has shown itself every now and then in the village-communities, and that all classes have had to submit to that sort of authority which assumed its most innocent shape in the office of the Roman Dictator, its more odious in the usurpation of the Greek Tyrant. The founders of a part of one modern European aristocracy, the Danish, are known to have been originally

peasants who fortified their houses during deadly village struggles and then used their advantage.

Such commencements of nobility as that to which I have just referred, appear, however, to have been exceptional in the Western world, and other causes must be assigned for that great transformation of the Village-Community which has been carried out everywhere in England, a little less completely in Germany, much less in Russia and in all Eastern Europe. I have attempted in another work ('Village-Communities in the East and West,' pp. 131 *et seq.*) to give an abridged account of all that is known or has been conjectured on the subject of that 'Feudalisation of Europe' which has had the effect of converting the Mark into the Manor, the Village-Community into the Fief; and I shall presently say much on the new light which the ancient laws of Ireland have thrown on the early stages of the process. At present I will only observe that, when completed, its effect was to make the Land the exclusive bond of union between men. The Manor or Fief was a social group wholly based upon the possession of land, and the vast body of feudal rules which clustered round this central fact are coloured by it throughout. That the Land is the foundation of the feudal system has, of course, been long and fully recognised; but I doubt whether the place of the fact in history has been sufficiently understood. It marks a phase in a course of change continued through long

ages and in spheres much larger than that of landed property. At this point the notion of common kinship has been entirely lost. The link between Lord and Vassal produced by Commendation is of quite a different kind from that produced by Consanguinity. When the relation which it created had lasted some time, there would have been no deadlier insult to the lord than to attribute to him a common origin with the great bulk of his tenants. Language still retains a tinge of the hatred and contempt with which the higher members of the feudal groups regarded the lower; and the words of abuse traceable to this aversion are almost as strong as those traceable to differences of religious belief. There is, in fact, little to choose between villain, churl, miscreant, and boor.

The break-up of the feudal group, far advanced in most European countries, and complete in France and England, has brought us to the state of society in which we live. To write its course and causes would be to re-write most of modern history, economical as well as political. It is not, however, difficult to see that without the ruin of the smaller social groups, and the decay of the authority which, whether popularly or autocratically governed, they possessed over the men composing them, we should never have had several great conceptions which lie at the base of our stock of thought. Without this collapse, we should never have had the conception of land as an exchange-

able commodity, differing only from others in the limitation of the supply; and hence, without it, some famous chapters of the science of Political Economy would not have been written. Without it, we should not have had the great increase in modern times of the authority of the State—one of many names for the more extensive community held together by common country. Consequently, we should not have had those theories which are the foundation of the most recent systems of jurisprudence—the theory of Sovereignty, or (in other words) of a portion in each community possessing unlimited coercive force over the rest—and the theory of Law as exclusively the command of a sovereign One or Number. We should, again, not have had the fact which answers to these theories—the ever-increasing activity of Legislatures; and, in all probability, that famous test of the value of legislation, which its author turned into a test of the soundness of morals, would never have been devised—the greatest happiness of the greatest number.

In saying that the now abundant phenomena of primitive ownership open to our observation strongly suggest that the earliest cultivating groups were formed of kinsmen, that these gradually became bodies of men held together by the land which they cultivated, and that Property in Land (as we now understand it) grew out of the dissolution of these

latter assemblages, I would not for a moment be understood to assert that this series of changes can be divided into stages abruptly separated from one another. The utmost that can be affirmed is that certain periods in this history are distinguished by the predominance, though not the exclusive existence, of ideas proper to them. Here, as elsewhere, the world is full of 'survivals,' and the view of society as held together by kinship still survives when it is beginning to be held together by land. Similarly, the feudal conception of social relations still exercises powerful influence when land has become a merchantable commodity. There is no country in which the theory of land as a form of property like any other has been more unreservedly accepted than our own. Yet English lawyers live *in fœce feodorum* Our law is saturated with feudal principles, and our customs and opinions are largely shaped by them. Indeed, within the last few years we have even discovered that vestiges of the village-community have not been wholly effaced from our law, our usages, and our methods of tillage.

The caution that the sequence of these stages does not imply abrupt transition from any one to the next seems to me especially needed by the student of the Ancient Laws of Ireland. Dr. Sullivan, 'of whose Introduction to the lately published lectures of O'Curry I have already spoken, dwells with great

emphasis on the existence of private property among the ancient Irish, and on the jealousy with which it was guarded. But though it is very natural that a learned Irishman, stung by the levity which has denied to his ancestors all civilised institutions, should attach great importance to the indications of private ownership in the Brehon law, I must say that they do not, in my judgment, constitute its real interest. The instructiveness of the Brehon tracts, at least to the student of legal history, seems to me to arise from their showing that institutions of modern stamp may be in existence with a number of rules by their side which savour of another and a greatly older order of ideas. It cannot be doubted, I think, that the primitive notion of kinship, as the cement binding communities together, survived longer among the Celts of Ireland and the Scottish Highlands than in any Western society, and that it is stamped on the Brehon law even more clearly than it is upon the actual land-law of India. It is perfectly true that the form of private ownership in land which grew out of the appropriation of portions of the tribal domain to individual households of tribesmen is plainly recognised by the Brehon lawyers; yet the rights of private owners are limited by the controlling rights of a brotherhood of kinsmen, and the control is in some respects even more stringent than that exercised over separate

property by an Indian village-community. It is also true that another form of ownership in land, that which had its origin in the manorial authority of the lord over the cultivating group, has also begun to show itself; yet, though the Chief of the Clan is rapidly climbing to a position answering to the Lordship of a Manor, he has not fully ascended to it, and the most novel information contained in the tracts is that which they supply concerning the process of ascent.

The first instructive fact which strikes us on the threshold of the Brehon law is, that the same word, 'Fine,' or Family, is applied to all the subdivisions of Irish society. It is used for the Tribe in its largest extension as pretending to some degree of political independence, and for all intermediate bodies down to the Family as we understand it, and even for portions of the Family (Sullivan, 'Introduction,' clxii.). It seems certain that each of the various groups into which ancient Celtic society was divided conceived itself as descended from some one common ancestor, from whom the name, or one of the names, of the entire body of kinsmen was derived. Although this assumption was never in ancient Ireland so palpable a fiction as the affiliation of Greek races or communities on an heroic eponymous progenitor, it was probably at most true of the Chief and his house so far as regarded the Irish Tribe taken as a

political unit. But it is probable that it was occasionally, and even often true of the smaller group, the Sept, sub-Tribe, or Joint Family, which appears to me to be the *legal* unit of the Brehon tracts. The traditions regarding the eponymous ancestor of this group were distinct and apparently trustworthy, and its members were of kin to one another in virtue of their common descent from the ancestor who gave his name to all. The chief for the time being was, as the Anglo-Irish judges called him in the famous 'Case of Gavelkind,' the *caput cognationis*.

Not only was the Tribe or Sept named after this eponymous ancestor, but the territory which it occupied also derived from him the name which was in commonest use. I make this remark chiefly because a false inference has been drawn from an assertion of learned men concerning the connection between names of families and names of places, which properly understood is perfectly sound. It has been laid down that, whenever a family and place have the same name, it is the place which almost certainly gave its name to the family. This is no doubt true of feudalised countries, but it is not true of countries as yet unaffected by feudalism. It is likely that such names as 'O'Brien's Country' and 'Macleod's Country' are as old as any appropriation of land by man; and this is worth remembering when we are tempted to gauge the intelligence of an early writer

by the absurdity of his etymologies. 'Hibernia from an eponymous discoverer, 'Hyber,' sounds ridiculous enough; but the chronicler who gives it may have been near enough the age of tribal society to think that the connection between the place and the name was the most natural and probable he could suggest. Even the most fanciful etymologies of the Greeks, such as Hellespont, from Helle, may have been 'survivals' from a primitive tribal system of naming places. In the relation between names and places, as in much more important matters, feudalism has singularly added to the importance of land.

Let me now state the impression which, partly from the examination of the translated texts, legal and non-legal, and partly by the aid of Dr. Sullivan's Introduction, I have formed of the agrarian organisation of an Irish Tribe. It has been long settled, in all probability, upon the tribal territory. It is of sufficient size and importance to constitute a political unit, and possibly at its apex is one of the numerous chieftains whom the Irish records call Kings. The primary assumption is that the whole of the tribal territory belongs to the whole of the tribe, but in fact large portions of it have been permanently appropriated to minor bodies of tribesmen. A part is allotted in a special way to the Chief as appurtenant to his office, and descends from Chief to Chief according to a special rule of succession. Other portions are

occupied by fragments of the tribe, some of which are under minor chiefs or 'flaiths,' while others, though not strictly ruled by a chief, have somebody of a noble class to act as their representative. All the unappropriated tribe-lands are in a more especial way the property of the tribe as a whole, and no portion can theoretically be subjected to more than a temporary occupation. Such occupations are, however, frequent, and among the holders of tribe-land, on these terms, are groups of men calling themselves tribesmen, but being in reality associations formed by contract, chiefly for the purpose of pasturing cattle. Much of the common tribe-land is not occupied at all, but constitutes, to use the English expression, the 'waste' of the tribe. Still this waste is constantly brought under tillage or permanent pasture by settlements of tribesmen, and upon it cultivators of servile status are permitted to squat, particularly towards the border. It is the part of the territory over which the authority of the Chief tends steadily to increase, and here it is that he settles his 'fuidhir,' or stranger-tenants, a very important class —the outlaws and 'broken' men from other tribes who come to him for protection, and who are only connected with their new tribe by their dependence on its chief, and through the responsibility which he incurs for them.

There is probably great uniformity in the compo-

sition of the various groups occupying, permanently or temporarily, the tribal territory. Each seems to be more or less a miniature of the large tribe which includes them all. Each probably contains freemen and slaves, or at all events men varying materially in personal status, yet each calls itself in some sense a family. Each very possibly has its appropriated land and its waste, and conducts tillage and grazing on the same principles. Each is either under a Chief who really represents the common ancestor of all the free kinsmen, or under somebody who has undertaken the responsibilities devolving according to primitive social idea upon the natural head of the kindred. In enquiries of the class upon which we are engaged the important fact which I stated here three years ago should always be borne in mind. When the first English emigrants settled in New England they distributed themselves in village communities; so difficult is it to strike out new paths of social life and new routes of social habit. It is all but certain that, in such a society as that of which we are speaking, one single model of social organisation and social practice would prevail, and none but slight or insensible departures from it would be practicable or conceivable.

But still the society thus formed is not altogether stationary. The temporary occupation of the common tribe-land tends to become permanent, either

through the tacit sufferance or the active consent of the tribesmen. Particular families manage to elude the theoretically periodical re-division of the common patrimony of the group; others obtain allotments with its consent as the reward of service or the appanage of office; and there is a constant transfer of lands to the Church, and an intimate intermixture of tribal rights with ecclesiastical rights. The establishment of Property in Severalty is doubtless retarded both by the abundance of land and by the very law under which, to repeat the metaphor of the Indian poetess, the tribal society has crystallised, since each family which has appropriated a portion of tribe-land tends always to expand into an extensive assemblage of tribesmen having equal rights. But still there is a co-operation of causes always tending to result in Several Property, and the Brehon law shows that by the time it was put into shape they had largely taken effect. As might be expected, the severance of land from the common territory appears to have been most complete in the case of Chiefs, many of whom have large private estates held under ordinary tenure in addition to the demesne specially attached to their signory.

Such is the picture of Irish tribal organisation in relation to the land which I have been able to present to my own mind. All such descriptions must be received with reserve: among other reasons, because

even the evidence obtainable from the law-tracts is still incomplete. But if the account is in any degree correct, all who have attended to this class of subjects will observe at once that the elements of what we are accustomed to consider the specially Germanic land-system are present in the territorial arrangements of the Irish tribe. Doubtless there are material distinctions. Kinship as yet, rather than landed right, knits the members of the Irish groups together. The Chief is as yet a very different personage from the Lord of the Manor. And there are no signs as yet even of the beginnings of great towns and cities. Still the assertion, which is the text of Dr. Sullivan's treatise, may be hazarded without rashness, that everything in the Germanic has at least its embryo in the Celtic land system. The study of the Brehon law leads to the same conclusion pointed at by so many branches of modern research. It conveys a stronger impression than ever of a wide separation between the Aryan race and races of other stocks, but it suggests that many, perhaps most, of the differences in kind alleged to exist between Aryan sub-races are really differences merely in degree of development. It is to be hoped that contemporary thought will before long make an effort to emancipate itself from those habits of levity in adopting theories of race which it seems to have contracted. Many of

these theories appear to have little merit except the facility which they give for building on them inferences tremendously out of proportion to the mental labour which they cost the builder.

LECTURE IV.

THE TRIBE AND THE LAND.

It has been very commonly believed that, before the agrarian measures of James the First, Ireland was one of the countries in which private property in land was invested with least sacredness, and in which forms of ownership generally considered as barbarous most extensively prevailed. Spenser and Davis certainly suggest this opinion, and several modern writers have adopted it. The Brehon law-tracts prove, however, that it can only be received with considerable qualification and modification, and they show that private property, and especially private property in land, had long been known in Ireland at the epoch to which they belong, having come into existence either through the natural disintegration of collective ownership or through the severance of particular estates from the general tribal domain. Nevertheless it cannot, I think, be doubted that at the period to which the tracts are an index much land was held throughout Ireland under rules or customs savouring of the ancient

collective enjoyment, and this I understand Dr Sullivan to allow. (Introduction, p. cxliv.)

Part of the evidence of the fact just stated is tolerably familiar to students of Irish history. At the beginning of the seventeenth century the Anglo-Irish Judges declared the English Common Law to be in force throughout Ireland, and from the date of this decision all land in the country descended to the eldest son of the last owner, unless its devolution was otherwise determined by settlement or will. In Sir John Davis's report of the case and of the arguments before the Court, it is recited that hitherto all land in Ireland had descended either under the rule of Tanistry or under the rules of Gavelkind. The system of inheritance here called Gavelkind is thus described: When a landowning member of an Irish Sept died, its chief made a re-distribution of all the lands of the Sept. He did not divide the estate of the dead man among his children, but used it to increase the allotments of the various households of which the Sept was made up. The Judges treated both Tanistry and Gavelkind as systems of succession after death, of a peculiarly barbarous and mischievous kind; and, as systems of succession, I shall consider them hereafter. But all systems of succession after death bear a close relation to ancient modes of enjoyment during life; for instance, in the Joint Undi-

vided Family of the Hindoos, the *stirpes*, or stocks, which are only known to European law as branches of inheritors, are actual divisions of the family, and live together in distinct parts of the common dwelling. ('Calcutta Review,' July 1874, p. 208.) The so-called Irish Gavelkind belongs to a class of institutions very common in the infancy of law; it is a contrivance for securing comparative equality among the joint proprietors of a common fund. The re-distribution here takes place at the death of a head of a household; but if equality were secured by what is practically the same process—viz., re-division after a fixed period of years—an institution would be produced which has not quite died out of Europe at the present moment, and of which there are traditions in all old countries. At the same time I have no doubt that, when the Irish Gavelkind was declared illegal, it was very far from being the only system of succession known to Ireland except Tanistry, and I think it probable that many different modes of enjoyment and inheritance were abolished by the decision giving the land to the eldest son.

It was the actual observation of peculiar agricultural usages, special methods of cultivation, and abnormal rules of tenure, which mainly enabled G. L. Von Maurer to restore the German Mark to knowledge; and it was by using Von Maurer's results as his key that Nasse was able to decipher the scattered

references to the 'Agricultural Community of the Middle Ages' in a variety of English documents. I venture to think that this class of observation has not been carried far enough in Ireland to yield material for a confident opinion, but there certainly seem to be vestiges of ancient collective enjoyment in the extensive prevalence of 'rundale' holdings in parts of the country. Under this system a definite area of land is occupied by a group of families. In the form now most common, the arable lands are held in severalty, while pasture and bog are in common. But as lately as fifty years since, cases were frequent in which the arable land was divided into farms which shifted among the tenant-families periodically, and sometimes annually. Even when no such division was made, a well-known relic of the Mark-system, as it showed itself in Germany and England, was occasionally found: the arable portion of the estates was composed of three different qualities of soil, and each tenant had a lot or lots in the land of each quality, without reference to position. What was virtually the same system of tenure prevailed quite recently in the Scottish Highlands. I have ascertained that the families which formed the village-communities only just extinct in the Western Highlands had the lands of the village re-distributed among them by lot at fixed intervals of time; and I gather from Mr. Skene's valuable note on 'Tribe Communities in Scotland'

(appended to the second volume of his edition of Fordun's Chronicle), that he believes this system of re-division to have been once universal, or at least widely extended, among the Scottish Celts.

It is to be observed that (so far as I am able to learn) the Irish holdings in 'rundale' are not forms of property, but modes of occupation. There is always some person above who is legally owner of all the land held by the group of families, and who, theoretically, could change the method of holding, although, practically, popular feeling would put the greatest difficulties in his way. We must bear in mind, however, that archaic kinds of tenancy are constantly evidence of ancient forms of proprietorship. This is so in countries in which superior ownership has arisen through the natural course of events—through purchase from small allodial proprietors, through colonisation of village waste-lands become in time the lord's waste, or (in an earlier state of society) through the sinking of whole communities of peasants into villeinage, and through a consequent transformation of the legal theory of their rights. But all this process of change would be gravely misconstrued if it were supposed that, because a Chief or Lord had come to be recognised as legal owner of the whole tribal domain, or of great portions of it, he therefore altered the accustomed methods of occupation and cultivation, or (as some would even seem to

think) he began at once to regard the occupying peasantry as modern lessees or modern tenants at will. No doubt the ancient type of ownership long served as the model for tenancy; and the common holdings, dying out as property, survived as occupation. And, if this were the case in other countries, much more would it be so in Ireland, where property has changed hands so often and so violently; where during whole centuries, the owners of land neither regarded, nor were in a position to regard, the occupiers save as payers of rent and dues; and where the conception of a landlord acting on his legal ownership with a view to improvement and increase of production is altogether modern.

The chief Brehon law-tract, which sets forth the mutual rights of the collective tribe and of individual tribesmen or households of tribesmen in respect of tribal property, is called the Corus Bescna, and is printed in the Third Volume of the official edition. It presents great difficulties. I quite agree with the Editors that the commentary and glosses constantly contradict and obscure the text, either because the commentators did not understand it or because they belonged to a later period and a different stage of legal relations. But the most serious doubt which occurs to the student of the text arises from the strong and palpable bias of the compiler towards the interests of the Church; indeed, part of the tract is

avowedly devoted to the law of Church property and of the organisation of religious houses. When this writer affirms that, under certain circumstances, a tribesman may grant or contract away tribal land, his ecclesiastical leaning constantly suggests a doubt as to his legal doctrine. Does he mean to lay down that the land may be parted with generally and in favour of anybody, or only that it may be alienated in favour of the Church? This difficulty of construction has an interest of its own. I am myself persuaded that the influence of the Christian Church on law has been very generally sought for in a wrong quarter, and that historians of law have too much overlooked its share in diffusing the conceptions of free contract, individual property, and testamentary succession, through the regions beyond the Roman Empire which were peopled by communities held together by the primitive tie of consanguinity. It is generally agreed among scholars that Churchmen introduced these races to wills and bequests; the Brehon tracts suggest to me at least that, along with the sacredness of bequests, they insisted upon the sacredness of contracts; and it is well known that, in the Germanic countries, their ecclesiastical societies were among the earliest and largest grantees of public or 'folk' land (Stubbs, 'Constitutional History,' vol. i. p. 154). The Will, the Contract, and the Separate Ownership were in fact indispensable to the Church as the donee

of pious gifts; and they were also essential and characteristic elements in the civilisation amid which the Church had been reared to maturity. It is possible that the compiler of the Corus Bescna may have been an ecclesiastic, as he certainly would have been in any society except the Irish; but, if he were a lawyer, he writes as a lawyer would state the case on behalf of a favourite and important client. Let me add that all the Brehon writers seem to me to have a bias towards private or several, as distinguished from collective, property. No doubt it was then, as always, the great source of legal business, and it may have seemed to them, and it possibly was, the index to such advance in civilisation as their country was capable of making.

My own strong opinion is that the 'Fine,' whose rights and powers are the principal theme of the Corus Bescna, and whose name the translators render 'Tribe,' is neither the Tribe in its largest extension, nor, on the other hand, the modern Family or group of descendants from a living ancestor, but the Sept. It is a body of kinsmen whose progenitor is no longer living, but whose descent from him is a reality, and neither a myth nor a fiction. It is the Joint Family of the Hindoos, but with the characteristics of that group considerably modified through settlement on the land. This peculiar assemblage or corporation of blood-relatives, which has been referred to by me

several times before, is formed by the continuance of the family union through several, and it may be through an indefinite number of generations. The rule throughout most of the civilised world is that, for all purposes of law, families are broken up into individuals or dissolved into a number of new families by the death of their head. But this is not necessarily the case. The group made up of those whom we vaguely call our relatives—of our brothers, nephews, great-uncles, uncles, and cousins, no less than those related to us in the ascending and descending lines—might very well, after any number of deaths, remain knitted together not only by blood and affection, but by mutual rights and duties prescribed or sanctioned by the law. An association of this sort is well known to the law of India as the Joint Undivided Family, or, to give the technical description, the Family, 'joint in food, worship, and estate.' If a Hindoo has become the root of a family it is not necessarily separated by his death; his children continue united for legal purposes as a corporate brotherhood, and some definite act of one or more of the brethren is required to effect a dissolution of the plexus of mutual rights and a partition of the family property. The family thus formed by the continuance of several generations in union is identical in outline with a group very familiar to the students of the older Roman law—the Agnatic Kindred. The Agnates

were that assemblage of persons who would have been under the patriarchal authority of some common ancestor, if he had lived long enough to exercise it. The Joint Family of the Hindoos is that assemblage of persons who would have joined in the sacrifices at the funeral of some common ancestor, if he had died in their lifetime. In the last case the sacerdotal point of view merely takes the place of the legal or civil.

So far as we are able, amid the disadvantages under which we are placed by the obscurity of our authorities, let us examine the legal qualities which the ancient Irish law attributes to this brotherhood of kinsmen as it was found in Ireland. First of all, the 'Tribe' of the Brehon tracts is a corporate, organic, self-sustaining unit. 'The Tribe sustains itself.' ('Ancient Laws of Ireland,' ii. 283.) Its continuity has begun to depend on the land which it occupies—'land,' says one of the still unpublished tracts, 'is perpetual man'—but it is not a purely land-owning body; it has 'live chattels and dead chattels,' distinguished from those of individual tribesmen. ('Ancient Laws of Ireland,' ii. 289.) Nor is it a purely cultivating body; it may follow a professional calling. (*Ibid.*, iii. 49–51.) A portion of the tribal domain, probably the arable and choice pasture lands, has been allotted to separate households of tribesmen, but they hold their allotments subject

to the controlling rights of the entire brotherhood, and the primary or fundamental rule is that they are to keep their shares of tribe-land intact. 'Every tribesman is able to keep his tribe-land; he is not to sell it or alienate or conceal it, or give it to pay for crimes or contracts.' ('Ancient Laws of Ireland,' ii. 283.) 'No person should leave a rent upon his land or upon his tribe which he did not find upon it.' (*Ibid.*, iii. 52, 53.) 'Everyone is wealthy who keeps his tribe-land perfect as he got it, who does not leave greater debt upon it than he found on it.' (*Ibid.*, iii. 55.)

Under certain circumstances the tribesman may alienate, by grant, contract, or bequest, a certain quantity of the tribe-land allotted to him; but what are the circumstances, and what the quantity, are points on which we cannot venture to make any precise statement, so obscure and contradictory are the rules set forth. But the grantee primarily contemplated is certainly the Church, though it seems clear that there is a general power of alienation, either with the consent of the entire tribal brotherhood or under pressure of strong necessity. It further appears to be beyond question that the tribesman has considerably greater power of disposition over property which he has acquired than over property which has devolved on him as a member of a tribe, and that he has more power over acquisitions made by his own unaided

industry than over acquisitions made through profits arising from the cultivation of tribal land. 'No person should grant land except such as he has purchased himself, unless by the common consent of the tribe. ('Ancient Laws of Ireland,' iii. 52, 53.) 'He who has not sold or bought (*i.e.*, he who keeps his tribe-land as he obtained it) is allowed to make grants, each according to his dignity (*i.e.*, as the commentator explains, to the extent of one-third or one-half of his tribe-land).' 'He who neither sells nor purchases may give as far as the third of his tribe-share in case of little necessity and one-half in case of great necessity.' ('Ancient Laws of Ireland,' iii. 47.) 'If it be land that acquires it, it is one-half; . . . if he be a professional man, it is two-thirds of his contracts' (iii. 49).

The distinction between acquired property and property inherited or received from kinsmen, and the enlarged power of parting with the first, are found in many bodies of ancient law—in our own early law among others. The rule that alienations, otherwise unlawful, may be made under pressure of necessity, is found in many parts of Hindoo law. The rule requiring the consent of the collective brotherhood to alienations, with many minor rules of this part of Brehon law, constantly forms part of the customs of Indian and Russian village-communities; and the duty of following common practices of

tillage, which is the bequest from these communities which lasted longest in the Germanic countries, is classed by the Corus Bescna, along with Marriage, as one of the fundamental institutions of the Irish people. ('Ancient Laws of Ireland,' iii. 17.) But much the most striking and unexpected analogies in the Brehon law on the subject of Tribesmen and the Tribe are those which it has with the Hindoo law of Joint Undivided Families. Under the Brahminical Indian law, whenever a member of a joint family has acquired property through special scientific knowledge or the practice of a liberal art, he does not bring it into the common fund, unless his accomplishments were obtained through a training given to him by his family or at their expense. The whole law on the subject was much considered in a strange case which arose before the High Court of Madras ('Madras High Court Reports,' ii. 56), where a joint family claimed the gains of a dancing-girl. The decision of the Court is thus summarised by the Reporter: 'The ordinary gains of science are divisible (*i.e.*, they are brought into hotchpot upon partition of an undivided estate), when such science has been imparted at the family expense and acquired while receiving a family maintenance. It is otherwise when the science has been imparted at the expense of persons not members of the learner's family.' The very counterparts of the Indian rule and of the Indian

exception are found in the ancient Irish law. 'If (the tribesman) be a professional man—that is, if the property be acquired by judicature or poetry, or any profession whatsoever—he is capable of giving two-thirds of it to the Church . . . but, if it was the lawful profession of his tribe, he shall not give of the emolument of his profession but just as he could give of the land of his tribe.' (Corus Bescna, 'Ancient Laws of Ireland,' iii. 5.)

It will be seen from the instances which I have given that the rules of the Irish Brehon law regulating the power of individual tribesmen to *alienate* their separate property answer to the rules of Indian Brahminical law which regulate the power of individual members of a joint family to *enjoy* separate property. The difference is material. The Hindoo law assumes that collective enjoyment by the whole brotherhood is the rule, and it treats the enjoyment of separate property by individual brethren as an exception—an exception, I may add, round which an enormous mass of law has now clustered. On the other hand, the Brehon law, so far as it can be understood, seems to me reconcileable with no other assumption than that individual proprietary rights have grown up and attained some stability within the circle of the tribe. The exercise of these rights is at the same time limited by the controlling powers of the collective brotherhood of tribesmen; and to

these last, as to the Agnatic Kindred at Rome, some ultimate right of succession appears to be reserved. Hence the Irish legal unit is not precisely a Joint Family; if the Brehon law is to be trusted, it has considerably less of the 'natural communism' which characterises the Indian institution. The 'Fine' of the tracts is constantly spoken of in connection with landed property, and, whenever it is so connected, I imagine it to have undergone some of the changes which are constantly brought about by contact with the land, and I figure it to myself in that case as a Mark or Village-Community, in which the ideas proper to the older group out of which it grew, the Joint Family, have survived in exceptional strength It in this respect approaches the Russian rather than the Indian type of village-community.

The 'Judgments of Co-Tenancy' is a Brehon law-tract, still unpublished at the time at which I write, and presenting, in its present state, considerable difficulties of interpretation. It puts, at the outset, the question,—'Whence does Co-Tenancy arise?' The answer given is, 'From several heirs and from their increasing on the land.' The tract then goes on to explain that the land is, in the first year, to be tilled by the kinsmen just as each pleases; that in the second year they are to exchange lots; that in the third year the boundaries are to be fixed; and that the whole process of severance is to

be consummated in the tenth year. I trust it is not a presumptuous conjecture that the order of change here indicated is more trustworthy than the time fixed for each of its stages. The period of ten years for the entire transition from collective to separate property seems to me greatly too short, and hard to reconcile with other Irish evidence; and I suggest that the Brehon lawyer, attached to the institution of separate property, like the rest of his class, is depicting rather an ideal than an actual set of arrangements. The process, however, which is here described, if it be spread over a much longer space of time, is really in harmony with all our knowledge of the rise and progress of cultivating communities. First a Joint Family, composed of 'several heirs increasing on the land,' is found to have made a settlement. In the earliest stage the various households reclaim the land without set rule. Next comes the system of exchanging lots. Finally, the portions of land are enjoyed in severalty.

The references to the ancient collective ownership and ancient collective enjoyment in the non-legal Irish literature appear to be very rare. But my friend Mr. Whitley Stokes has supplied me with two passages in point. The 'Liber Hymnorum,' attributed to the eleventh century, contains (folio 5A) the following statement: 'Numerous were the human beings in Ireland at that time (*i.e.* the time of the

sons of Aed Slane, A.D. 658–694), and such was their number that they used to get only thrice nine ridges for each man in Ireland, to wit, nine of bog, and nine of smooth (arable), and nine of wood.' Another Irish manuscript, believed to date from the twelfth century, the 'Lebor na Huidre,' says that 'there was not ditch, nor fence, nor stone-wall round land, till came the period of the sons of Aed Slane, but (only) smooth fields. Because of the abundance of the households in their period, therefore it is that they introduced boundaries in Ireland. These curious statements can, of course, only be regarded as authority for the existence, at the time when they were penned, of a belief that a change from a system of collective to a system of restricted enjoyment had occurred at some period or other in Ireland, and of a tradition respecting the date of the change. But it is instructive to find both of them attributing it to the growth of population, and an especial interest attaches to the account given in the 'Liber Hymnorum' of the newer distribution of land which was thought to have taken the place of something older. The periodical allotment to each household of a definite portion of bog land, wood land, and arable land wears a strong resemblance to the apportionment of pasture and wood and arable land which still goes on in our day under the communal rules of the Swiss Allmenden (see Laveleye,

'*P. et s. F. P.*,' pp. 268 *et seq.*), and which is an undoubted legacy from the ancient constitution of certain Swiss Cantons as Teutonic Hundreds.

Property in Land, wherever it has grown out of the gradual dissolution of the ancient cultivating communities, has many characteristics which distinguish it from the form of landed property with which Englishmen and men of English race are best acquainted. The area within which this last form of property is the sole or dominant kind of ownership is now much larger than it was, through its diffusion over all North America, except Mexico, and over all colonies settled for the first time by Englishmen, but our nearly exclusive familiarity with it has led, I think, to our very commonly over-estimating the extent to which it prevails over the world, and even over Western Europe. Its parentage may be traced, not to the decaying authority of the Tribe over the severalties of the tribesmen, but to the ever-increasing authority of the Chief, first over his own domain and 'booked' land, and secondarily over the tribe-lands. The early growth of the power of the Chief is thus of the utmost interest in the history of landed property, and I propose to discuss it at some length in the succeeding Lectures. Meantime, let me say something on the transmutations which Patriarchal Power is observed, as a fact, to undergo in the assemblages of

men held together by kinship which are still found making a part of Aryan communities.

The Joint Undivided Family, wherever its beginning is seen in such communities, springs universally out of the Patriarchal Family, a group of natural or adoptive descendants held together by subjection to the eldest living ascendant, father, grandfather, or great-grandfather. Whatever be the formal prescriptions of the law, the head of such a group is always in practice despotic, and he is the object of a respect, if not always of an affection, which is probably seated deeper than any positive institution. But in the more extensive assemblages of kinsmen which constitute the Joint Family the eldest male of the eldest line is never the parent of all the members, and not necessarily the first in age among them. To many of them he is merely a distant relative, and he may possibly be an infant. The sense of patriarchal right does not die out in such groups. Each father or grandfather has more power than anybody else over his wife, children, and descendants; and there is always what may be called a belief that the blood of the collective brotherhood runs more truly and purely in some one line than in any other. Among the Hindoos, the eldest male of this line, if of full mental capacity, is generally placed at the head of the concerns of the joint family; but where the institution survives in any completeness, he is not a Paterfamilias, nor is he

owner of the family property, but merely manager of its affairs and administrator of its possessions. If he is not deemed fit for his duties, a 'worthier' kinsman is substituted for him by election, and, in fact, the longer the joint family holds together, the more election gains ground at the expense of birth. The head or manager of the Sclavonic House-Communities (which, however, are much more artificial than the Hindoo Joint Families) is undisguisedly an elective representative, and in some of our examples a council of kinsmen belonging to the eldest line of descent takes the place of an individual administrator. The whole process I will describe as the gradual transmutation of the Patriarch into the Chief. The general rule is that the Chief is elected, with a strong preference for the eldest line. Sometimes he is assisted by a definite council of near kinsmen, and sometimes this council takes his place. On the whole, where the body of kinsmen formed on the type of the Joint Family is a purely civil institution, the tendency is towards greater disregard of the claims of blood. But in those states of society in which the brotherhood is not merely a civil confraternity, but a political, militant, self-sustaining group, we can perceive from actually extant examples that a separate set of causes come into operation, and that the Chief, as military leader, sometimes more than regains the privileges which he lost through the decay of the

tradition which connected him with the common root of all the kindred. True patriarchal authority, however, revives whenever the process of expansion into a group is interrupted and whenever one of the brotherhood plants himself at a distance from the rest. A Hindoo who severs himself from a Joint Family, which the law as administered by the English tribunals gives him great facilities for doing, acquires much greater power over his family, in our sense of the word, than he had as a member of the larger brotherhood. Similarly, in the developed Joint Family or Village-Community, as the little society becomes more populous, as the village spreads, as the practice of living in separate dwellings extends, as the land rather than the common lineage gets to be regarded as the cement of the brotherhood, each man in his own house practically obtains stringent patriarchal authority over his wife, children, and servants. But then, on the other hand, the separated member of the joint family, or the head of the village household, will himself become the root of a new joint brotherhood, unless his children voluntarily dissolve the family union after his death. Thus all the branches of human society may or may not have been developed from joint families which arose out of an original patriarchal cell; but, wherever the Joint Family is an institution of an Aryan race, we see it springing from such a cell, and, when it dissolves, we see it dissolving into a number of such cells.

LECTURE V.

THE CHIEF AND HIS ORDER.

NOTHING seems to me to have been more clearly shown by recent researches than the necessity of keeping apart the Tribe and the Tribal Chief as distinct sources of positive institutions. The lines of descent are constantly entwined, but each of them is found to run up in the end to an independent origin. If I were to apply this assertion to political history, I should be only repeating much of what has been said by Mr. Freeman in his excellent work on 'Comparative Politics.' Confining myself to the history of private institutions, let me observe that the distinction which I have drawn should be carefully borne in mind by those who desire to penetrate to the beginnings of Property in Land. The subject has been greatly obscured by the practice, now brought home to the early writers on feudal law, of systematically passing over or misconstruing all forms of proprietary enjoyment which they could not explain on their own principles; and hitherto the truth has only been directly seen through some of the rules of

tenure. It may now, however, be laid down without rashness that Property in Land, as known to communities of the Aryan race, has had a twofold origin. It has arisen partly from the disentanglement of the individual rights of the kindred or tribesmen from the collective rights of the Family or Tribe, and partly from the growth and transmutation of the sovereignty of the Tribal Chief. The phenomena attributable to the double process seem to me easily distinguishable from one another. Both the sovereignty of the Chief and the ownership of land by the Family or Tribe were in most of Western Europe passed through the crucible of feudalism; but the first reappeared in some well-marked characteristics of military or knightly tenures, and the last in the principal rules of non-noble holdings, and among them of Socage, the distinctive tenure of the free farmer. The status of the Chief has thus left us one bequest in the rule of Primogeniture, which, however, has long lost its most ancient form; another in the right to receive certain dues and to enforce certain monopolies; and a third in a specially absolute form of property which was once exclusively enjoyed by the Chief, and after him by the Lord, in the portion of the tribal territory which formed his own domain. On the other hand, several systems of succession after death, and among them the equal division of the land between the children, have sprung out of tribal ownership in various

stages of decay; and it has left another set of traces (not quite so widely extended), in a number of minute customary rules which govern tillage and occasionally regulate the distribution of the produce.

The fate of this double set of institutions in England and in France appears to me most instructive. I have frequently dwelt in this place on the erroneousness of the vulgar opinion which dates the extreme subdivision of the soil of France from the first French Revolution, and from the sale of the Church lands and of the estates of the emigrant nobility. A writer—I was going to say as commonly read as Arthur Young, but certainly as often mentioned as if he were commonly read—notices this *morcellement*, on the very eve of the French Revolution, and immediately after it, as the great feature which distinguished France from England. 'From what we see in England,' he says, ('Travels in 1787, '88, and '89,' p. 407) 'we cannot form an idea of the abundance in France of small properties, that is, little farms belonging to those who cultivate them.' He estimates that more than a third of the kingdom was occupied by them—a very large proportion, when the extent of Church land in France is taken into account; but recent French investigations have shown reasons for thinking that the true proportion was still larger, and that it was rather growing than diminishing, through that extravagance of the nobles which Court life fostered, and which

compelled them to sell their domains to peasants in small parcels. Young clearly saw that this subdivision of the soil was the result of some legal rule; and strongly dissenting from the Revolutionary leaders who wished to carry it farther, he declared that 'a law ought to be passed to render all division below a certain number of arpents illegal.'

It seems to have very generally escaped notice that the law of equal or nearly equal division after death was the general law of France. The rule of primogeniture was of exceptional application, and was for the most part confined to lands held by knightly tenure; indeed, in the South of France, where the custom of equal division was strengthened by the identical rule of the Roman jurisprudence, the privileges of the eldest son were only secured by calling in the exceptional rules of which the Roman Law gives the benefit to *milites* (or soldiers on service) when making their wills or regulating their successions, and by laying down that every *chevalier*, and every noble of higher degree, was a *miles* within the meaning of the Roman juridical writers. The two systems of succession and the two forms of property lay side by side, and there were men alive quite recently who could remember the bitter animosities caused by their co-existence and antagonism. A very great part of the land held by laymen belonged to the peasantry, and descended

according to the rule of equal division, but eldest son after eldest son succeeded to the signory. Yet it was not the rule of primogeniture followed in noble descents which was the true grievance; at most it became a grievance under the influence of the peculiar vein of sentiment introduced by Rousseau. The legacy from tribal sovereignty to signorial privilege, which was really resented, was that which I placed second in order. The right to receive feudal dues and to enforce petty monopolies, now almost extinguished in England by the measures to which the Copyhold Commission has given effect, had ceased long before the end of the last century to be of any considerable importance to the class which was invested with it; but M. de Tocqueville has explained, in his 'Ancien Régime' (i. 18), that it made up almost the entire means of living which the majority of the French nobility possessed. A certain number of noblemen, besides their feudal rights, had their *terres*, or domain, belonging to them in absolute property, and sometimes of enormous extent; and the wealthiest members of this limited class, the *grands*, who so frequently appear in French Court history, but who, away from the Court, were much the most respected and beloved of their order, formed the counterpart, from the legal point of view, of the English landed proprietary. The rest of the nobles lived mainly, not on rent, but on their feudal dues, and eked out a

meagre subsistence by serving the King in arms. The sense of property in the soil was thus not in the lord but in the peasantry; and the peasantry viewed the exercise of signorial rights with a feeling closely akin to that which is inspired by a highly oppressive tax. The condition of sentiment produced by it is even now a political force of some moment in France; and a similar, though a far weaker, repulsion is known to have been caused in this country by the taking of tithes in kind. It is a significant fact that, where the ownership is acknowledged to reside in the superior holder, the exaction of even an extreme rent from the tenants below has very rarely been regarded with the same bitterness of resentment.

