



JA

41

B91

1901

CORNELL  
UNIVERSITY  
LIBRARY



BOUGHT WITH THE INCOME  
OF THE SAGE ENDOWMENT  
FUND GIVEN IN 1891 BY  
HENRY WILLIAMS SAGE





## Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.





STUDIES  
IN  
HISTORY AND JURISPRUDENCE



STUDIES  
IN HISTORY AND  
JURISPRUDENCE

BY

JAMES BRYCE, D.C.L.

AUTHOR OF

"THE HOLY ROMAN EMPIRE," "THE AMERICAN COMMONWEALTH," ETC.  
FORMERLY REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY  
OF OXFORD; HONORARY FELLOW OF ORIEL AND TRINITY  
COLLEGES, CORRESPONDING MEMBER OF THE  
INSTITUTE OF FRANCE

1901

OXFORD UNIVERSITY PRESS  
AMERICAN BRANCH  
NEW YORK : 91 AND 93 FIFTH AVENUE  
LONDON : HENRY FROWDE

JA  
41  
B91  
1901  
A 155710

Copyright, 1901, by  
OXFORD UNIVERSITY PRESS  
AMERICAN BRANCH

Press of J. J. Little & Co.  
Astor Place, New York

THIS VOLUME WAS TO HAVE BEEN OFFERED TO HENRY SIDGWICK (LATE PROFESSOR OF MORAL PHILOSOPHY IN THE UNIVERSITY OF CAMBRIDGE) WITH WHOM I HAD OFTEN DISCUSSED THE TOPICS IT DEALS WITH, AND IN WHOM I HAD ADMIRER, DURING AN INTIMATE FRIENDSHIP OF NEARLY FORTY YEARS, A SUBTLE AND FERTILE MIND, A CHARACTER OF SINGULAR PURITY AND BEAUTY, AND AN UNFAILING LOVE OF TRUTH.

IT IS NOW DEDICATED TO HIS MEMORY.



## PREFACE

THIS volume contains a collection of Studies composed at different times over a long series of years. It treats of diverse topics: yet through many of them there runs a common thread, that of a comparison between the history and law of Rome and the history and law of England. I have handled this comparison from several points of view, even at the risk of some little repetition, applying it in one essay to the growth of the Roman and British Empires (Essay I), in another to the extension over the world of their respective legal systems (Essay II), in another to their Constitutions (Essay III), in others to their legislation (Essays XIV and XV), in another to an important branch of their private civil law (Essay XVI). The topic is one profitable to a student of the history of either nation; and it has not been largely treated by any writers known to me; as indeed few of our best known historians touch upon the legal aspects of history.

Two Essays (III and IV) embody an effort to examine political constitutions generally from comparatively unfamiliar points of view. Five (IX, X, XI, XII and XIII) are devoted to the discussion, in a non-technical way, of problems in jurisprudence which have both a theoretical and a historical—to some extent also a practical—side. Another sketches in outline the early history of Iceland, and the very peculiar constitution of the primitive Icelandic Republic. Three others relate to modern constitutions. One contains reflections on the history of the constitution of the United States, a second describes the systems of the two Dutch Repub-

lics in South Africa, and a third analyses and comments on the constitution recently created for the new Commonwealth of Australia.

My aim throughout the book has been to bring out the importance, sometimes overlooked, of the constitutional and legal element in history, and to present topics which, because somewhat technical, often repel people by their apparent dryness, in a way which shall make them at least intelligible—since they can hardly be made seductive—to a reader who does not add to a fair general knowledge of history any special knowledge of law. Technicalities cannot be wholly avoided; but I hope to have indulged in none that were not absolutely necessary.

The longer one lives the more is one impressed by the close connexion between the old Greco-Italian world and our own. We are still very near the ancients; and have still much to learn from their writings and their institutions. The current of study and education is at present setting so strongly towards the sciences of nature that it becomes all the more needful for those who value historical inquiry and the literature of the past to do what they can to bring that old world into a definite and tangible relation with the modern time, a relation which shall be not only stimulative but also practically helpful.

None of these Studies have previously appeared in print except two, viz. those relating to the United States and to the two Dutch Republics; and both of these have been enlarged and revised. My thanks are due to my friend Professor Herbert B. Adams of Johns Hopkins University, Baltimore, and to the proprietors of the *Forum* magazine respectively for permission to republish these two.

Some Studies were (in substance) delivered as Public Lectures at Oxford, during the years 1870-1893 (when I held the Regius Professorship of Civil Law there), pursuant to the custom which exists in that University

for a professor to deliver from time to time discourses dealing with the wider and less technical aspects of his subject. All these have, however, been rewritten for publication; and whoever has had a similar experience will know how much more time and trouble it takes to rewrite a discourse than to compose one *de novo*. Two Lectures, delivered one when I entered on and the other when I resigned the professorship, have been appended, in the belief that they may have some interest for members of the University and for those who watch with sympathy the development of legal teaching in England.

I have endeavoured to bring up to date all references to recent events, so that when such events are mentioned the book may be taken to speak as from 1900 or 1901.

As it is now nine years since I was obliged (when I entered Mr. Gladstone's Ministry in 1892) to intermit any minute study either of Roman or of English law, it is probable that the book may disclose an imperfect knowledge of facts and views given to the world during those nine years. Under these conditions I might have wished to keep the book longer before publishing it. But life is short. Some of the friends to whose comments and criticisms I had most looked forward while composing these Studies have already passed away. So it seemed better to let what I have written, under the constant pressure of other duties, go forth now.