The change, therefore, which took place in France at the first Revolution was this: the land-law of the people superseded the land-law of the nobles. In England the converse process has been gone through, and what has occurred is obviously in harmony with much else in English history. The system of the nobles has become in all essential particulars the system of the people. The rule of primogeniture, which once applied only to knightly holdings, came to apply to the great bulk of English tenures, except the Gavelkind of Kent and some others of merely local importance. This part of the change took place at a remote epoch, and its circumstances are involved in much obscurity; and we know little more of it

with certainty than that it was rapidly proceeding between the time at which Glanville and the time at which Bracton wrote. Glanville, probably not earlier than the thirty-third year of Henry the Second's reign, expresses himself as if the general rule of law caused lands held by free cultivators in socage to be divided equally between all the male children at the death of the last owner; Bracton, probably not later than the fifty-second year of Henry the Third, writes as if the rule of primogeniture applied universally to military tenures and generally to socage tenures. But another branch of the process was postponed almost to our own day. Possibly not many Englishmen have recognised with as much clearness as a recent French writer (Doniol, 'La Révolution Française et la Féodalité') that the transmutation of customary and copyhold into freehold property, which has been proceeding for about forty years under the conduct of the Copyhold and Enclosure Commissioners, is the peaceful and insensible removal of a grievance which did more than any other to bring about the first French Revolution and to prevent the re-establishment of the ancient political order. But long before there was a Copyhold Commission, the great mass of English landed property had assumed certain characteristics which strongly distinguished it from the peasant property of the Continent as it existed before it was affected by the French Codes, and as

it is still found in some countries. This last form of proprietorship was very generally fettered by the duty of cultivation in some particular way, and, as a rule, could not be dealt with so as to bar the rights reserved to the children and widow of the owner by the law of succession. The traces of a similar species of ownership, probably once widely diffused, may still be here and there discerned through the customs of particular English manors. I repeat the opinion which I expressed three years ago, that our modern English conception of absolute property in land is really descended from the special proprietorship enjoyed by the Lord, and more anciently by the tribal Chief, in his own Domain. It would be out of place to enter here on a discussion of the changes which seem to me desirable in order to make the soil of England as freely exchangeable as the theory now generally accepted demands; but to the principle of several and absolute property in land I hold this country to be committed. I believe I state the inference suggested by all known legal history when I say that there can be no material advance in civilisation unless landed property is held by groups at least as small as Families; and I again remind you that we are indebted to the peculiarly absolute English form of ownership for such an achievement as the cultivation of the soil of North America.

Before describing to you the new light which the

Ancient Laws of Ireland throw on the primitive condition of the institutions of which I have been speaking, let me give you one word of caution as to the statements of modern Irish writers respecting the original relations of the Irish Tribe and of the Irish Tribal Chief. Unhappily the subject has been discussed in the spirit of the later agrarian history of Ireland. On the one hand, some disputants have thought to serve a patriotic purpose by contending that the land of each Tribe belonged absolutely to itself and was its common property, and that the Chief was a mere administrative officer, rewarded for his services in making a fair distribution of the territory among the tribesmen by a rather larger share of its area than the rest, which was allotted to him as his domain. Contrariwise, some writers, not perhaps actuated by much kindliness to the Irish people, have at least suggested that they were always cruelly oppressed by their superiors, and probably by their natural chiefs more than any others. These authors point to the strong evidence of oppression by the Chiefs which the books of the English observers of Ireland contain. Edmund Spenser and Sir John Davis cannot have merely intended to calumniate the Irish native aristocracy when they emphatically declared that the 'chiefs do most shamefully rackrent their tenants,' and spoke with vehement indignation of the exactions from which the tribesmen suffered, the

'coshering,' and the 'coin and livery,' which occur over and over again in their pages. A third school, of a very different order from these, has representatives among the most learned Irishmen of our day. They resent the assertion that the land belonged to the tribe in common as practically imputing to the ancient Irish that utter barbarism to which private property is unknown. They say that traces of ownership jealously guarded are found in all parts of the Brehon laws, and they are on the whole apt to speak of the vassalage to the Chief which these laws attribute to the tribesmen as if it implied something like modern tenancy in the latter and modern ownership in the former. But they say that the relation of landlord and tenant was regulated by careful and kindly provisions, and they ascribe the degradation of the system, like the other evils of Ireland, to English cupidity and ignorance. The Norman nobles who first settled in Ireland are well known to have become in time Chieftains of Irish Tribes; and it is suggested that they were the first to forget their duties to their tenants and to think of nothing but their privileges. Nor is there anything incredible in this last assumption. An English settler in India who buys land there is often reputed a harder landlord than the native zemindars, his neighbours, not because he intends to be harsher (indeed in some things he is usually far more considerate and bounti-

ful), but because he is accustomed to a stricter system and cannot accommodate himself to the loose and irregular play of relations between native landowner and native tenant.

I cannot wholly concur in any one of these theories concerning Chief and Tribe. Each seems to me to contain a portion of truth, but not the whole. Let me first say that the whole land-system shadowed forth in the Brehon laws does seem to me to have for its basis the primary ownership of the tribe-land by the Tribe. It is also true that the Chief appears to exercise certain administrative duties in respect of this land, and that he has a specific portion of the tribe-land allotted to him, in the vicinity of his residence or stronghold, for the maintenance of his household and relatives. But this is not all. As we see the system through the law, it is not stationary, but shifting, developing, disintegrating, re-combining. Even according to the texts apparently oldest, much of the tribal territory appears to have been permanently alienated to sub-tribes, families, or dependent chiefs; and the glosses and commentaries show that, before they were written, this process had gone very far indeed. Whatever, again, may have been the original dignity and authority of the Chief, they are plainly growing, not merely through the introduction of alien principles and ideas, but from natural causes, more or less operative all over Europe. The general charac-

ter of these causes is very much the same as in the Germanic countries. The power of the Chief grows first through the process which is called elsewhere 'commendation,' the process by which the free tribesman becomes 'his man,' and remains in a state of dependence having various degrees. It farther grows from his increasing authority over the waste-lands of the tribal territory and from the servile or semi-servile colonies he plants there; and lastly, it augments from the material strength which he acquires through the numbers of his immediate retainers and associates, most of whom stand to him in more or less servile relations. But the Brehon law tells us much that is novel and surprising concerning the particular course of these changes and their nature in detail. It furnishes us with some wholly new ideas concerning the passage of society from inchoate to complete feudalism, and helps us to complete the account of it derived from Germanic sources. In this, as it seems to me, the greatest part of its interest consists.

With the Chieftaincy of the Tribe the early history of modern Aristocracy and modern Kingship begins. These two great institutions had, in fact, at first the same history, and the Western world long continued to bear the marks of their original identity. The Manor with its Tenemental lands held by the free tenants of the Lord, and with its Domain which was in immediate dependence on him, was the type of all

the feudal sovereignties in their complete form, whether the ruler acknowledged a superior above him or whether he at most admitted one in the Pope, or the Emperor, or God himself. In every County, or Dukedom, or Kingdom there were great tenants holding directly of its head and on some sort of parity with him; and there was a Domain under his more immediate government and at his immediate disposal. There is no obscurer and more difficult subject than the origin of the class whose power was the keystone of all these political and proprietary constructions, and none on which the scantiest contributions to our knowledge are more welcome.

There is one view of the original condition of privileged classes which, though held by learned men, has been a good deal weakened of late by German research, and seems to me still farther shaken by portions of the Brehon law. This is the impression that they always constituted, as they practically do now, a distinct class or section of the community, each member of the class standing in a closer relation to the other members than to the rest of the national or tribal society to which all belong. It cannot be doubted that the earliest modern aristocracies have as a fact, when they are first discerned, this particular aspect. Mr. Freeman ('Norman Conquest,' i. 88) says that the 'difference between eorl and ceorl is a primary fact from which we start.' Tacitus plainly

distinguished the noble from the non-noble freeman in the Germanic societies which he observed; and Cæsar, as I stated in another Lecture, divides all the Continental Celtic tribes into the Equites and the Plebs. We can understand that a spectator looking at a set of tribal communities from the outside would naturally class together all men visibly exalted above the rest; but nevertheless this is not quite the appearance which early Germanic society wears in the eyes of enquirers who follow the method of Von Maurer and Landau. Each Chief or Lord appears to them to have been noble less with reference to other noblemen than with reference to the other free tribesmen comprised in the same group with himself. Nobility has many diverse origins; but its chief source seems to have been the respect of co-villagers or assemblages of kinsmen for the line of descent in which the purest blood of each little society was believed to be preserved. Similarly, the Brehon law suggests that the Irish Chiefs were not the class by themselves which the corresponding order among the Continental Celts appeared to Cæsar to be, but were necessarily the heads of separate groups composed of their kindred or of their vassals. 'Every chief,' says the text which I quoted before, 'rules over his land, whether it be great or whether it be small.' And while the Irish law describes the way (as I shall point out) in which a common freeman can become a

chief, it also shows that the position to which he attains is the presidency of a group of dependants. Nevertheless the persons thus elevated undoubtedly tend to become, from various causes, a class by themselves and a special section of the general community; and it is very probable that the tendency was at work from the earliest times. It is farther to be remarked that some aristocracies were really a section of the community from the very first. This structure of society is produced where one entire tribal group conquers or imposes its supremacy upon other tribal groups also remaining entire, or where an original body of tribesmen, villagers, or citizens, gradually gathers round itself a miscellaneous assemblage of protected dependants. There are many known instances of both processes, and the particular relation of tribal groups which the former implies was certainly not unknown to the Celtic societies. Among the Scottish Highlanders some entire septs or clans are stated to have been enslaved to others; and on the very threshold of Irish history we meet with a distinction between free and rent-paying tribes which may possibly imply the same kind of superiority and subordination.

The circumstance of greatest novelty in the position of the Chief which the Brehon law appears to me to bring out is this: Whatever else a Chief is, he is before all things a rich man; not, however, rich, as popular associations would lead us to anticipate, in

land, but in live stock—in flocks and herds, in sheep, and before all things in oxen. Here let me interpose the remark, that the opposition commonly set up between birth and wealth, and particularly wealth other than landed property, is entirely modern. In French literature, so far as my knowledge extends, it first appears when the riches of the financial officers of the French monarchy—the Superintendents and Farmers-General—begin to attract attention. With us it seems to be exclusively the result of the great extension and productiveness of industrial undertakings on the largest scale. But the heroes of the Homeric poems are not only valiant but wealthy (Odyss. xiv. 96–106); the warriors of the Nibelungen-Lied are not only noble but rich. In the later Greek literature we find pride of birth identified with pride in seven wealthy ancestors in succession, ἕπτα πάπποι πλούσιοι; and you are well aware how rapidly and completely the aristocracy of wealth assimilated itself in the Roman State to the aristocracy of blood. Passing to the Irish Chief, we find the tract called the 'Cain-Aigillne' laying down (p. 279) that 'the head of every tribe should be the man of the tribe who is the most experienced, the most noble, the *most wealthy*, the most learned, the most truly popular, the most powerful to oppose, the *most steadfast to sue for profits and to be sued for losses*.' There are many other passages to the same effect; and on closely examining the system (as I pro-

pose to do presently) we can perceive that personal wealth was the principal condition of the Chief's maintaining his position and authority.

But while the Brehon laws suggest that the possession of personal wealth is a condition of the maintenance of chieftainship, they show with much distinctness that through the acquisition of such wealth the road was always open to chieftainship. We are not altogether without knowledge that in some European societies the humble freeman might be raised by wealth to the position which afterwards became modern nobility One fact, among the very few which are tolerably well ascertained respecting the specific origin of particular modern aristocracies is, that a portion of the Danish nobility were originally peasants; and there are in the early English laws some traces of a process by which a Ceorl might become a Thane. These might be facts standing by themselves, and undoubtedly there is strong reason to suspect that the commencements of aristocracy were multifold; but the Brehon tracts point out in several places, with legal minuteness, the mode in which a peasant freeman in ancient Ireland could become a chief. There are few personages of greater interest spoken of in these laws than the Bo-Aire, literally the 'cow-nobleman.' He is, to begin with, simply a peasant who has grown rich in cattle, probably through obtaining the use of large portions of tribe-land.

The true nobles, or Aires—a word striking from its consonance with words of similar meaning in the Teutonic languages—are divided, though we can scarcely believe the classification to correspond with an universal fact, into seven grades. Each grade is distinguished from the others by the amount of wealth possessed by the Chief belonging to it, by the weight attached to his evidence, by his power of binding his tribe by contracts (literally of 'knotting'), by the dues which he receives in kind from his vassals according to a system to be presently described, and by his Honor-Price, or special damages incurred by injuring him. At the bottom of the scale is the chief or noble called the Aire-desa; and the Brehon law provides that when the Bo-Aire has acquired twice the wealth of an Aire-desa, and has held it for a certain number of generations, he becomes an Aire-desa himself. The advantage secured to wealth does not, you see, exclude respect for birth, but works into it. 'He is an inferior chief,' says the 'Senchus Mor,' 'whose father was not a chief;' and there are many other strong assertions of the reverence due to inherited rank. The primary view of chieftainship is evidently that it springs from purity or dignity of blood, but noble birth is regarded as naturally associated with wealth, and he who becomes rich gradually climbs to a position indistinguishable from that which he would have occupied if he had been nobly born.

What is thus new in the system is the clear account of nobility as a status, having its origin in the organic structure of ancient society, but nevertheless in practice having perpetually fresh beginnings.

The enormous importance which belongs to wealth and specially to wealth in cattle, in the early Aryan society reflected by the Brehon tracts, helps, I think, to clear up one great difficulty which meets us on the threshold of an enquiry into the origin of aristocracies. I suppose that the popular theory on the subject of the privileged class in modern communities is that it was originally indebted for its status, if not for its power or influence, to kingly favour. An Englishman once questioned the Emperor Paul of Russia on the position of the Russian nobility. 'The only man who is noble in my dominions,' said the Czar, 'is the man to whom I speak, for the time that I am speaking to him.' I merely take these words as the strongest possible statement of the view to which I am referring; but they were used by a monarch with a disturbed brain, whose authority had contracted something of an Oriental character from its long subordination to Tartar power, and they were never absolutely true even of Russia. Among ourselves, however, the favourite assumption seems certainly to be, however slight may be the practical consequences we draw from it, that all aristocratic privilege had its origin in kingly grace; and this

appears, on the whole, to be the theory of English law. But the institutions of many parts of the Continent long retained the traces of a different set of ideas, and these were found where kingly power was actually much greater than in England. The French Noblesse, before the Revolution, would as a body have resented the assertion that they were a creation of the King, and the Kings of France more than once admitted that they were only the most exalted members of a class to which their own nobility belonged.

Kings have everywhere nowadays, and in many countries have had for centuries, a monopoly of the power of ennobling. This road to nobility has been so long trodden, that men in general have almost forgotten there ever was another route. Yet historical scholars have long known that nobility conferred by royal grant was, in one sense, a modern institution, though they have not succeeded in completely explaining how it came to supplant or dwarf the institution upon which it was engrafted. There seems to be no doubt that the first aristocracy springing from kingly favour consisted of the Comitatus, or Companions of the King. Although there is a good deal of evidence that the class was at first considered in some way servile, it gradually became in some countries the type of all nobility. A few tolerably familiar facts may serve to remind us how remarkable has been the fortune of the royal households all over

Western Europe. The Mayor of the Frankish Palace became King of the Franks. The Chamberlain of the Romano-German Emperors is now the German Emperor. The blood of the Steward of Scotland runs in the veins of the Kings of England. The Constables of France repeatedly shook or saved the French throne. Among ourselves the great officers of the Royal Council and Household still take precedence either of all Peers or of all Peers of their own degree. Whence, then, came this great exaltation of the Mayor or Count of the Palace, of the great Seneschal or Steward, of the High Chancellor, the Great Chamberlain, and High Constable—titles which, when they do not mark an office originally clerical, point to an occupation which must at first have been menial?

It seems certain that the Household sprang from very humble beginnings. Tacitus describes the companions of the Germanic chief as living with him in his house and supported by his bounty. Mr. Stubbs when stating ('Constitutional History,' p. 150) that 'the gesiths of an (English) king were his guard and private council,' observes that the 'free household servants of a ceorl are also in a certain sense his gesiths.' The Companions of the King appear also in the Irish legal literature, but they are not noble, and they are associated with the king's body-guard, which is essentially servile. The King of

Erin, though he never existed (strictly speaking), save for short intervals, yet always, so to speak, tended to exist, and the Crith Gablach, a Brehon tract of which a translation is given at the end of Sullivan's edition of O'Curry's Lectures, contains a picture of his palace and state. The edifice intended to be described is apparently very much the same as the great Icelandic house of which Mr. Dasent, in the 'Story of Burnt Njal,' has attempted to give a drawing from the descriptions found in Norse literature. In it the King feasts his guests, from kings and king's sons to a ghastly company of prisoners in fetters, the forfeited hostages of subject-chiefs or sub-septs who have broken their engagements. The Companions are there also, and they are stated to consist of his privileged tenantry and of his body-guard, which is composed of men whom he has delivered from death, jail, or servitude, never (a significant exception) of men whom he has saved on the battle-field. I am afraid that the picture of Irish society supplied by the Crith Gablach must throughout be regarded as to a great extent ideal or theoretical; at any rate, there is much testimony from English visitors to Ireland that many considerable Irish Chiefs were much more humbly furnished out than the King of Erin at Tara. Yet it is very likely that they all had Companions attending them, and I suspect that the obligation of maintaining a little

court had much to do with that strange privilege which in later times had a deplorable history, the right of the Chief to go with a following to the dwellings of his tenants and there be feasted at the tenant's expense. That even petty Chiefs of the Scottish Highlands had a retinue of the same character is known to all who can recall that immortal picture of Celtic society which for the first time brought it home to men who were nearly our contemporaries that ancient Celtic life and manners had existed almost down to their days—the novel of 'Waverley.'

It seems extremely probable that, in a particular stage of society, this personal service to the Chief or King was everywhere rendered in expectation of reward in the shape of a gift of land. The Companions of the Teutonic kings, in Continental Europe, shared largely in the Benefices—grants of Roman provincial land fully peopled and stocked. In ancient England the same class are believed to have been the largest grantees of public land next to the Church; and doubtless we have here part of the secret of the mysterious change by which a new nobility of Thanes, deriving dignity and authority from the King, absorbed the older nobility of Eorls. But we are a little apt to forget the plentifulness of land in countries lying beyond the northern and western limits of the Roman Empire, or just within

them. Mr. Thorold Rogers, writing of a period relatively much later, and founding his opinion on the extant evidence of returns from manor-lands, speaks of land as the 'cheapest commodity of the Middle Ages.' The practical difficulty was not to obtain land, but the instruments for making it productive; and hence, in a society older relatively than any Teutonic society of which we have any distinct knowledge, that very society which the Brehon tracts enable us to understand, it may very well have been that the object of suit at court was much less to obtain land than to obtain cattle. The Chief, as I have already said, was before all things rich in flocks and herds. He was military leader, and a great part of his wealth must have been spoil of war, but in his civil capacity he multiplied his kine through his growing power of appropriating the waste for pasture, and through a system of dispersing his herds among the tribesmen, which will be described in the next Lecture. The Companion who followed him to the foray, or was ready to do so, cannot but have been enriched by his bounty; and thus, if already noble, he became greater; if he was not noble, the way to nobility lay through wealth. The passage which I am about to read to you may serve to illustrate what probably took place, though there is nothing except common humanity to connect the tribes of whose customs it speaks with the primitive Teutons and

Celts. The Rev. H. Dugmore, in a most interesting volume, called a 'Compendium of Kafir Laws and Customs,' and published at the Wesleyan Missionary Press, Mount Coke, British Kaffraria, writes thus of much the most advanced of the South African native races, the Kafirs or Zulus (p. 27): 'As cattle constitute the sole wealth of the people, so they are their only medium of such transactions as involve exchange, payment, or reward. The retainers of a chief serve him for cattle; nor is it expected that he could maintain his influence, or indeed secure any number of followers, if unable to provide them with what at once constitutes their money, food, and clothing. He requires, then, a constant fund from which to satisfy his dependants; and the amount of the fund required may be judged of from the character of the demand made upon him. His retinue, court, or whatever it is to be called, consists of men from all parts of the tribe, the young, the clever, and the brave, who come to do court service for a time, that they may obtain cattle to furnish them with the means of procuring wives, arms, or other objects of desire. On obtaining these they return to their homes and give place to others. Thus the immediate retinue of a chief is continually changing, and constitutes a permanent drain on his resources.' Mr. Dugmore goes on to state that the sources of the chief's wealth are the inherited cattle of his father,

offerings made to him on the ceremony of his circumcision, benevolences levied from his tribe, fines and confiscations, and the results of predatory excursions.

The remarkable part played by kine in ancient Irish society will, I hope, be made more intelligible in the next Lecture. Meantime, let me observe that the two Celtic societies included in these islands which longest retained their ancient usages were both notoriously given to the plunder of cattle. Lord Macaulay, in speaking of Irish cattle-stealing, sometimes, I must own, seems to me to express himself as if he thought the practice attributable to some native vice of Irish character; but no doubt it was what Mr. Tylor has taught us to call a survival, an ancient and inveterate habit, which in this case continued through the misfortune which denied to Ireland the great condition of modern legal ideas, a strong central government. The very same practice, among the Celts of the Scottish Highlands and the rude Germanic population of the Lowland Border, has almost been invested by one man's genius with the dignity of a virtue. Again, turning to 'Waverley,' I suppose there is no truer representative of the primitive Celtic chief than Donald Bean Lean, who drives the cattle of Tully Veolan, and employs a soothsayer to predict the number of beeves which are likely to come in his way. He is a far more genuine 'survival' than Fergus McIvor, who all but deserts his cause for a disappointment about an earldom.

It has been pointed out that the status of the King's Companions was at first in some way servile. Whenever legal expression has to be given to the relations of the Comitatus to the Teutonic kings, the portions of the Roman law selected are uniformly those which declare the semi-servile relation of the Client or Freedman to his Patron. The Brehon law permits us to take the same view of the corresponding class in Celtic societies. Several texts indicate that a Chief of high degree is always expected to surround himself with unfree dependants; and you will recollect that the retinue of the King of Erin was to consist not only of free tribesmen but of a body-guard of men bound to him by servile obligations. So far as it goes, I quite agree with the explanation which Mr. Freeman has given of the original connection between servile status and that nobility with which the primitive nobility of birth has become mixed up and confounded. 'The lowly clientage,' he says, 'of the Roman Patrician and the noble following of the Hellenic and Teutonic leader may really come from the same source, and may both alike be parts of the same primeval heritage.' ('Comparative Politics,' p. 261.) But perhaps we may permit ourselves to go a step beyond this account. The Comitatus or Companions of the Chief, even when they were freemen, were not necessarily or ordinarily his near kindred. Their dependence on

him, carrying with it friendship and affection, would in modern societies place them in a position well understood, and on something like an equality with him; but in the beginning of things one man was always the kinsman, the slave, or the enemy of another, and mere friendship and affection would, by themselves, create no tie between man and man. In order that they might have any reality, they would have to be considered as establishing one of the relations known to that stage of thought. Between equals this would be assumed or fictitious kinship. But between the Chief who embodied purity of tribal descent and his associates, it would have more or less to follow the pattern of the slave's dependence on his master, and, where the Companion was not actually the Chief's slave, the bond which connected them would very probably be adapted to the more honourable model furnished by the relation between ex-slave and ex-master.

LECTURE VI.

THE CHIEF AND THE LAND.

THE Brehon law-tracts strongly suggest that, among the things which we in modern times have most forgotten, is the importance of horned cattle, not merely in the infancy of society, but at a period when it had made some considerable advance towards maturity. It is scarcely possible to turn over a page without finding some allusion to beeves, to bulls, cows, heifers, and calves. Horses appear, sheep, swine, and dogs; and bees, the producers of the greatest of primitive luxuries, have a place assigned to them as an article of property which has something corresponding to it in old Roman law. But the animals much the most frequently mentioned are kine. There are some few facts both of etymology and of legal classification which point to the former importance of oxen. *Capitale*—kine reckoned by the head—cattle—has given birth to one of the most famous terms of law and to one of the most famous terms of political economy, Chattels and Capital. *Pecunia* was probably the word for money which was employed

by the largest part of mankind for the longest time together. But oxen, though they have furnished a modern synonym for personal property, were not, I need scarcely say, classed in the lower order of commodities in all ancient systems of law. The primitive Roman law placed them in the highest class, and joined them with land and slaves as items of the *Res Mancipi*. As in several other instances, the legal dignity of this description of property among the Romans appears to answer to its religious dignity among the Hindoos. Kine, which the most ancient Sanscrit literature shows to have been eaten as food, became at some unknown period sacred, and their flesh forbidden; and ultimately two of the chief 'Things which required a Mancipation' at Rome, oxen and landed property, had their counterpart in the sacred bull of Siva and the sacred land of India.

The subject has possibly been obscured by an impression that horned cattle were only of pre-eminent importance to mankind in that pastoral stage of society which has been the theme of so much not altogether profitable speculation. The actual evidence seems to show that their greatest value was obtained when groups of men settled on spaces of land and betook themselves to the cultivation of food-grains. It is very possible that kine were at first exclusively valued for their flesh and milk, but it is clear that in very early times a distinct special

importance belonged to them as the instrument or medium of exchange. In the Homeric literature, they are certainly a measure of value; there seems no reason to doubt the traditional story that the earliest coined money known at Rome was stamped with the figure of an ox; and at all events the connection between 'pecus' and 'pecunia' is unmistakeable. Part, but by no means all, the prominence given by the Brehon lawyers to horned cattle arises certainly from their usefulness in exchange. Throughout the Brehon tracts fines, dues, rents, and returns are calculated in live-stock, not exclusively in kine, but nearly so. Two standards of value are constantly referred to, 'sed' and 'cumhal.' 'Cumhal' is said to have originally meant a female slave, just as 'ancilla' in mediæval Latinity sometimes means the price of a slave-girl; but 'sed' is plainly used for an amount or quantity of live stock, probably to some small extent variable. The next stage, however, in the history of cattle is that at which their service to mankind is greatest. They are now valued chiefly, in some communities exclusively, for their use in tillage, for their labour and their manure. Their place has been taken very generally in Western Europe by horses as beasts of plough, but the change was even there both gradual and comparatively modern; and there are still large portions of the world where the horse is exclusively employed, as it seems

everywhere to have been at one time, for war, for pleasure, or the chase. Oxen were thus almost the sole representatives of what a Political Economist would now call Capital applied to land. I think it probable that the economical causes which led to the disuse of oxen as a medium of exchange led also to the change in their legal position which we find to have taken place at Rome and in India. The sanctification of the ox among the Hindoos, rendering his flesh unlawful as food, must certainly have been connected with the desire to preserve him for tillage, and his elevation to a place among the Res Mancipi may well have been supposed to have the same tendency, since it made his alienation extremely difficult, and must have greatly embarrassed his employment in exchange. At this point the history of horned cattle becomes unhappily mixed up with that of large portions of mankind. The same causes which we perceive altering the position of the ox and turning him into an animal partially *adscriptus glebæ*, undoubtedly produced also a great extension of slavery. The plentifulness of land, even in what are considered old countries, down to comparatively recent times, and the scarcity of capital even in its rudest forms, seem to me to be placed in the clearest light by Mr. Thorold Rogers's deeply instructive volumes on Agriculture and Prices during the Middle Ages; and much in history which has been only partially intelligible is ex-

plained by them. The enormous importation of slaves into the central territories of the Roman Commonwealth, and the wholesale degradation of the free cultivating communities of Western Europe into assemblages of villeins, seem to be expedients of the same nature as restrictions on the alienation of the ox and on its consumption for food, and to have been alike suggested by the same imperious necessity of procuring and preserving instruments for the cultivation of land.

The importance of horned cattle to men in a particular state of society must, as it seems to me, be carefully borne in mind if we are to understand one of the most remarkable parts of the ancient Irish law which relates to the practice of 'giving stock.' I stated before that, though I did not draw the same inferences from the fact, I agreed with the writers who think that the land-system of ancient Ireland was theoretically based on the division of the tribe-lands among the free tribesmen. But I also said that in my opinion the true difficulty of those days was not to obtain land but to obtain the means of cultivating it. The want of capital, taken in its original sense, was the necessity which pressed on the small holder of land and reduced him occasionally to the sorest straits. On the other hand, the great owners of cattle were the various Chiefs, whose primitive superiority to the other tribesmen in this respect was probably owing to their natural functions

as military leaders of the tribe. The Brehon law suggests to me that the Chiefs too were pressed by a difficulty of their own, that of finding sufficient pasturage for their herds. Doubtless their power over the waste-lands of the particular group over which they happened to preside was always growing, but the most fruitful portions of the tribal territory would probably be those which the free tribesmen occupied. The fact that the wealth of the Chiefs in cattle was out of proportion to their power of dealing with the tribal lands, and the fact that the tribesmen were every now and then severely pressed by the necessity of procuring the means of tillage, appear to me to supply the best explanation of the system of giving and receiving stock, to which two sub-tracts of the Senchus Mor are devoted, the Cain-Saerrath and the Cain-Aigillne, the Law of Saer-stock tenure and the Law of Daer-stock tenure.

The interest of these two compendia is very great. In the first place, they go far to show us how it was that the power of the tribal Chief increased, not merely over his servile dependants, but over the free tribesmen among whom he had been at first only *primus inter pares*. In the next, they give us, from the authentic records of the ancient usages of one particular society, a perfectly novel example of a proceeding by which feudal vassalage was created. I need scarcely dwell on the historical importance of

the various agencies by which the relation of Lord and Vassal was first established. It was by them that the Western Europe of the Roman despotism was changed into the Western Europe of the feudal sovereignties. Nothing can be more strikingly unlike in external aspect than the states of society which are discerned on either side of the stormy interval filled with the movement and subsidence of the barbarian invasions. Just before it is reached, we see a large part of mankind arranged, so to speak, on one vast level surface dominated in every part by the overshadowing authority of the Roman Emperor. On this they lie as so many equal units, connected together by no institutions which are not assumed to be the creation of positive Roman law; and between them and their sovereign there is nothing but a host of functionaries who are his servants. When feudal Europe has been constituted, all this is changed. Everybody has become the subordinate of somebody else higher than himself and yet exalted above him by no great distance. If I may again employ an image used by me before, society has taken the form of a pyramid or cone. The great multitude of cultivators is at its base; and then it mounts up through ever-narrowing sections till it approaches an apex, not always visible, but always supposed to be discoverable, in the Emperor, or the Pope, or God Almighty. There is strong reason to believe that

neither picture contains all the actual detail, and that neither the theory of the Roman lawyers on one side nor the theory of the feudal lawyers on the other accounts for or takes notice of a number of customs and institutions which had a practical existence in their day. Either theory was, however, founded upon the most striking facts of the epoch at which it was framed.

We know something, though not very much, of the formal instrumentalities by which the later set of facts became so extremely dissimilar to the earlier. Mr. Stubbs ('Constitutional History,' i. 252) has thus summarised the most modern views on the subject. Feudalism 'had grown up from two great sources, the Benefice and the practice of Commendation. The beneficiary system originated partly in gifts of land made by the kings out of their own estates to their kinsmen and servants, with a special undertaking to be faithful, partly in the surrender by landowners of their estates to churches or powerful men, to be received back again and held by them as tenants for rent or service. By the latter arrangement the weaker man obtained the protection of the stronger, and he who felt himself insecure placed his title under the defence of the Church. By the practice of Commendation, on the other hand, the inferior put himself under the personal care of a lord, but without altering his title or divesting himself of his right to his estate; he became a vassal and did

homage.' Commendation, in particular, went on all over Western Europe with singular universality of operation and singular uniformity of result, and it helped to transform the ancient structure of Teutonic society no less than the institutions of the Roman Provincials. Yet there is considerable mystery about men's motives for resorting to so onerous a proceeding, and the statements of nearly all writers on the subject are general and chiefly conjectural. Perhaps the most precise assertion which we have been hitherto able to hazard as to the reasons of so large a part of the world for voluntarily placing themselves in a condition of personal subordination is, that they must have been connected with the system of civil and criminal responsibility which prevailed in those times. Families—real or artificial—natural or formed by agreement—were responsible for the offences and even for the civil liabilities of their members; but corporate responsibility must have been replaced, conveniently for all persons concerned, by the responsibility of a single lord, who could prevent injury and pay compensation for it, and whose testimony, in compurgation and other legal proceedings, had a weight often assigned to it exceeding that of several inferior persons combined. More generally, but with at least equal plausibility, we can lay down that the general disorder of the world had much to do with the growth of the new institutions; and that a little

society compactly united under a feudal lord was greatly stronger for defence or attack than any body of kinsmen or co-villagers and than any assemblage of voluntary confederates. It would be absurd, however, to suppose that we have materials for a confident opinion as to men's motives for submitting themselves to a change which was probably recommended to them or forced on them by very various circumstances in different countries and in relatively different stages of society.

I do not wish to generalise unduly from the new information furnished by the Brehon law, but there has long been a suspicion (I cannot call it more) among learned men that Celtic usages would throw some light on Commendation, and, at any rate, amid the dearth of our materials, any addition to them from an authentic source is of value. Let me again state the impression I have formed of the ancient Irish land-system, in the stage at which it is revealed to us by the Brehon tracts. The land of the tribe, whether cultivated or waste, belongs to the tribe, and this is true, whether the tribe be a joint-family of kinsmen or a larger and more artificial assemblage. Such theoretically is the principle, if the traditional view of the primitive state of things may be called a theory. But much of the territory of the larger tribes has been permanently assigned to Chiefly families or to smaller sub-divisions of tribesmen, and the

land of the smaller sub-divisions tends ever to become divided among their members, subject to certain reserved rights of the collective brotherhood. Every considerable tribe, and almost every smaller body of men contained in it, is under a Chief, whether he be one of the many tribal rulers whom the Irish records call Kings, or whether he be one of those heads of joint-families whom the Anglo-Irish lawyers at a later date called the Capita Cognationum. But he is not owner of the tribal land. His own land he may have, consisting of private estate or of official domain, or of both, and over the general tribal land he has a general administrative authority, which is ever growing greater over that portion of it which is unappropriated waste. He is meanwhile the military leader of his tribesmen, and, probably in that capacity, he has acquired great wealth in cattle. It has somehow become of great importance to him to place out portions of his herds among the tribesmen, and they on their part occasionally find themselves through stress of circumstance in pressing need of cattle for employment in tillage. Thus the Chiefs appear in the Brehon law as perpetually 'giving stock,' and the tribesmen as receiving it. The remarkable thing is, that out of this practice grew, not only the familiar incidents of ownership, such as the right to rent and the liability to pay it, together with some other incidents less pleasantly familiar to the student of Irish history,

but, above and besides these, nearly all the well-known incidents of feudal tenure. It is by taking stock that the free Irish tribesman becomes the Ceile or Kyle, the vassal or man of his Chief, owing him not only rent but service and homage. The exact effects of 'commendation' are thus produced, and the interesting circumstance is that they are produced from a simple and intelligible motive. The transaction between Chief and Vassal is very burdensome to the latter, but the necessity which leads to it is pressing, and the force of this necessity would be greater the more primitive the society in which it arose, and the more recent its settlement on its lands. All this is especially instructive, because there is no reason whatever to suppose that Beneficiary grants and Commendation arose suddenly in the world at the disruption of the Roman Empire. They were probably, in some form or other, deeply seated among the rudimentary usages of all Aryan societies.

The new position which the tribesman assumed through accepting stock from a Chief varied according to the quantity of stock he received. If he took much stock he sank to a much lower status than if he had taken little. On this difference in the quantity accepted there turns the difference between the two great classes of Irish tenantry, the Saer and Daer tenants, between whose status and that of the free and higher base tenants of an English manor

there is a resemblance not to be mistaken. The Saer-stock tenant, distinguished by the limited amount of stock which he received from the Chief, remained a freeman and retained his tribal rights in their integrity. The normal period of his tenancy was seven years, and at the end of it he became entitled to the cattle which had been in his possession. Meantime he had the advantage of employing them in tillage, and the Chief on his part received the 'growth and increase and milk,' the first two words implying the young and the manure. So far there is nothing very remarkable in the arrangement, but it is expressly laid down that besides this it entitled the Chief to receive homage and manual labour; manual labour is explained to mean the service of the vassal in reaping the Chief's harvest and in assisting to build his castle or fort, and it is stated that, in lieu of manual labour, the vassal might be required to follow his Chief to the wars. Any large addition to the stock deposited with the Saer-stock tenant, or an unusual quantity accepted in the first instance by the tribesman, created the relation between vassal and chief called Daer-stock tenancy. The Daer-stock tenant had unquestionably parted with some portion of his freedom, and his duties are invariably referred to as very onerous. The stock given to him by the Chief consisted of two portions, of which one was proportionate to the rank of the recipient, the other to the

rent in kind to which the tenant became liable. The technical standard of the first was the tenant's 'honor-price,' the fine or damage which was payable for injuring him, and which in these ancient systems of law varies with the dignity of the person injured. The relation between the second portion of stock and the rent is elaborately defined in the Brehon law: 'The proportionate stock of a calf of the value of a sack with its accompaniments, and refections for three persons in the summer, and work for three days, is three "samhaisc" heifers or their value' ('Cain-Aigillne,' p. 25); or, in other words, that the Chief may entitle himself to the calf, the refections, and the labour, he must deposit three heifers with the tenant. 'The proportionate stock of a "dartadh" heifer with its accompaniment, is twelve "seds,"' explained to mean twelve 'samhaisc' heifers, or six cows. And so on in many places. The rent in kind, or food-rent, which was thus proportioned to the stock received, unquestionably developed in time into a rent payable in respect of the tenant's land; but it is certainly a curious and unexpected fact that the rent of the class which is believed to have embraced a very large part of the ancient Irish tenantry did not, in its earliest form, correspond in any way to the value of the tenant's land, but solely to the value of the Chief's property deposited with the tenant. But the most burdensome obligation imposed on the Daer-

stock tenant is that which, in the quotation just made by me, is expressed by the word 'refections.' Beside the rent in kind and the feudal services, the Chief who had given stock was entitled to come, with a company of a certain number, and feast at the Dear-stock tenant's house, at particular periods, for a fixed number of days. This 'right of refection,' and liability to it, are among the most distinctive features of ancient Irish custom, and their origin is probably to be explained by the circumstance that the Irish Chief, though far more privileged than his tenants, was little better housed and almost as poorly furnished out, and could not have managed to consume at home the provisions to which his gifts of stock entitled him. But the practice had a most unhappy history. The Brehon law defines it and limits it narrowly on all sides; but its inconvenience and its tendency to degenerate into an abuse are manifest, and from it are doubtless descended those oppressions which revolted such English observers of Ireland as Spenser and Davis, the 'coin and livery,' and the 'cosherings' of the Irish Chiefs, which they denounce with such indignant emphasis. Perhaps there was no Irish usage which seemed to Englishmen so amply to justify that which as a whole I believe to have been a great mistake and a great wrong, the entire judicial or legislative abolition of Irish customs. The precautions by which the Brehon lawyers could fence

it in were not probably at any time very effectual, but, as I before stated, they did what they could; and, moreover, as defined by them, the relation out of which Daer-stock tenancy and its peculiar obligations arose was not perpetual. After food-rent and service had been rendered for seven years, if the Chief died, the tenant became entitled to the stock; while, on the other hand, if the tenant died, his heirs were partly, though not wholly, relieved from their obligation. At the same time it is very probable that Daer-stock tenancy, which must have begun in the necessities of the tenant, was often from the same cause rendered practically permanent.

It has frequently been conjectured that certain incidents of feudal tenure pointed back to some such system as the Brehon tracts describe to us. The Heriot of English Copyhold tenure, the 'best beast' taken by the Lord on the death of a base tenant, has been explained as an acknowledgment of the Lord's ownership of the cattle with which he anciently stocked the land of his villeins, just as the Heriot of the military tenant is believed to have had its origin in a deposit of arms. Adam Smith recognised the great antiquity of the Metayer tenancy, still widely spread over the Continent, of which one variety was in his day found in Scotland under the name of 'steelbow.' I am not at all surprised that, in one of the Prefaces to the official translation of the Brehon

laws, a comparison should be instituted between this tenancy and the Saer and Daer-stock tenancy of ancient Irish law. The outward resemblance is considerable, and the history of Metayer tenancy is so obscure that I certainly cannot undertake to say that practices answering to those I have described had not in some countries something to do with its primitive form. But the distinctions between the ancient and the modern tenancies are more important than the analogies. In Metayer tenancy a landlord supplies the land and stock, a tenant the labour only and the skill; but in Saer and Daer-stock tenancy the land belonged to the tenant. Again, the effect of the ancient Irish relation was to produce, not merely a contractual liability, but a status. The tenant had his social and tribal position distinctly altered by accepting stock. Further, the acceptance of stock was not always voluntary. A tribesman, in one stage of Irish custom at all events, was bound to receive stock from his own 'King,' or, in other words, from the Chief of his tribe in its largest extension; and everywhere the Brehon laws seem to me to speak of the acceptance of stock as a hard necessity. Lastly, the Tribe to which the intending tenant belonged had in some cases a veto on his adoption of the new position, which was clearly regarded as a proceeding invasive of tribal rights and calculated to enfeeble them. In order to give the Tribe the oppor-

tunity of interposing whenever it had legal power to do so, the acceptance of stock had to be open and public, and the consequences of effecting it surreptitiously are elaborately set forth by the law. It seems to me clear that it was discouraged by the current popular morality. One of those rules, frequent in ancient bodies of law, which are rather moral precepts than juridical provisions, declares that 'no man should leave a rent on his land which he did not find there.'

The system which I have been describing must have contributed powerfully to dissolve the more ancient tribal and family organisation. If the Chief who gave and the Ceile who accepted stock belonged to the same Tribe, the effect of the transaction was to create a relation between them, not indeed altogether unlike that of tribal connection, but still materially different from it in many respects and much more to the advantage of the chieftain. But the superior from whom a man took stock was not always the Chief of his own Sept or Tribe. So far as the Brehon law can be said to show any favour to the new system of vassalage, it encourages it between natural chief and natural tribesman; and, on the other hand, it puts difficulties in its way when there is an attempt to establish it between a tribesman and a strange Chief. But there seem to be abundant admissions that freemen did occasionally commend themselves in

this way to superiors other than their Chiefs. Every nobleman, as I said before, is assumed to be as a rule rich in cattle, and it appears to have been an object with everyone to disperse his herds by the practice of giving stock. The enriched peasant who was on his way to be ennobled, the Bo-Aire, seems to have had Ceiles who accepted stock from him, as well as had the nobles higher in degree. Accordingly, the new groups formed of the Lord and his Vassals—if we may somewhat antedate these last words—were sometimes wholly distinct from the old groups composed of the Chief and his Clan. Nor, again, was the new relation confined to Aires, or noblemen, and Ceiles, or free but non-noble tribesmen. The Bo-Aire certainly, and apparently the higher Chiefs also, accepted stock on occasion from chieftains more exalted than themselves; and in the end to 'give stock' came to mean the same thing as to assert feudal superiority, and to 'accept stock' the same thing, which in the language of other societies was called 'commendation.' It is strong evidence of the soundness of the conclusions reached of late years by historical scholars (and, among others, by Mr. Bryce), as to the deep and wide influence exercised by the Roman Empire, even in its later form, that (of course by a fiction) the Brehon law represents the King of Ireland as 'accepting stock' from the Emperor. 'When the King of Erin is without opposition'—that is, as the explanation

runs, when he holds the ports of Dublin, Waterford, and Limerick, which were usually in the hands of the Danes—'he receives stock from the King of the Romans' (S. M., ii. 225). The commentary goes on to say that sometimes 'it is by the successor of Patrick that the stock is given to the King of Erin;' and this remarkable passage seems to show that an Irish writer spoke of the successor of St. Patrick, where a writer of the same approximate period in England or on the European Continent would assuredly have spoken of the Pope.

I hope it is unnecessary for me to insist on the interest which attaches to this part of the Brehon law. It has been not uncommon, upon the evidence furnished by the usages of the Scottish Highlanders, sharply to contrast Celtic tribal customs with feudal rules; and doubtless between these customs and feudalism in its perfected state there are differences of the greatest importance. Yet, if the testimony of the Brehon tracts may be trusted, such differences arose, not from essential distinctions, but, in some measure at all events, from distinctions of degree in comparative social development. The germs of feudalism lay deep in the more ancient social forms, and were ready to assert their vitality even in a country like Ireland, which, after it was once Christianised, can have borrowed next to no institutions from its neighbours, cut off as it was from the Continent by

distance, and from England by stubborn national repulsion. It is also worthy of observation that this natural growth of feudalism was not, as some eminent recent writers have supposed, entirely distinct from the process by which the authority of the Chief or Lord over the Tribe or Village was extended, but rather formed part of it. While the unappropriated waste-lands were falling into his domain, the villagers or tribesmen were coming through natural agencies under his personal power.

The Irish practice of 'giving stock' seems to me also to connect itself with another set of phenomena which have generally been thought to belong to a very different stage of history. We obtain from the law-tracts a picture of an aristocracy of wealth in its most primitive form; and we see that the possession of this wealth gave the nobles an immense power over the non-noble freemen who had nothing but their land. Cæsar seems to me to be clearly referring to the same state of relations in the Celtic sister society, when he speaks of the Gaulish chiefs, the Equites, having one principal source of their influence in the number of their debtors. (B. G., i. 4; B. G., vi. 13.) Now, you will remember how uniformly, when our knowledge of the ancient world commences, we find plebeian classes deeply indebted to aristocratic orders. At the beginning of Athenian history we find the Athenian commonalty the bondslaves through

debt of the Eupatrids; at the beginning of Roman history we find the Roman Commons in money bondage to the Patricians. The fact has been accounted for in many ways, and it has been plausibly suggested that it was the occurrence of repeated bad seasons which placed the small farmers of the Attic and Roman territory at the mercy of wealthy nobles. But the explanation is imperfect unless we keep in mind the chief lesson of these Brehon tracts, and recollect that the relative importance of Land and Capital has been altering throughout history. The general proposition that Land is limited in quantity and is distinguished by this limitation from all other commodities which are practically capable of indefinite multiplication, has always of course been abstractedly true; but, like many other principles of Political Economy, its value depends on the circumstances to which it is applied. In very ancient times land was a drug, while capital was extremely perishable, added to with the greatest difficulty, and lodged in very few hands. The proportionate importance of the two requisites of cultivation changed very slowly, and it is only quite recently that in some countries it has been well-nigh reversed. The ownership of the instruments of tillage other than the land itself was thus, in early agricultural communities, a power of the first order, and, as it may be believed that a stock of the primitive capital larger than usual was very

generally obtained by plunder, we can understand that these stocks were mostly in the hands of noble classes whose occupation was war, and who at all events had a monopoly of the profits of office. The advance of capital at usurious interest, and the helpless degradation of the borrowers, were the natural results of such economical conditions. For the honour of the obscure and forgotten Brehon writers of the Cain-Saerrath and the Cain-Aigillne, let it not be forgotten that their undertaking was essentially the same as that which went far to immortalise one great Athenian legislator. By their precise and detailed statements of the proportion which is to be preserved between the stock which the Chief supplies and the returns which the tenant pays, they plainly intend to introduce certainty and equity into a naturally oppressive system. Solon, dealing with a state of society in which coined money had probably not long taken the place of something like the 'seds' of the Brehon law, had no expedient open to him but the debasement of the currency and the cancellation of debts; but he was attacking the same evil as the Brehon lawyers, and equally interfering with that freedom of contract which wears a very different aspect according to the condition of the society in which it prevails.

The great part played in the Brehon law by Cattle as the oldest form of Capital ought further to leave

no doubt of the original objects of the system of 'eric'-fines, or pecuniary composition for violent crime. As I said before, no Irish institution was so strongly denounced by Englishmen as this, or with so great a show of righteous indignation. As members of a wealthy community, long accustomed to a strong government, they were revolted partly by its apparent inadequacy and partly the unjust impunity which it seemed to give to the rich man and to deny to the poor. Although the English system of criminal penalties which they sought to substitute for the Irish system of compositions would nowadays be described by an ordinary writer in pretty much as dark colours as those used by Spenser and Davis for the Irish institution, it is very possible that in the sixteenth century it would have been an advantage to Ireland to have the English procedure and the English punishments. There is much evidence that the usefulness of 'eric'-fines had died out, and that they unjustly profited the rich and powerful. But that only shows that the confusions of Ireland had kept alive beyond its time an institution which in the beginning had been a great step forwards from barbarism. If the modern writers who have spoken harshly of these pecuniary compositions had come upon a set of usages belonging to a society in which tribe was perpetually struggling with tribe, and in which life was held extraordinarily cheap, and had

found that, by this customary law, the sept or family to which the perpetrator of a crime belonged forfeited a considerable portion of its lands, I am not sure that they would not have regarded the institution as showing for the age an extremely strict police. But in the infancy of society a fine on the cultivating communities, of the kind afterwards called pecuniary, was a much severer punishment than the forfeiture of land. They had plenty of land within their domains, but very slight appliances for cultivating it; and it was out of these last that compositions were paid. The system of course lost its meaning as the communities broke up and as property became unequally divided. In its day, nevertheless, it had been a great achievement, and there are traces of it everywhere, even in Roman law, where, however, it is a mere survival.

Before I quit the subject let me say something on the etymology of the famous word, Feodum, Feud, or Fief. The derivation from Emphyteusis is now altogether abandoned, and there is general, though not quite universal, agreement that Feodum is descended from one or other of the numerous family of old Teutonic terms which have their present representative in the modern German *Vieh*, 'cattle.' There is supposed to have been much the same transmutation of meaning which occurred with the analogous Latin word. *Pecunia*, allied to *pecus*, signified first money,

and then property generally; the Roman lawyers, in fact, tell us that it is the most comprehensive term for all a man's property; and in the same way 'feodum' is supposed to have come to mean 'property,' from having originally meant 'cattle.' The investigations we have been pursuing may perhaps, however, suggest that the connection of 'feodum' with cattle is closer and more direct than this theory assumes. Dr. Sullivan, I ought to add, assigns a different origin to 'feodum' from any hitherto put forward (Introd. p. ccxxvi.). He claims it as a Celtic word, and connects it with *fuidhir*, the name of a class of denizens on tribal territory whose status I am about to discuss.

The territory of every Irish tribe appears to have had settled on it, besides the Saer and Daer Ceiles, certain classes of persons whose condition was much nearer to slavery than that of the free tribesman who, by accepting stock from the Chief, had sunk lowest from his original position in the tribal society. They are called by various names, Sencleithes, Bothachs, and Fuidhirs; and the two last classes are again subdivided, like the Ceiles, into Saer and Daer Bothachs, and Saer and Daer Fuidhirs. There is evidence in the tracts, and especially in the unpublished tract called the 'Corus Fine,' that the servile dependants, like the freemen of the territory, had a family or tribal organisation; and indeed all fragments of a society like that of ancient Ireland take more or less

the shape of the prevailing model. The position of the classes, obscurely indicated in Domesday and other ancient English records as Cotarii and Bordarii, was probably very similar to that of the Sencleithes and Bothachs; and in both cases it has been suspected that these servile orders had an origin distinct from that of the dominant race, and belonged to the older or aboriginal inhabitants of the country. Families or sub-tribes formed out of them were probably hewers of wood and drawers of water to the ruling tribe or its subdivisions. Others were certainly in a condition of special servitude to the Chief or dependence on him; and these last were either engaged in cultivating his immediate domain-land and herding his cattle, or were planted by him in separate settlements on the waste land of the tribe. The rent or service which they paid to him for the use of this land was apparently determinable solely by the pleasure of the Chief.

Much the most important, and much the most interesting of these classes from the historical point of view, was that just described as settled by the Chief on the unappropriated tribal lands. Indeed, it has been suggested that its fortunes are identical with those of the great bulk of the Irish people. It consisted of the Fuidhirs, the strangers or fugitives from other territories, men, in fact, who had broken the original tribal bond which gave them a place in the

community, and who had to obtain another as best they might in a new tribe and a new place. The Brehon law shows by abundant evidence that the class must have been a numerous one. The desertion of their lands by families or portions of families is repeatedly spoken of. Under certain circumstances, indeed, the rupture of the tribal bond and the flight of those who break it are eventualities distinctly contemplated by the law. In the Brehon law, as in other ancient juridical systems, the corporate responsibility of tribes, sub-tribes, and families takes the place of that responsibility for crime, and even to some extent of civil obligation, which, under modern institutions, presses upon the individual. But the responsibility might be prevented from attaching by compelling or inducing a member of the group, habitually violent or vowed to revenge, to withdraw from its circle; and the Book of Aicill gives the legal procedure which is to be observed in the expulsion, the tribe paying certain fines to the Chief and the Church and proclaiming the fugitive. Such provisions assume a certain order in the society to which they apply; yet we know as a fact that for many centuries it was violently disordered. The result was probably to fill the country with 'broken men,' and such men could only find a home and protection by becoming Fuidhir tenants. Everything, in short, which tended to disturb the Ireland of the Brehon laws tended to multiply this particular class.

Now, the Fuidhir tenant was exclusively a dependant of the Chief, and was through him alone connected with the Tribe. The responsibility for crime, which in the natural state of Irish society attached to the Family or Tribe, attached, in the case of the Fuidhir, to the Chief, who in fact became to this class of tenants that which their original tribesmen or kindred had been. Moreover, the land which they cultivated in their place of refuge was not theirs but his. They were the first 'tenants at will' known to Ireland, and there is no doubt that they were always theoretically rackrentable. The 'three rents,' says the Senchus Mor, are the '*rackrent from a person of a strange tribe*, a fair rent from one of the tribe, and the stipulated rent which is paid equally by the tribe and the strange tribe.' The 'person from a strange tribe' is undoubtedly the Fuidhir; and though the Irish expression translated 'rackrent' cannot, of course, in the ancient state of relation between population and land, denote an extreme competition rent, it certainly indicates an extreme rent; since in one of the glosses it is graphically compared to the milk of a cow which is compelled to give milk every month to the end of the year. At the same time there is no reason to suppose that, in the first instance, the Fuidhir tenants were oppressively treated by the Chiefs. The Chief had a strong interest in encouraging them; 'he brings in Fuidhirs,' says one of the tracts,

'to increase his wealth.' The interests really injured were those of the Tribe, which may have become stronger for defence or attack by the addition to the population of the territory, but which certainly suffered as a body of joint proprietors by the curtailment of the waste land available for pasture. The process before described by which the status of the tribesmen declined proportionately to the growth of the Chiefs' powers, must have been indirectly hastened in several ways by the introduction of Fuidhirs. Such indications of the course of change as the Brehon laws furnish are curiously in harmony with a passage from a work recently published, which, amid much other valuable matter, gives a most vivid picture of agricultural life in the backward Indian province of Orissa. Mr. Hunter, the writer, is speaking of the relation of landlord and tenant; but as the 'hereditary peasantry' referred to have, as against their landlord, rights defined by law, they are not without analogy to the tribesmen of an ancient Irish territory. 'The migratory husbandman,' the Fuidhir of modern India, 'not only lost his hereditary position in his own village, but he was an object of dislike and suspicion among the new community into which he thrust himself. For every accession of cultivators tended to better the position of the landlord, and *pro tanto* to injure that of the (older) cultivators. So long as the land on an estate continued

to be twice as much as the hereditary peasantry could till, the resident husbandmen were of too much importance to be bullied or squeezed into discontent. But once a large body of immigrant cultivators had grown up, this primitive check on the landlords' exactions was removed. The migratory tenants, therefore, not only lost their position in their old villages, but they were harassed in their new settlements. Worse than all, they were to a certain extent confounded with the landless low castes who, destitute of the local connections so keenly prized in rural society as the evidences of respectability, wandered about as hired labourers and temporary cultivators of surplus village lands.' (Hunter, 'Orissa,' i. 57, 58.)

You will perhaps have divined the ground of the special attention which has been claimed for these Fuidhir tenants, and will be prepared to hear that their peculiar status has been supposed to have a bearing on those agrarian difficulties which have recurred with almost mysterious frequency in the history of Ireland. It is certainly a striking circumstance that in the far distance of Irish tradition we come upon conflicts between rent-paying and rent-receiving tribes—that, at the first moment when our information respecting Ireland becomes full and trustworthy, our informants dwell with indignant emphasis on the 'racking' of tenants by the Irish Chiefs—and that the relation of Irish landlord and

Irish tenant, after being recognised ever since the beginning of the century as a social difficulty of the first magnitude, finally became a political difficulty, which was settled only the other day. I do not say that there is not a thread of connection between these stages of Irish agrarian history, but there are two opposite errors into which we may be betrayed if we assume the thread to have been uniform throughout. In the first place, we may be tempted to antedate the influence of those economical laws which latterly had such powerful operation in Ireland until their energy was well-nigh spent through the consequences of the great famine of 1845–6. An overflowing population and a limited area of cultivable land had much to do, and probably more than anything else to do, with the condition of Ireland during that period; but neither the one nor the other was a characteristic of the country at the end of the sixteenth century. Next, we may perhaps be inclined, as some writers of great merit seem to me to be, to post-date the social changes which caused so large a portion of the soil of Ireland to be placed under the uncontrolled Law of the Market, or, to adopt the ordinary phraseology, which multiplied 'tenants at will' to an unusual extent. Doubtless, if we had to found an opinion as to these causes exclusively on ancient Irish law, and on modern English real property law, we should perhaps come to the conclu-

sion that an archaic system, barely recognising absolute ownership, had been violently and unnaturally replaced by a system of far more modern stamp based upon absolute property in land. But, by the end of the sixteenth century, our evidence is that the Chiefs had already so much power over their tenants that any addition to it is scarcely conceivable. 'The Lords of land,' says Edmund Spenser, writing not later than 1596, 'do not there use to set out their land to farme, for tearme of years, to their tenants, but only from yeare to yeare, or during pleasure, neither indeed will the Irish tenant or husbandman otherwise take his land than so long as he list himselfe. The reason thereof in the tenant is, for that the landlords there use most shamefully to racke their tenants, laying upon them coin and livery at pleasure, and exacting of them besides his covenants what he pleaseth. So that the poore husbandman either dare not binde himselfe to him for longer tearme, or thinketh, by his continuall liberty of change, to keepe his landlord the rather in awe from wronging of him. And the reason why the landlord will no longer covenant with him is, for that he dayly looketh after change and alteration, and hovereth in expectation of new worlds.' Sir John Davis, writing rather before 1613, used still stronger language: 'The Lord is an absolute Tyrant and the Tennant a very slave and villain, and in one respect more miserable than Bond

Slaves. For commonly the Bond Slave is fed by his Lord, but here the Lord is fed by his Bond Slave.'

There is very little in common between the miserable position of the Irish tenant here described and the footing of even the baser sort of Ceiles, or villeins, who had taken stock from the Chief. If the Brehon law is to be trusted, the Daer Ceile was to be commiserated, rather because he had derogated from his rights as a free tribesman of the same blood with the Chief, than because he had exposed himself to unbridled oppression. Besides paying dues more of the nature of modern rent, he certainly stood under that unfortunate liability of supplying periodical refection for his Chief and his followers. But not only was the amount of his dues settled by the law, but the very size of the joints and the quality of the ale with which he regaled his Chief were minutely and expressly regulated. And, if one provision of the law is clearer than another, it is that the normal period of the relation of tenancy or vassalage was not one year, but seven years. How, then, are we to explain this discrepancy? Is the explanation that the Brehon theory never in reality quite corresponded with the facts? It may be so to some extent, but the careful student of the Brehon tracts will be inclined to think that the general bias of their writers was rather towards exaggeration of the privileges of Chiefs than towards overstatement of the immunities of tribesmen. Is it,

on the other hand, likely that, as some patriotic Irishmen have asserted, Spenser and Davis were under the influence of English prejudice, and grossly misrepresented the facts of Irish life in their day? Plenty of prejudice of a certain kind is disclosed by their writings, and I doubt not that they were capable of occasionally misunderstanding what they saw. Nothing, however, which they have written suggests that they were likely wilfully to misdescribe facts open to their observation. I can quite conceive that some things in the relations of the Chiefs and tenants escaped them, possibly a good deal of freely-given loyalty on one side, and of kindliness and good-humoured joviality on the other. But that the Irish Chief had in their day the power or right which they attribute to him cannot seriously be questioned.

The power of the Irish Chiefs and their severity to their tenants in the sixteenth century being admitted, they have been accounted for, as I before stated, by supposing that the Norman nobles who became gradually clothed with Irish chieftainships—the Fitzgeralds, the Burkes, and the Barrys—abused an authority which in native hands would have been subject to natural limitations, and thus set an evil example to all the Chiefs of Ireland. The explanation has not the antecedent improbability which it might seem to have at first sight, but I am not aware that there is positive evidence to sustain it. I owe a far more

plausible theory of the cause of change to Dr. Sullivan, who, in his Introduction (p. cxxvi), has suggested that it was determined by the steady multiplication of Fuidhir tenants. It must be recollected that this class of persons would not be protected by the primitive or natural institutions springing out of community of blood. The Fuidhir was not a tribesman but an alien. In all societies cemented together by kinship the position of the person who has lost or broken the bond of union is always extraordinarily miserable. He has not only lost his natural place in them, but they have no room for him anywhere else. The wretchedness of the outcast in India, understood as the man who has lost or been expelled from caste, does not arise from his having been degraded from a higher to a lower social standing, but from his having no standing whatever, there being no other order of society open to receive him when he has descended from his own. It was true that the Fuidhir, though he had lost the manifold protection of his family and tribe, was not actually exposed to violent wrong. From that he was protected by the new Chief to whom he had attached himself, but between him and this Chief there was nothing. The principle would always be that he was at the mercy of the Chief. At the utmost, some usages favourable to him might establish themselves through lapse of time, but they would have none of the obligatory

force belonging to the rules which defined the rights of the Chief in respect of his Saer-stock and Daer-stock tenants. We can see that several of the duties corresponding to these rights were of a kind to invite abuse; much more certainly would obligations analogous to them, but wholly imposed by the pleasure of the Chief, become cruelly oppressive. The 'refections' of the Brehon law would, by a miserable degradation, become (to borrow the language of Spenser and Davis) coin and livery, cuttings, cosherings, and spendings, in the case of the Fuidhirs. Meanwhile there were causes at work, powerfully and for long periods of time, to increase the numbers of this class. Even those Irishmen who believe that in the distant past there was once a tolerably well-ordered Ireland admit that for many centuries their country was racked with perpetual disturbance. Danish piracies, intestine feuds, Anglo-Norman attempts at conquest never consistently carried out or thoroughly completed, the very existence of the Pale, and above all the policy directed from it of playing off against one another the Chiefs beyond its borders, are allowed by all to have distracted the island with civil war, however the responsibility for it is to be apportioned But the process is one which must have broken up tribes far and wide, and broken tribes imply a multitude of broken men. Even in brief intervals of peace the violent habits produced by constant disorder would

bring about the frequent expulsion by families of members for whom they refused to remain responsible, and in the commoner eventuality of war whole fragments would be from time to time torn away from tribes and their atoms scattered in every part of Ireland. It is, therefore, a conjecture possessing a very high degree of plausibility, that the tenantry of the Irish Chiefs whose sufferings provoked the indignation of Spenser and Davis consisted largely of Fuidhirs.

The explanation may, however, be carried beyond this point. You will bear in mind the passage quoted by me from Hunter's 'Orissa,' which shows how a tenantry enjoying hereditary rights is injured, even under a Government which sternly compels peace and order, by a large immigration of cultivators dependent on the landlord or Zemindar. They narrow the available waste land by their appropriations; and, though they do not compete directly for the anciently cultivated land with the tenants enjoying hereditary rights, they greatly raise in the long run the standard of rent, at the same time that they arm the landlord with those powers of exacting it which in ancient Ireland consisted in the strong hand of the Chief himself, and which consist, in modern India, in the money which puts in motion the arm of the law. I have no doubt whatever that a great multiplication of Fuidhir tenants would always seriously alter for the worse the position of the tenants by Saer-stock and Dear-stock tenure.

LECTURE VII.

ANCIENT DIVISIONS OF THE FAMILY.

'BEFORE the establishment of the (English) common law, all the possessions within the Irish territories ran either in course of Tanistry or in course of Gavelkind. Every Signory or Chiefry with the portion of land which passed with it went without partition to the Tanist, who always came in by election or with the strong hand, and not by descent; but all inferior tenanties were partible between males in Gavel kind.' (Sir J. Davis' Reports, 'Le Cas de Gavelkind,' Hil. 3, Jac. 1., before all the Judges.)

This passage occurs in one of the famous cases in which the Anglo-Irish Judges affirmed the illegality of the native Irish tenures of land. They declared the English common law to be in force in Ireland, and thenceforward the eldest son succeeded, as heir-at-law, both to lands which were attached to a Signory and to estates which had been divided according to the peculiar Irish custom here called Gavelkind. The Judges thoroughly knew that they were making

a revolution, and they probably thought that they were substituting a civilised institution for a set of mischievous usages proper only for barbarians. Yet there is strong reason for thinking that Tanistry is the form of succession from which Primogeniture descended, and that the Irish Gavelkind, which they sharply distinguished from the Gavelkind of Kent, was nothing more than an archaic form of this same institution, of which Courts in England have always taken judicial notice, and which prevailed far more widely on the European Continent than succession by Primogeniture.

It will be convenient that we should first consider the so-called Gavelkind of Ireland, which is thus described by Sir John Davis : 'By the Irish custom of Gavelkind, the inferior tenanties were partible among all the males of the Sept, both Bastards and Legitimate ; and, after partition made, if any one of the Sept had died, his portion was not divided among his sonnes, but the Chief of the Sept made a new partition of all the lands belonging to that Sept, and gave every one his part according to his antiquity.'

This statement occasions some perplexity, which does not, however, arise from its being antecedently incredible. It is made, you will observe, not of the Clan or Tribe in its largest extension, but of the Sept. The first was a large and miscellaneous body, composed in great part of men whose relationship of

blood with the Chief and the mass of free tribesmen, was a mere fiction. The last was a much smaller body, whose proximity to a common ancestor was close enough to admit of their kinship either being a fact or being believed to be a fact. It apparently corresponded to the small Highland communities observed in Scotland, by an English officer of Engineers about 1730. 'They (the Highlanders) are divided into tribes or clans under chiefs or chieftains, and each clan is again divided into branches from the main stock, who have chieftains over them. These are subdivided into smaller branches, of fifty or sixty men, who deduce their original from their particular chieftains. (Quoted by Skene, 'Highlanders,' i. p. 156.) Such a body, as I have already stated, seems to be the Joint Family well known to the Hindoos, but continued as a corporate unit (which is very rarely the case in India), through several successive generations. There is no difference in principle, and little in practical effect, between the mode of succession described by Davis and the way in which a Hindoo Joint Family is affected by the death of one of its members. All the property being held in common, and all earnings being brought into the 'common chest or purse,' the lapse of any one life would have the effect, potentially if not actually, of distributing the dead man's share among all the kindred united in the family group. And if, on a dis-

solution of the Joint Family, the distribution of its effects were not *per capita* but *per stirpes*, this would correspond to what Davis probably means when he describes the Chief as giving to each man 'according to his antiquity.'

The special novelty of the information supplied to us by the ancient Irish law consists in its revealing to us a society of Aryan race, settled, indeed, on the land, and much influenced by its settlement, but preserving an exceptional number of the ideas and rules belonging to the time when kinship and not the land is the basis of social union. There is, therefore, nothing extraordinary in our finding, among the ancient usages of the Irish, an institution savouring so much of the 'natural communism' of the primitive forms of property as this Irish Gavelkind. This 'natural communism,' I have repeatedly urged, does not arise from any theory or *à priori* assumption as to the best or justest mode of dividing the land of a community, but from the simple impossibility, according to primitive notions, of making a distinction between a number of kinsmen solely connected by their real or assumed descent from a common ancestor. The natural solvent of this communism is the land itself upon which the kindred are settled. As the common ancestry fades away into indistinctness, and the community gets to consider itself less an assemblage of blood-relations than a body of co-villagers,

each household clings with increasing tenacity to the allotment which it has once obtained, and re-divisions of the land among the whole community, whether at fixed periods or at a death, become rarer and rarer, and at last cease altogether, or survive only as a tradition. In this way the widely diffused but modified form of tribal succession, which in England is called Gavelkind, is at last established; the descendants of the latest holder take his property, to the exclusion of everybody else, and the rights of the portion of the community outside the family dwindle to a veto on sales, or to a right of controlling the modes of cultivation. Nevertheless, surveying the Aryan world as a whole, and looking to societies in which some fragments of the ancient social organisation still survive, we can discover forms of succession or property which come surprisingly near to the Irish Gavelkind described by Davis. The best example of this occurs in a practice which existed down to our own day over a large part of Russia. The principle was that each household of the village was entitled to a share of the village-lands proportioned to the number of adult males it contained. Every death, therefore, of a grown-up man diminished *pro tanto* the share of the household, and every member of it grown to manhood increased its lot in the cultivated area. There was a fixed unit of acreage corresponding to the extent of soil cultivable by one man's labour.

and at the periodical division each household obtained just as much land as answered to its number of adult labouring men. The principal distinction between this system and that which seemed so monstrous and unnatural to Sir John Davis is, that under the first the re-division took place, not as each death occurred, but at stated intervals. I must not, indeed, be understood to say that I think the distinction unimportant. It is very possible that re-distributions at deaths of a common fund may mark a more advanced stage in the history of Property than periodical redistribution, and that the recognition of interests for an entire life may have preceded and paved the way for the final allotment of permanent shares to separate households. Until, however, this last point has been reached, all the modes of re-division known to us are plainly referable to the same principle.

The difficulty suggested by the recital in the 'Case of Gavelkind' is thus not a difficulty in believing it if it stood by itself, or if it were made with less generality. But it is distinctly stated that all the lands in Ireland which did not descend by the rule of Tanistry descended by the rule of Gavelkind. The indications of the state of law or custom furnished by the Brehon tracts certainly seem to me inconsistent with this assertion. They show us proprietary rights defined with a sharpness and guarded with a jealousy which is hard to reconcile with the degree

of 'natural communism' implied in the language of Davis's Report. The Corus Bescna, of which I said something before, and which deals with rights over tribal lands, implies that under certain circumstances they might be permanently alienated, at all events to the Church; and we shall presently have to discuss some very singular rules of succession, which, however they may affect the Family, certainly seem to exclude the Sept. Dr. Sullivan, who appears to have consulted many more original authorities than have been translated or given to the world, expresses himself as if he thought that the general law of succession in Ireland was nearly analogous to the Gavelkind of Kent. 'According to the Irish custom, property descended at first only to the male heirs of the body, each son receiving an equal share. . . . . Ultimately, however, daughters appear to have become entitled to inherit all, if there were no sons' (Introd., p. clxx).

I do not expect that the apparent contradiction between the Brehon tracts and the language of Davis and his contemporaries respecting the Irish law of succession to land will be fully accounted for till the whole of the ancient legal literature is before the world; but meanwhile it is a plausible explanation of the discrepancy that the Irish and the English writers attended to different sets of phenomena. I cannot doubt that the so-called Irish Gavelkind was found over a great part of the country. The state-

ments of English authorities on the point are extremely precise. They affirm that 'no civil habitations were erected, and no enclosure or improvement was made of land where Gavelkind was in use,' and they say that this was especially the case in Ulster, 'which was all one wilderness.' Nevertheless it is extremely probable that another set of facts justified the indications given by the Brehon tracts, and that there were other modes of succession known besides succession by Tanistry on the one hand, and besides on the other hand the peculiarly archaic system under which each lapsed share was at once divided between all the members of the Sept. Such an institution as the last, though exceptional circumstances may keep it alive, contains within itself a principle of decay. Each household included in the Joint Family gains a firmer hold on its share of the lands as the distance increases from the common ancestor; and finally appropriates it, transmitting it exclusively to offshoots from its own branch. Nothing is more likely than that there were frequent examples of Irish septs with their land-customs in this condition; and it is still more probable that usages of a similarly modern stamp prevailed in estates permanently severed or 'booked off' from tribal possession or established at a distance from the main seat of the tribe. It is true that, in society based on kinship, each family separated from the rest tends itself to expand into a joint family or

sept; but in these severed estates custom would be apt to be enfeebled and to abate something of its tyranny. Thus, putting the rule of Tanistry aside, I can quite conceive that the Irish Gavelkind, the modern Gavelkind known to Kent, and many forms of succession intermediate between the two, co-existed in Ireland. Both the English and the Irish authorities on law had prejudices of their own which might lead them to confine their attention to particular usages. The Brehon writers seem to me distinctly biassed in favour of the descent of property in individual families, which commended itself to them as lawyers, as friends of the Church, and (it may be) as well-wishers to their country. On the other, the strange ancient form of ownership which he called Gavelkind would fascinate the observation of an Englishman resident in Ireland. He would assuredly have none of the curiosity about it which we feel nowadays, but surprise and dislike would fix his attention upon it, and perhaps prevent his recognising the comparatively wide diffusion of institutions of the opposite type.

This interpretation of the seeming contradiction between our authorities is consistent with the very little we know respecting actual divisions of land in ancient Ireland. It constantly happened both in Ireland and the Scottish Highlands that a Chief, besides the domain which appertained to his office,

had a great estate held under what the English lawyers deemed the inferior tenure. There are two cases on record in which Irish Chiefs of considerable dignity distributed such estates among their kindred. In the fourteenth century Connor More O'Brien, a chief who had children of his own, is stated to have divided his land on principles which must have more or less corresponded to those condemned by the Anglo-Irish Judges. The bulk of the estate he assigned to the various families of the Sept formed by his own relatives. To himself he reserved only one-sixth of one-half of one-third, and even this sixth he divided between his three sons, reserving only a rent to himself. But at the end of the fifteenth century Donogh O'Brien, son of Brien Duff, son of Connor, King of Thomond, divided all his lands between his eleven sons, reserving to himself only the mansion and the demesne in its vicinity. The difference between the two cases, which (it is instructive to observe) are separated by at least a century, appears to me sufficiently plain. In the first the land had remained in a state of indivision during several generations; in the second it had been periodically divided. Connor More O'Brien was distributing the inheritance of a joint family; Donogh O'Brien that of a family. (Vallancey, 'Collectanea de Rebus Hibernicis,' i. 264, 265.)

It is worthy of observation that in the more

ancient example Connor More O'Brien appears to have paid regard to the various *stirpes* or stocks into which the descendants of the original founder of his family had branched out. The principle he followed I suppose to be the same as that pointed out by Davis when he speaks of the chief dividing a lapsed share between the members of a sept 'according to their antiquity.' The proceeding deserves to be noted, as showing an advance on the oldest known tribal customs. In the most archaic forms of the Joint Family, and of the institution which grew out of it, the Village-Community, these distributions are *per capita*; no one person who is entitled takes more than another, whether the whole estate or a portion is divided, and no respect is paid to the particular way in which a given individual has descended from the common ancestor. Under a more advanced system the distribution is *per stirpes*; careful attention is paid to the lines into which the descendants of the ancestor of the joint-family have separated, and separate rights are reserved to them. Finally, the stocks themselves escape from the sort of shell constituted by the Joint Family; each man's share of the property, now periodically divided, is distributed among his direct descendants at his death. At this point, property in its modern form has been established; but the Joint Family has not wholly ceased to influence successions. When direct descendants fail it is even now the rules

of the Joint Family which determine the taking of the inheritance. Collateral successions, when they are distant, follow the more primitive form of the old institution, and are *per capita*; when they are those of the nearer kindred they are adjusted to its more modern shape, and are *per stirpes*.

The remark has further to be made that both Connor O'Brien and Donogh O'Brien divided their own land among their sons or kindred during their own lifetime. Like Laertes in the Odyssee and like Lear in the tragedy of Shakespeare, the old Chief, in the decay of his vigour, parts with his power and retains but a fraction of the property he had administered; and the poorer freeman becomes one of those 'senior' pensioners of the tribe so often referred to in the tracts. Precisely the same practice is recognised, and even (as some think) enjoined, by the more archaic bodies of Hindoo jurisprudence. The principle is that the right of each member of a family accrues at his birth; and, as the family has in theory a perpetual existence, there is no particular reason why, if the property is divided at all, it should be exclusively divided at a death. The power of distributing inheritances vested in the Celtic chiefs has been made the basis of some very doubtful theories, but I have no doubt it is essentially the same institution as the humble privilege which is reserved to the Hindoo father by the Mitakshara. It is part of the prerogative belonging to the repre-

sentative of the purest blood in the joint family; but in proportion as the Joint Family, Sept, or Clan becomes more artificial, the power of distribution tends more and more to look like mere administrative authority.

Under some systems of Hindoo law, the father, when making a distribution of property during his lifetime, is entitled to retain a double share, and by some Indian customs the eldest son, when dividing the patrimony with his brothers, takes twice as much as the others. There are a good many traces of the usage in this last form in a variety of communities. It is, for instance, the 'birthright' of the Hebrew patriarchal history. I mention it particularly because it seems to me to be sometimes improperly confounded with the right conferred by what we call the rule of Primogeniture. But the double share is rather given as the reward or (perhaps we should say) the security for impartial distribution, and we find it often coupled with the right to take exclusively such things as are deemed incapable of partition, the family house, for instance, and certain utensils. The proof that it is not essentially a privilege of the eldest son, we find in the circumstances that it is sometimes enjoyed by the father and sometimes by the youngest of the sons, and in this way it is connected with our own custom of Borough English, of which I shall have more to say presently. There is a difference of historical origin between this kind of privileged suc-

cession and that which we call Primogeniture. The first is descended from a custom of the Tribe; the last, to which I now pass, seems to me traceable to the special position of the Chief.

The Brehon tracts at present translated do not add much to the knowledge which we possessed of the Irish customs corresponding to the usage of exclusive succession by the eldest son; and Primogeniture remains what I called it thirteen years ago ('Ancient Law,' p. 227), 'one of the most difficult problems of historical jurisprudence.' The first of the difficulties which surround it is the total absence, before a particular epoch in history, of recorded precedents for any such mode of succession to property. It was unknown to the Hellenic world. It was unknown to the Roman world. It was unknown to the Jews, and apparently to the whole Semitic world. In the records of all these societies there are vestiges of great differences between the succession of males and the succession of females; but there was nothing like the exclusive succession of a single son to property, although the descent of sovereignties to the eldest son of the last reigning king was a familiar fact, and though the Greek philosophers had conjectured that, in an earlier state of society than theirs, the smaller groups of men—families and villages—had been governed by eldest son after eldest son.

Even when the Teutonic races spread over Western Europe they did not bring with them Primogeniture as their ordinary rule of succession. The allodial property of the Teutonic freeman, that share which he had theoretically received at the original settlement of the brotherhood to which he belonged on their domain, was divided at his death, when it was divided at all, equally between his sons or equally between his sons and daughters. It is quite certain, however, that the appearance of Primogeniture in the West and its rapid diffusion must be connected with the irruption of the barbarians, and with the tribal ideas re-introduced by them into the Roman world. At this point, however, we encounter another difficulty. The Primogeniture which first meets us is not uniformly the Primogeniture with which we are now familiar. The right of the eldest son sometimes gives way to the right of the eldest male relative of the deceased, and occasionally it seems as if neither the succession of the eldest son nor that of the eldest relative could take effect without election or confirmation by the members of the aggregate group to which both belong.

As usual, we have to look for living illustrations of the ancient system to the usages of the Hindoos. The Family, according to the Hindoo theory, is despotically governed by its head; but if he dies and the Family separates at his death, the property is equally

divided between the sons. If, however, the Family does not separate, but allows itself to expand into a Joint Family, we have the exact mixture of election and doubtful succession which we find in the early examples of European primogeniture. The eldest son, and after him his eldest son, is ordinarily the manager of the affairs of the Joint Family, but his privileges theoretically depend on election by the brotherhood, and may be set aside by it, and, when they are set aside, it is generally in favour of a brother of the deceased manager, who, on the score of greater age, is assumed to be better qualified than his nephew for administration and business. In ancient Irish society the Joint Family, continued through many generations, has grown first into the Sept and then into the Clan, contracting a greater degree of artificiality in proportion to its enlargement. The importance, meanwhile, of the Chief to the Tribe has rather increased than diminished, since he is no longer merely administrator of its civil affairs but its leader in war. The system produced from these elements appears to me sufficiently intelligible. The veneration of the Tribe is not attracted by individuals of the Chieftain's family, but by the family itself, as representing the purest blood of the entire brotherhood. It chooses its head and leader (save on the very rarest occasions) from this family, and there are instances of the choice being systemati-

cally made from two families in alternation. But the necessity of having a military leader in the vigour of his physical and mental powers is much too imperious to admit of his choice being invariably deferred to the death of the ruling Chief, or to allow of the election falling universally or even generally on his son. 'It is a custom among all the Irish,' says Spenser, 'that presently after the death of any of their chief lords or captains, they do presently assemble themselves to a place generally appointed and known unto them to choose another in his stead, where they do nominate and elect for the most part, not the eldest son, nor any of the children of the lord deceased, but the next to him of blood that is eldest and worthiest, as commonly the next brother if he have any, or the next cousin, and so forth, as any is elder in that kindred or sept; and then, next to him, they choose the next of the blood to be Tanaist, who shall succeed him in the said Captaincy if he live thereunto. . . . For when their Captain dieth, if the Signory should descend to his child, and he perhaps an infant, another might peradventure step in between or thrust him out by strong hand being then unable to defend his right and to withstand the force of a forreiner; and therefore they do appoint the eldest of the kin to have the Signory, for that commonly he is a man of stronger years and better experience to maintain the inheritance and to

defend the country. . . . And to this end the Tanaist is always ready known, if it should happen to the Captain suddenly to die, or to be slain in battle, or to be out of the country, to defend and keep it from all such dangers.' (Spenser's 'View of the State of Ireland.')

Primogeniture, therefore, considered as a rule of succession to property, appears to me to be a product of tribal leadership in its decay. Some such system as that represented by the Irish Tanistry belonged probably at one time to all the tribal communities which overran the Roman Empire, but no precise assertion can be made as to the stage in their history at which it began to be modified, especially since Sohm's investigations (in his 'Fränkische Reichs-und Gerichtsverfassung') have shown us how considerably the social organisation of some of these communities had been affected by central or royal authority in the interval between the observations of Tacitus and the writing of the Salic Law. But I think we may safely conjecture that the transition from the older to the newer Primogeniture took place everywhere under circumstances nearly the reverse of those which kept Tanistry so long alive in Ireland. Wherever some degree of internal peace was maintained during tolerably long periods of time, wherever an approach was made to the formation of societies of the distinctive modern type, wherever military and

civil institutions began to group themselves round the central authority of a king, the value of strategical capacity in the humbler chiefs would diminish, and in the smaller brotherhoods the respect for purity of blood would have unchecked play. The most natural object of this respect is he who most directly derives his blood from the last ruler, and thus the eldest son, even though a minor, comes to be preferred in the succession to his uncle; and, in default of sons, the succession may even devolve on a woman. There are not a few indications that the transformation of ideas was gradual. The disputes among great Highland families about the title to the chieftaincy of particular clans appear to date from a period when there was still a conflict between the old principle of succession and the new; and at a relatively later period, when throughout most of Western Europe tribal customs have been replaced by feudal rules, there is a visible uncertainty about such of these rules as affect succession. Glanville, writing of English military tenures in the later part of the reign of Henry the Second, observes: 'When anyone dies, leaving a younger son and a grandson, the child of his eldest son, great doubt exists as to which of the two the law prefers in the succession to the other, whether the son or the grandson. Some think the younger son has more right to the inheritance than the grandson . . . but others incline to think that the grandson

ought to be preferred to his uncle.' (Glanville, vii. 7.) This ancient doubt has left traces of itself on literature no less than on history, since it manifestly affects the plot of Shakespeare's *Hamlet*; but the very question of principle arose between the descendants of daughters in the controversy between Bruce and Baliol. The succession to the Crown of Scotland was ultimately settled, as it would have been in earlier times, by what amounted to national election, but the decision of Edward the First in favour of Baliol was undoubtedly in accordance with principles which were gaining ground everywhere, and I quite agree with Mr. Burton (ii. 249) that the celebrity of the dispute and the full consideration given to it did much to settle the rule which prevailed in the end, that the whole of the descendants of an elder child must be exhausted before those of the younger had a title. When, however, the eldest son had once taken the place of his uncle as the heir to the humbler chieftaincies, he doubtless also obtained that 'portion of land attached to the Signory or Chiefry which went without partition to the Tanaist;' and, as each community gradually settled down into comparative peace under royal or central authority, this demesne, as it was afterwards called, must have assumed more and more the character of mere property descending according to the rule of primogeniture. It may be believed that in this way a principle of inheritance was formed which first of all extended

from the demesne to all the estates of the holder of the Signory, however acquired, and ultimately determined the law of succession for the privileged classes throughout feudalised Europe. One vestige of this later course of change may perhaps be traced in the noble tenure once widely extended on the Continent, and called in French 'Parage,' under which the near kinsmen of the eldest son still took an interest in the family property, but held it of him as his Peers. There were, however, other causes than those just stated which led to the great development of Primogeniture in the early part of the Middle Ages, but for an examination of them I may be allowed to refer to the work of mine which I mentioned above. ('*Ancient Law*,' pp. 232 *et seq.*)

I do not think that the disaffirmation of the legality of Tanistry, and the substitution for it of the rule of Primogeniture, can justly be reckoned among the mistakes or crimes of the English in Ireland. The practice had been perpetuated in the country by its disorders, which preserved little groups of kinsmen and their petty chiefs in an unnatural vitality; and probably Sir John Davis does not speak too harshly of it when he charges it with 'making all possessions uncertain, and bringing confusion, barbarism, and incivility.' The decision against the Irish Gavelkind was far less justifiable. Even if the institution were exactly what Davis supposed it to be, there was injustice in suddenly disappointing the expectations of

the distant kindred who formed the sept of the last holder; but it is probable that several different modes of succession were confounded under the name of Gavelkind, and that in many cases a number of children were unjustifiably deprived of their inheritance for the advantage of one. All that can be said for the authors of the revolution is that they seem to have sincerely believed the mischievousness of the institutions they were destroying; and it is some evidence of this that, when their descendants a century later really wished to inflict an injury on the majority of Irishmen, they re-introduced Gavelkind, though not in its most ancient shape. They 'gavelled' the lands of Papists and made them descendible to all the children alike. There seems to me a melancholy resemblance between some of the mistakes which, at two widely distant epochs, were committed by Englishmen, apparently with the very best intentions, when they were brought into contact with stages in the development of institutions earlier than that which their own civilisation had reached. Sir John Davis's language on the subject of the Irish custom of Gavelkind might be that of an Anglo-Indian lawyer who should violently censure the Brahminical jurists for not confounding families with joint undivided families. I do not know that any such mistake has been made in India, though undoubtedly the dissolution of the Joint Family was in the early days of our government unduly encouraged by our

Courts. But there is a closer and more unfortunate similarity between some of the English experiments in Ireland and those tried in India. Under an Act of the twelfth year of Queen Elizabeth the Lord Deputy was empowered to take surrenders and regrant estates to the Irishry. The Irish lords, says Davis, 'made surrenders of entire countries, and obtained grants of the whole again to themselves only, and none other, and all in demesne. In passing of which grants, there was no care taken of the inferior septs of people. . . . So that upon every such surrender or grant, there was but one freeholder made in a whole country, which was the lord himself; all the rest were but tenants at will, or rather tenants in villenage.' There are believed to be many Indian joint-families or septs which, in their later form of village-communities, had the whole of their lands similarly conferred on a single family out of their number, or on a royal taxgatherer outside them, under the earliest Indian settlements. The error was not in introducing absolute ownership into Ireland or India, but in the apportionment of the rights of which property is made up. How, indeed, this apportionment shall be wisely and justly made, when the time has fully come for putting individual property in the place of collective property by a conscious act of the State, is a problem which taxes to the utmost the statesmanship of the most advanced era, when animated by the highest benevolence and informed with the widest knowledge.

It has been reserved for our own generation to witness the least unsatisfactory approach which has hitherto been made towards the settlement of this grave question in the great measures collectively known as the enfranchisement of the Russian serfs.

The Irish practice of Tanistry connects itself with the rule of Primogeniture, and the Irish Gavelkind with the rules of succession most widely followed among both the Eastern and Western branches of the Aryan race; but there are some passages in the Brehon tracts which describe an internal division of the Irish Family, a classification of its members and a corresponding system of succession to property, extremely unlike any arrangement which we, with our ideas, can conceive as growing out of blood-relationship. Possibly, only a few years ago, these passages would have been regarded as possessing too little interest in proportion to their difficulty for it to be worth anybody's while to bestow much thought upon their interpretation. But some reasons may be given why we cannot wholly neglect them.

The distribution of the Irish Family into the Geilfine, the Deirbhfine, the Iarfine, and the Indfine—of which expressions the three last are translated the True, the After, and the End Families—is obscurely pointed at in several texts of the earlier volumes of the translations; but the Book of Aicill,

in the Third Volume, supplies us for the first time with statements concerning it having some approach to precision. The learned Editor of this volume, who has carefully examined them, describes their effect in the following language: 'Within the Family, seventeen members were organised in four divisions, of which the junior class, known as the Geilfine division, consisted of five persons; the Deirbhfine, the second in order; the Iarfine, the third in order; and the Indfine, the senior of all, consisted respectively of four persons. The whole organisation consisted, and could only consist, of seventeen members. If any person was born into the Geilfine division, its eldest member was promoted into the Deirbhfine, the eldest member of the Deirbhfine passed into the Iarfine; the eldest member of the Iarfine moved into the Indfine; and the eldest member of the Indfine passed out of the organisation altogether. It would appear that this transition from a lower to a higher grade took place upon the introduction of a new member into the Geilfine division, and therefore depended upon the introduction of new members, not upon the death of the seniors.'

It seems an inference from all the passages bearing on the subject that any member of the Joint-family or Sept might be selected as the starting-point, and might become a root from which sprung as many of these groups of seventeen men as he had

sons. As soon as any one of the sons had four children, a full Geilfine sub-group of five persons was formed; but any fresh birth of a male child to this son or to any of his male descendants had the effect of sending up the eldest member of the Geilfine sub-group, provided always he were not the person from whom it had sprung, into the Deirbhfine. A succession of such births completed in time the Deirbhfine division, and went on to form the Iarfine and the Indfine, the After and the End Families. The essential principle of the system seems to me a distribution into fours. The fifth person in the Geilfine division I take to be the parent from whom the sixteen descendants spring, and it will be seen, from the proviso which I inserted above, that I do not consider his place in the organisation to have been ever changed. He appears to be referred to in the tracts as the Geilfine Chief.

The interest of this distribution of the kinsmen consists in this: whatever else it is, it is not a classification of the members of the family founded on degrees of consanguinity, as we understand them. And, even if we went no farther than this, the fact would suggest the general reflection which often occurs to the student of the history of law, that many matters which seem to us altogether simple, natural, and therefore probably universal, are in reality artificial and confined to limited spheres of application. When one of us opens his Prayer-book and glances

at the Table of Prohibited Degrees, or when the law-student turns to his Blackstone and examines the Table of Descents, he possibly knows that disputes have arisen about the rights and duties proper to be adjusted to these scales of relationship, but it perhaps has never occurred to him that any other view of the nature of relationship than that upon which they are based could possibly be entertained. Yet here in the Book of Aicill is a conception of kinship and of the rights flowing from it altogether different from that which appears in the Tables of Degrees and of Descents. The groups are not formed upon the same principles, nor distinguished from one another on the same principles. The English Tables are based upon a classification by degrees, upon identity in the number of descents by which a given class of persons are removed from a given person. But the ancient Irish classification obviously turns upon nothing of the sort. A Geilfine class may consist of a father and four sons who are not in the same degree, and the Brehon writers even speak of its consisting of a father, son, grandson, great-grandson, and great-great-grandson, which is a conceivable case of Geilfine relationship, though it can scarcely have been a common one. Now, each of these relatives is in a different degree from the others. Yet this distribution of the family undoubtedly affected the law of inheritance, and the Geilfine class, to our eyes sc

anomalous, might succeed in certain eventualities to the property of the other classes, of which the composition is in our eyes equally arbitrary.

This singular family organisation suggests, however, a question which, in the present state of enquiry on the subject which occupies us, cannot fairly be avoided. I have spoken before of a volume on 'Systems of Consanguinity and Affinity in the Human Family,' published by the Smithsonian Institute at Washington. The author, Mr. Lewis Morgan, is one of the comparatively few Americans who have perceived that, if only on the score of the plain extant evidences of the civilisation which was once enjoyed and lost by some branches of their stock, the customs and ideas of the Red Indians deserve intelligent study. In prosecuting his researches Mr. Morgan was struck with the fact that the conception of Kinship entertained by the Indians, though extremely clear and precise, and regarded by them as of much importance, was extremely unlike that which prevails among the now civilised races. He then commenced a laborious investigation of the whole subject, chiefly through communications with correspondents in all parts of the world. The result at which he arrived was that the ideas on the subject of relationship entertained by the human family as a whole were extraordinarily various, but that a generalisation was possible, and that these ideas could be referred to one or

other of two distinct systems, which Mr. Morgan calls respectively the Descriptive and the Classificatory system. The time at our command will only allow me to explain his meaning very briefly. The Descriptive system is that to which we are accustomed. It has come to us from the Canon law, or else from the Roman law, more particularly as declared in the 118th Novel of Justinian, but it is not at all confined to societies deeply affected by Civil and Canon law. Its essence consists in the giving of separate names to the classes of relatives which are formed by the members of the family who are removed by the same number of descents from yourself, the *ego* or propositus, or from some common ancestor. Thus, your uncle stands to you in the third degree, there being one degree or step from yourself to your father or mother, a second from your father or mother to their parents, a third from those parents to their other children, among whom are your uncles. And 'uncle' is a general name for all male relatives standing to you in this third degree. The other names employed under the Descriptive system are among the words in most common use; yet it is to be noted that the system cannot in practice be carried very far. We speak of uncle, aunt, nephew, niece, cousin; but then we get to great-uncle, grand-nephew, and so forth, and at length lose our way amid complications of 'great' and 'grand' until we cease to distinguish our

distant kindred by particular designations. The Roman technical law went considerably farther than we do with the specific nomenclature of relatives; yet there is reason to think that the popular dialects of Latin were more barren, and no Descriptive system can go on indefinitely with the process. On the other hand, the Classificatory system groups the relatives in classes, often large ones, which have no necessary connection with degrees. Under it a man's father and his uncles are grouped together, sometimes his uncles on his father's side, sometimes on the mother's side, sometimes on both; and perhaps they are all indifferently called his fathers. Similarly, a man's brothers and all his male cousins may be classed together and called his brothers. The effect of the system is in general to bring within your mental grasp a much greater number of your kindred than is possible under the system to which we are accustomed. This advantage is gained, it is true, at the expense of the power of discriminating between the members of the several classes, but still it may be very important in certain states of society, since each of the classes usually stands under some sort of conjoint responsibility.

I am not now concerned with the explanation of the Classificatory system of Kinship. Mr. Morgan and the school to which he belongs find it, as I said before, in a state of sexual relations, alleged to have

once prevailed universally throughout the human race, and known now to occur in some obscure fragments of it. The fullest account of the condition of society in which these views of relationship are believed to have grown up may be read in Mr. McLennan's most original work on Primitive Marriage. The point before us, however, is whether we have a trace of the Classificatory system in the Irish division of the Family into four small groups, no one of which is necessarily composed of relatives of the same degree, and each of which has distinct rights of its own, and stands under definite responsibilities. Undoubtedly, the Descriptive system was that which the ancient Irish generally followed; but still it would be an interesting, and, in the opinion of pre-historic writers, an important fact, if a distribution of the Family only intelligible as a relic of the Classificatory system remained as a 'survival' among the institutions reflected by the Brehon Laws. My own opinion, which I will state at once, is that the resemblance between the Irish classification of kindred and the modes of classification described by Mr. Morgan is only superficial and accidental. The last explanation Mr. Morgan would admit of the remarkable ideas concerning kinship which form the subject of his book would be that they are connected with the Patria Potestas, that famous institution which held together what he and his school consider to be a relatively modern form of

the Family. I think, however, I can assign some at least plausible reasons for believing that this perplexing four-fold division of the Celtic Family is neither a mere survival from immemorial barbarism nor, as most persons who have noticed it have supposed, a purely arbitrary arrangement, but a monument of that Power of the Father which is the first and greatest land-mark in the course of legal history.

Let me repeat that the Irish Family is assumed to consist of three groups of four persons and one group of five persons. I have already stated that I consider the fifth person in the group of five to be the parent from whom all the other members of the four divisions spring, or with whom they are connected by adoptive descent. Thus, the whole of the natural or adoptive descendants are distributed into four groups of four persons each, their rank in the Family being in the inverse order of their seniority. The Geilfine group is several times stated by the Brehon lawyers to be at once the highest and the youngest.

Now, Mr. Whitley Stokes has conveyed to me his opinion that 'Geilfine' means 'hand-family.' As I have reason to believe that a different version of the term has been adopted by eminent authority, I will give the reasons for Mr. Stokes's view. 'Gil' means 'hand'—this was also the rendering of O'Curry—and it is, in fact, the Greek word χείρ. In several Aryan languages the term signifying 'hand' is an expressive

equivalent for Power, and specially for Family or Patriarchal Power. Thus, in Greek we have *ὑποχείριος* and *χέρης*, for the person under the hand. In Latin we have *herus* 'master,' from an old word, cognate to *χείρ*; and we have also one of the cardinal terms of ancient Roman Family Law, *manus*, or hand, in the sense of Patriarchal authority. In Roman legal phraseology, the wife who has become in law her husband's daughter by marriage is *in manu*. The son discharged from Paternal Power is *emancipated*. The free person who has undergone mancipation is *in mancipio*. In the Celtic languages we have, with other words, 'Gilla,' a servant, a word familiar to sportsmen and travellers in the Highlands and to readers of Scott in its Anglicised shape, 'Gillie.'

My suggestion, then, is that the key to the Irish distribution of the Family, as to so many other things in ancient law, must be sought in the Patria Potestas. It seems to me to be founded on the order of emancipation from Paternal authority. The Geilfine, the Hand-family, consists of the parent and the four natural or adoptive sons immediately under his power. The other groups consist of emancipated descendants, diminishing in dignity in proportion to their distance from the group which, according to archaic notions, constitutes the true or representative family.

The remains which we possess of the oldest Ro-

man law point to a range of ideas very similar to that which appears to have produced the Irish institution. The Family under Patria Potestas was, with the Pater-Familias, the true Roman Family. The children who were emancipated from Paternal Power may have gained a practical advantage, but they undoubtedly lost in theoretical dignity. They underwent that loss of status which in ancient legal phraseology was called a *capitis deminutio*. We know too that, according to primitive Roman law, they lost all rights of inheritance, and these were only gradually restored to them by a relatively modern institution, the Equity of the Roman Prætor. Nevertheless there are hints on all sides that, as a general rule, sons as they advanced in years were enfranchished from Paternal Power, and no doubt this practice supplies a partial explanation of the durability of the Patria Potestas as a Roman institution. The statements, therefore, which we find concerning the Celtic Family would not be very untrue of the Roman. The youngest children were first in dignity.

Of course I am not contending for an exact resemblance between the ancient Roman and ancient Celtic Family. We have no trace of any systematised discharge of the sons from the Roman Patria Potestas; their enfranchisement seems always to have been dependent on the will of the Pater-Familias. The divisions of the Celtic Family seem, on the other

hand, to have been determined by a self-acting principle. An even more remarkable distinction is suggested by passages in the Book of Aicill which seem to show that the parent, who retained his place in the Geilfine group, might himself have a father alive. The peculiarity, which has no analogy in ancient Roman law, may possibly have its explanation in usages which many allusions in the Brehon law show to have been followed by the Celts, as they were by several other ancient societies. The older members of the Family or Joint Family seem in advanced age to have become pensioners on it, and, like Laertes in the Odyssee, to have vacated their privileges of ownership or of authority. On such points, however, it is safest to suspend the judgment till the Brehon law has been more thoroughly and critically examined.

At the date at which the Book of Aicill was put together the Irish division of the Family seems only to have had importance in the law of succession after death. This, however, is the rule in all societies. When the ancient constitution of the Family has ceased to affect anything else, it affects inheritance. All laws of inheritance are, in fact, made up of the *débris* of the various forms which the Family has assumed. Our system of succession to personalty, and the whole French law of inheritance, are derived from Roman law, which in its latest condition is a

mixture of rules having their origin in successive ascertainable stages of the Roman Family, and is a sort of compromise between them.

The authors of the Brehon Law Tracts frequently compare the Geilfine division of the Family to the human hand, but with them the comparison has at first sight the air of being purely fanciful. The Geilfine group has five members, and the hand has five fingers. Dr. Sullivan—who, however, conceives the Geilfine in a way materially different from the authorities whom I follow—tells us that 'as they represented the roots of the spreading branches of the Family, they were called the *cuic mera na Fine*, or the 'five fingers of the *Fine*.' If the explanation of 'Geilfine' which I have partly taken from Mr. Whitley Stokes be correct, we must suppose that, at the time at which the Brehon tracts were thrown into their present form, the Patria Potestas of the ancient Irish, though frequently referred to in the tracts as the father's power of 'judgment, proof, and witness' over his sons, had nevertheless considerably decayed, as it is apt to do in all societies under unfavourable circumstances, and that with this decay the association of the Geilfine group with 'hand' in the sense of Paternal Power had also become faint. There is, however, a real connection of another kind between the Geilfine group and the five fingers of the hand. If you ask why in a large

number of ancient societies Five is the representative number, no answer can be given except that there are five fingers on the human hand. I commend to your attention on this point Mr. Tylor's most instructive chapter on the infancy of the Art of Counting, in the first volume of his 'Primitive Culture.' 'Finger-counting,' he observes, 'is not only found among savages and uneducated men, carrying on a part of their mental operations where language is only partly able to follow it, but it also retains a place and an undoubted use among the most cultured nations as a preparation and means of acquiring higher arithmetical methods' (I. 246.) *Five* is thus a primitive natural maximum number. You will recollect that the early English Township was represented by the Reeve and the four men. The Council of an Indian Village Community most commonly consists of five persons, and throughout the East the normal number of a Jury or Board of arbitrators is always five—the *punchayet* familiar to all who have the smallest knowledge of India. The Geilfine, the representative group of the Irish Family, consisting of the Parent and the four descendants still retained under his Patria Potestas, falls in with this widely extended conception of representation.

The Patria Potestas seems to me the most probable source of a well-known English custom which has occasioned no little surprise to students

of our law. 'Borough English,' under which the youngest son and not the eldest succeeds to the burgage-tenements of his father, has from time immemorial being recognised as a widely diffused usage of which it is the duty of our Courts to take judicial notice, and many writers on our real property laws, from Littleton downwards, have attempted to account for it. Littleton thought he saw its origin in the tender age of the youngest son, who was not so well able to help himself as the rest of the brethren. Other authors, as Blackstone tells us, explained it by a supposed right of the Seigneur or lord, now very generally regarded as apocryphal, which raised a presumption of the eldest son's illegitimacy. Blackstone himself goes as far a-field as North-Eastern Asia for an explanation. He quotes from Duhalde the statement that the custom of descent to the youngest son prevails among the Tartars. 'That nation,' he says, 'is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation. The youngest son, therefore, who continues longest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other Northern nations, it was the custom for all the sons but one to migrate from the

father, which one now became his heir.' The explanation was really the best which could be given in Blackstone's day, but it was not necessary to go for it so far from home. It is a remarkable circumstance that an institution closely resembling Borough English is found in the Laws of Wales, giving the rule of descent for all cultivating villeins. 'Cum fratres inter se dividant hæreditatem,' says a rule of that portion of the Welsh Law which has survived in Latin; 'junior debet habere tygdyn, *i.e.* ædificia patris sui, et octo acras de terrâ, si habuerint' (L. Wall., vol. ii. p. 780). And, when the youngest son has had the paternal dwelling-house, eight acres of land and certain tools and utensils, the other sons are to divide what remains. It appears to me that the institution is founded on the same ideas as those which gave a preference to the Geilfine division of the Celtic family. The home-staying, unemancipated son, still retained under Patria Potestas, is preferred to the others. If this be so, there is no room for the surprise which the custom of Borough English has excited, and which arises from contrasting it with the rule of Primogeniture. But the two institutions have a different origin. Primogeniture is not a natural outgrowth of the family. It is a political not a tribal institution, and comes to us not from the clansmen but from the Chief. But the rule of Borough English, like the privileges of the Geilfine,

is closely connected with the ancient conception of the Family as linked together by Patria Potestas. Those who are most emphatically part of the Family when it is dissolved by the death of its head are preferred in the inheritance according to ideas which appear to have been once common to the primitive Romans, to the Irish and Welsh Celts, and to the original observers, whoever they were, of the English custom.

LECTURE VIII.

THE GROWTH AND DIFFUSION OF PRIMITIVE IDEAS.

MR. TYLOR has justly observed that the true lesson of the new science of Comparative Mythology is the barrenness in primitive times of the faculty which we most associate with mental fertility, the Imagination. Comparative Jurisprudence, as might be expected from the natural stability of law and custom, yet more strongly suggests the same inference, and points to the fewness of ideas and the slowness of additions to the mental stock as among the most general characteristics of mankind in its infancy.

The fact that the generation of new ideas does not proceed in all states of society as rapidly as in that to which we belong, is only not familiar to us through our inveterate habit of confining our observation of human nature to a small portion of its phenomena. When we undertake to examine it, we are very apt to look exclusively at a part of Western Europe and perhaps of the American Continent. We constantly leave aside India, China, and the whole Mahometan

East. This limitation of our field of vision is perfectly justifiable when we are occupied with the investigation of the laws of Progress. Progress is, in fact, the same thing as the continued production of new ideas, and we can only discover the law of this production by examining sequences of ideas where they are frequent and of considerable length. But the primitive condition of the progressive societies is best ascertained from the observable condition of those which are non-progressive; and thus we leave a serious gap in our knowledge when we put aside the mental state of the millions upon millions of men who fill what we vaguely call the East as a phenomenon of little interest and of no instructiveness. The fact is not unknown to most of us that, among these multitudes, Literature, Religion, and Art—or what corresponds to them—move always within a distinctly drawn circle of unchanging notions; but the fact that this condition of thought is rather the infancy of the human mind prolonged than a different maturity from that most familiar to us, is very seldom brought home to us with a clearness rendering it fruitful of instruction.

I do not, indeed, deny that the difference between the East and the West, in respect of the different speed at which new ideas are produced, is only a difference of degree. There were new ideas produced in India even during the disastrous period just before

the English entered it, and in the earlier ages this production must have been rapid. There must have been a series of ages during which the progress of China was very steadily maintained, and doubtless our assumption of the absolute immobility of the Chinese and other societies is in part the expression of our ignorance. Conversely, I question whether new ideas come into being in the West as rapidly as modern literature and conversation sometimes suggest. It cannot, indeed, be doubted that causes, unknown to the ancient world, lead among us to the multiplication of ideas. Among them are the never-ceasing discovery of new facts of nature, inventions changing the circumstances and material conditions of life, and new rules of social conduct; the chief of this last class, and certainly the most powerful in the domain of law proper, I take to be the famous maxim that all institutions should be adapted to produce the greatest happiness of the greatest number. Nevertheless, there are not a few signs that even conscious efforts to increase the number of ideas have a very limited success. Look at Poetry and Fiction. From time to time one mind endowed with the assemblage of qualities called genius makes a great and sudden addition to the combinations of thought, word, and sound which it is the province of those arts to produce; yet as suddenly, after one or a few such efforts, the productive activity of both branches of invention

ceases, and they settle down into imitativeness for perhaps a century at a time. An humbler example may be sought in rules of social habit. We speak of the caprices of Fashion; yet, on examining them historically, we find them singularly limited, so much so, that we are sometimes tempted to regard Fashion as passing through cycles of form ever repeating themselves. There are, in fact, more natural limitations on the fertility of intellect than we always admit to ourselves, and these, reflected in bodies of men, translate themselves into that weariness of novelty which seems at intervals to overtake whole Western societies, including minds of every degree of information and cultivation.

My present object is to point out some of the results of mental sterility at a time when society is in the stage which we have been considering. Then, the relations between man and man were summed up in kinship. The fundamental assumption was that all men, not united with you by blood, were your enemies or your slaves. Gradually the assumption became untrue in fact, and men, who were not blood relatives, became related to one another on terms of peace and mutual tolerance or mutual advantage Yet no new ideas came into being exactly harmonising with the new relation, nor was any new phraseology invented to express it. The new member of each group was spoken of as akin to it, was treated as

akin to it, was thought of as akin to it. So little were ideas changed that, as we shall see, the very affections and emotions which the natural bond evoked were called forth in extraordinary strength by the artificial tie. The clear apprehension of these facts throws light on several historical problems, and among them on some of Irish history. Yet they ought not greatly to surprise us, since, in a modified form, they make part of our everyday experience. Almost everybody can observe that, when new circumstances arise, we use our old ideas to bring them home to us; it is only afterwards, and sometimes long afterwards, that our ideas are found to have changed. An English Court of Justice is in great part an engine for working out this process. New combinations of circumstance are constantly arising, but in the first instance they are exclusively interpreted according to old legal ideas. A little later lawyers admit that the old ideas are not quite what they were before the new circumstances arose.

The slow generation of ideas in ancient times may first be adduced as necessary to the explanation of that great family of Fictions which meet us on the threshold of history and historical jurisprudence. Specimens of these fictions may be collected on all sides from bodies of archaic custom or rudimentary systems of law, but those most to our present purpose are fictitious assumptions of blood-relationship. Else-

where I have pointed out the strange conflict between belief or theory and what seems to us notorious fact, which is observable in early Roman and Hellenic society. 'It may be affirmed of early commonwealths that their citizens considered all the groups in which they claimed membership to be founded on common lineage. What was obviously true of the Family was believed to be true first of the House, next of the Tribe, lastly of the State. And yet we find that, along with this belief, each community preserved records or traditions which distinctly showed that the fundamental assumption was false. Whether we look to the Greek States, or to Rome, or to the Teutonic aristocracies in Ditmarsh which furnished Niebuhr with so many valuable illustrations, or to the Celtic clan associations, or to that strange social organisation of the Sclavonic Russians and Poles which has only lately attracted notice, everywhere we discover traces of passages in their history when men of alien descent were admitted to, and amalgamated with, the original brotherhood. Adverting to Rome singly, we perceive that the primary group, the Family, was being constantly adulterated by the practice of adoption, while stories seem to have been always current respecting the exotic extraction of one of the original Tribes, and concerning a large addition to the Houses made by one of the early Kings. The composition of the State uniformly assumed to be

natural was nevertheless known to be in great measure artificial.' (*Ancient Law*, pp. 129, 130.) The key to these singular phenomena has been recently sought in the ancient religions, and has been supposed to be found in the alleged universal practice of worshipping dead ancestors. Very striking illustrations of them are, however, supplied by the law and usage of Ireland after it had been Christianised for centuries, and long after any Eponymous progenitor can be conceived as worshipped. The Family, House, and Tribe of the Romans—and, so far as my knowledge extends, all the analogous divisions of Greek communities—were distinguished by separate special names. But in the Brehon Law, the same word, Fine (or 'family'), is used for the Family as we ordinarily understand it—that is, for the children of a living parent and their descendants—for the Sept or, in phrase of Indian law, the Joint Undivided Family, that is, the combined descendants of an ancestor long since dead—for the Tribe, which was the political unit of ancient Ireland, and even for the large Tribes in which the smaller units were sometimes absorbed. Nevertheless the Irish Family undoubtedly received additions through Adoption. The Sept, or larger group of kindred, had a definite place for strangers admitted to it on stated conditions, the Fine Taccair. The Tribe avowedly included a number of persons, mostly refugees from other Tribes, whose only connection

with it was common allegiance to its Chief. Moreover the Tribe in its largest extension and considered a political as well as a social unit might have been absorbed with others in a Great or Arch Tribe, and here the sole source of the kinship still theoretically maintained is Conquest. Yet all these groups were in some sense or other Families.

Nor does the artificiality solely consist in the extension of the sphere of kinship to classes known to have been originally alien to the true brotherhood. An even more interesting example of it presents itself when the ideas of kinship and the phraseology proper to consanguinity are extended to associations which we should now contemplate as exclusively founded on contract, such as partnerships and guilds. There are no more interesting pages in Dr. Sullivan's Introduction (pp. ccvi *et seq.*) than those in which he discusses the tribal origin of Guilds. He claims for the word itself a Celtic etymology, and he traces the institution to the grazing partnerships common among the ancient Irish. However this may be, it is most instructive to find the same words used to describe bodies of co-partners, formed by contract, and bodies of co-heirs or co-parceners formed by common descent. Each assemblage of men seems to have been conceived as a Family. As regards Guilds, I certainly think, as I thought three years ago, that they have been much too confidently attributed to a relatively modern

origin; and that many of them, and much which is common to all of them, may be suspected to have grown out of the primitive brotherhoods of co-villagers and kinsmen. The trading guilds which survive in our own country have undergone every sort of transmutation which can disguise their parentage. They are artificial to begin with, though the hereditary principle has a certain tendency to assert itself. They have long since relinquished the occupations which gave them a name. They mostly trace their privileges and constitution to some royal charter; and kingly grants, real or fictitious, are the great cause of interruption in English History. Yet anybody who, with a knowledge of primitive law and history, examines the internal mechanism and proceedings of a London Company will see in many parts of them plain traces of the ancient brotherhood of kinsmen, 'joint in food, worship, and estate;' and I suppose that the nearest approach to an ancient tribal holding in Ireland is to be found in those confiscated lands which are now the property of several of these Companies.

The early history of Contract, I need scarcely tell you, is almost exclusively to be sought in the history of Roman law. Some years ago I pointed to the entanglement which primitive Roman institutions disclose between the conveyance of property and the contract of sale. Let me now observe that

one or two others of the great Roman contracts appear to me, when closely examined, to afford evidence of their having been gradually evolved through changes in the mechanism of primitive society. You have seen how brotherhoods of kinsmen transform themselves into alliances between persons whom we can only call partners, but still at first sight the link is missing which would enable us to say that here we have the beginning of the contract of partnership. Look, however, at the peculiar contract called by the Romans '*societas omnium* (or *universorum*) *bonorum*.' It is commonly translated 'partnership with unlimited liability,' and there is no doubt that the elder form of partnership has had great effect on the newer form. But you will find that, in the *societas omnium bonorum*, not only were all the liabilities of the partnership the liabilities of the several partners, but the whole of the property of each partner was brought into the common stock and was enjoyed as a common fund. No such arrangement as this is known in the modern world as the result of ordinary agreement, though in some countries it may be the effect of marriage. It appears to me that we are carried back to the joint brotherhoods of primitive society, and that their development must have given rise to the contract before us. Let us turn again to the contract of Mandatum or Agency. The only complete representation of one man by another which

the Roman law allowed was the representation of the Paterfamilias by the son or slave under his power. The representation of the Principal by the Agent is much more incomplete, and it seems to me probable that we have in it a shadow of that thorough coalescence between two individuals which was only possible anciently when they belonged to the same family.

The institutions which I have taken as my examples are institutions of indigenous growth, developed probably more or less within all ancient societies by the expansion of the notion of kinship. But it sometimes happens that a wholly foreign institution is introduced from without into a society based upon assumed consanguinity, and then it is most instructive to observe how closely, in such a case, material which antecedently we should think likely to oppose the most stubborn resistance to the infiltration of tribal ideas assimilates itself nevertheless to the model of a Family or Tribe. You may be aware that the ancient Irish Church has long been a puzzle to ecclesiastical historians. There are difficulties suggested by it on which I do not pretend to throw any new light, nor, indeed, could they conveniently be considered here. Among perplexities of this class are the extraordinary multiplication of bishops and their dependence, apparently an almost servile dependence, on the religious houses to which they were attached.

But the relation of the various ecclesiastical bodies to one another was undoubtedly of the nature of tribal relation. The Brehon law seems to me fully to confirm the account of the matter given, from the purely ecclesiastical literature, by Dr. Todd, in the Introduction to his Life of St. Patrick. One of the great Irish or Scotic Missionaries, who afterwards nearly invariably reappears as a Saint, obtains a grant of lands from some chieftain or tribe in Ireland or Celtic Britain, and founds a monastery there, or it may be that the founder of the religious house is already himself the chieftain of a tribe. The House becomes the parent of others, which again may in their turn throw out minor religious establishments, at once monastic and missionary. The words signifying 'family' or 'tribe' and 'kinship' are applied to all the religious bodies created by this process. Each monastic house, with its monks and bishops, constitutes a 'family' or 'tribe;' and its secular or servile dependants appear to be sometimes included under the name. The same appellation is given to the collective assemblage of religious houses formed by the parent monastery and the various churches or monastic bodies sprung from it. These make up together the 'tribe of the saint,' but this last expression is not exclusively employed with this particular meaning. The abbot of the parent house and all the abbots of the minor houses are the 'comharbas' or

co-heirs of the saint, and in yet another sense the 'family' or 'tribe' of the saint means his actual tribesmen or blood-relatives. Iona, or Hy, was, as you know, the famous religious house founded by St Columba near the coast of the newer Scotia. 'The Abbot of Hy,' says Dr. Todd, 'or Co-arb of Columba, was the common head of Durrow, Kells, Swords, Drumcliff, and other houses in Ireland founded by Columba, as well as of the parent monastery of Hy, and the "family of Colum-kille" was composed of the congregations or inmates and dependants of all those monasteries. The families, therefore, of such monasteries as Clonmacnois or Durrow might muster a very respectable body of fighting men.' Let me add, that there is very good evidence that these 'families of the saints' were occasionally engaged in sanguinary little wars. But, 'in general' (I now quote again from Dr. Todd), 'the "family" meant only the monks or religious of the house.'

It will be obvious to you that this application of the same name to all these complicated sets of relations is every now and then extremely perplexing, but the key to the difficulty is the conception of the kindred branching off in successive generations from the common stock, planting themselves occasionally at a distance, but never altogether breaking the bond which connected them with their original family and chief. Nothing, let me observe, can be more curious

than the way in which, throughout these artificial structures, the original natural principle upon which they were modelled struggles to assert itself at the expense of the imitative system. In all the more modern guilds, membership always tended to become hereditary, and here we have the Brehon law striving to secure a preference, in elections to the Abbacy, to the actual blood-relatives of the sainted founder. The ecclesiastical rule, we know, required election by the monks, but the Corus Bescna declares that, on a vacancy, the 'family of the saint' (which here means the founder's sept), if there be a qualified monk among them, ought to be preferred in elections to the Abbacy—'though there be but a psalm-singer of them, if he be fit, he shall have it.' And it proceeds to say that, if no relative or tribesman of the saint be qualified, the Abbacy shall go to some member of the tribe which originally granted the land.

A very modern example of this plasticity of the notion of kinship has recently been brought to my notice. The co-villagers of an Indian village call themselves brothers, although, as I have frequently observed, the composition of the community is often artificial and its origin very miscellaneous. The appellation, at the same time, is distinctly more than a mere word. Now, some of the Christian missionaries have recently tried an experiment which promises to have much success, and have planted in vil-

lages converts collected from all sorts of different regions. Yet these persons, as I am informed, fall into a 'brotherhood' quite as easily and talk the language and assume the habits appropriate to it quite as naturally as if they and their forefathers had been members from time immemorial of this peculiarly Indian association, the village-community.

There is, however, another set of phenomena which belong to the same class, but which seem to me to have been much misunderstood. When men, under the influence of the cast of thought we are discussing, are placed in circumstances which naturally breed affection and sympathy, or when they are placed in a relation which they are taught to consider especially sacred, not only their words and ideas but their feelings, emotions, and prejudices mould themselves on the pattern of those which naturally result from consanguinity. We have, I believe, a striking example of the process in the history of the Christian Church. You know, I dare say, that Spiritual Relationship, or the tie between a sponsor and a baptized person, or between sponsors, or even between the sponsors and the family of the baptized, became by degrees the source of a great number of prohibitions against intermarriage, which stood on the same level with those based on affinity, and almost with those founded on consanguinity. The earliest evidence we have that this order of ideas was stirring the Chris-

tian community is, I believe, a Constitution of Justinian in the Code (v. 4. 26), which forbids the marriage of the sponsor with the baptized; but the prohibitions were rapidly extended by the various authorities which contributed to the Canon law, and were finally regulated and somewhat narrowed by the Council of Trent. Nowadays, I am told that they merely survive formally in the Roman Catholic Church, and that dispensations relaxing them are obtainable as of course. The explanation of the system by technical theologians is that it is based on the wish to give a peculiar sacredness to the bond created by sponsorship, and this I believe to be a true account of its origin. But I do not believe that Spiritual Relationship, a structure based on contract, would in every stage of thought have assimilated itself to natural relationship. The system developed itself just when Christianity was being diffused among races whose social organisation was founded on kinship, and I cannot but think that their ideas reacted on the Church. With such races a very sacred tie was necessarily of the nature of a family tie, and carried with it the same associations and the same order of feeling. I do not, therefore, consider that such terms as Gossipred, Godfather, Godson—to which there are counterparts in several languages—were created by the theory of Spiritual Relationship, but

rather that they mark the process by which that theory was formed.

It seems to me accordingly in the highest degree natural that Spiritual Relationship, when introduced into a tribal society like that of the ancient Irish, should closely assimilate itself to blood-relationship. We know in fact that it did so, and that the stringency of the relation and the warmth of the affections which it produced moved the scorn, the wrath, and the astonishment of several generations of English observers, deriving their ideas from a social order now become very unlike that of Ireland. But by the side of Gossipred, or Spiritual Relationship, there stood another much more primitive institution, which was extraordinarily developed among the ancient Irish, though not at all peculiar to them. This was Fosterage, the giving and taking of children for nurture. Of the reasons why this practice, now known to have been widely diffused among Aryan communities, should have had an exceptional importance and popularity in Ireland, we can say little more than that they probably belong to the accidents of Irish history and of Irish social life. But of the fact there is no doubt. An entire sub-tract in the Senchus Mor is devoted to the Law of Fosterage, and sets out with the greatest minuteness the rights and duties attaching to all parties when the children of another family were received for nurture and education. It is

classed, with Gossipred, as one of the anomalies or curses of Ireland by all her English critics, from Giraldus Cambrensis in the twelfth century to Spenser in the sixteenth. It seemed to them monstrous that the same mother's milk should produce in Ireland the same close affections as did common paternity in their own country. The true explanation was one which is only now dawning on us. It was, that Fosterage was an institution which, though artificial in its commencements, was natural in its operations; and that the relation of foster-parent and foster-child tended, in that stage of feeling, to become indistinguishable from the relation of father and son.

The form of Fosterage which has most interest for the modern enquirer is called by the Translators of the Brehon tracts Literary Fosterage. It was an institution nearly connected with the existence of the Brehon Law Schools, and it consists of the various relations established between the Brehon teacher and the pupils he received into his house for instruction in the Brehon lore. However it may surprise us that the connection between Schoolmaster and Pupil was regarded as peculiarly sacred by the ancient Irish, and as closely resembling natural fatherhood, the Brehon tracts leave no room for doubt on the point. It is expressly laid down that it created the same *Patria Potestas* as actual paternity; and the literary foster-father, though he teaches gratuitously, has a claim

through life upon portions of the property of the literary foster-son. Thus the Brehon with his pupils constituted not a school in our sense but a true family. While the ordinary foster-father was bound by the law to give education of some kind to his foster-children — to the sons of chiefs instructions in riding, shooting with the bow, swimming, and chess-playing, and instruction to their daughters in sewing, cutting out, and embroidery—the Brehon trained his foster-sons in learning of the highest dignity, the lore of the chief literary profession. He took payment, but it was the law which settled it for him. It was part of his status, and not the result of a bargain.

There are some faint traces of Fosterage in the Hindoo law, but substantially it has dropped out of the system. The vestiges of Literary Fosterage are, however, tolerably abundant and very plain. According to the general custom of India, the Brahmin teacher of Brahmin pupils receives no payment for his services, but the Hindoo law repeatedly reserves to him a remote succession to their property. In each of four Brahminical law-tracts of great authority, the Vyavahara Mayukha, the Daya-Bhaga, the Mitakshara, and the Daya-Krama-Sangraha, the same ancient text is quoted (sometimes but not always attributed to Manu), which is to the effect that 'If there be no male issue the nearest kinsman inherits;

or in default of kindred, the preceptor, or failing him the disciple.' One commentator explains that the preceptor is the instructor in the Vedas, and another describes him as the person who affords religious instruction to his pupil after investing him with the Brahminical thread. These writers add that if neither teacher nor pupil have survived the deceased his fellow-student will succeed. Modern cases turning on these peculiar rules of succession may be found in the Anglo-Indian Law Reports.

We are thus brought face to face with a problem which possesses interest in proportion to its difficulty —the problem of the origin of Castes. I cannot profess to do more than approach it, but the opportunity of throwing even the least light on a subject so dark ought not to be neglected. First let me say that, among the comparatively few English writers who have noticed the Brehon lawyers, some have loosely described them as a caste. But this is an improper use of the word, though it is one not uncommon in India. As regards the position of the Brehons in very early times, the evidence of the Irish records is consistent with the testimony of Cæsar as to the literary class of the Gallic Celts, and seems to show that anyone who went through a particular training might become a Brehon. When, however, Ireland began to be examined by English observers, it is plain that the art and knowledge of the Brehon

had become hereditary in certain families who were attached to or dependent on the Chiefs of particular tribes. There is nothing remarkable in this change, which has obviously occurred with a vast number of trades and professions in India, now popularly called castes. In societies of an archaic type, a particular craft or kind of knowledge becomes in time an hereditary profession of families, almost as a matter of course. The difficulty with a native of India, unsophisticated by English ideas, is not to find a reason why a son should succeed to the learning of his father, and consequently to his office and duties; his difficulty would rather be to explain to himself why it should not be so, and how the public interests could be consulted by any other arrangement. The States governed by native Indian Princes are becoming a good deal Anglicised, but still in them it is the practically universal rule that office is hereditary. We do not, however, thus arrive at a complete account of the growth of those castes which are definite sections of great populations One only of these castes really survives in India, that of the Brahmins, and it is strongly suspected that the whole literary theory of Caste, which is of Brahmin origin, is based on the existence of the Brahmin caste alone. Now, the tendency of knowledge to become hereditary is, by itself, consistent with a great variety of religious and literary cultivation; but, as a fact, the Brahmins of India are a remarkably

homogeneous class, admitting (though no doubt with considerable local qualifications) a general brotherhood of all members of the order.

While, then, I cannot say that our scanty information respecting changes in the status of the Brehon lawyers helps us much towards a comprehension of the beginnings of Caste in the true sense, I certainly think that we learn something more than we knew before from the references in the Brehon tracts to Literary Fosterage. They appear to me to give a new emphasis and point to the rules of Hindoo Law respecting the remote succession of the 'spiritual preceptor' to the property of families. It seems as if in the most ancient state of both systems Literary or Religious fatherhood had been closely assimilated to actual fatherhood. Under these circumstances, if great schools of Vedaic learning existed in India in very ancient times, as we have strong reason to think they did, the relation between Teacher and Pupil would closely follow and imitate the relation between father and son. A great profession would thus be formed, with stores of common knowledge; but the tie between the members would not be purely intellectual; it would from the first be conceived as of the nature of kinship. Such a system, as the old ideas decayed, would tend infallibly to become one of real consanguinity. The aptitude for sacred knowledge would come to be thought to run in the blood

of sons whose fathers had been instructed in it, and none but such sons would be received into the schools. A Caste would thus be formed, in the eyes of its members the type of all Castes.

We have thus strong reason for thinking that societies still under the influence of primitive thought labour under a certain incapacity for regarding men, grouped together by virtue of any institutions whatsoever, as connected otherwise than through blood-relationship. We find that, through this barrenness of conception, they are apt to extend the notion of consanguinity and the language beginning in it to institutions of their own not really founded on community of blood, and even to institutions of foreign origin. We find also that the association between institutions arising from true kinship and institutions based on artificial kinship is sometimes so strong, that the emotions which they respectively call forth are practically indistinguishable. These phenomena of early thought and feeling appear to me amply to account for some facts of Irish history which nearly all English writers on Ireland have noticed with extreme surprise or indignation. The expressions of Sir John Davis, while stating that many of the early Anglo-Norman adventurers settled in Ireland became in time pure Irish chieftains, reflect the violent astonishment and anger which the transformation excited in Englishmen. 'The English Colonists did embrace

and use the Irish customs, after they had rejected the Civil and Honourable Laws and Customs of England, whereby they became degenerate and metamorphosed like Nebuchadnezzar, who, although he had the face of a man, had the heart of a beast; or like those who had drunk of Circe's cup and were turned into very beasts, and yet took such pleasure in their beastly manner of life as they would not return to their shape of men again; insomuch as within less time than the age of a man, they had no marks or difference left among them of that noble nation from which they were descended.' The fact, stated in this bitter language, is not especially marvellous. We have seen the general complexion of Irish society giving its colour to institutions of all sorts—associations of kinsmen shading off into assemblages of partners and guild-brothers—foster parentage, spiritual parentage, and preceptorship taking their hue from natural paternity—ecclesiastical organisation blending with tribal organisation. The Anglo-Norman captain who had thought to conquer for himself an Irish signory passed insensibly in the same way into the chieftain of an Irish tribe. The dependants who surrounded him did not possibly draw any clear distinction between the actual depositary of power and the natural depositary of power, and, as the contagiousness of ideas is in proportion to their fewness, it is intelligible that he too was affected by the mental atmosphere in

which he lived. Nor were other motives wanting. The extreme poverty and constant distractions of Ireland did not prevent an extraordinary amount of the pride of authority, of the pride of birth, and even of the pride of wealth from centring in the dignity of an Irish Chief.

LECTURE IX.

THE PRIMITIVE FORMS OF LEGAL REMEDIES.

I.

I STATED on a former occasion (Lecture I. p. 8) that the branch of law which we now call the Law of Distress occupies the greatest part of the largest Brehon law-tract, the Senchus Mor. The importance thus given to Distress is a fact of much significance, and in this and the following Lecture I propose to discuss the questions it raises and the conclusions it suggests.

The value of the precious discovery made by Niebuhr, when he disinterred in 1816 the manuscript of Gaius, does not solely arise from the new light which was at once thrown on the beginnings of the legal system which is the fountain of the greatest part of civilised jurisprudence. There are portions of the treatise then restored to the world which afford us glimpses of something older than law itself, and which enable us to connect with law the practices dictated to barbarous men by impulses which it has become the prime office of all law to

control. At the head of the passages in the work of Gaius which allow the mind's eye to penetrate some little way into the chaos out of which social order sprang, I place the fragmentary and imperfect account, given near the commencement of the Fourth Book, of the old Legis Actiones, which in the age of Gaius himself had ceased to have more than an historical and antiquarian interest.

Legis Actio, of which the exact meaning does not seem to have been known to Gaius, may be conjectured to have been the substantive form of the verbal expression, *legem* or *lege agere*, and to have been equivalent to what we now call Procedure. It has been several times observed that among the Legis Actiones are included several proceedings which are not of the nature of Actions or Suits, but are rather modes of executing decrees. The fact seems to be that, by a course of change which may be traced in the history of Roman law, one portion, 'Actio,' of the venerable phrase 'Legis Actio' has been gradually disjoined from the rest, and has come to denote that stage of the administration of justice which is directly conducted by the Court, together, in some judicial systems, with the stage immediately preceding it. I suppose that originally *lex*, used of the assumed written basis of Roman law, and *legis actio*, corresponded roughly to what many centuries afterwards were called Substantive and Adjective Law, the law de-

claring rights and duties and the rules according to which the law declaring rights and duties is administered. On the expression just mentioned, Adjective Law, with which Bentham and his school have familiarised us, I will make a remark which applies to much in the phraseology and classifications of the Analytical Jurists, that it is correct and convenient according to the ideas of their day, but that, if used of very old law, it is apt to lead to an historical misconception. It would not be untrue to assert that, in one stage of human affairs, rights and duties are rather the adjective of procedure than procedure a mere appendage to rights and duties. There have been times when the real difficulty lay, not in conceiving what a man was entitled to, but in obtaining it; so that the method, violent or legal, by which an end was obtained was of more consequence than the nature of the end itself. As a fact, it is only in the most recent times or in the most highly developed legal systems that remedies have lost importance in comparison with rights and have ceased to affect them deeply and variously.

The first and in many respects the most interesting of these ancient modes of proceeding is the Legis Actio Sacramenti, the undoubted parent of all the Roman Actions, and consequently of most of the civil remedies now in use in the world. Several years ago I pointed out (*Ancient Law*, pp. 376, 377)

that the technical formalities appeared plainly, upon inspection, to be a dramatisation of the Origin of Justice. 'Two armed men,' I said, 'are wrangling about some disputed property. The Prætor, *vir pietate gravis*, happens to be going by and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides re signing the subject of the quarrel, shall pay a sum of money to the umpire as remuneration for his trouble and loss of time.' 'This interpretation,' I then added, 'would be less plausible than it is, were it not that, by a surprising coincidence, the ceremony described by Gaius as the imperative course of proceeding in a Legis Actio is substantially the same with one of the two subjects which the God Hephæstus is described by Homer as moulding into the First Compartment of the Shield of Achilles.' Since these passages were written, the labours of more recent enquirers enable us to class this judicial picture of the origin of one great institution, Civil Justice, with other pictorial or dramatic representations of forgotten practices which, in various parts of the world, survive in the forms attending institutions of at least equal importance. It may be seen, for example, from Mr. McLennan's work on 'Primitive Marriage,' that a large part of mankind still simulate in their marriage ceremonies the carrying off the bride by violence, and thus preserve the memory

of the reign of force which, at all events as between tribe and tribe, preceded everywhere the reign of law. It is not at the same time to be supposed that these long-descended dramas imply or ever implied any disrespect for the institutions with which they are associated. In all probability they intentionally commemorate not the evil but the remedy for the evil: and, until they degenerate into meaningless usages, they are enacted, not in honour of brute force, but in honour of the institutions which superseded it, Marriage and Civil Justice

Almost every gesture and almost every set of formal words in the Legis Actio Sacramenti symbolise something which, in some part of the world or another, in some Aryan society or another, has developed into an important institution. The claimant places his hand on the slave or other subject of dispute, and this grasp of the thing claimed, which is reproduced in the corresponding procedure of the ancient Germans and which, from them, was continued in various modified forms far down into the Middle Ages, is an early example of that Demand before action on which all civilised systems of law insist. The wand, which the claimant held in his hand, is stated by Gaius to have represented a spear, and the spear, the emblem of the strong man armed, served as the symbol of property held absolutely and against the world, not

only in the Roman but in several other Western societies. The proceedings included a series of assertions and reassertions of right by the parties, and this formal dialogue was the parent of the Art of Pleading. The quarrel between plaintiff and defendant, which was a mere pretence among the Romans, long remained a reality in other societies, and, though its theory was altered, it survived in the Wager of Battle which, as an English institution, was only finally abolished in our fathers' day. The interposition of the Prætor and the acceptance of his mediation expanded into the Administration of Justice in the Roman State, one of the most powerful of instrumentalities in the historical transformation of the civilised world. The disputants staked a sum of money—the Sacramentum, from which the proceedings took their name—on the merits of their quarrel, and the stake went into the public exchequer. The money thus wagered, which appears in a singularly large number of archaic legal systems, is the earliest representative of those Court-fees which have been a more considerable power in legal history than historians of law are altogether inclined to admit. The very spirit in which a Legis Actio was conducted was that which, in the eyes of laymen, has been most characteristic of lawyers in all historical times. If, says Gaius, you sued by Legis Actio for injury to your vines, and called them vines, you would fail; you

must call them trees, because the text of the Twelve Tables spoke only of trees. The ancient collection of Teutonic legal formulas, known as the Malberg Gloss, contains provisions of precisely the same character. If you sue for a bull, you will miscarry if you describe him as a bull; you must give him his ancient juridical designation of 'leader of the herd.' You must call the forefinger the 'arrow'-finger, the goat the 'browser upon leeks.' There are lawyers alive who can recollect when the English system of Special Pleading, now just expiring, was applied upon principles not remotely akin to these and historically descended from them.

The description given by Gaius of the Legis Actio Sacramenti is followed by a lacuna in the manuscript. It was once occupied with an account of the Judicis Postulatio, which was evidently a modification of the older Sacramental Action by which this ancient remedy was adapted to a particular class of cases. The text of the treatise begins again with a description of the Condictio, which is said by Gaius to have been created, but which is believed to have been only regulated, by two Roman statutes of the sixth century of Rome—the Lex Silia and the Lex Calpurnia. The Condictio, which afterwards developed into one of the most useful of the Roman actions, originally derived its name from a notice which the plaintiff gave the defendant to appear before the Prætor in

thirty days, in order that a Judex or referee might be nominated; and immediately (as I myself think) on this notice being given, the parties entered into a 'sponsio' and 'restipulatio,' that is, they laid a formal wager (distinct from the stake called Sacramentum) on the justice of their respective contentions. The sum thus staked, which was always equal to a third of the amount in dispute, went in the end to the successful litigant, and not, like the Sacramentum, to the State. Lawyers wondered, Gaius tells us, that such an action should be needed when property could have been recovered by the older and unmodified procedure. Many technical answers to this question have been given by modern commentators on Roman law, but we will see whether a better explanation of it cannot be obtained by approaching it from another side.

Gaius, leaving the Condictio, proceeds to discuss two of the Legis Actiones, the Manus Injectio and the Pignoris Capio, which cannot be made to square in any way with our modern conception of an action. The Manus Injectio is expressly stated to have been originally the Roman mode of execution against the person of a judgment debtor. It has considerable historical interest, for it was undoubtedly the instrument of the cruelties practised by the Roman aristocracy on their defaulting plebeian debtors, and thus it gave the first impetus to a series of popular movements which affected the whole history of the Roman

Commonwealth. The Pignoris Capio also, possibly under a slightly altered name, was a mode of execution in later times against property after decree; but this was not its original purpose as a Legis Actio. It was at first a wholly extra-judicial proceeding. The person who proceeded by it seized in certain cases the goods of a fellow-citizen, against whom he had a claim, but against whom he had not instituted a suit. The power of seizure could be exercised by soldiers against public officers bound to supply them with pay, horse, or forage; and it could also be resorted to by the seller of a beast for sacrifice against a defaulting purchaser. It was thus confined to claims of great urgency or of highly sacred obligation; but it was afterwards extended to demands for overdue arrears of public revenue. I am indebted to Mr. Poste for the observation that the ideal institutions of Plato's Laws include something strongly resembling the Roman Pignoris Capio; and here again it is a remedy for breach of public duties connected with military service or religious observance.

I take the Pignoris Capio as the immediate starting-point of all which I am about to say on the subject of Ancient Civil Procedure. First of all let us ask whether Gaius himself gives us any hint of its meaning and significance in the primitive Roman system. The clue is slender, but it seems to me sufficiently traceable in the statement that the Pignoris Capio

could be resorted to in the absence of the Prætor and generally in that of the person under liability, and also that it might be carried out even when the Courts were not sitting.

Let us go back for a moment to the parent Legis Actio—the L. A. Sacramenti. Its venerable forms presuppose a quarrel and celebrate the mode of settling it. It is a passing arbitrator whose interposition is simulated by the Prætor. But suppose there is no arbitrator at hand. What expedient for averting bloodshed remains, and is any such expedient reflected in that ancient procedure which, by the fact of its existence, implies that the shedding of blood has somehow been prevented?

I dare say I shall at the outset appear to be making a trivial remark when I say that one method of gaining the object is to lay a wager. Even now this is one of the commonest ways of postponing a dispute as to a matter of fact, and the truth is that the tendency to bet upon results lies extremely deep in human nature, and has grown up with it from its remote infancy. It is not everybody who, when his blood is hot, will submit to have a quarrel referred to a third person present, much less to a third person absent; but he will constantly do so, if he lays a wager on it, and if, besides being found in the right, he has a chance of receiving the amount staked. And this I suppose—differing, I own, from several high

authorities—to be the true significance of the Sponsio and Restipulatio, which we know to have been of the essence of the ancient Roman Condictio, and of the agreement to appear before the Prætor in thirty days. The Legis Actio Sacramenti assumes that the quarrel is at once referred to a present arbitrator; the Condictio that the reference is to the decision of an arbitrator after thirty days' interval, but meantime the parties have entered into a separate wager on the merits of their dispute. We know that the liability to an independent penalty attached to the suitor by Condictio even when it had become one of the most important Roman actions, and that it was still exacted in the age of Cicero.

There is yet another primitive contrivance by which, in the absence of a present arbitrator, a quarrel may be prevented from issuing in bloodshed. The claimant willing to go to arbitration may, in the absence of his adversary, or if he be the stronger, in his presence, take forcible possession of his moveable property and detain it till he too submits. I believe this to have been the true primitive office of the Pignoris Capio, though the full evidence of my opinion will not be before you till I have tracked the same institution through the twilight of other legal systems. Among the Romans, even at the date of the Twelve Tables, it had become (to employ Mr. Tylor's phrase) a mere survival, confined to cases when the denial of justice

was condemned by superstition or by a sense of the sternest public emergency; and this was a consequence of the exceptionally rapid development of Roman law and procedure, and of the exceptionally early date at which the Roman tribunals became the organs of the national sovereignty. You will see hereafter how much reason there is for thinking that the progress of most societies towards a complete administration of justice was slow and gradual, and that the Commonwealth at first interfered through its various organs rather to keep order and see fair play in quarrels than took them, as it now does always and everywhere, into its own hands. To this period, long forgotten among the Romans, those peculiar rules pointed back which survived along with the Pignoris Capio, and which provided for its exercise out of court and during the judicial vacation.

I turn to the Teutonic societies for vestiges of a practice similar to that which the Romans called Pignoris Capio. They seem to be quite unmistakeable in that portion of our own English law which is concerned with the power of Distraint or Distress and with the connected legal remedy known as Replevin. The examples of the right to distrain another man's property which are most familiar to you are, I dare say, the landlord's right to seize the goods of his tenant for unpaid rent, and the right of the lawful possessor of land to take and impound stray beasts

which are damaging his crops or soil. The process by which the latter right is made effectual retains far more of the ancient institution than does distress for rent. For the peculiar power of the landlord to distrain for rent, while it remains an extrajudicial remedy, has been converted into a complete remedy of its kind by a series of statutes comparatively modern. It has always, however, been the theory of the most learned English lawyers that distress is in principle an incomplete remedy; its primary object is to compel the person against whom it is properly employed to make satisfaction. But goods distrained for rent are nowadays not merely held as a security for the landlord's claim; they are ultimately put up for sale with certain prescribed formalities, the landlord is paid out of the proceeds, and the overplus is returned to the tenant. Thus the proceeding has become merely a special method by which payment of rent, and certain other payments which are placed on the same footing, are enforced without the help of a Court of Justice. But the distraint of cattle for damage still retains a variety of archaic features. It is not a complete remedy. The taker merely keeps the cattle until satisfaction is made to him for the injury, or till they are returned by him on an engagement to contest the right to distrain in an action of Replevin.

The practice of Distress—of taking *nams*, a word

preserved in the once famous law-term *withernam*— is attested by records considerably older than the Conquest. There is reason to believe that anciently it was resorted to in many more cases than our oldest Common-law authorities recognise; but about the reign of Henry the Third, when it was confined to certain specific claims and wrongs, the course of the proceeding was as follows: The person assuming himself to be aggrieved seized the goods (which anciently were almost always the cattle) of the person whom he believed to have injured him or failed in duty towards him. He drove the beasts to a pound, an enclosed piece of land reserved for the purpose, and generally open to the sky. Let me observe in passing that there is no more ancient institution in the country than the Village-Pound. It is far older than the King's Bench, and probably older than the Kingdom. While the cattle were on their way to the pound the owner had a limited right of rescue which the law recognised, but which he ran great risk in exercising. Once lodged within the enclosure, the impounded beasts, when the pound was uncovered, had to be fed by the owner and not by the distrainor; nor was the rule altered till the present reign. The distrainor's part in the proceedings ended in fact with the impounding; and we have to consider what courses were thereupon open to the person whose cattle had been seized. Of course

he might submit and discharge the demand. Or he might tender security for its acquittal. Or again he might remain obstinate and leave his beasts in the pound. It might happen, however, that he altogether denied the distrainor's right to distrain, or that the latter, on security being tendered to him for the adjustment of his claim, refused to release the cattle. In either of these cases the cattle-owner (at least at the time of which we are speaking) might either apply to the King's Chancery for a writ commanding the Sheriff to 'make replevin,' or he might verbally complain himself to the Sheriff, who would then proceed at once to 'replevy.' The process denoted by this ancient phrase consisted of several stages. The Sheriff first of all demanded a view of the impounded cattle; if this were refused, he treated the distrainor as having committed a violent breach of the King's peace, and raised the hue and cry after him. If the cattle (as doubtless constantly was the case) had been driven to a distance and out of his jurisdiction, the Sheriff sought for cattle of the distrainor and seized them to double the value of the beasts which were not forthcoming—the 'taking in withernam' of old English law. In more peaceable times, however, and among law-abiding people, the deputy of the Crown was allowed to see the cattle, which he immediately returned to their original owner on a pledge to abide by the decision of a Court of Justice. A day was

then appointed for the trial, which took place with the proceeding well known to lawyers as the Action of Replevin. A great deal of technical learning has clustered round it, but for our purposes it is enough to say that the plaintiff in the action was the owner of the distrained cattle and the defendant was the distrainor.

The comparative antiquity of the various steps in the procedure are not, I think, difficult to detect. Nothing can be more archaic than the picture presented by its more venerable details. The seizure of the cattle, the rescue and the counter-seizure, belong to the oldest practices of mankind. We were carried back, by the Legis Actio Sacramenti of the Romans, to a sudden fight over disputed property barely stopped by a casual passer-by. Here, not in a city-community, but among the ancient legal forms of a half-pastoral, half-agricultural people, we come upon plain traces of a foray. But the foray which survives in the old Law of Distress is not, like the combat of the ancient Roman Action, a mere dramatic representation. Up to a certain point it is a reality, and the most probable account of its origin is that it is a genuinely disorderly proceeding which the law steps in to regulate. You will see presently that there are other independent reasons for thinking that some of the earliest interferences of the power which we call the Law, the State, or the King, with high-handed

violence consisted, neither in wholly forbidding it nor in assuming active jurisdiction over the quarrel which provoked it, but in limiting it, prescribing forms for it, or turning it to new purposes. Thus the next series of incidents in the practice of distraint—the impounding, the stress laid upon pledge or security, and the acknowledgment of continuing ownership which is implied in the liability of the person distrained upon to feed the cattle, and in the rule that the distrainor shall not work them—belong to a newer range of ideas which dictate the first attempts to moderate reprisals and regulate revenge for wrong. Distress now becomes a semi-orderly contrivance for extorting satisfaction. Many vestiges of this ancient function remain. It has been observed by Blackstone and others that the modified exemption of certain classes of goods from distraint—plough-oxen, for example, and tools of trade—was not in its origin the least intended as a kindness to the owner. It was entailed by the very nature of the whole proceeding, since without the instruments of tillage or handicraft the debtor could never pay his debt. A passage in the 'Dialogus de Scaccario' (ii. 14), prescribing the order in which the goods of the King's debtors are to be sold, strongly bears out this view.

Latest in the order of proceeding, and latest probably in date, came the direct interposition of the State. The King steps in, first, in what we should now

call his administrative capacity. His administrative deputy, the Sheriff, on complaint made by their owner, follows up the cattle, demands a sight of them, raises the hue and cry if it be refused, and seizes twice their number if the beasts have been driven away. Even when he obtains his view, he can do nothing unless the cattle-owner, denying the right of his adversary to distrain, is prepared with security that he will try the question between them in a Court of Justice. Thus tardily does that power make its appearance which according to our notions should long since have appeared on the scene, the judicial power of the Commonwealth. Its jurisdiction is obviously acquired through the act of the Sheriff in restoring the cattle upon pledge given. The distrainor has lost his material security, the cattle. The owner of the cattle has become personally bound. And thus both are placed under a compulsion which drives them in the end to a judicial arbitration.

Nearly six hundred years ago, the contrast between the ancient proceedings in Replevin and suits conducted on what were then modern principles was already striking. The second chapter of the Statute of Westminster the Second is aimed at certain contrivances by which tenants contrived to defeat the lord's remedy by distress; and, in giving the King's Justices jurisdiction in such cases, it goes on to say that such a provision does not militate against the principle of

the Common Law which forbids the removal of suits to the Justices on the petition of a defendant. 'For,' it adds, 'although at first sight the tenant may seem to be plaintiff and the lord defendant, yet in reality, regard being had to the fact that the lord distrains and sues for services and dues behind, he is rather plaintiff or complainant than defendant.' The action of Replevin is in fact an excellent illustration of the difference between ancient and modern juridical principles. According to ideas now confirmed in us, the person who sets a Court of Justice in motion is the person who complains of a wrong. In the case supposed, this is not the man distrained upon but the man who distrains. He it is who has suffered an injury for which he made reprisals on his adversary's property. Yet it is his adversary who has to start the legal procedure and to constitute himself plaintiff in the Action of Replevin. The reason why a modern Court of Justice would insist on taking the whole dispute into its own hands, and dealing with it in its own way from the very beginning, is that, having always the full command of the public force, it is sure of being able to compel the submission of the defendant to its jurisdiction and of coercing him in the end till he does justice, however long the coercion may be delayed. But at the era to which the procedure in distress originally belonged, the Court had no such assurance of power; and hence the person assumed to

have a grievance is allowed to proceed according to the primitive method, which has the advantage of giving the other side the strongest inducements to call in the judicial authority of the State and submit to its decision.

The information furnished to us respecting this primitive procedure by the various bodies of Continental Teutonic law known collectively as the Leges Barbarorum is of a very interesting kind. Almost all of them contain references to Pignoratio or distraint of goods. The Visigothic law expressly prohibits it; and, at the other end of the scale, the Lombardic law has a trace of that licence of distress which has survived in the English Common-law and permits it after simple demand of payment. But the Salic law, which the most learned Germans now believe to have been drawn up at some period between the time at which Tacitus wrote and the time at which the Franks broke into the Empire, contains a series of very peculiar and instructive provisions on the subject, which have been for the first time fully interpreted by Sohm. Under this system, Distress is not yet a judicial remedy; it is still an extrajudicial mode of redress, but it has been incorporated with a regular and highly complex procedure. A succession of notices have to be given in solemn form by the complainant to the person of whom he complains, and whose property he proposes to seize. Nor can he

proceed to seizure until he has summoned this person before the Popular Court, and until the Popular Officer of the Court, the Thunginus, has pronounced a formula licensing distraint. Then, and not till then, he can make what we should call a distress upon his adversary. It seems quite clear that, before the Conquest, attempts were made in England to narrow the liberty of distraint by the same class of restrictions which we find in the Salic Law and the allied Teutonic bodies of usage. These provisions have their close counterpart in the ordinance of Canute that no man is to take *nams* unless he has demanded right three times in the Hundred; if he obtain no justice the third time, he is to go to the Shire-gemot; the shire is to appoint him a fourth time, and, if that fails, he may take the distress.

It is to be remarked that the process of the Salic Law which answers to our distress is especially a remedy in certain cases of breach of contract. Distraint, the seizing of *nams*, was certainly employed to enforce a similar class of demands under old English law before the Conquest; and the practice seems to have been known in Bracton's day, though the brevity of his notice does not permit us to understand fully its course and character. In this respect the Pignoration of the Continental Teutonic law is more archaic than the distress with which we are familiar in England, since the fragment of the system which

has survived in our Common law (and it is to this that it probably owes its survival) was from the first pre-eminently a remedy by which the lord compelled his tenants to render him their services. But on the other hand it is interesting to observe that our English distress is in some particulars of a more archaic character than the corresponding compulsory process of the Leges Barbarorum. Thus notice of the intention to distrain was never in England essential to the legality of distress (Trent *v.* Hunt, 9 Exch. Rep. 20), although statute-law renders it necessary to make a sale of the distrained property legal; and again, in the oldest ascertainable state of our Common-law, though distraint sometimes followed a proceeding in the lord's Court, yet it did not necessarily presuppose or require it.

It should be understood that the Frankish procedure was completely at the disposal of the complainant. It is not a strictly judicial procedure, but rather a procedure regulating extrajudicial redress. If the complainant observes the proper forms, the part of the Court in licensing seizure is purely passive. Even after the exhaustive examination which this part of the Salic Law has undergone from Professor Sohm, it is very difficult to say whether at any point of the procedure the defendant had the opportunity of putting in a substantial defence; but it seems certain that, whenever he could do this, he

appeared virtually as a plaintiff like the distrainee in our Action of Replevin, and there is no doubt that, if he submitted or was unsuccessful in attacking the proceedings of the other side, he paid not only the original debt but various additional penalties entailed by neglect to comply with previous notices to discharge it. Such a procedure seems to us founded on the now monstrous assumption that plaintiffs are always in the right and defendants always in the wrong. Yet the assumption would not perhaps have struck the earliest authors of legal improvement as altogether monstrous, nor could they have quite comprehended the modern principle which compels the complainant to establish at all events a *primâ facie* case. With them, the man most likely to be in the right would appear to be the man who faced the manifold risks attending the effort to obtain redress, the man who complained to the Popular Assembly, the man who cried for justice to the King sitting in the gate. It is only when violent wrong has ceased to be rife, when the dangers of contesting the oppressions of powerful men have become insignificant, when the law has been long and regularly administered according to technical procedure, that unjust claims are seen to be hardly less common than unjust refusals to satisfy them. In one particular case, the complaint of the King, the old assumption that complainants are presumably in the right was kept long

alive among us, and had much to do with the obstinate dislike of lawyers to allowing prisoners to be defended by Counsel.

Gaius, speaking of the Legis Actiones generally, observes that 'they fell into discredit, because through the excessive subtlety of the ancient lawyers, things came to such a pass that he who committed the smallest error failed altogether.'

Blackstone, many centuries afterwards, has the following remark on the English Law of Distress: 'The many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceeding; for, if any one irregularity was committed, it vitiated the whole.'

I quote these passages, not only on account of the curious similarity of language between two writers of whom the later could not possibly have read the earlier, but because the excessive technicality of ancient law which they both notice goes some way to explain the severity and onesidedness of the old Teutonic procedure. The power of seizing a man's property extrajudicially in satisfaction of your demand was, as Professor Sohm justly remarks, a sort of two-edged sword. You might bring your adversary to the ground by it, but you were extremely likely to injure yourself. For, unless the complainant who sought to distrain went through all the acts and words required by the law with the most

rigorous accuracy, he in his turn, besides failing in his object, incurred a variety of penalties, which could be just as harshly exacted as his own original demand. The difficulty of putting the procedure into operation thus at once made disputants cautious in resorting to it, and seemed to men in general to compensate for its inherent inequitableness. This consideration, however, though it explains in part how the harsh ancient law reconciled itself to the sense of right, is not by itself sufficient to account for the form which it assumed in the Teutonic Codes, or for the vitality of a portion of it amid our own institutions.

I cannot doubt that the practice which I have called by the general name of Distress kept its place in ancient Teutonic law partly as a mere 'survival.' I have already insisted that one great characteristic of the primitive ages was the fewness of human ideas. Societies, just emerging from the savage state, had been used to associate redress of wrong with the seizure of a wrong-doer's goods, and they were unable mentally quite to disconnect the two even when they began to regulate the practice. They did not, therefore, supersede distress by a wholly new system, but engrafted it on a later procedure, which occasionally took the form so curiously preserved in its main features to our own day by the English Common law, but which at a relatively later date and

more generally may be believed to have shaped itself on the model of the rules observed by the Salian Franks.

It is not possible to explain all survivals by some convenience which they incidentally serve. Some have undoubtedly been continued by superstition, some by mere habit. But those relics of ancient thought and conduct which have been kept alive longest have generally had an usefulness of their own. Here the private redress of wrong, taken into the legal procedure, served to compel the appearance of the defendant and his submission to jurisdiction at a time when judicial authority was yet in its infancy, and when Courts of Justice could not as yet completely and regularly command the aid of sovereign power. Gradually, as the public force, the arm of the State, was more and more placed at the disposal of tribunals, they were able more and more to dispense with extrajudicial assistance. In the state of Teutonic law represented by the Frankish Code, we find a specific class of cases tried throughout judicially (in our modern sense of the word) from the initial stage to the judgment; but the judgment is not by its own force operative. If the defendant has expressly promised to obey it, the Count or royal deputy, on being properly summoned, will execute it; but if no such promise has been made, the plaintiff has no remedy except an application to the King in person.

No long time, however, after the Franks have been settled within the Empire, we find that another step has been taken towards the administration of justice on modern principles, and now the royal deputy will execute the judgment even though there has been no promise to submit to it. At this point Distress is wholly taken out of the hands of private litigants and extrajudicial seizure becomes judicial seizure. The change is obviously a result of the growing vigour of Courts, greatly due in our own country to the development of royal justice at the expense of popular justice. Still English judicial proceedings long savoured of the old practices. Every student of our ancient English forms of proceeding will recollect on what small apparent provocation the King constantly took the lands of the defendant into his hands or seized his goods, simply to compel or perfect his submission to the royal jurisdiction. It seems probable that Distress was gradually lost in and absorbed by Attachment and Distringas. The theory of Attachment now is that it is the taking of property into the actual or constructive possession of the judicial power, and the later course of change under which it has faded into an occasional and exceptional proceeding, requiring to be justified by special reasons, corresponds with the growing confidence of Courts of Justice in their possession of irresistible power confided to them by the sovereign. As regards

that fragment of the primitive institution which remains in our law, I imagine that Distress would at most have become a mere survival, confined perhaps to the impounding of stray cattle, if several statutory innovations had not turned it into a convenient extra-judicial remedy for landlords, by giving the distrainor a power of sale which in old English law was limited to a few very special demands. The modern theory of Distress is that a landlord is allowed to distrain because by the nature of the case he is always compelled to give his tenant credit, and that he can distrain without notice because every man is supposed to know when his rent is due. But this theory, though it explains the continuance of Distress to our day, does not at all fit in with the most ancient ideas on the subject, and could not indeed be easily made to square with the practice of distraint even at a date so comparatively late as that at which Bracton wrote. How accidental is the association of Distress with the powers of landlords may be seen from the fact that, though there are plentiful traces of the institution in the ancient Scottish law, the same practical results which the English system produces by allowing landlords to distrain for rent are chiefly attained in Scotland by applying to landlord and tenant the Romanised Law of Hypothek.

The comparison of the various Teutonic bodies of law suggests then to my mind, as regards those

systems, the following conclusions respecting the historical development of the remedies which grew out of the savage practice of violently seizing property in redress for supposed wrong. Two alternative expedients were adopted by nascent law. One of these consisted in tolerating distraint up to a certain point; it was connived at so far as it served to compel the submission of defendants to the jurisdiction of Courts, but in all other cases it was treated as wilful breach of the peace. The other was the incorporation of distraint with a regular procedure. The complainant must observe a great number of forms at his peril; but if he observes them he can distrain in the end. In a still more advanced condition of legal ideas, the tribunals take the seizure of land or goods into their own hands, using it freely to coerce defendants into submission. Finally, Courts of Justice resort to coercion before judgment only on the rarest occasions, sure as they at last are of the effectiveness of their process, and of the power which they hold in deposit from the Sovereign Commonwealth.

LECTURE X.

THE PRIMITIVE FORMS OF LEGAL REMEDIES.

II.

I PASS from the early law of procedure in the Roman and Teutonic societies to the corresponding branch of another ancient legal system which has been only just revealed to us, and which, so far as its existence was suspected, was supposed until lately to be separated by peculiarly sharp distinctions from all Germanic bodies of usage.

Rather more than half of the Senchus Mor is taken up with the Law of Distress. The Senchus Mor, as I told you, pretends to be a Code of Irish law, and indeed to be that very Code which was prepared under the influence of St. Patrick upon the introduction of Christianity into Ireland. I added that in the present state of our knowledge, no theory can be very confidently advanced as to the date of this Brehon compendium. It may be that some such revision of the pre-Christian law did take place; it may be that the Brehon lawyers only conjectured that it must have taken place;

it may be that a tract of unusual dimensions and proportionately valued by the Brehon law-school which happened to possess it, came gradually to be associated with a name held in pre-eminent honour or pre-eminently sacred, a process of which there are believed to be several examples in the history of Eastern jurisprudence. These doubts, however, as to the true date of the Senchus Mor do not take away from the significance and instructiveness of the fact that in a volume of great antiquity, of undoubted genuineness, and evidently thought by its possessors to contain all that was important in the law, the Law of Distress, now an extremely subordinate branch of our legal system, occupies a space so extraordinarily large.

I borrow from the Editor of the First Volume of 'Ancient Laws of Ireland,' the following epitome of the old Irish law of distress as laid down in the Senchus Mor:—

'The plaintiff or creditor, having first given the proper notice, proceeded, in the case of a defendant or debtor, not of chieftain grade, to distrain. If the defendant or debtor were a person of chieftain grade, it was necessary not only to give notice, but also to "fast upon him." The fasting upon him consisted in going to his residence and waiting there for a certain time without food. If the plaintiff did not within a certain time receive satisfaction for his claim, or a

pledge therefor, he forthwith, accompanied by a law-agent, witnesses, and others, seized his distress. The distress, when seized, was in certain cases liable to a Stay, which was a period varying according to fixed rules, during which the debtor received back the distress, and retained it in his own keeping, the creditor having a lien upon it. Such a distress is a "distress with time;" but under certain circumstances and in particular cases an "immediate distress" was made, the peculiarity of which was that during the fixed period of the Stay the distress was not allowed to remain in the debtor's possession, but in that of the creditor, or in one of the recognised greens or pounds.

'If the debt was not paid by the end of the Stay, the creditor took away the distress, and put it in a pound. He then served notice of the distress on the debtor whom he had distrained, letting him know where what was distrained was impounded. The distress remained in the pound a certain period, fixed according to its nature (*dithim*, translated "delay in pound," is the name of this period). At the end of the delay in pound, the Forfeiting Time began to run, during which the distress became forfeited at the rate of three "seds" per day, until entirely forfeited. If the entire value of the distress thus forfeited was exactly equal to the original debt and the subsequent expenses, the debt was liquidated; if it

was less than this, a second distress was taken for the difference; and, if more, the overplus was returned All this proceeding was managed by the party himself, or his law-agent, with the several witnesses of the various steps, and other necessary parties.

'But if, instead of allowing his cattle to go to pound, the debtor gave a sufficient pledge, *e.g.*, his son, or some article of value, to the creditor, that he would within a certain time try the right to the distress by law, the creditor was bound to receive such pledge. If he did not go to law, as he so undertook, the pledge became forfeited for the original debt. At any time, up to the end of the "dithim," the debtor could recover his cattle by paying the debt and such expenses as had been incurred. But, if he neglected to redeem them until the "dithim" had expired, then he could only redeem such as were still unforfeited.'

The very existence in ancient Ireland of the law thus summarised is almost enough by itself to destroy those reckless theories of race which assert an original, inherent difference of idea and usage between Teuton and Celt. The Irish system of Distress is obviously, in all essential features, the Germanic system. It wears, on its face, a very strong general resemblance to the corresponding branch of our Common Law; and I have seen some very ingenious attempts to account for the differences between the two by suggestions that the primitive contour of the

English law of Distress has been impaired. The object of such speculations is to argue for the direct derivation of the English set of rules from the Celtic; but it does not appear to me necessary to resort to a supposition which has great and special difficulties of its own. The virtual identity of the Irish law of Distress with the Teutonic law is best brought out by comparing it with the Teutonic systems of procedure collectively. Thus the Distress of the Senchus Mor is not, like the Distress of the English Common Law, a remedy confined in the main to demands of the lord on his tenants; as in the Salic and other Continental Germanic Codes, it extends to breaches of contract, and indeed, so far as the Brehon law is already known, it would appear to be the universal method of prosecuting claims of all kinds. The Notice again to the person whose goods are to be distrained which it strenuously insists upon, though not found in the surviving English Common law, fills an important place, as I stated, in other Teutonic collections of rules. So too the attendance of witnesses is required by the Continental Codes; and, though the presence of the Brehon law agent is peculiar to the Irish system and very characteristic of it, certain persons having much the same duties are required by some of the Teutonic systems to be present during the process of distraint. Further, the Stay of proceedings, which has been compared to an Attach-

ment, seems to me better explained by certain provisions of the 'Leges Barbarorum.' Under some of them when a person's property is about to be seized he makes a mimic resistance; under the Salic law, he protests against the injustice of the attempt; under the Ripuarian law, he goes through the expressive formality of standing at his door with a drawn sword. Thereupon, the seizure is interrupted and an opportunity is given for enquiring into the regularity of the proceedings and, probably also, into the justice of the claim. The Lien or charge upon the distrained property, which the Irish law confers on the creditor during the currency of the Stay, is not found in the Continental Teutonic law in this exact shape; but, at a particular stage of the Salic proceedings, the creditor has the power of interdicting the debtor from selling or mortgaging any part of his property until the debt has been satisfied. On the other hand, several features of the Irish system, which are wholly absent from the Continental Teutonic procedure, or very faintly marked in it, belong conspicuously to the English law. Among these may be placed the impounding, and the 'taking in withernam,' but the great resemblance of all, and the common point of dissimilarity from the most ancient of the Leges Barbarorum, lies in the fact that the Irish procedure, like the English, requires neither assistance nor permission from any Court of Justice. In

all the Teutonic bodies of custom except the English and the Lombardic, even when the greatest latitude of seizure is allowed to litigants out of Court, some judicial person or body must be applied to before they proceed to extremities. With us, however, the entire seizure is completed before authority is called in; and the Irish law has exactly the same peculiarity. Not only so, but the Irish law corresponds to the English law of Distress in a very advanced stage of development. It does not employ the seizure of cattle merely as a method of extorting satisfaction. It provides, as you have seen, for their forfeiture in discharge of the demand for which they were taken; and thus is distinguished by an improvement which was only added to the English law by statute after the lapse of several centuries.

The true difficulty in estimating the place of this Irish procedure in the historical development of law arises from doubts as to the part really played by the legal proceeding in which it terminated. The English process of Distress, wherever it was felt to be unjust, led up to, and ended in, the action of Replevin, and the Court, which ultimately tried the action, practically acquired its jurisdiction through the interposition of the Sheriff in restoring the cattle upon security given. No such interference with a high hand as that of the Sheriff appears to be contemplated by the Irish law; but the Brehon lawyer who ought properly

to accompany the distrainor is expressly stated by the Senchus Mor to aid him 'until the decision of a Court.' ('Ancient Laws of Ireland,' i. 85.) What was the proceeding thus referred to? What authority had the Irish Courts at any time at which the Brehon law was held in respect? What were these Courts? To what extent did they command the public force of the sovereign State? Was there any sovereign power at any time established in any part of Ireland which could give operative jurisdiction to Courts of Justice and operative force to the law? All these questions—of which the last are in truth the great problems of ancient Irish history—must in some degree be answered before we can have anything like a confident opinion on the actual working of the Law of Distress set forth at such length in the Senchus Mor.

The learned Editors of the various Introductions prefixed to the official publications of Ancient Irish Law are plainly of opinion that such jurisdiction as any Irish Courts possessed was, to use the technical phrase, voluntary. The Law of Distress, in this view, was clearly enough conceived by the Brehon lawyers, but it depended for the practical obedience which it obtained on the aid of public opinion and of popular respect for a professional caste. Its object was to force disputants to submit to what was rather an arbitration than an action, before a Brehon selected

by themselves, or at most before some recognised tribunal advised by a Brehon. At the same time, it would seem that there are ancient Irish tracts or fragments of tracts in existence which describe the ancient Irish as having had a most elaborate public organisation, judicial as well as legislative. Dr. Sullivan, in his Introduction, admits that the information which has come down to us on these subjects is very fragmentary, and so obscure that it will be impossible to give a satisfactory account of them until the whole of the law-fragments in Irish MSS. are published or at least made accessible to scholars; but he nevertheless believes in the historical reality of this organisation, and he speaks (Introduction, pp. cclii. cclxii.) of the Irish Courts in language of extremely modern tinge. Enough is known of Irish history to make it very difficult to understand when this elaborate judicial system can have existed; but a place is found for it by attributing it to a period not only before the Anglo-Norman invasions of Ireland, but before the Viking descents on the Irish coasts. The safest course is certainly to reserve one's opinion on the subject until the authorities for Dr. Sullivan's statements have been much more critically examined than they have been; but I am bound to say that they are not so inherently improbable, nor are Dr. Sullivan's opinions so hard to reconcile with the views of the Editors

of the translations, as persons unacquainted with legal history might suppose. There are analogies to many of the tribunals described among the rudimentary institutions of several communities. Such tribunals might further be highly developed and yet their jurisdiction might be only voluntary. Sohm appears to me to have proved that the Frankish Popular Courts did not execute their own decrees; if the defendant had promised to submit to an award, the local deputy of the King might be required to enforce it, but, if there had been no such promise, the plaintiff was forced to petition the King in person. There is much reason in fact for thinking that, in the earliest times and before the full development of that kingly authority which has lent so much vigour to the arm of the law in most Aryan communities, but which was virtually denied to the Irish, Courts of Justice existed less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong. Even then if we suppose that the Ireland which is said to have enjoyed an elaborate judicial organisation was greatly ruder and wilder than Irish patriots would probably allow it to have been, there is no such inconsistency between the prevalence of disorder and the frequency of litigation as would make them exclude one another. The Norse literature, which Mr. Dasent has popularised among us, shows that per-

petual fighting and perpetual litigation may go on side by side, and that a highly technical procedure may be scrupulously followed at a time when homicide is an everyday occurrence. The fact seems to be that contention in Court takes the place of contention in arms, but only gradually takes its place; and it is a tenable theory that many of the strange peculiarities of ancient law, the technical snares, traps, and pitfalls with which it abounds, really represent and carry on the feints, stratagems, and ambuscades of actual armed strife between man and man, between tribe and tribe. Even in our own day, when a wild province is annexed to the British Indian Empire, there is a most curious and instructive rush of suitors to the Courts which are immediately established. The arm of the law summarily suppresses violence, and the men who can no longer fight go to law instead, in numbers which sometimes make Indian officials believe that there must be something maleficent in the law and procedure which tempt men into Court who never saw a Court before. The simple explanation is that the same natural impulse is gratified in a new way; hasty appeals to a judge succeed hurried quarrels, and hereditary law-suits take the place of ancestral blood-feuds. If the transition from one state of society to another in modern India were not sudden but gradual and slow, as it universally was in the old Aryan world, we should see the battle with

technicalities going on in Court at the same time that the battle was waged out of Court with sword and matchlock.

When, however, we are considering the place in legal history of the old Irish Law of Distress, the point to which we have to attend is not so much the mere existence of Courts of Justice as the effectiveness of their process, or in other words the degree in which they command the public force of the Commonwealth. I think I have shown it to be probable that, in proportion as Courts grow stronger, they first take under their control the barbarous practice of making reprisals on a wrongdoer by seizing his property, and ultimately they absorb it into their own procedure. Now, the Irish Law of Distress belongs in one respect to a very early stage in this course of development, since it is even more completely extrajudicial than is that fragment of the primitive barbarous remedy which has survived among ourselves. On the other hand, there are several particulars in which it is not more but distinctly less archaic than the English Common law. The 'Notice' to the defendant, for which it provides—the 'Stay,' or temporary retention of the goods by the owner, subject to a lien—the witnesses who have to be present, and the skilled legal adviser who has to attend throughout the proceedings—belong to a range of ideas greatly more advanced than that under which all these precautions are dispensed

with. Even stronger evidence of maturity is furnished by the almost inconceivable multitude of rules and distinctions which the Senchus Mor applies to every part of the proceedings; and our own experience shows that the most remarkable feature of the old Irish law, the forfeiture of the property taken in distress when the original debt and the expenses of custody come up to its full value, has its place among the latest improvements in jurisprudence.

Whatever, then, be the truth as to the Ireland of the golden age, these characteristics of the Irish Law of Distress leave on my mind a very distinct impression that it was brought to the shape in which we find it amid a society in which the action of Courts of Justice was feeble and intermittent. It says much for the spirit of equity and reasonableness which animated the Brehon lawyers who gave it its form, and much also for their ingenuity, but suggests that they relied little on the assistance of Courts and directed their efforts to making the most of a remedy which was almost wholly extrajudicial. The comparison of the Teutonic laws shows that they had a basis of Aryan custom to work upon; but, while in other communities the superstructure on this foundation was the work of Courts ever feeling themselves stronger, in Ireland it seems to have been the work of lawyers dependent in the main for the usefulness of their labours on popular respect for their order. I do not affect to

say how the ancient law of Ireland is to be fitted to the ancient history. It may be that the picture of judicial organisation found in some law-tracts is, like the description of private law found in others, rather a representation of what ought to be than of what is or has been. It may be also that the law laid down in the Senchus Mor is of much later date than the compilers of that tract pretend, and that therefore it received its shape in times of disturbance and confusion. But I cannot believe that it ever synchronised with a period of judicial activity and efficiency.

From what I have said I think you will have collected the chief points of difference between the Irish Law of Distress, as laid down in the Senchus Mor, and the English Common Law of Distress, as declared by the earliest authorities which our Courts recognise. Both had the same origin, but the Irish distraint was an universal, highly developed proceeding employed in enforcing all kinds of demands, while the corresponding English remedy, though much less carefully guarded by express rules, was confined to a very limited and special class of cases. I have a melancholy reason for calling your attention to the contrast. Edmund Spenser has spoken of it, in his 'View of the State of Ireland,' and here is the passage:—

'There are one or two statutes which make the

wrongful distraining of any man's goods against the forme of Common Law to be fellony. The which statutes seeme surely to have been at first meant for the good of the realme, and for restrayning of a foul abuse, which then reigned commonly among that people, and yet is not altogether laide; that, when anyone was indebted to another, he would first demand his debt, and, if he were not paid, he would straight go and take a distress of his goods and cattell, where he could find them to the value; which he would keep till he were satisfied; and this the simple churl (as they call him) doth commonly use to doe yet through ignorance of his misdoing, or evil use that hath long settled among them. But this, though it be sure most unlawful, yet surely me seems it is too hard to make it death, since there is no purpose in the party to steal the other's goods, or to conceal the distress, but he doeth it openly for the most part before witnesses. And again the same statutes are so slackly penned (besides there is one so unsensibly contryved that it scarcely carryeth any reason in it) that they are often and very easily wrested to the fraude of the subject, as if one going to distrayne upon his own land or tenement, where lawfully he may, yet if in doing thereof he transgresse the least point of the Common Law, he straight committeth fellony. Or if one by any other occasion take any thing from another, as boyes sometimes cap one another, the same is straight fellony. This is a very hard law.

Spenser goes on, in a passage which I need not quote in full, to account for these statutes by a special provision in the charters of most of the Anglo-Irish corporate towns. The English law had not currency, he tells us, beyond the walls, and the burgesses had the power conferred on them of distraining the goods of any Irishman staying in the town or passing through it, for any debt whatsoever. He suggests that the Irish population outside was led in this way to suppose it lawful to distrain the property of the townspeople. The explanation, if true, would be sad enough, but we know that it cannot convey the whole truth, and the real story is still sadder. The Irish used the remedy of distress because they knew no other remedy, and the English made it a capital felony in an Irishman to follow the only law with which he was acquainted. Nay, those very subtleties of old English law which, as Blackstone says, made the taking of distress 'a hazardous sort of proceeding' to the civil distrainor, might bring an Irishman to the gallows, if in conscientiously attempting to carry out the foreign law he fell into the smallest mistake. It is some small consolation to be able, as one result of the inquiries we have been prosecuting, to put aside as worthless the easy justification of those who pass over these cruelties as part of the inevitable struggle between men of different races. Both the Irish law, which it was a capital crime to

obey, and the English law, which it was a capital crime to blunder in obeying, were undoubtedly descended from the same body of usage once universally practised by the forefathers of both Saxon and Celt.

Among the writers who have recognised the strong affinities connecting the English and Irish Law of Distress, I find it difficult to distinguish between those who believe in the direct derivation of the English law from pre-existing Celtic customs common to Britain and Ireland, and those who see a sufficient explanation of the resemblances between the two sets of rules in their common parentage. I am not at all prepared to deny that recent researches, and particularly those into old French customary law, render it easier to believe than it once was that portions of primitive or aboriginal custom survive the most desolating conquests. But I need scarcely say that the hypothesis of the direct descent of any considerable branch of English law from British usage is beset by extraordinary difficulties, of which not the least is the curiously strong case which may also be made out for the purely Roman origin of a good many institutions and rules which we are used to consider purely English and Germanic. On this last point a very interesting little volume, which has attracted too little notice, Mr. Coote's 'Neglected Fact in English History,' may be read

with advantage, and should be compared with the reply to its arguments, on the whole a successful one, which Mr. Freeman published in 'Macmillan's Magazine' for July, 1870. The true rival of all these theories of the derivation of one body of custom from another is, of course, the theory of the common descent of all from an original basis of usage which we must, provisionally at all events, call Aryan. Confining ourselves to the practice which we have been investigating, the remedy for supposed wrong by distress, if there could be a doubt of its being a legacy from the primitive Aryan usages, it would be removed by the remarkable detail which connects the Irish with the Hindoo law. The Irish rules of distraint very strongly resemble the English rules, less strongly resemble the Continental Teutonic rules, but they include one rule not found in any Teutonic Code, almost unintelligible in the Irish system, but known to govern conduct even at this hour all over the East, where its meaning is perfectly clear. This is the rule that a creditor who requires payment from a debtor of higher rank than himself shall 'fast upon him.' What possible explanation will cover all the fact except that the primitive Aryans bequeathed the remedy of distress to the communities which sprang from them, and that varieties of detail have been produced by what Dr. Sullivan, in his Introduction, has happily called dynamical influences?

Here is the leading provision of the Senchus Mor on the subject (i. 113):—

'Notice precedes every distress in the case of the inferior grades except it be by persons of distinction or upon persons of distinction. Fasting precedes distress in their case. He who does not give a pledge to fasting is an evader of all; he who disregards all things shall not be paid by God or man.'

Mr. Whitley Stokes was the first, I believe, to point out that the institution here referred to was identical with a practice diffused over the whole East, and called by the Hindoos 'sitting dharna.' I will presently read you a passage in which the proceeding is described as it was found in India before the British Government, which has always regarded it as an abuse, had gone far in its efforts to suppress it. But perhaps the most striking examples of the ancient custom are to be found at this day in Persia, where (I am told) a man intending to enforce payment of a demand by fasting begins by sowing some barley at his debtor's door and sitting down in the middle. The symbolism is plain enough. The creditor means that he will stay where he is without food, either until he is paid or until the barley-seed grows up and gives him bread to eat.

The corresponding Indian practice is known, I before stated, as 'sitting dharna'—*dharna*, according to the better opinion, being exactly equivalent to the

Roman 'capio,' and meaning 'detention' or 'arrest.' Among the methods of enforcing payment of a debt described in the collection of rules attributed to the semi-divine legislator, Manu (viii. 49), is one which Sir William Jones renders 'the mediation of friends;' but more recent Sanscrit scholars assert that the expression of the original text signifies 'dharna.' And in the Vyavahara Mayukha, a Brahminical law-book of much authority, Brihaspiti, a juridical writer sometimes classed with Manu, is cited as enumerating, among the lawful modes of compulsion by which the debtor can be made to pay, 'confining his wife, his son, or his cattle, or watching constantly at his door.' This remarkable passage not only connects Hindoo law with Irish law through the reference to 'watching constantly at the door,' but it connects it also with the Teutonic, and among them with the English bodies of custom, by speaking of the distraint of cattle as a method of enforcing a demand. We have not in the Western world, so far as I am aware, any example of so strong a form of distress as seizing a man's wife or children, but it is somewhat curious that we have evidence of its having been common in ancient Ireland to give a son as a pledge to the creditor for the purpose of releasing the distrained property.

Lord Teignmouth has left us a description (in Forbes' 'Oriental Memoirs,' ii. 25) of the form which

the 'watching constantly at the door' of Brihaspiti had assumed in British India before the end of the last century: 'The inviolability of the Brahmin is a fixed principle with the Hindoos, and to deprive him of life, either by direct violence or by causing his death in any mode, is a crime which admits of no expiation. To this principle may be traced the practice called dharna, which may be translated caption or arrest. It is used by the Brahmins to gain a point which cannot be accomplished by any other means, and the process is as follows: The Brahmin who adopts this expedient for the purpose mentioned proceeds to the door or house of the person against whom it is directed, or wherever he may most conveniently arrest him; he then sits down in dharna with poison or a poignard or some other instrument of suicide in his hand, and threatening to use it if his adversary should attempt to molest or pass him, he thus completely arrests him. In this situation the Brahmin fasts, and by the rigour of the etiquette the unfortunate object of his arrest ought to fast also, and thus they both remain till the institutor of the dharna obtains satisfaction. In this, as he seldom makes the attempt without the resolution to persevere, he rarely fails; for if the party thus arrested were to suffer the Brahmin sitting in dharna to perish by hunger, the sin would for ever lie upon his head. This practice has been less frequent of

late years, since the institution of the Court of Justice at Benares in 1793; but the interference of the Court and even of the Resident has occasionally proved insufficient to check it.'

You will observe that the old Brahminical writer merely speaks of confining a man to his house by 'watching constantly at the door' as one among several modes of extorting satisfaction. He classes it with forms of distraint more intelligible to us—the seizure of the debtor's cattle, of his wife, or of his child. Though the ancient rule has not descended to us along with its original context, we need not doubt that even in the earliest times it was enforced by a supernatural sanction, since every violation of the Brahminical Code was regarded by its authors not only as a civil offence but as a sin. Thus a Brahmin might quite well be conceived as saying with the writer in the Senchus Mor, 'He who does not give a pledge to fasting is an evader of all; he who disregards all things shall not be paid by God or man.' Many centuries then elapse, which it would be vain to calculate, and almost in our own day we find the ancient usage practised in India, but with modifications corresponding to a great deal of change which is suspected to have occurred in Hindoo theology. The indefinite supernatural penalty has become the definite supernatural penalty incurred by destroying life, and particularly human life. The creditor not

only 'watches at the door,' but kills himself by poison or dagger if the arrest is broken, or by starvation if payment is too long delayed. Finally, we have the practice described by Lord Teignmouth as one peculiarly or exclusively resorted to by Brahmins. The sanctity of Brahminical life has now in fact pretty much taken, in Hindoo idea, the place once occupied by the sanctity of human life, and 'sitting dharna,' when the English law first endeavoured to suppress it, was understood to be a special mode of oppression practised by Brahmins for a consideration in money. This is the view taken of it by the Indian Penal Code, which condemns it in the following terms (s. 508):—

'Whoever voluntarily causes . . . any person to do anything which that person is not legally bound to do . . . by inducing . . . that person to believe that he . . . will become by some act of the offender an object of Divine displeasure, if he does not do the thing which it is the object of the offender to cause him to do . . . shall be punished with imprisonment, &c.'

It seems to me that a reasonable explanation may be given of the origin of these practices which now seem so strange. Let us not forget that all forms of Distress, the seizure of wife, child, or cattle, even when wholly unregulated by law, were improvements on older custom. The primitive proceeding was

undoubtedly the unceremonious, unannounced, attack of the tribe or the man stung by injury on the tribe or the man who had inflicted it. Any expedient by which sudden plunder or slaughter was adjourned or prevented was an advantage even to barbarous society. Thus, it was a gain to mankind as a whole when its priests and leaders began to encourage the seizure of property or family, not for the purpose of permanent appropriation, but with a view to what we should now not hesitate to call extortion. Similarly, it was a step forwards when men learned to pause before attacking instead of attacking at once. We are told, in the Compendium of Kafir Laws and Customs published by Mr. Dugmore and other missionaries (p. 38), that the regular procedure of a Kafir law-suit simulates an expedition in force of the plaintiff and his friends against the village to which the defendant belongs. 'On their arrival they sit down together in some conspicuous position and await quietly the result of their presence. This . . . is the signal for mustering all the adult male residents that are forthcoming. These accordingly assemble and also sit down within conversing distance.' After long silence a conversation ensues, and the proceeding, which is a perfectly peaceable one, is continued by a long series of technical formalities and intricate pleadings. This silent pause of

the attacking party is an early form of Notice, in itself one of the most valuable of institutions; and with it is connected another primitive contrivance, shutting a man up in his house till he gives satisfaction, instead of setting on him at once. A very striking illustration of it is found in a law of Alfred, familiar to historical scholars (Kemble, 'Saxons,' i. 272; Thorpe, 'Ancient Laws,' i. 91):—

'Let the man who knows his foe to be homesitting fight not before he have demanded justice of him. If he have power to beset his foe and besiege him in his house, let him keep him there for seven days but not attack him if he will remain indoors. If then, after seven days, he be willing to surrender and give up his weapons, let him be kept safe for thirty days, and let notice be given to his kinsmen and friends. But if the plaintiff have not power of his own, let him ride to the Ealdorman, and, if the Ealdorman will not aid him, let him ride to the King before he fights.' The passage ends with a provision of which the spirit, strange to say, survives in the modern Code making the loudest claim to civilised principle, the Code Napoléon (*Code Pénal*, s. 324), to the effect that if the man who is homesitting be really shut up in his house with the complainant's wife, daughter, or sister, he may be attacked and killed without ceremony.

The object of the Law of Alfred is plainly the

same with that aimed at by the ancient rule of Brihaspiti. The man who, if nature had her way, would be slain at once, is shut up in his house but left otherwise unharmed till he or his kinsmen pay the debt or compound for the money. The English rule is to be enforced by the civil power, the Ealdorman or the King; the Hindoo Brahminical rule by the fear of punishment in another world. The Irish law-tract retains the Brahminical rule as an alternative in certain cases to Notice. But an institution which was perfectly intelligible in a society which included an order of lawyers who were also priests has lost all meaning when this society has been introduced by Christianity to a wholly new set of religious ideas.

The course of our enquiry has led us backwards and forwards between the extreme Easterly and the extreme Westerly branches of the Aryan race. Let me now add one word to connect the Eastern usage with the most ancient law of the community which once occupied with its government nearly the whole space between the two. 'Sitting dharna,' placed under the ban of British law, chiefly survives in British India in an exaggerated air of suffering worn by the creditor who comes to ask a debtor of higher rank for payment, and who is told to wait. But it is still common in the Native Indian States, and there it is pre-eminently an expedient resorted to by soldiers

to obtain arrears of pay. You will remember that the 'pignoris capio' of the Romans is stated by Gaius to have survived as a remedy in two classes of cases, one of them being the default of a military pay-master.

LECTURE XI.

THE EARLY HISTORY OF THE SETTLED PROPERTY OF MARRIED WOMEN.

THE subject on which I am about to speak may perhaps convey one lesson. It may serve as a caution against the lax employment of the words 'ancient' and 'modern.' There are few persons, I suppose, who, approaching the Settled Property of Married Women without previous knowledge of its history, would not pronounce it one of the most modern of subjects. It has given rise to vehement controversy in our own day; some of the questions which it suggests are not yet solved; and there are many here, I dare say, who believe that they remember the first dawn of sound ideas on these questions. Yet, as a matter of fact, the discussion of the settled property of married women is a very old discussion. I do not indeed say, considering the vast antiquity now claimed for the human race, that our very first forefathers troubled themselves about the matter; but nothing can be more certain than that very soon after those divisions of mankind which were destined to ultimate greatness

are seen in possession of the institution which was the one condition of their progress to civilisation—the Family—they are discerned grappling with the very same problem, no doubt in an early form, which we ourselves have hardly yet succeeded in solving. This assertion, I may observe, is less incredible to a Frenchman, or indeed to a citizen of any Continental State, than it is possibly to an Englishman. The law of the Continent on the proprietary relations of husband and wife is in the main Roman law, very slightly transmuted; and through the institutions of the Romans the history of this branch of law may be traced to the earliest institutions of so much of the human race as has proved capable of civilisation.

The Roman and Hindoo systems of law from which I propose to illustrate my subject are very far indeed from being the only sources from which information can be gathered concerning the infancy of mankind, or even concerning the Aryan race of men. But the evidence supplied by each of them is highly authentic, and, while both of them run back to what may fairly be called a vast antiquity, they both assume at their starting-point the existence of the institution, by no means apparently universal among savage men, out of which, as I said, all civilisation has grown—the Family. I need scarcely add that, even for historical purposes, their value is very unequal.

There is no history so long, so continuous, and so authentic as that of the Roman Law; and yet it is not a little remarkable that till about half a century ago it was systematically treated, except by a small minority of jurists, as if it had no history at all. This was a consequence of its great juridical perfection. Let me pause to observe that, considering the time and pains spent in acquiring the Latin language, it is much to be regretted that so little is known of the chief branch of Latin literature. For it is really so expressed, and so put together, as to deserve the name of literature. Moreover, it was the only literature of the Romans which has any claim to originality; it was the only part of their literature in which the Romans themselves took any strong interest; and it is the one part which has profoundly influenced modern thought. One result, however, of its symmetry and lucidity was that it was long regarded as a birth of pure intellect, produced, so to speak, at a single effort. Those who attempted to construct a history for it were few, and not of the highest credit. But it happened that in 1816, the great German historian, Niebuhr, travelling in Italy, had his attention attracted at Verona to a manuscript of one of the Fathers, under the letters of which ancient writing appeared. This manuscript, when deciphered, proved to be a nearly perfect copy of an educational work, written in the second

century of our era, for young Roman students of law, by one of the most famous of Roman lawyers, Gaius or Caius. At that period Roman jurisprudence retained enough of the traces of its most ancient state for it to be necessary that they should be explained to young readers by the author of such a treatise; and it thus became possible to reconstruct, from the book of Gaius, the whole past history of Roman law with some completeness Certainly, without Niebuhr's discovery the subject of this lecture could never have been understood, or its original outline restored.

Hindoo law, which I have placed by the side of Roman law, calls assuredly for no eulogy. It is full of monstrous iniquities, and has been perverted in all directions by priestly influence. But then a great deal of it is undoubtedly of prodigious antiquity, and, what is more important, we can see this ancient law in operation before our eyes. British legislation has corrected some of its excesses, but its principles are untouched, and are still left to produce some of their results. French law, as I said, is Roman law a little altered, but then it is the Roman law in its matured, developed, and refined condition, and the ancient institutions of the Romans are only seen through it dimly. But some of the institutions which the Romans and Hindoos once had in common may be

seen actually flourishing in India, under the protection of English Courts of Justice.

The two societies, Roman and Hindoo, which I take up for examination, with the view of determining some of their earliest ideas concerning the property of women, are seen to be formed at what for practical purposes is the earliest stage of their history, by the multiplication of a particular unit or group, the Patriarchal Family. There has been much speculation of late among writers belonging to the school of so-called pre-historic inquiry as to the place in the history of human society to which this peculiar group, the Patriarchal Family, is entitled. Whether, however, it has existed universally from all time—whether it has existed from all time only in certain races—or whether in the races among whose institutions it appears, it has been formed by slow and gradual development—it has, everywhere, where we find it, the same character and composition. The group consists of animate and inanimate property, of wife, children, slaves, land, and goods, all held together by subjection to the despotic authority of the eldest male of the eldest ascending line, the father, grandfather, or even more remote ancestor. The force which binds the group together is Power. A child adopted into the Patriarchal family belongs to it as perfectly as the child naturally born into it, and a child who severs his connection with it is lost to it alto-

gether. All the larger groups which make up the primitive societies in which the Patriarchal family occurs, are seen to be multiplications of it, and to be, in fact, themselves more or less formed on its model.

But, when first we view the Patriarchal Family through perfectly trustworthy evidence, it is already in a state of decay. The emancipation or enfranchisement of male children from parental power by the parents' voluntary act has become a recognised usage, and is one among several practices which testify a relaxation of the stricter ideas of a more remote antiquity. Confining our attention to women, we find that they have begun to inherit a share of the property of the family concurrently with their male relatives; but their share appears, from several indications, to have been smaller, and they are still controlled both in the enjoyment of it and in the disposal. Here, however, we come upon the first trace of a distinction which runs through all legal history. Unmarried women, originally in no different position from married women, acquire at first a much higher degree of proprietary independence. The unmarried woman is for life under the guardianship of her male relatives, whose primitive duty was manifestly to prevent her alienating or wasting her possessions, and to secure the ultimate reversion of these

possessions to the family to whose domain those possessions had belonged. But the powers of the guardians are undergoing slow dissolution through the two great sapping agencies of jurisprudence, Legal Fictions and Equity. To those who are alive to the permanence of certain legal phenomena there is no more interesting passage in ancient law than that in which the old lawyer Gaius describes the curious forms with which the guardian's powers were transferred to a trustee, whose trust was to exercise them at the pleasure of the ward. Meantime, there can be no reasonable doubt that among the Romans, who alone supply us with a continuous history of this branch of jurisprudence, the great majority of women became by marriage, as all women had originally become, the daughters of their husbands. The Family was based, less upon actual relationship than upon power, and the husband acquired over his wife the same despotic power which the father had over his children. There can be no question that, in strict pursuance of this conception of marriage, all the wife's property passed at first absolutely to the husband, and became fused with the domain of the new family; and at this point begins, in any reasonable sense of the words, the early history of the property of married women.

The first sign of change is furnished by the employment of a peculiar term to indicate the relation of husband to wife, as different from the relation of

father to child, or master to slave. The term, a famous one in legal history, is *manus*, the Latin word for 'hand,' and the wife was said *convenire in manum*, to come under the hand of her husband. I have elsewhere expressed a conjectural opinion that this word *manus* or hand, was at first the sole general term for patriarchal power among the Romans, and that it became confined to one form of that power by a process of specialisation easily observable in the history of language. The allotment of particular names to special ideas which gradually disengage themselves from a general idea is apparently determined by accident. We cannot give a reason, other than mere chance, why power over a wife should have retained the name of *manus*, why power over a child should have obtained another name, *potestas*, why power over slaves and inanimate property should in later times be called *dominium*. But, although the transformation of meanings be capricious, the process of specialisation is a permanent phenomenon, in the highest degree important and worthy of observation. When once this specialisation has in any case been effected I venture to say that there can be no accurate historical vision for him who will not, in mental contemplation, re-combine the separated elements. Taking the conceptions which have their root in the family relation—what we call property, what we call marital right, what we call parental authority,

were all originally blended in the general conception of patriarchal power. If, leaving the Family, we pass on to the group which stands next above it in the primitive organisation of society—that combination of families, in a larger aggregate, for which at present I have no better name than Village Community—we find it impossible to understand the extant examples of it, unless we recognise that, in the infancy of ideas, legislative, judicial, executive, and administrative power are not distinguished, but considered as one and the same. There is no distinction drawn in the mind between passing a law, affirming a rule, trying an offender, carrying out the sentence, or prescribing a set of directions to a communal functionary. All these are regarded as exercises of an identical power lodged with some depositary or body of depositaries. When these communities become blended in the larger groups which are conveniently called political, the re-combination of ideas originally blended becomes infinitely more difficult, and, when successfully effected, is among the greatest achievements of historical insight. But I venture to say that, whether we look to that immortal system of village communities which became the Greek or Hellenic world—or that famous group of village-communities on the Tiber, which, grown into a legislating empire, has influenced the destinies of mankind far more by altering their

primitive customs than by conquering them—or to the marvellously complex societies to which we belong, and in which the influence of the primitive family and village notions still makes itself felt amid the mass of modern thought—still I venture to say, that one great secret for understanding these collections of men, is the reconstruction in the mind of ancient, general, and blended ideas by the re-combination of the modern special ideas which are their offshoots.

The next stage in the legal history of Roman civil marriage is marked by the contrivance, very familiar to students of Roman law, by which the process of 'coming under the hand' was dispensed with, and the wife no longer became in law her husband's daughter. From very early times it would appear to have been possible to contract a legal marriage by merely establishing the existence of conjugal society. But the effect on the wife of continuous conjugal society was, in old Roman law, precisely the same as the effect on a man of continuous servile occupation in a Roman household. The institution called Usucapion, or (in modern times) Prescription, the acquisition of ownership by continuous possession, lay at the root of the ancient Roman law, whether of persons or of things; and, in the first case, the woman became the daughter of the chief of the house; in the last case the man became his slave. The legal

result was only not the same in the two cases because the shades of power had now been discriminated, and paternal authority had become different from the lordship of the master over the slave. In order, however, that acquisition by Usucapion might be consummated, the possession must be continuous; there was no Usucapion where the possession had been interrupted—where, to use the technical phrase (which has had rather a distinguished history), there had been *usurpation*, the breaking of *usus* or enjoyment. It was possible, therefore, for the wife, by absenting herself for a definite period from her husband's domicile, to protect herself from his acquisition of paternal power over her person and property. The exact duration of the absence necessary to defeat the Usucapion—three days and three nights—is provided for in the ancient Roman Code, the Twelve Tables, and doubtless the appearance of such a rule in so early a monument of legislation is not a little remarkable. It is extremely likely, as several writers on the ancient law conjectured, that the object of the provision was to clear up a doubt, and to declare with certainty what period of absence was necessary to legalise an existing practice. But it would never do to suppose that the practice was common, or rapidly became common. In this, as in several other cases, it is probable that the want of qualification in the clause of the Twelve Tables is to be explained by

the reliance of the legislator on custom, opinion, or religious feeling to prevent the abuse of his legislation. The wife who saved herself from coming under marital authority no doubt had the legal status of wife, but the Latin antiquaries evidently believed that her position was not at first held to be respectable. By the time of Gaius, however, any association of imperfect respectability with the newer form of marriage was decaying or had perished; and, in fact, we know that marriage, 'without coming under the hand,' became the ordinary Roman marriage, and that the relation of husband and wife became a voluntary conjugal society, terminable at the pleasure of either party by divorce. It was with the state of conjugal relations thus produced that the growing Christianity of the Roman world waged a war ever increasing in fierceness; yet it remained to the last the basis of the Roman legal conception of marriage, and to a certain extent it even colours the Canon law founded though it be, on the whole, on the sacramental view of marriage.

For our present purpose it is necessary to regard this newer marriage just when it had superseded the ancient and stricter usages of wedlock, and just before it began to be modified by the modern and much severer principles of the Christian community. For at this point in the history of marriage we come upon the beginnings of that system of settling the property

of married women which has supplied the greatest part of Continental Europe with its law of marriage settlement. It appears an immediate consequence from thoroughly ascertained legal principles that, as soon as the wife ceased to pass by marriage into her husband's family, and to become in law his daughter, her property would no longer be transferred to him. In the earlier period of Roman law, this property, present and prospective, would have remained with her own family, and, if she was no longer under direct parental authority, would have been administered by her guardians for the behoof of her male relatives. As we know, however, and as I before stated, the power of guardians was gradually reduced to a shadow. The legal result would seem to have been that the woman would be placed in the same position as a French wife at this day under what the French Code calls the *régime* of *biens séparés*, or as an English wife whose property has been secured to her separate use by an appropriate marriage settlement or by the operation of the new Married Women's Property Act. But, though this was the legal consequence, it would be a social anachronism to assume that in practice it followed rapidly or generally. The original object of the marriage 'without coming under the hand' was doubtless to prevent the acquisition of excessive proprietary power by the husband, not to deprive him of all such power, and

indeed the legal result of this marriage, unless practically qualified in some way, would unquestionably have been far in advance of social feeling. Here, then, we come upon an institution which, of all purely artificial institutions, has had perhaps the longest and the most important history. This is the *dos*, or dotal estate, something very different from our 'dower.' It has become the *dot* of French law, and is the favourite form of settling the property of married women all over the Continent of Europe. It is a contribution by the wife's family, or by the wife herself, intended to assist the husband in bearing the expenses of the conjugal household. Only the revenue belonged to the husband, and many minute rules, which need not be specified here, prevented him from spending it on objects foreign to the purpose of the settlement. The *corpus* or capital of the settled property was, among the Romans (as now in France), incapable of alienation, unless with the permission of a court of justice. If any part of the wife's property was not settled on her as *dos*, it became her *parapherna*. Parapherna means something very different from our 'paraphernalia,' and is the *biens separés* of French law. It was that portion of a wife's property which was held by her under the strict law applicable to a woman marrying without 'coming under the hand.' The authority of her guardians having died out, and this part of her pro-

perty not having, by the assumption, been conveyed to the husband as *dos*, it remained under her exclusive control, and at her exclusive disposal. It is only quite recently, under the Married Women's Property Act, that we have arrived at a similar institution, since money settled to a wife's separate use, though practically the same thing, required a settlement to create it.

I have now abridged a very long, and, in some portions, a very intricate history. The Roman law began by giving all the wife's property to the husband, because she was assumed to be, in law, his daughter. It ended in having for its general rule that all the wife's property was under her own control, save when a part of it had been converted by settlement into a fund for contributing to the expenses of the conjugal household. But, no doubt, the exception to the general rule was the ordinary practice. In all respectable households, as now on the Continent, there was a settlement by way of *dos*. Not that we are to suppose there was among the Romans any such form of contract as we are accustomed to under the name of Marriage Settlement. The mechanism was infinitely simpler. A few words on paper would suffice to bring any part of the wife's property under the well-ascertained rules supplied by the written law for dotal settlements, and nothing more than these words would be needed, unless the

persons marrying wished to vary the provisions of the law by express agreement. This simple, but most admirable, contrivance of having, so to speak, model settlements set forth ready made in the law, which may be adopted or not at pleasure, characterises the French Code Napoléon, and it was inherited by the French from the Romans.

Warning you that the account which I have given you of the transitions through which the Roman law of settled property passed, is, from the necessity of the case, fragmentary, I pass to the evidence of early ideas on our subject which is contained in the Hindoo law. The settled property of a married woman, incapable of alienation by her husband, is well-known to the Hindoos under the name of *Stridhan*. It is certainly a remarkable fact that the institution seems to have been developed among the Hindoos at a period relatively much earlier than among the Romans. But instead of being matured and improved, as it was in the Western society, there is reason to think that in the East, under various influences which may partly be traced, it has gradually been reduced to dimensions and importance far inferior to those which at one time belonged to it.

The definition of Stridhan, or 'woman's property,' given in one of the oldest and most authoritative of the Hindoo juridical treatises, the Mitakshara, is as follows: 'That which is given (to the wife) by the

father, the mother, the husband, or a brother, at the time of the wedding, before the nuptial fire.' Up to this point, the doctrine has the concurrence of all the schools of Hindoo law, but the compiler of the Mitakshara adds a proposition not found elsewhere: 'also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, is denominated by Manu and the others "woman's property."' (Mitakshara, xi. 2.) These words, attributed, you see, to the mythical legislator, Manu, have excited the most vehement controversies among later Brahminical commentators, and have caused considerable perplexity to Anglo-Indian Judges, bound as they are to elicit consistent doctrine from the Hindoo legal texts. 'All the property which a woman may have acquired by inheritance, purchase, partition, seizure, or finding,' is a comprehensive description of all the forms of property as defined by the modes of acquisition, and, if all this be Stridhan, it follows that the ancient Hindoo law secured to married women, in theory at all events, an even greater degree of proprietary independence than that given to them by the modern English Married Women's Property Act. No doubt there is much difficulty in understanding this. The existing Hindoo written law, which is a mixed body of religious, moral, and legal ordinances, is pre-eminently distinguished by the strictness with which it maintains a

number of obligations plainly traceable to the ancient despotism of the Family, and by its excessive harshness to the personal and proprietary liberty of women. Among the Aryan sub-races, the Hindoos may be as confidently asserted as the Romans to have had their society organised as a collection of patriarchally governed families. If, then, at any early period, the married woman had among the Hindoos her property altogether enfranchised from her husband's control, it is not easy to give a reason why the obligations of the family despotism were relaxed in this one particular. In point of fact, there is no clue to the mystery so long as we confine our attention to the Hindoo law, and no course is open to a Judge except to take his stand on the one ancient authority I have quoted or to follow the great bulk of modern authorities who repudiate the doctrine of the Mitakshara on this point. The Anglo-Indian Courts have now substantially decided that Hindoo law (with the possible exception of that current in Western India) limits the Stridhan to property given to the woman at her marriage either by her family or by her husband ('Madras High Court Reports,' iii. 312). I think, however, that if we extend our examination to other bodies of Aryan custom, we may partly understand the amplitude which the Mitakshara, one of the most archaic of Hindoo compendia, assigns to the Stridhan. A full enquiry would take

me much beyond the limits which I have proposed to myself in this Lecture, but its results would shortly be these. Among the Aryan communities as a whole, we find the earliest traces of the separate property of women in the widely diffused ancient institution known as the Bride-Price. Part of this price, which was paid by the bridegroom either at the wedding or the day after it, went to the bride's father as compensation for the Patriarchal or Family authority which was transferred to the husband, but another part went to the bride herself and was very generally enjoyed by her separately and kept apart from her husband's property. It further appears that under a certain number of Aryan customs the proprietary rights of other kinds which women slowly acquired were assimilated to their rights in their portion of the Bride-Price, probably as being the only existing type of woman's property. The exact extent of the separate ownership which the ancient Irish law allowed to married women is still uncertain, but undoubtedly they had some power of dealing with their own property without the consent of their husbands, and this was one of the institutions expressly declared by the Judges to be illegal at the beginning of the seventeenth century.

If then the Stridhan had a pre-historic origin in the Bride-Price, its growth and decay become more intelligible. First of all it was property conferred

on the wife by the husband 'at the nuptial fire,' as the sacerdotal Hindoo lawyers express it. Next it came to include what the Romans called the *dos*, property assigned to the wife at her marriage by her own family. The next stage may very well have been reached only in certain parts of India, and the rules relating to it may only have found their way into the doctrine of certain schools; but still there is nothing contrary to the analogies of legal history in the extension of the Stridhan until it included all the property of a married woman. The really interesting question is how came the law to retreat after apparently advancing farther than the Middle Roman Law in the proprietary enfranchisement of women, and what are the causes of the strong hostility of the great majority of Hindoo lawyers to the text of the Mitakshara, of which the authority could not be wholly denied? There are in fact clear indications of a sustained general effort on the part of the Brahminical writers on mixed law and religion, to limit the privileges of women which they seem to have found recognised by older authorities. The attention of English and European students of the Hindoo law books was first attracted to this subject by a natural desire to scrutinise the sacred texts upon which the Brahmin learned were in the habit of insisting in defence of the abominable practice of Suttee or widow-burning. The discovery was soon made

that the oldest monuments of law and religion gave no countenance to the rite, and the conclusion was at once drawn that, even on Hindoo principles, it was an unlawful innovation. This mode of reasoning undoubtedly gave comfort to many devout Hindoos, whom no secular argument could have reconciled to the abandonment of a custom of proved antiquity; but still, in itself it was unsound. The disuse of all practices which a scholar could show to be relatively modern would dissolve the whole Hindoo system. These inquiries, pushed much farther, have shown that the Hindoo laws, religious and civil, have for centuries been undergoing transmutation, development, and, in some points, depravation at the hands of successive Brahminical expositors, and that no rules have been so uniformly changed—as we should say, for the worse—as those which affect the legal position of women.

It will probably be conceded by all who have paid any attention to our subject, that the civilised societies of the West, in steadily enlarging the personal and proprietary independence of women, and even in granting to them political privilege, are only following out still farther a law of development which they have been obeying for many centuries. The society, which once consisted of compact families, has got extremely near to the condition in which it will consist exclusively of individuals, when it has finally and

completely assimilated the legal position of women to the legal position of men. In addition to many other objections which may be urged against the common allegation that the legal disabilities of women are merely part of the tyranny of sex over sex, it is historically and philosophically valueless, as indeed are most propositions concerning classes so large as sexes. What really did exist is the despotism of groups over the members composing them. What really is being relaxed is the stringency of this despotism. Whether this relaxation is destined to end in utter dissolution—whether, on the other hand, under the influence either of voluntary agreement or of imperative law, society is destined to crystallise in new forms—are questions upon which it is not now material to enter, even if there were any hope of solving them. All we need at present note is that the so-called enfranchisement of women is merely a phase of a process which has affected very many other classes, the substitution of individual human beings for compact groups of human beings as the units of society. Now, it is true that in the legal institutions of the Hindoos (political institutions, I need scarcely say, for many centuries they have had none) the despotism of the family group over the men and women composing it is maintained in greater completeness than among any society of similar civilisation and culture. Yet there is abundant evidence that the emancipation of the individual

from the family had proceeded some way, even before the country had come under the Western influences through the British dominion. If I were to give you the full proof of this, I should have to take you through much of the detail of Hindoo law. I will mention one indication of it, because few are aware that the peculiarity in question serves as a sort of test by which we can distinguish very ancient or undeveloped from comparatively matured and developed law.

All beginners in law have heard of the difference between distributing an inheritance *per stirpes* and distributing it *per capita*. A man has two sons, one of whom has eight children, and the other two. The grandfather dies, his two sons having died before him, and the grandfather's property has to be divided between the grandchildren. If the division is *per stirpes* the stocks of the two sons will be kept separate, and one half of the inheritance will be distributed between the eight grandchildren, and the other half between the two. If the division is *per capita* the property will be equally divided between the whole ten grandchildren, share and share alike. Now the tendency of matured and developed law is to give a decided preference to distribution *per stirpes*; it is only with remote classes of relatives that it abandons the distinctions between the stocks and distributes the property *per capita*. But in this, as in several

other particulars, very ancient and undeveloped law reverses the ideas of the modern jurist, and uniformly prefers distribution *per capita*, exactly equal division between all the surviving members of the family; and this is apparently on the principle that, all having been impartially subject to a despotism which knew no degrees, all ought to share equally on the dissolution of the community by the death of its chief. A preference for division *per stirpes*, a minute care for the preservation of the stocks, is in fact very strong evidence of the growth of a respect for individual interests inside the family, distinct from the interests of the family group as a whole. This is why the place given to distribution *per stirpes* shows that a given system of law has undergone development, and it so happens that this place is very large in Hindoo law, which is extremely careful of the distinction between stocks, and maintains them through long lines of succession.

Let us now turn to the causes which in the Hindoo law, and in the great alternative Aryan system, the Roman law, have respectively led to the disengagement of the individual from the group. So far as regards the Roman institutions, we know that among the most powerful solvent influences were certain philosophical theories, of Greek origin, which had deep effect on the minds of the jurists who guided the development of the law. The law, thus trans-

formed by a doctrine which had its most distinct expression in the famous proposition, 'all men are equal,' was spread over much of the world by Roman legislation. The empire of the Romans, for one reason alone, must be placed in a totally different class from the Oriental despotisms, ancient and modern, and even from the famous Athenian Empire. All these last were tax-taking empires, which exercised little or no interference in the customs of village-communities or tribes. But the Roman Empire, while it was a tax-taking, was also a legislating empire. It crushed out local customs, and substituted for them institutions of its own. Through its legislation alone it effected so great an interruption in the history of a large part of mankind, nor has it had any parallel except—and the comparison is very imperfect—the modern British Empire in India. There is no reason to suppose that philosophical theory had any serious influence on the jurisprudence of the Hindoos. I speak with reserve on the subject, but I believe that none of the remarkable philosophical theories which the genius of the race produced are founded on a conception of the individual as distinct from that of the group in which he is born. From those of them with which I happen to be acquainted, I should say that their characteristics are of exactly the reverse order, and that they have their nearest counterpart in certain philosophical systems of our own day, under which the

individual seems lost in some such conception as that of Humanity. What, then, was the influence (for some influence there certainly was) which, operating on the minds of the Brahminical jurists, led them to assign to the individual rights distinct from those which would have belonged to him through mere membership in the family group? I conceive that it was the influence of Religion. Wherever among any part of Hindoo society there prevailed the conviction of responsibility after death—whether that responsibility was to be enforced by direct rewards and punishments, or through the stages of the metempsychosis—the conception of the individual, who was to suffer separately and enjoy separately, was necessarily realised with extreme distinctness.

The portions of the race strongly affected by religious belief of this kind were exactly those for which the Brahminical jurists legislated, and at first they probably legislated for these alone. But with the notion of responsibility after death the notion of expiation was always associated. Building upon this last notion, the Brahminical commentators gradually transformed the whole law until it became an exemplification of what Indian lawyers call the doctrine of Spiritual Benefit. Inasmuch as the condition of the dead could be ameliorated by proper expiatory rites, the property descending or devolving on a man came to be regarded by these writers partly as a fund for

paying the expenses of the ceremonial by which the soul of the person from whom the inheritance came could be redeemed from suffering or degradation, and partly as a reward for the proper performance of the sacrifices. There ought to be nothing to surprise us in the growth of such a doctrine, since it is only distinguished, by its logical completeness, from one which had great influence on Western jurisprudence. The interest which from very early times the Church claimed in the moveable or personal property of deceased persons is best explained by its teaching that the first and best destination of a dead man's goods was to purchase masses for his soul, and out of this view of the proper objects of wealth the whole testamentary and intestate jurisdiction of the Ecclesiastical Courts appears to have grown. But in India the law constructed on these principles became extremely unfavourable to the ownership of property by women, apparently because its priestly authors thought that women, through their physical weakness and their seclusion (which was doubtless regarded as unavoidable), would have much greater difficulty than men, amid a society always more or less disturbed, in applying a proper share of the property to the funeral ceremonies of the person who had transmitted it. The reasoning on the subject current even in comparatively ancient times is thus given in the Mitakshara: 'The wealth of a

regenerate man is designed for religious uses, and a woman's succession to such property is unfit because she is not competent to the performance of religious rites.' The compiler of the Mitakshara who has preserved the liberal rule as to Stridhan which I before referred to, combats this doctrine, not, however, by affirming the capacity of women for sacrifice, but by denying that all property is intended for religious uses, and by pointing out that certain acts which a female owner can do are of a quasi-religious character, *e.g.*, she may dig tanks. (Mitakshara, ii. 1, 22, 23, 24.) And, putting him aside, the Brahminical commentators who succeed one another in the Hindoo juridical schools show a visibly increasing desire to connect all property with the discharge of sacrificial duties, and with this desire the reluctance to place property in the hands of women is somehow connected.

On the whole the successive generations of Hindoo lawyers show an increasing hostility to the institution of the Stridhan, not by abolishing it, but by limiting to the utmost of their power the circumstances under which it can arise. Minute distinctions are drawn between the various modes in which property may devolve upon a woman, and the conditions under which such property may become Stridhan made rare and exceptional. The aim of the lawyers was to add to the family stock, and to place

under the control of the husband as much as they could of whatever came to the wife by inheritance or gift; but whenever the property does satisfy the multifarious conditions laid down for the creation of the Stridhan, the view of it as emphatically 'woman's property' is carried out with a logical consistency very suggestive of the character of the ancient institution on which the Brahminical jurists made war. Not only has the woman singularly full power of dealing with the Stridhan—not only is the husband debarred from intermeddling with it, save in extreme distress—but, when the proprietress dies, there is a special order of succession to her property, which is manifestly intended to give a preference, wherever it is possible, to female relatives over males.

Let me add that the account which I have given you of the probable liberality of the Hindoo institutions to females at some long past period of their development, and of the dislike towards this liberality manifested by the Brahminical lawyers, is not to be regarded as fanciful or purely conjectural, although, doubtless, we can only guess at the explanation of it. It is borne out by a very considerable number of indications, one of which I mention as of great but very painful interest. The most liberal of the Hindoo schools of jurisprudence, that prevailing in Bengal Proper, gives a childless widow the enjoyment of her husband's property, under certain restrictive condi-

tions, for her life; and in this it agrees with many bodies of unwritten local custom. If there are male children, they succeed at once; but if there are none the widow comes in for her life before the collateral relatives. At the present moment, marriages among the upper classes of Hindoos being very commonly infertile, a considerable portion of the soil of the wealthiest Indian province is in the hands of childless widows as tenants for life. But it was exactly in Bengal Proper that the English, on entering India, found the Suttee, or widow-burning, not merely an occasional, but a constant and almost universal practice with the wealthier classes, and, as a rule, it was only the childless widow, and never the widow with minor children, who burnt herself on her husband's funeral pyre. There is no question that there was the closest connection between the law and the religious custom, and the widow was made to sacrifice herself in order that her tenancy for life might be got out of the way. The anxiety of her family that the rite should be performed, which seemed so striking to the first English observers of the practice, was, in fact, explained by the coarsest motives; but the Brahmins who exhorted her to the sacrifice were undoubtedly influenced by a purely professional dislike to her enjoyment of property. The ancient rule of the civil law, which made her tenant for life, could not be got rid of, but it was combated by the modern institution

which made it her duty to devote herself to a frightful death.

If the Stridhan of the Hindoos is a form of married women's separate property, which has been disliked and perverted by the professional classes who had the power to modify it, the institution which was first the *dos* of the Romans, and is now the *dot* of Continental Europe, has received a singular amount of artificial encouragement. I have endeavoured to describe to you how it originated, but I have yet to state that it entered into one of the most famous social experiments of the Roman Empire. A well-known statute of the Emperor Augustus, celebrated by Horace in an official ode as the prince's greatest legislative achievement, had for its object the encouragement and regulation of marriage and the imposition of penalties on celibacy. Among the chief provisions of this 'Lex Julia et Papia Poppœa'—to give its full title—was a clause compelling opulent parents to create portions, or *dotes*, for their marriageable daughters. This provision of a statute, which very deeply affected the Roman law in many ways, must have met with general approval, for at a later date we find the same principle applied to the *donatio propter nuptias*, or settlement on the married couple from the husband's side. In the matured Roman law, therefore, singular as it may seem to us, parents were under a statutory obligation to make settlements on their children.

It has been rather the fashion to speak of these experiments of the Roman Emperors on public morality as if they totally miscarried—I suppose, from some idea that the failure added to the credit of the moral regeneration effected by Christianity. But, as a matter of fact, the Christian Church conferred few civil benefits of greater moment to several generations of mankind than in keeping alive the traditions of the Roman legislation respecting settled property, and in strenuously exerting itself to extend and apply the principles of these disciplinary laws. There can be no serious question that, in its ultimate result, the disruption of the Roman Empire was very unfavourable to the personal and proprietary liberty of women. I purposely say, 'in its ultimate result,' in order to avoid a learned controversy as to their position under purely Teutonic customs. It is very possible that the last stages of the process, which it is difficult to call anything but feudalisation, were more unfavourable to women than the earlier changes, which were exclusively due to the infusion of Germanic usage; but, at any rate, the place of women under the new system when fully organised was worse than it was under Roman law, and would have been very greatly worse but for the efforts of the Church. One standing monument of these efforts we have constantly before us in the promise of the husband in the Marriage service, 'With all my worldly goods, I

thee endow;' a formula which sometimes puzzles the English lawyer, from its want of correspondence with anything which he finds among the oldest rules of English law. The words have, indeed, been occasionally used in English legal treatises, as the text of a disquisition on the distinction between Roman *dos*, to which they are supposed to refer, and the *doarium*, which is the 'dower' of lands known to English law. The fact is, however, that the tradition which the Church was carrying on was the general tradition of the Roman *dos*, the practical object being to secure for the wife a provision of which the husband could not wantonly deprive her, and which would remain to her after his death. The bodies of customary law which were built up over Europe were, in all matters of first principle, under ecclesiastical influences; but the particular applications of a principle once accepted were extremely various. The dower of lands in English law, of which hardly a shadow remains, but under which a wife surviving her husband took a third of the rents and profits of his estates for life, belonged to a class of institutions widely spread over Western Europe, very similar in general character, often designated as *doarium*, but differing considerably in detail. They unquestionably had their origin in the endeavours of the Church to revive the Roman institution of the compulsory *dos*, which, in this sense, produced the *doarium*, even

though the latter may have had a partially Germanic origin, and even though it occasionally assume (as it unquestionably does) a shape very different from the original institution. I myself believe that another effect of this persistent preaching and encouragement is to be found in the strong feeling which is diffused through much of Europe, and specially through the Latinised societies, in favour of *dotation*, or portioning of daughters, a feeling which seldom fails to astonish a person acquainted with such a country as France by its remarkable intensity. It is an economical power of considerable importance, for it is the principal source of those habits of saving and hoarding which characterise the French people, and I regard it as descended, by a long chain of succession, from the obligatory provisions of the marriage law of the Emperor Augustus.

The importance and interest of our subject, when treated in all its bearings and throughout its whole history, are quite enough to excuse me, I trust, for having detained you with an account of its obscure beginnings. It has been said that the degree in which the personal immunity and proprietary capacity of women are recognised in a particular state or community is a test of its degree of advance in civilisation; and, though the assertion is sometimes made without the qualifications which are necessary to give it value, it is very far indeed from being a mere gallant com-

monplace. For, inasmuch as no class of similar importance and extent was, in the infancy of society, placed in a position of such absolute dependence as the other sex, the degree in which this dependence has step by step been voluntarily modified and relaxed, serves undoubtedly as a rough measure of tribal, social, national capacity for self-control—of that same control which produces wealth by subduing the natural appetite of living for the present, and which fructifies in art and learning through subordinating a material and immediate to a remote, intangible, and spiritual enjoyment. The assertion, then, that there is a relation between civilisation and the proprietary capacities of women is only a form of the truth that every one of those conquests, the sum of which we call civilisation, is the result of curbing some one of the strongest, because the primary, impulses of human nature. If we were asked why the two societies with which we have been concerned—the Hindoos on the one hand, and the Romans and all the races to which they have bequeathed their institutions on the other—have had so widely different a history, no reply can be very confidently given, so difficult is it, among the vast variety of influences acting on great assemblages of men, to single out any one or any definite number of them, and to be sure that these have operated more powerfully than the rest. Yet, if it were absolutely necessary to give an

answer, it would consist in pointing to the difference in their social history which has been the subject of this lecture, and in observing that one steadily carried forward, while the other recoiled from, the series of changes which put an end to the seclusion and degradation of an entire sex.

LECTURE XII.

SOVEREIGNTY.

THE historical theories commonly received among English lawyers have done so much harm not only to the study of law but to the study of history, that an account of the origin and growth of our legal system, founded on the examination of new materials and the re-examination of old ones, is perhaps the most urgently needed of all additions to English knowledge. But next to a new history of law, what we most require is a new philosophy of law. If our country ever gives birth to such a philosophy, we shall probably owe it to two advantages. The first of them is our possession of a legal system which for many purposes may be considered indigenous. Our national pride, which has sometimes retarded or limited our advance in juridical enquiry, has kept our law singularly pure from mixture with the stream of legal rules flowing from the great fountain of the Roman Corpus Juris, and thus, when we place it in juxtaposition with any other European legal system,

the results of the comparison are far more fruitful of instruction than those obtained by contrasting the various Continental bodies of law with one another. The second advantage I believe to consist in the growing familiarity of Englishmen with the investigations of the so-called Analytical Jurists, of whom the most considerable are Jeremy Bentham and John Austin. Of this advantage we have a monopoly. Bentham seems to be exclusively known in France and Germany as the author of an unpopular system of morals. Austin is apparently not known at all. Yet to Bentham, and even in a higher degree to Austin, the world is indebted for the only existing attempt to construct a system of jurisprudence by strict scientific process and to found it, not on *à priori* assumption, but on the observation, comparison, and analysis of the various legal conceptions. There is not the smallest necessity for accepting all the conclusions of these great writers with implicit deference, but there is the strongest necessity for knowing what those conclusions are. They are indispensable, if for no other object, for the purpose of clearing the head.

An important distinction between Bentham and Austin is not as often recognised as it ought to be. Bentham in the main is a writer on legislation. Austin in the main is a writer on jurisprudence. Bentham is chiefly concerned with law as it might be

and ought to be. Austin is chiefly concerned with law as it is. Each trespasses occasionally on the domain of the other. Unless Bentham had written the treatise called the 'Fragment on Government,' Austin's 'Province of Jurisprudence Determined,' which sets forth the basis of his system, would never probably have been composed. On the other hand, Austin, in his singular discussion of the theory of utility as an index to the Law of God, has entered on an investigation of the class followed by Bentham. Still the description which I have given of their objects is sufficiently correct as a general description, and those objects are widely different. Bentham aims at the improvement of the law to be effected by the application of the principles now indissolubly associated with his name. Almost all of his more important suggestions have been adopted by the English Legislature, but the process of engrafting on the law what to each successive generation seem to be improvements is in itself of indefinite duration, and may go on, and possibly will go on, as long as the human race lasts. Austin's undertaking is more modest. It would be completed, if a Code were produced perfectly logical in order of arrangement and perfectly lucid in statement of rule Jurisprudence, the science of positive law, is sometimes spoken of nowadays as if it would bring the substance of the law into a state of indefinite perfection. It would

doubtless, if it were carried far, lead indirectly to great legal reforms by dispelling obscurities and dissipating delusions, but the investigation of the principles on which the direct improvement of substantive legal rules should be conducted belongs nevertheless not to the theorist on jurisprudence but to the theorist on legislation.

The portion of Austin's Lectures which sets forth the basis of his system, and which was published several years ago as the 'Province of Jurisprudence Determined,' has long been one of the higher class-books in this University; and, taken together with the other lectures more recently given to the world (though unhappily in a fragmentary shape), it must always, or for a long time to come, be the mainstay of the studies prosecuted in this Department. Making the utmost acknowledgment of the value of the book, I find it impossible not to recognise the magnitude of the difficulties which it occasions to the beginner. Those which have their origin in peculiarities of style and which seem to be attributable to the perpetual commerce of thought in which the writer lived with his precursors, Bentham and Hobbes, I find to be practically less grave than difficulties of another sort which arise from the repulsion created in the mind by the shape in which the conceptions of law, right, and duty are presented to it by Austin's analysis. Of course, so far as this distaste is caused by unpalatable

truth, any tenderness shown to it would be wasted; but even thus it is a misfortune, and, if it be in any degree provoked by avoidable causes, such as methods of statement or arrangement, no pains bestowed on the attempt to remove it to this extent would be thrown away. A very frequent effect of forcing on students of active mind and industrious habits a system or subject which for some reason or other is repugnant to them is to make them regard it as so much dogma, as something resting on the personal authority of the writer with whose name it happens to be associated. Now nothing could be more unfortunate for the philosophy of law than that the system of the 'Province of Jurisprudence Determined' should come to be regarded simply as Austin's system—as standing by the side of Blackstone's or Hegel's or any other system—as interchangeable with it or equivalent to it. For, when certain assumptions or postulates have been made, I am fully convinced that the great majority of Austin's positions follow as of course and by ordinary logical process. These assumptions do not appear to me to be stated and described by Austin with sufficient fulness —possibly because, though he is a comparatively modern writer, a part of the enquiries necessary for such statement had in his day been barely commenced—but, whatever the cause, the result is that he seems to me open to the same charge as some of

the greatest writers on Political Economy who have omitted to set forth at the outset with adequate distinctness the limited objects of their science, and who have thus attracted to it a mass of prejudice of which it may never possibly get rid. The present Lecture is an attempt to show what a certain number of these assumptions or postulates are; in that which follows it, I endeavour to show how these assumptions are affected by some conclusions which we have arrived at in former Lectures during our investigation of the early history of society. (*Supra*, Lectures I. to XI.) I think it best for my purpose to begin with calling attention to the definition of Sovereignty. Beyond all doubt this is the logical order of the discussion undertaken by Austin, and I find it difficult to understand, except on one hypothesis, why, deserting the arrangement of Hobbes, he began the discussion of this part of his subject by the analysis of Law, Right and Duty, and ended it with an account of Sovereignty which it seems to me should have come first. I imagine, however, that Blackstone influenced him, as he did Bentham, so to speak, by repulsion. Blackstone, following Roman Institutional writers, begins with a definition of law and proceeds to give a theory of the connection of the various legal conceptions. The desire to expose the fallacies of this portion of the Commentaries furnished Bentham with his principal motive for writing the Fragment

on Government, and Austin with his chief inducement to determine the Province of Jurisprudence, and the latter seems to me to have thought that the propositions he disputed would be most effectually disposed of, if they were contradicted in the order given them by their author. However that may be, the branch of my subject on which I shall first have to enter may be described as an enquiry into the probable mode in which Austin's analysis would have been affected, if he had begun in his first Lecture with the examination of the nature of Sovereignty. This examination he placed in the Sixth, which, so far as the 'Province of Jurisprudence' is concerned, is the last of his Lectures.

I believe I may assume that most of my hearers are familiar with the general character of the investigation prosecuted by Austin in the Treatise to which I have referred, but, as his definitions are not easily carried in the memory in their complete shape, I will give his descriptions of an Independent Political Society and of Sovereignty, the two conceptions being interdependent and inseparable from one another.

'If (he says) a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is Sovereign in that society, and the society, including the superior, is a society political and independent.'

He then proceeds: 'To that determinate superior the other members of the society are subject; or on that determinate superior the other members of the society are dependent. The position of its other members towards that determinate superior is a state of subjection or a state of dependence. The mutual relation which subsists between that superior and them, may be styled the relation of Sovereign and Subject, or the relation of Sovereignty and Subjection.'

I may perhaps save the necessity for part of the amplification and explanation of these definitions contained in the Chapter in which they occur, if I state Austin's doctrine of Sovereignty in another way—more popularly, though without, I think, any substantial inaccuracy. It is as follows: There is, in every independent political community—that is, in every political community not in the habit of obedience to a superior above itself—some single person or some combination of persons which has the power of compelling the other members of the community to do exactly as it pleases. This single person or group—this individual or this collegiate Sovereign (to employ Austin's phrase)—may be found in every independent political community as certainly as the centre of gravity in a mass of matter. If the community be violently or voluntarily divided into a number of separate fragments, then, as soon as

each fragment has settled down (perhaps after an interval of anarchy) into a state of equilibrium, the Sovereign will exist and with proper care will be discoverable in each of the now independent portions. The Sovereignty over the North American Colonies of Great Britain had its seat in one place before they became the United States, in another place afterwards; but in both cases there was a discoverable Sovereign somewhere. This Sovereign, this person or combination of persons, universally occurring in all independent political communities, has in all such communities one characteristic, common to all the shapes Sovereignty may take, the possession of irresistible force, not necessarily exerted but capable of being exerted. According to the terminology preferred by Austin, the Sovereign, if a single person, is or should be called a Monarch; if a small group, the name is an Oligarchy; if a group of considerable dimensions, an Aristocracy; if very large and numerous, a Democracy. Limited Monarchy, a phrase perhaps more fashionable in Austin's day than it is now, is abhorred by Austin, and the Government of Great Britain he classes with Aristocracies. That which all the forms of Sovereignty have in common is the power (the power but not necessarily the will) to put compulsion without limit on subjects or fellow-subjects. It is sometimes extremely difficult to discover the Sovereign in a given State, and, when he

or it is discovered, he may fall under no recognised designation, but, where there is an independent political society not in a condition of anarchy, the Sovereign is certainly there. The question of determining his character is, you will understand, always a question of fact. It is never a question of law or morals. He who, when a particular person or group is asserted to constitute the Sovereign in a given community, denies the proposition on the ground that such Sovereignty is an usurpation or a violation of constitutional principle, has completely missed Austin's point of view.

The definitions which I read from the Sixth Lecture furnish Austin's tests for discovering the seat of Sovereignty in independent states. I will again refer to a few of the most important of them, though very briefly.

First, the Sovereign is a *determinate* human superior. He is not necessarily a single person; in the modern Western world he is very rarely so; but he must have so much of the attributes of a single person as to be *determinate*. If he is not a single person, he must be a number of persons capable of acting in a corporate or collegiate capacity. This part of the definition is absolutely necessary, since the Sovereign must effect his exertions of power, must issue his orders, by a definite exercise of his will. The possession of physical power, which is one characteristic

of Sovereignty, has as matter of historical fact repeatedly been for a time in the hands of a number of persons *not* determinate, not so connected together as to be capable of exercising volition, but such a state of things Austin would call anarchy, though it might not have all the usually recognised symptoms of a revolutionary interval. At the same time, the limitation of Sovereignty to determinate groups, when the Sovereign is not an individual, is extremely important, since it qualifies the notion of Sovereignty by rendering it subject to the various artifices by which an exercise of volition is elicited from a corporate body. Familiar to us as is the practice of taking the opinion of a majority as the opinion of an entire group, and natural as it seems, nothing can be more artificial.

Again, the bulk of the society must obey the superior who is to be called Sovereign. Not the whole of the society, for in that case Sovereignty would be impossible, but the bulk, the large majority, must obey. After the accession of the House of Hanover to the British throne, a certain number of Jacobites and a considerable portion of the Scottish Highlanders habitually disobeyed or disregarded the commands of the British Crown and Parliament, but the bulk of the nation, including no doubt the bulk of the Jacobites themselves, gave to these commands a practical obedience. On Austin's principles, there-

fore, there is not the least ground for questioning the Sovereignty of George the First and Second and of the Parliaments elected at their summons. The Jacobite view, that the Hanoverian Kings were exclusively Sovereign in Hanover, would at once be thrown aside by Austin as not raising that question of fact which is alone disputable under his system.

Next, the Sovereign must receive an habitual obedience from the bulk of the community. In European societies professing the Roman Catholic faith, the great majority of the population receives a variety of directions on points of personal conduct, either mediately or immediately, from the See of Rome. But, compared with the number of times it submits itself to the laws of the country it inhabits, its obedience to these extrinsic commands is only occasional, and not habitual. At the same time a dim appreciation of the principles brought into light by Austin may be detected in several famous ecclesiastical controversies, which sometimes tend to become disputes whether the obedience to the See of Rome which is actually paid is or is not so frequent as to fall under the description of habitual.

A further characteristic of Sovereignty is immunity from the control of every other human superior. The limitation is obviously necessary, for otherwise the Governor-General of India in Council would be Sovereign, and indeed would exhibit a closer corres-

pondence with the more salient features of Sovereignty than almost any other potentate on the face of the globe.

Those who have observed with what slowness definite conceptions are developed in the field of history and politics will be prepared to hear that this whole view of the nature of Sovereignty is older than Austin's work. But, so far as my own knowledge extends, I do not think that any material portion of it is older than Hobbes. On the other hand, in the *Leviathan* of Hobbes and in the Chapter *De Cive* in his Treatise first published in Latin, called the *Elementa Philosophiæ*, the analysis of Government and Society and the determination of Sovereignty are so nearly completed that little could be added to them by Bentham and Austin. The originality of these later writers, and more particularly of Austin, resides in their much fuller examination of the conceptions dependent on the notion of Sovereignty—positive law, positive duty, sanction and right—in setting forth the relations of these conceptions to others superficially resembling them, in combating objections to the theory by which the entire group of notions are connected together, and in applying this theory to certain complex states of fact which had arisen since Hobbes wrote. There is, however, one great difference between Hobbes and his latest successor. The process of Hobbes was scientific, but

his object was less scientific than political. When, with a keenness of intuition and lucidity of statement which have never been rivalled, he has made out a case for the universal theoretical existence of Sovereignty, it becomes clear that he has, to say the least, a strong preference for monarchies over aristocracies and democracies, or (to use the phraseology of the school which he founded) for individual over corporate Sovereignty. Those of his intellectual followers who would have repudiated his politics have often asserted that he has been misunderstood, and no doubt some superficial readers have supposed that he was pointing at despotism when he was really referring to the essentially unqualified power of the Sovereign whatever the form of the Sovereignty But I do not think it can in candour be denied that his strong dislike of the Long Parliament and of the English Common law, as the great instrument of resistance to the Stuart Kings, has occasionally coloured the language which he uses in examining the nature of Sovereignty, Law, and Anarchy; nor is it matter for surprise that he should have been charged during his life with having devised his system with the secret intention of making his peace with the Protector, though the accusation itself is sufficiently refuted by dates. But Austin's object is strictly scientific. If he has fallen into errors, he has been led into them by his philosophy, and his language

scarcely ever betrays the colour of his political opinions.

Another considerable difference is this. Hobbes, it is well known, speculated on the origin of Government and Sovereignty. It is the one fact which some persons seem to have learned about him, and they appear to think his philosophy sufficiently condemned by it. But Austin barely enters on this enquiry; and indeed he occasionally, though perhaps inadvertently, uses language which almost seems to imply that Sovereignty and the conceptions dependent on it have an *à priori* existence. Now in this matter I myself hold that the method of Hobbes was correct. It is true that nothing can be more worthless in itself than Hobbes's conjectural account of the origin of society and government. Mankind, he asserts, were originally in a state of war. They then made a compact under which every man abandoned his powers of aggression, and the result was Sovereignty, and through Sovereignty law, peace, and order. The theory is open to every sort of objection. There is no evidence of any stage of the supposed history, and the little we know of primitive man contradicts it. The universal disorder of the race in its infancy may be true of the contests of tribe with tribe and of family with family; but it is not true of the relations of individual man with individual man, whom we, on the contrary, first discern

living together under a regimen which, if we are compelled to employ modern phraseology, we must call one of ultra-legality. And, in addition, the theory is open to precisely the same objection as the counter-hypothesis of Locke, that it antedates the modern juridical conception of Contract. But still I think that Hobbes did correctly in addressing himself to the problem, though he did little to solve it. The duty of enquiring, if not how Sovereignty arose, at all events through what stages it has passed, is in my judgment indispensable. It is only thus that we can assure ourselves in what degree the results of the Austinian analysis tally with facts.

There is, in truth, nothing more important to the student of jurisprudence than that he should carefully consider how far the observed facts of human nature and society bear out the assertions which are made or seem to be made about Sovereignty by the Analytical Jurists. To begin with, these assertions must be disentangled from one another. The first of them is that, in every independent community of men, there resides the power of acting with irresistible force on the several members of that community. This may be accepted as actual fact. If all the members of the community had equal physical strength and were unarmed, the power would be a mere result from the superiority of numbers; but, as a matter of fact, various causes, of which much the most import-

ant have been the superior physical strength and the superior armament of portions of the community have conferred on numerical minorities the power of applying irresistible pressure to the individuals who make up the community as a whole. The next assertion is that, in every independent *political* community, that is in every independent community neither in a state of nature on the one hand nor in a state of anarchy on the other, the power of using or directing the irresistible force stored-up in the society resides in some person or combination of persons who belong to the society themselves. The truth of this assertion is strongly suggested by a certain class of facts, particularly by the political facts of the Western and Modern world; but all the relevant facts, it must be recollected, have not been fully observed. The whole world, of which theorists on human nature are extremely apt to forget considerably more than half, and the entire history of the whole world, would have to be examined before we could be quite sure of the facts, and, if this were done, it may be that a great number of the facts would not so strongly suggest the conclusion, or, as I myself think, the assertion which we are considering would not so much be shown to be false as to be only verbally true, and therefore without the value which it possesses in societies of the type to which our own belongs. An assertion, however, which the great

Analytical Jurists cannot be charged with making, but which some of their disciples go very near to hazarding, that the Sovereign person or group actually wields the stored-up force of society by an uncontrolled exercise of will, is certainly never in accordance with fact. A despot with a disturbed brain is the sole conceivable example of such Sovereignty. The vast mass of influences, which we may call for shortness moral, perpetually shapes, limits, or forbids the actual direction of the forces of society by its Sovereign. This is the point which, of all others, it is practically most necessary that the student should bear in mind, because it does most to show what the Austinian view of Sovereignty really is—that it is the result of Abstraction. It is arrived at by throwing aside all the characteristics and attributes of Government and Society except one, and by connecting all forms of political superiority together through their common possession of force. The elements neglected in the process are always important, sometimes of extreme importance, for they consist of all the influences controlling human action except force directly applied or directly apprehended; but the operation of throwing them aside for purposes of classification is, I need hardly say, perfectly legitimate philosophically, and is only the application of a method in ordinary scientific use.

To put the same thing in another way, that which

we reject in the process of abstraction by which the conception of Sovereignty is reached is the entire history of each community. First of all, it is the history, the whole historical antecedents, of each society by which it has been determined where, in what person or group, the power of using the social force is to reside. The theory of Sovereignty neglects the mode in which the result has been arrived at, and thus is enabled to class together the coercive authority of the great King of Persia, of the Athenian Demos, of the later Roman Emperors, of the Russian Czar, and of the Crown and Parliament of Great Britain. Next, it is its history, the entire mass of its historical antecedents, which in each community determines how the Sovereign shall exercise or forbear from exercising his irresistible coercive power. All that constitutes this—the whole enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, of ideas of all kinds, hereditary and acquired, some produced by institutions and some by the constitution of human nature—is rejected by the Analytical Jurists. And thus it is that, so far as the restrictions contained in their definition of Sovereignty are concerned, the Queen and Parliament of our own country might direct all weakly children to be put to death or establish a system of *lettres de cachet.*

The procedure of the Analytical Jurists is closely

analogous to that followed in mathematics and political economy. It is strictly philosophical, but the practical value of all sciences founded on abstractions depends on the relative importance of the elements rejected and the elements retained in the process of abstraction. Tried by this test, mathematical science is of greatly more value than political economy, and both of them than jurisprudence as conceived by the writers I am criticising. Similarly, the misconceptions to which the Austinian analysis gives rise are very similar to those which might be conceived as embarrassing the student of mixed mathematics, and which do actually embarrass the student of political economy. Just as it is possible to forget the existence of friction in nature and the reality of other motives in society except the desire to grow rich, so the pupil of Austin may be tempted to forget that there is more in actual Sovereignty than force, and more in laws which are the commands of sovereigns than can be got out of them by merely considering them as regulated force. I am not prepared to deny that Austin occasionally, and Hobbes frequently, express themselves as if their system were not limited throughout by the limitation which is at its base All the great masters of Abstraction are, in fact, now and then betrayed into speaking or writing as if the materials thrown aside in the purely mental process were actually dross.

When, however, it has once been seen that in Austin's system the determination of Sovereignty ought to precede the determination of Law, when it is once understood that the Austinian conception of Sovereignty has been reached through mentally uniting all forms of government in a group by conceiving them as stripped of every attribute except coercive force, and when it is steadily borne in mind that the deductions from an abstract principle are never from the nature of the case completely exemplified in facts, not only, as it seems to me, do the chief difficulties felt by the student of Austin disappear, but some of the assertions made by him at which the beginner is most apt to stumble have rather the air of self-evident propositions. I dare say you are sufficiently acquainted with his treatise to make it enough for me to mention some of these propositions, without the amplifications which are necessary for their perfectly accurate statement. Jurisprudence is the science of Positive Law. Positive Laws are Commands, addressed by Sovereigns to their Subjects, imposing a Duty, or condition of obligedness, or obligation, on those Subjects, and threatening a Sanction, or Penalty, in the event of disobedience to the Command. A Right is the faculty or power conferred by the Sovereign on certain members of the community to draw down the sanction on a fellow-subject violating a Duty. Now all these conceptions of Law, Right,

Duty and Punishment depend upon the primary conception of Sovereignty, just as the lower links of a chain hanging down depend upon the highest link. But Sovereignty, for the purposes of Austin's system, has no attribute but force, and consequently the view here taken of 'law,' 'obligation' and 'right' is a view of them regarded exclusively as products of coercive force. The 'sanction' thus becomes the primary and most important member of the series of notions and gives its colour to all the others. Probably nobody ever found a difficulty in allowing that laws have the character given to them by Austin, so far as such laws have proceeded from formal Legislatures. But many persons, and among them some men of powerful mind, have struggled against the position that the great mass of legal rules which have never been prescribed by the organ of State, conventionally known as the Legislature, are commands of the Sovereign. The customary law of all countries which have not included their law in Codes, and specially the English Common law, have often had an origin claimed for them independently of the Sovereign, and theories have been propounded on the subject which Austin scouts as mysterious and unintelligible. The way in which Hobbes and he bring such bodies of rules as the Common law under their system is by insisting on a maxim which is of vital importance to it—'Whatever the Sovereign permits, he commands.'

Until customs are enforced by Courts of Justice, they are merely 'positive morality,' rules enforced by opinion, but, as soon as Courts of Justice enforce them, they become commands of the Sovereign, conveyed through the Judges who are his delegates or deputies. It is a better answer to this theory than Austin would perhaps have admitted that it is founded on a mere artifice of speech, and that it assumes Courts of Justice to act in a way and from motives of which they are quite unconscious. But, when it is clearly comprehended that, in this system, there are no associations with the Sovereign but force or power, the position that what Sovereigns permit they command becomes more easily intelligible. They command because, being by the assumption possessed of uncontrollable force, they could innovate without limit at any moment. The Common law consists of their commands because they can repeal or alter or re-state it at pleasure. The theory is perfectly defensible as a theory, but its practical value and the degree in which it approximates to truth differ greatly in different ages and countries. There have been independent political communities, and indeed there would still prove to be some of them if the world were thoroughly searched, in which the Sovereign, though possessed of irresistible power, never dreams of innovation, and believes the persons or groups, by whom laws are declared and applied, to be as much

part of the necessary constitution of society as he is himself. There have again been independent political societies in which the Sovereign has enjoyed irresistible coercive power and has carried innovation to the farthest point; but in which every single association connected with law would have violence done to it if laws were regarded as his commands. The Tyrant of a Greek city often satisfied every one of Austin's tests of Sovereignty; yet it was part of the accepted definition of a Tyrant that 'he subverted the laws.' Let it be understood that it is quite possible to make the theory fit in with such cases, but the process is a mere straining of language. It is carried on by taking words and propositions altogether out of the sphere of the ideas habitually associated with them.

Before proceeding to speak at some length in my next Lecture of these historical limitations on the practical value of Austin's theories, let me repeat my opinion that if the method of discussion which seems to me correct had been followed in his treatise, and if the examination of Sovereignty had preceded the examination of the conceptions dependent on it, a considerable number of the statements which he has made respecting these latter conceptions would have appeared not merely innocent but self-evident. Law is here regarded as regulated force, simply because force is the one element which has been allowed to enter into the primary notion upon which all the

others depend. The one doctrine of this school of jurists which is repugnant to lawyers would lose its air of paradox if an assumption were made which, in itself theoretically unobjectionable, manifestly approximates to practical truth as the course of history proceeds—the assumption that what the Sovereign might alter, but does not alter, he commands. The same arrangement would have a further advantage, as it seems to me, through the modifications it would necessitate in Austin's manner of discussing Morality, though the subject is not one which can be here treated with completeness. The position at which many readers have stumbled—I do not affect to do more than state it in popular language—is that the sanction of moral rules, as such, is the disapprobation which one's fellow-men manifest at their violation. It is sometimes construed to mean that the only motive for obeying moral rules is the fear of such disapprobation. Such a construction of Austin's language is an entire misconception of his meaning; but, if the order of discussion which I advocate had been followed, I do not think it could ever possibly occur to any mind. Let us suppose Austin to have completed his analysis of Sovereignty and of the conceptions immediately dependent on it, law, legal right, and legal obligation. He would then have to examine that great mass of rules, which men in fact obey, which have some of the characteristics of laws,

but which are not (as such) imposed by Sovereigns on subjects, and which are not (as such) enforced by the sanction supplied by Sovereign power. It would be, of course, incumbent on the philosophical jurist to examine these rules, because Sovereigns being by his hypothesis *human* superiors are, as human beings, subject to them. Austin has, in fact, examined them from this point of view in some of his most interesting passages. While insisting that Sovereignty is from the nature of the case incapable of legal limitation, he fully admits that Sovereigns are restrained from issuing some commands and determined to issue others by rules which, though they are not laws, are of extreme cogency. The Crown and Parliament of Great Britain are in his view Sovereign—a sovereign aristocracy, as he would call it—but, though this aristocracy could for purposes of argument do anything it pleased, it would be outraging all experience to assert that it does this. That great body of rules which is embodied in constitutional maxims keeps it from doing some things; that great body of rules which in ordinary usage are called moral keeps it from doing others. What common characteristics has this aggregate of rules which operate on men and on Sovereigns, like other men? Austin, as you know, names it 'positive morality,' and says that its sanction is opinion, or the disapproval of the bulk of the community following on its viola-

tion. Properly understood, this last is an obviously true proposition, for what is meant is that public disapprobation is the one sanction which all these rules have in common. The rule which keeps the Crown and Parliament from declaring murder legal, and the rule which keeps them from allowing the Queen to govern without Ministers, are connected together through the penalty attendant on a breach of them, which is the strong disapprobation of a majority of Englishmen; and it is their having a sanction of some kind which principally connects both rules with laws proper. But, though fear of opinion be a motive for obedience to both rules, it does not at all follow that the sole motive for obedience to both rules is fear of opinion. This fear would be allowed by most people to be the chief, if not the exclusive, motive for obedience to constitutional rules; but such an admission involves no necessary assertion whatever as to the complete sanction of moral rules. The truth is that Austin's system is consistent with *any* ethical theory; and, if Austin seems to assert the contrary, I think the cause is to be sought in his firm conviction of the truth of his own ethical creed, which, I need not say, was Utilitarianism in its earlier shape I do not, indeed, for a moment intend to deny that the careful study of Austin would probably modify the student's view of morals The discussion of ethics, like many

others, is conducted amid much obscurity of thought, and there is no specific more sovereign for dispelling such obscurity than the association of the cardinal terms which enter into our enquiry with absolutely consistent meanings, and the employment of the terms with these meanings as a test for the detection of equivocal phraseology. It is the one inestimable service of the Analytical School to jurisprudence and morals that it furnishes them with a rigidly consistent terminology. But there is not the faintest reason for thinking that the intelligent and appreciative student of the system must necessarily be an utilitarian.

I shall state hereafter what I believe to be the true point of contact between Austin's system and the utilitarian philosophy. Meantime, devotion to this philosophy, coupled with what I hold to be a faulty arrangement, has produced the most serious blemish in the 'Province of Jurisprudence Determined.' The 2nd, 3rd, and 4th Lectures are occupied with an attempt to identify the law of God and the law of Nature (so far as these last words can be allowed to have any meaning) with the rules required by the theory of utility. The lectures contain many just, interesting, and valuable observations; but the identification, which is their object, is quite gratuitous and valueless for any purpose. Written, I doubt not, in the honest belief that they would

help to obviate or remove prejudices, they have attracted to Austin's system a whole cloud of prejudices both from the theological and from the philosophical side. If, however, following the order I have suggested, Austin, after concluding the examination of the nature of Sovereignty and of positive law, had entered on an enquiry into the nature of the laws of God, it must have taken the form of an investigation of the question how far the characteristics of the human superiors called Sovereigns can be supposed to attach to an all-powerful and non-human ruler, and how many of the conceptions dependent on human Sovereignty must be considered as contained in his commands. I much doubt whether such an enquiry would have seemed called for in a treatise like Austin's. Taken at its best, it is a discussion belonging not to the philosophy of law but to the philosophy of legislation. The jurist, properly so called, has nothing to do with any ideal standard of law or morals.

LECTURE XIII.

SOVEREIGNTY AND EMPIRE.

THE word 'law' has come down to us in close association with two notions, the notion of *order* and the notion of *force*. The association is of considerable antiquity and is disclosed by a considerable variety of languages, and the problem has repeatedly suggested itself, which of the two notions thus linked together is entitled to precedence over the other, which of them is first in point of mental conception? The answer, before the Analytical Jurists wrote, would on the whole have been that 'law' before all things implied order. 'Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics or mechanics, as well as the laws of nature and of nations.' With these words Blackstone begins that Chapter on 'the Nature of Laws in General,' which may almost be said to have made Bentham and

Austin into Jurists by virtue of sheer repulsion. The Analytical Jurists, on the other hand, lay down unhesitatingly that the notion of force has priority over the notion of order. They say that a true law, the command of an irresistible Sovereign, enjoins a class of acts or a class of omissions either on a subject or on a number of subjects, placed by the command alike and indifferently under a legal obligation. The characteristic which thus as a matter of fact attaches to most true laws of binding a number of persons, taken indifferently, to a number of acts or omissions, determined generally, has caused the term 'law' to be extended by metaphor to all uniformities or invariable successions in the physical world, in the operations of the mind, or in the actions of mankind. Law when used in such expressions as the Law of Gravity the Law of Mental Association, or the Law of Rent is treated by the Analytical Jurists as a word wrested from its true meaning by an inaccurate figurative extension, and the sort of disrespect with which they speak of it is extremely remarkable. But I suppose that, if dignity and importance can properly be attributed to a word, there are in our day few words more dignified and more important than Law, in the sense of the invariable succession of phenomena, physical, mental, or even politico-economical. With this meaning, 'law' enters into a great deal of modern thought, and has almost become the condi-

tion of its being carried on. It is difficult at first to believe that such an expression as 'the Reign of Law,' in the sense in which the words have been popularised by the Duke of Argyll's book, would have been strongly disliked by Austin; but his language leaves little doubt on the point, and more than once reminds us that, though his principal writings are not much more than forty years old, he wrote before men's ideas were leavened to the present depth by the sciences of experiment and observation.

The statement that, in all languages, Law primarily means the command of a Sovereign, and has been applied derivatively to the orderly sequences of Nature is extremely difficult of verification: and it may be doubted whether its value, if it be true, would repay the labour of establishing its truth. The difficulty would be the greater because the known history of philosophical and juridical speculation shows us the two notions, which as a matter of fact are associated with Law, acting and reacting on one another. The order of Nature has unquestionably been regarded as determined by a Sovereign command. Many persons to whom the pedigree of much of modern thought is traceable, conceived the particles of matter which make up the universe as obeying the commands of a personal God just as literally as subjects obey the commands of a sovereign through fear of a penal sanction. On the other hand, the contemplation of

order in the external world has strongly influenced the view taken of laws proper by much of the civilised part of mankind. The Roman theory of a Law Natural has affected the whole history of law, and this famous theory is in fact compounded of two elements, one furnished by an early perception, Greek in origin, of a certain order and regularity in physical nature, and the other attributable to an early perception, Roman in origin, of a certain order and uniformity among the observances of the human race. I need not here repeat the proof of this which I attempted to give in a volume published some years ago. Nobody is at liberty to censure men or communities of men for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meaning appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other. The laws with which the student of Jurisprudence is concerned in our own day are undoubtedly either the actual commands of Sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula 'a law is a command,' by help of the formula, 'whatever the Sovereign permits, is his command.' From the point of

view of the Jurist, law is only associated with order through the necessary condition of every true law that it must prescribe a class of acts or omissions, or a number of acts and omissions determined generally; the law which prescribes a single act not being a true law, but being distinguished as an 'occasional' or 'particular' command. Law, thus defined and limited, is the subject-matter of Jurisprudence as conceived by the Analytical Jurists. At present we are only concerned with the foundations of their system; and the questions which I wish to raise in the present Lecture are these: has the force which compels obedience to a law always been of such a nature that it can reasonably be identified with the coercive force of the Sovereign, and have laws always been characterised by that generality which, it is said, alone connects them with physical laws or general formulas describing the facts of nature? These enquiries may seem to you to lead us far afield, but I trust you will perceive in the end that they have interest and importance, and that they throw light on the limits which must be assigned in certain cases, not to the theoretical soundness, but to the practical value, of the speculations we have been discussing.

Let me recur to Sovereignty, as conceived by the Analytical Jurists. The readers of Austin's treatise will remember his examination of a number of existing governments or (as he would say), forms of

political superiority and inferiority, for the purpose of determining the exact seat of sovereignty in each of them. This is among the most interesting parts of his writings, and his sagacity and originality are nowhere more signally demonstrated. The problem had become much more complex than it was when Hobbes wrote, and even than it was at the date of Bentham's earlier publications. Hobbes, a partisan in England, was a keen scientific observer of the political phenomena of the Continent, and there the political conditions open to his observation were (putting England aside) practically limited to despotism and anarchy. But, by the time Austin wrote, England, probably considered by Hobbes as the ground on which the battle of his principles was to be fought out, had long since become a 'limited monarchy,' an expression disliked by Hobbes' successors almost as much as the *thing* was by Hobbes himself, and moreover the influences of the first French Revolution were beginning to have their play. France had lately become a limited monarchy, and almost all the other Continental States had given signs of becoming so. The complex political mechanism of the United States had arisen on the other side of the Atlantic, and the even more complicated systems of the German and Swiss Confederations in Continental Europe. The analysis of political societies, for the purpose of determining the seat of sovereignty, had obviously become

much more difficult, and nothing can exceed the penetration evinced by Austin in applying this analysis to extant examples.

Nevertheless Austin fully recognises the existence of communities, or aggregates of men, in which no dissection could disclose a person or group answering to his definition of a Sovereign. In the first place, like Hobbes, he fully allows that there is a state of anarchy. Wherever such a state is found, the question of Sovereignty is being actively fought out, and the instance given by Austin is that which was never absent from Hobbes's mind, the struggle between Charles the First and his Parliament. An acute critic of Hobbes and Austin, whom I am permitted to identify with Mr. Fitzjames Stephen, insists that there is a condition of *dormant* anarchy, and the reservation is doubtless made to meet such cases as that of the United States before the War of Secession. Here the seat of sovereignty was for years the subject of violent dispute in words or on paper, and many eminent Americans acquired fame by measures which compromised for a time a notorious difference of principle, and adjourned a struggle which was nevertheless inevitable. It is in fact quite possible that there may be deliberate abstinence from fighting out a question known to be undecided, and I see no objection to calling the temporary equilibrium thus produced a state of dormant

anarchy. Austin further admits the theoretical possibility of a state of nature. He does not attach to it the importance which belongs to it in the speculations of Hobbes and others, but he allows its existence wherever a number of men, or of groups not numerous enough to be political, have not as yet been brought under any common or habitually acting authority. And, in speaking in this last sentence of groups not numerous enough to be political, I have introduced the most remarkable exception allowed by Austin to the rule that Sovereignty is universal among mankind. The passage occurs at p. 237 of the first volume of the third edition:—

'Let us suppose that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children. Now, since it is not a limb of another and larger community, the society formed by the parents and children, is clearly an independent society, and, since the rest of its members habitually obey its chief, this independent society would form a society political, in case the number of its members were not extremely minute. But, since the number of its members *is* extremely minute, it would, I believe, be esteemed a society in a state of nature; that is, a society consisting of persons not in a state of subjection. Without an appli-

cation of the terms, which would somewhat smack of the ridiculous, we could hardly style the society a society *political* and independent, the imperative father and chief a *monarch* or *sovereign*, or the obedient mother and children *subjects*.'

And then Austin quotes from Montesquieu the doctrine that 'Political power necessarily implies the union of several families.'

The effect of this passage then is that a society may be too small to admit of the application of the theory. The employment, Austin says, of his terminology would be ridiculous in such a case. I believe I shall be able to point out to you the significance of this appeal to our sense of absurdity, generally a most dangerous criterion; but at present I merely ask you to note the seriousness of the admission, since the form of authority about which it is made, the authority of the Patriarch or Paterfamilias over his family, is, at least according to one modern theory, the element or germ out of which all permanent power of man over man has been gradually developed.

There are, however, another set of cases, known to us from sources of knowledge of which it is perhaps fair to say that (though Austin is in one sense a modern writer) they were hardly open when he wrote —cases in which the application of his principles is at least difficult and doubtful. It is from no special love of Indian examples that I take one from India,

but because it happens to be the most modern precedent in point. My instance is the Indian Province called the Punjaub, the Country of the Five Rivers, in the state in which it was for about a quarter of a century before its annexation to the British Indian Empire. After passing through every conceivable phase of anarchy and dormant anarchy, it fell under the tolerably consolidated dominion of a half-military, half-religious oligarchy, known as the Sikhs. The Sikhs themselves were afterwards reduced to subjection by a single chieftain belonging to their order, Runjeet Singh. At first sight, there could be no more perfect embodiment than Runjeet Singh of Sovereignty, as conceived by Austin. He was absolutely despotic. Except occasionally on his wild frontier, he kept the most perfect order. He could have commanded anything; the smallest disobedience to his commands would have been followed by death or mutilation, and this was perfectly well known to the enormous majority of his subjects. Yet I doubt whether once in all his life he issued a command which Austin would call a law. He took, as his revenue, a prodigious share of the produce of the soil. He harried villages which recalcitrated at his exactions, and he executed great numbers of men. He levied great armies; he had all material of power, and exercised it in various ways. But he never made a law. The rules which regulated the life of his subjects were

derived from their immemorial usages, and these rules were administered by domestic tribunals, in families or village-communities—that is, in groups no larger or little larger than those to which the application of Austin's principles cannot be effected, on his own admission, without absurdity.

I do not for a moment assert that the existence of such a state of political society falsifies Austin's theory, as a theory. The great maxim by which objections to it are disposed of is, as I have so often said before, 'What the Sovereign permits, he commands.' The Sikh despot permitted heads of households and village-elders to prescribe rules, therefore these rules were his commands and true laws. Now we can see that an answer of this kind might have some force if it were made to an English lawyer who denied that the Sovereign in England had ever commanded the Common law. The Crown and Parliament command it, because the Crown and Parliament permit it; and the proof that they permit it is that they could change it. As a matter of fact, since the objection was first advanced, the Common law has been largely encroached upon by Act of Parliament, and, in our own day, it is possible that it may come to owe the whole of its binding force to statute. But my Oriental example shows that the difficulty felt by the old lawyers about the Common law may have once deserved more respect than it obtained from Hobbes

and his successors. Runjeet Singh never did or could have dreamed of changing the civil rules under which his subjects lived. Probably he was as strong a believer in the independent obligatory force of such rules as the elders themselves who applied them. An Eastern or Indian theorist in law, to whom the assertion was made that Runjeet Singh commanded these rules, would feel it stinging him exactly in that sense of absurdity to which Austin admits the appeal to be legitimate. The theory remains true in such a case, but the truth is only verbal.

You must not suppose that I have been indulging in a merely curious speculation about a few extreme cases to which the theory of Sovereignty, and of Law founded on it, will not apply without straining of language. In the first place, the Punjaub under Runjeet Singh may be taken as a type of all Oriental communities in their native state, during their rare intervals of peace and order. They have ever been despotisms, and the commands of the despots at their head, harsh and cruel as they might be, have always been implicitly obeyed. But then these commands, save in so far as they served to organise administrative machinery for the collection of revenue, have not been true laws; they have been of the class called by Austin occasional or particular commands. The truth is that the one solvent of local and domestic usage in those parts of the world of which we have any real

knowledge has been not the command of the Sovereign but the supposed command of the Deity. In India, the influence of the Brahminical treatises on mixed law and religion in sapping the old customary law of the country has always been great, and in some particulars, as I tried to explain on a former occasion, it has become greater under English rule.

It is important to observe that, for the purposes of the present enquiry, the state of political society which I have described as Indian or Oriental is a far more trustworthy clue to the former condition of the greatest part of the world than is the modern social organisation of Western Europe, as we see it before our eyes. It is a perhaps not unreasonable impression, that Sovereignty was simpler and more easily discovered in the ancient than in the modern world. The critic of Hobbes and Austin, whom I before quoted, writes, 'in every state of which we read, whether Greek, Phœnician, Italian, or Asiatic, there was a Sovereign of some sort whose authority was absolute while it lasted;' and he adds that, 'if Hobbes had tried to write an imaginary history of mankind he could not have constructed one better fitted for his purpose than the history of the foundation and establishment of the Roman Empire.' I put aside for awhile the consideration of the Roman Empire, and my reasons for doing so will become apparent afterwards; but, if we give our attention to empires

at all resembling that of the Romans in territorial extent, we shall find that, properly understood, they are very far from corresponding to the Great Leviathan imagined by Hobbes. We know something of the Assyrian and Babylonian Empires from Jewish records, and something of the Median and Persian Empires from Greek records. We learn from these that they were in the main tax-taking empires. We know that they raised enormous revenues from their subjects. We know that, for occasional wars of conquest, they levied vast armies from populations spread over immense areas. We know that they exacted the most implicit obedience to their occasional commands, or punished disobedience with the utmost cruelty. We know that the monarchs at their head were constantly dethroning petty kings and even transplanting whole communities. But amid all this, it is clear that in the main they interfered but little with the every day religious or civil life of the groups to which their subjects belonged. They did not legislate. The 'royal statute' and 'firm decree' which has been preserved to us as a sample of 'law of the Medes and Persians which altereth not' is not a law at all in the modern juridical acceptation of the term. It is what Austin would call a 'particular command,' a sudden, spasmodic, and temporary interference with ancient multifarious usage left in general undisturbed. What is even more instructive is that the famous

Athenian Empire belonged to the same class of sovereignties as the Empire of the Great King. The Athenian Assembly made true laws for residents on Attic territory, but the dominion of Athens over her subject cities and islands was clearly a tax-taking as distinguished from a legislating Empire.

The difficulty of employing Austin's terminology of these great governments is obvious enough. How can it conduce to clear thinking to speak of the Jewish law as commanded at one period by the Great King at Susa? The cardinal rule of the Analytical Jurists, 'what the Sovereign permits, he commands,' remains verbally true, but against its application in such a case there lies an appeal to a higher tribunal of which Austin allows the jurisdiction, our sense of the ridiculous.

I have now reached the point at which I can conveniently state my own opinion of the practical limitations which must be given to the system of the Analytical Jurists, in order that it may possess, I will not say theoretical truth, but practical value. The Western world, to which they confined their attention, must be conceived as having undergone two sets of changes. The States of modern Europe must be conceived as having been formed in a manner different from the great empires of antiquity (save one), and from the modern empires and kingdoms of the East, and a new order of ideas on the subject of

legislation must be conceived as having been introduced into the world through the empire of the Romans. Unless these changes had taken place, I do not believe that the system would ever have been engendered in the brain of its authors. Wherever these changes have not taken place, I do not believe the application of the system to be of value.

The most nearly universal fact which can be asserted respecting the origin of the political communities called States is that they were formed by the coalescence of groups, the original group having been in no case smaller than the patriarchal family. But in the communities which came into existence before the Roman Empire, and in those which have been slightly affected by it or not at all, this coalescence was soon arrested. There are some traces of the process everywhere. The hamlets of Attica coalesce to form the Athenian State; and the primitive Roman State is formed by the coalescence of the minute communities on the original hills. In very many Indian village-communities there are signs of smaller elements combining to make them up. But this earlier coalescence soon stops. In a later stage, political communities, wearing a superficial resemblance to the Roman Empire, and often of very great territorial extent, are constructed by one community conquering another or one chieftain, at the head of a single community or tribe, subjugat-

ing great masses of population. But, independently of the Roman Empire and its influence, the separate local life of the small societies included in these great States was not extinguished or even much enfeebled. They continued as the Indian village-community has continued, and indeed, even in their most glorious forms, they belonged essentially to that type of society. But the process of change by which the States of the modern world were formed has been materially different from this. The smaller groups have been much more completely broken up and absorbed in the larger, the larger have again been swallowed up in still wider, and these in yet wider areas. Local life and village custom have not, it is true, decayed everywhere in the same degree. There is much more of them in Russia than in Germany; more of them in Germany than in England; more of them in England than in France. But on the whole, whenever the modern State is formed, it is an assemblage of fragments considerably smaller than those which made up empires of the earlier type, and considerably liker to one another.

It would be rash to lay down confidently which is cause and which is consequence, but unquestionably this completer trituration in modern societies of the groups which once lived with an independent life has proceeded concurrently with much greater activity in legislation. Wherever the primitive con-

dition of an Aryan race reveals itself either through historical records or through the survival of its ancient institutions, the organ which in the elementary group corresponds to what we call the legislature, is everywhere discernible. It is the Village Council, sometimes owning a responsibility to the entire body of villagers, sometimes disclaiming it, sometimes overshadowed by the authority of an hereditary chief, but never altogether obscured. From this embryo have sprung all the most famous legislatures of the world, the Athenian Ekklesia, the Roman Comitia, Senate and Prince, and our own Parliament, the type and parent of all the 'collegiate sovereignties' (as Austin would call them) of the modern world, or in other words of all governments in which sovereign power is exercised by the people or shared between the people and the King. Yet, if we examine the undeveloped form of this organ of State, its legislative faculty is its least distinct and least energetic faculty. In point of fact, as I have observed elsewhere, the various shades of the power lodged with the Village Council, under the empire of the ideas proper to it, are not distinguished from one another, nor does the mind see a clear difference between making a law, declaring a law, and punishing an offender against a law. If the powers of this body must be described by modern names, that which lies most in the background is legislative

power, that which is most distinctly conceived is judicial power. The laws obeyed are regarded as having always existed, and usages really new are confounded with the really old.

The village-communities of the Aryan race do not therefore exercise true legislative power so long as they remain under primitive influences. Nor again is legislative power exercised in any intelligible sense of the words by the Sovereigns of those great States, now confined to the East, which preserve the primitive local groups most nearly intact. Legislation, as we conceive it, and the break up of local life appear to have universally gone on together. Compare the Hindoo village-community in India with the Teutonic village-community in England. The first of them, among all the institutions of the country which are not modern and of British construction, is far the most definite, far the most strongly marked, far the most highly organised. Of the latter, the ancient English community, the vestiges may certainly be tracked, but the comparative method has to be called in, and the written law and written history of many centuries searched, before their significance can be understood and the broken outline restored to completeness. It is impossible not to connect the differing vitality of the same institution with certain other phenomena of the two countries. In India, Mogul and Mahratta, following

a long series of earlier conquerors, have swept over the village-communities, but after including them in a nominal empire they have imposed no permanent obligation beyond the payment of tax or tribute. If on some rare occasions they have attempted the enforced religious conversion of subjugated populations, the temples and the rites have been at most changed in the villages, while the civil institutions have been left untouched. Here in England the struggle between the central and the local power has followed a very different course. We can see plainly that the King's law and the King's courts have been perpetually contending against the local law and the local courts, and the victory of the King's law has drawn after it the long series of Acts of Parliament founded on its principles. The whole process can only be called legislation ever increasing in energy, until the ancient multifarious law of the country has been all but completely abolished, and the old usages of the independent communities have degenerated into the customs of manors or into mere habits having no sanction from law.

There is much reason to believe that the Roman Empire was the source of the influences which have led, immediately or ultimately, to the formation of highly-centralised, actively-legislating, States. It was the first great dominion which did not merely tax, but legislated also. The process was spread

over many centuries. If I had to fix the epochs of its commencement and completion, I should place them roughly at the issue of the first Edictum Provinciale, and at the extension of the Roman citizenship to all subjects of the empire, but no doubt the foundations of the change were laid considerably before the first period, and it was continued in some ways long after the last. But, in the result, a vast and miscellaneous mass of customary law was broken up and replaced by new institutions. Seen in this light, the Roman Empire is accurately described in the Prophecy of Daniel. It devoured, brake in pieces, and stamped the residue with its feet.

The irruption of the barbarian races into the Empire diffused through the communities included in it a multitude of the primitive tribal and village ideas which they had lost. Nevertheless no society directly or indirectly influenced by the Empire has been altogether like the societies formed on that more ancient system which the immobility of the East has continued till we can actually observe it. In all commonwealths of the first kind, Sovereignty is more or less distinctly associated with legislative power, and the direction in which this power was to be exercised was in a considerable number of countries clearly chalked out by the jurisprudence which the Empire left behind it. The Roman law, from which the most ancient legal notions had been almost wholly

expelled, was palpably the great solvent of local usage everywhere. There are thus two types of organised political society. In the more ancient of these, the great bulk of men derive their rules of life from the customs of their village or city, but they occasionally, though most implicitly, obey the commands of an absolute ruler who takes taxes from them but never legislates. In the other, and the one with which we are most familiar, the Sovereign is ever more actively legislating on principles of his own, while local custom and idea are ever hastening to decay. It seems to me that in the passage from one of these political systems to another, laws have distinctly altered their character. The Force, for example, which is at the back of law, can only be called the same by a mere straining of language. Customary law—a subject on which all of Austin's remarks seem to me comparatively unfruitful—is not obeyed, as enacted law is obeyed. When it obtains over small areas and in small natural groups, the penal sanctions on which it depends are partly opinion, partly superstition, but to a far greater extent an instinct almost as blind and unconscious as that which produces some of the movements of our bodies. The actual constraint which is required to secure conformity with usage is inconceivably small. When, however, the rules which have to be obeyed once emanate from an authority external to the small

natural group and forming no part of it, they wear a character wholly unlike that of a customary rule. They lose the assistance of superstition, probably that of opinion, certainly that of spontaneous impulse. The force at the back of law comes therefore to be purely coercive force to a degree quite unknown in societies of the more primitive type. Moreover, in many communities, this force has to act at a very great distance from the bulk of the persons exposed to it, and thus the Sovereign who wields it has to deal with great classes of acts and with great classes of persons, rather than with isolated acts and with individuals. Among the consequences of this necessity are many of the characteristics sometimes supposed to be inseparable from laws, their indifferency, their inexorableness, and their generality.

And as the conception of Force associated with laws has altered, so also, I think, has the conception of Order. In the elementary social groups formed by men of the Aryan race, nothing can be more monotonous than the routine of village custom. Nevertheless, in the interior of the households which together make up the village-community, the despotism of usage is replaced by the despotism of paternal authority. Outside each threshold is immemorial custom blindly obeyed; inside is the Patria Potestas exercised by a half-civilised man over wife, child, and slave. So far then as laws are commands,

they would be associated in this stage of society less with invariable order than with inscrutable caprice; and it is easier to suppose the men of those times looking to the succession of natural phenomena, day and night, summer and winter, for types of regularity, than to the words and actions of those above them who possessed coercive power over them.

The Force then which is at the back of laws was not always the same. The Order which goes with them was not always the same. They have only gradually attracted to themselves the attributes which seem essential to them not only in the popular view but to the penetrating eye of the Analytical Jurist. Their generality and their dependence on the coercive force of a Sovereign are the result of the great territorial area of modern States, of the comminution of the sub-groups which compose them, and above all of the example and influence of the Roman Commonwealth under Assembly, Senate, and Prince, which from very early times was distinguished from all other dominations and powers in that it brake up more thoroughly that which it devoured.

It has sometimes been said of great systems of thought that nothing but an accident prevented their coming into existence centuries before their actual birth. No such assertion can be made of the system of the Analytical Jurists, which could not have been

conceived in the brain of its authors till the time was fully ripe for it. Hobbes's great doctrine is plainly the result of a generalisation which he had opportunities unrivalled in that day for effecting, since during the virility of his intellect he was as much on the Continent as in England, first as a travelling tutor and afterwards as an exile flying from civil disturbances. Independently of English affairs, which he certainly viewed as a strong partisan, the phenomena which he had to observe were governments rapidly centralising themselves, local privileges and jurisdictions in extreme decay, the old historical bodies, such as the French Parliaments, tending for the time to become furnaces of anarchy, the only hope of order discoverable in kingly power. These were among the palpable fruits of the wars which ended in the Peace of Westphalia. The old multiform local activity of feudal or quasi-feudal society was everywhere enfeebled or destroyed; if it had continued, the system of this great thinker would almost certainly have never seen the light; we have heard of a village Hampden, but a village Hobbes is inconceivable. By the time Bentham wrote, and while he was writing, the conditions which suggest the Analytical System of Jurisprudence presented themselves still more distinctly. A Sovereign who was a democracy commenced, and a Sovereign who was a despot completed, the Codification of the laws of

France. There had never before in the modern world been so striking an exemplification of the proposition that, what the Sovereign permits, he commands, because he could at any time substitute an express command for his tacit permission, nor so impressive a lesson in the far-reaching and on the whole most beneficial results which might be expected from the increased activity of Sovereigns in legislation proper.

No geniuses of an equally high order so completely divorced themselves from history as Hobbes and Bentham, or appear, to me at all events, so completely under the impression that the world had always been more or less as they saw it. Bentham could never get rid of the idea that imperfect or perverse applications of his principles had produced many things with which they had nothing whatever to do, and I know no more striking instance of an historical misconception (though at the time a very natural one) than Hobbes's comparison of privileged corporations and organised local groups to the parasites which the physiology then becoming fashionable had shown to live in the internal membranes of the human body. We now know that, if we are forced to use a physiological illustration, these groups must rather be compared to the primary cells out of which the whole human body has been built up.

But, if the Analytical Jurists failed to see a great deal which can only be explained by the help of his-

tory, they saw a great deal which even in our day is imperfectly seen by those who, so to speak, let themselves drift with history. Sovereignty and Law, regarded as facts, had only gradually assumed a shape in which they answered to the conception of them formed by Hobbes, Bentham, and Austin, but the correspondence really did exist by their time, and was tending constantly to become more perfect. They were thus able to frame a juridical terminology which had for one virtue that it was rigidly consistent with itself, and for another that, if it did not completely express facts, the qualifications of its accuracy were never serious enough to deprive it of value and tended moreover to become less and less important as time went on. No conception of law and society has ever removed such a mass of undoubted delusion. The force at the disposal of Sovereigns did in fact act largely through laws as understood by these Jurists, but it acted confusedly, hesitatingly, with many mistakes and vast omissions. They for the first time saw all that it was capable of effecting, if it was applied boldly and consistently. All that has followed is a testimony to their sagacity. I do not know a single law-reform effected since Bentham's day which cannot be traced to his influence; but a still more startling proof o the clearing of the brain produced by this system, even in an earlier stage, may be found in Hobbes. In his 'Dialogue of the Common Laws,' he

argues for a fusion of law and equity, a registration of titles to land, and a systematic penal code—three measures which we are on the eve of seeing carried out at this very moment.

The capital fact in the mechanism of modern States is the energy of legislatures. Until the fact existed, I do not, as I have said, believe that the system of Hobbes, Bentham and Austin could have been conceived; wherever it exhibits itself imperfectly, I think that the system is never properly appreciated. The comparative neglect with which German writers have treated it seems to me to be explained by the comparative recency of legislative activity in Germany. It is however impossible to observe on the connection between legislation and the analytical theory of law without having the mind carried to the famous addition which Bentham and Austin engrafted on the speculations of Hobbes. This addition consisted in coupling them with the doctrine or theory of utility—of the greatest happiness of the greatest number considered as the basis of law and morals. What, then, is the connection, essential or historical, between the utilitarian theory and the analytical theory of law? I certainly do not affect to be able, especially at the close of a lecture, to exhaust a subject of such extent and difficulty, but I have a few words to say of it. To myself the most interesting thing about the theory of Utility is

that it presupposes the theory of Equality. The greatest number is the greatest number of men taken as units; 'one shall only count for one,' said Bentham emphatically and over and over again. In fact, the most conclusive objection to the doctrine would consist in denying this equality; and I have myself heard an Indian Brahmin dispute it on the ground that, according to the clear teaching of his religion, a Brahmin was entitled to twenty times as much happiness as anybody else. Now how did this fundamental assumption of equality, which (I may observe) broadly distinguishes Bentham's theories from some systems with which it is supposed to share the reproach of having pure selfishness for its base—how did it suggest itself to Bentham's mind? He saw plainly—nobody more clearly—that men are not as a fact equal; the proposition that men are by nature equal he expressly denounced as an anarchical sophism. Whence then came the equality which is a postulate of his famous doctrine about the greatest happiness of the greatest number? I venture to think that this doctrine is nothing more than a working rule of legislation, and that in this form it was originally conceived by Bentham. Assume a numerous and tolerably homogeneous community—assume a Sovereign whose commands take a legislative shape—assume great energy, actual or potential, in this legislature—the only possible, the

only conceivable, principle which can guide legislation on a great scale is the greatest happiness of the greatest number. It is in fact a condition of legislation which, like certain characteristics of laws, has grown out of the distance from which sovereign power acts upon subjects in modern political societies, and of the necessity under which it is thereby placed of neglecting differences, even real differences, between the units of which they are composed. Bentham was in truth neither a jurist nor a moralist in the proper sense of the word. He theorises not on law but on legislation; when carefully examined, he may be seen to be a legislator even in morals. No doubt his language seems sometimes to imply that he is explaining moral phenomena; in reality he wishes to alter or re-arrange them according to a working rule gathered from his reflections on legislation. This transfer of his working rule from legislation to morality seems to me the true ground of the criticisms to which Bentham is justly open as an analyst of moral facts.

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