Among the friends whom I have to thank for information or suggestions are Professors A. V. Dicey, Sir F. Pollock, Henry Goudy, and Henry Pelham of Oxford, Sir Courtenay Ilbert (Parliamentary Counsel to the Treasury), Dr. C. L. Shadwell and Mr. Edward Jenks of Oxford, Dr. F. Sigel of Warsaw, and Mr. Jón Stefánsson of Iceland.

The Index has been prepared by Mr. J. S. Cotton, to whom I am indebted for the care he has bestowed upon it.

*June 27, 1901.*



# CONTENTS

## ESSAY I

	PAGE
THE ROMAN EMPIRE AND THE BRITISH EMPIRE IN INDIA . . . . .	1-71
Conquest or Absorption by modern European nations of the less advanced races . . . . .	1
Creation by this process of a sort of unity of mankind . . . . .	2
Earlier effort of Rome to unify mankind . . . . .	3
Part borne by England in the work of ruling and civilizing new territories . . . . .	3
The Colonies of England : the British Empire in India . . . . .	4
Position of Rome and England respectively in their Empires . . . . .	7
Origin of the British Indian compared with that of the Roman Empire . . . . .	7
Conditions favouring Roman and British Indian conquest . . . . .	9
Military character of Roman and British rule . . . . .	11
What the Roman and the English conquerors have owed to natural frontiers . . . . .	12
Strength of the Roman and British armies . . . . .	15
Efforts to find a scientific frontier . . . . .	16
The Romans and English as Road and Railway Builders . . . . .	18
Success of both in maintaining internal order and security . . . . .	19
Character of Roman and British administration . . . . .	22
Despotic system : measure of self-government left to the subjects . . . . .	25
Variations in provincial administration in Roman Empire and India . . . . .	29
Revenue and taxation of the two Empires . . . . .	31
Employment of native subjects in civil and military posts . . . . .	35
Civil rights of conquerors and of subjects . . . . .	38
Respect shown to native religions and customs : contrast of religious feeling in ancient and in modern world . . . . .	42

	PAGE
Character of the conquerors as a source of their strength . . . . .	48
Contrasts between the two Empires : geographical position of the ruling race . . . . .	51
Fusion of Romans and provincials : no similar fusion of English and Indians . . . . .	52
Influence of Climate, of Colour, of Religion . . . . .	53
Languages and literature in Roman Empire and in India . . . . .	59
Influences which favoured fusion in Roman Empire absent from India . . . . .	62
Retroactive influences of the provinces on Rome and of India on Britain . . . . .	64
What the experience of the English in India has proved . . . . .	67
Causes which overthrew the Roman Empire . . . . .	68
Probable future of British power in India . . . . .	69

## ESSAY II

THE EXTENSION OF ROMAN AND ENGLISH LAW THROUGH- OUT THE WORLD . . . . .	72-123
Geographical areas now covered by Roman and by English Law . . . . .	72
Extension of Roman Law by conquest . . . . .	75
Methods of Legal Administration in the provinces . . . . .	77
Gradual assimilation of Roman and Provincial Law . . . . .	83
Establishment of one law for the Roman Empire . . . . .	84
How the Romans were able to create an imperial law . . . . .	88
Spread of Roman Law after the fall of the Western Empire . . . . .	89
Diffusion of English Law over regions settled or conquered . . . . .	94
Legal systems which the English found in India . . . . .	97
Policy followed by the English in dealing with Indian Law . . . . .	100
Codification in India . . . . .	103
Reciprocal action of English and Native Law on one another . . . . .	106
Merits and working of the Anglo-Indian Codes . . . . .	108
Roman Law in the Empire compared with English Law in India . . . . .	114
Probable future of English Law in India . . . . .	118
English and Roman Law over the world . . . . .	121

## ESSAY III

FLEXIBLE AND RIGID CONSTITUTIONS . . . . .	124-215
Observations on the Constitutions of Rome and England . . . . .	124

	PAGE
Old Classification of Constitutions as Written and Unwritten . . . . .	126
Proposed new classification . . . . .	128
Flexible Constitutions : how far distinguishable from laws in general . . . . .	132
Origin of Flexible Constitutions . . . . .	136
Strength and weakness of Flexible Constitutions . . . . .	139
Such Constitutions are rather elastic than unstable . . . . .	143
Illustrations from the Constitutions of Rome and England . . . . .	144
Dangers possibly inherent in Flexible Constitutions . . . . .	149
Flexible Constitutions suited to aristocratic governments . . . . .	152
Checks applied in Rome and in England . . . . .	155
Influence of Constitutions on the mind of a nation . . . . .	158
Illustrations from Rome and England . . . . .	161
Capacity of Constitutions for Territorial Expansion . . . . .	164
Enumeration of existing Rigid Constitutions . . . . .	167
Circumstances under which Rigid Constitutions arise . . . . .	170
Enactment and amendment of Rigid Constitutions . . . . .	174
Various modes now in use for amending them . . . . .	178
How far can Rigid Constitutions be definite or complete ? . . . . .	184
Stability of Rigid Constitutions . . . . .	187
The interpretation of Rigid Constitutions . . . . .	193
Contrast of Anglo-American doctrines with those of the European Continent . . . . .	195
American views as to Interpretation . . . . .	196
Suitability of Rigid Constitutions to Democracies . . . . .	198
Recent changes of opinion in the United States and England . . . . .	202
Probable future of the two types of Constitution . . . . .	205
Proposals for federalizing the British Constitution . . . . .	207
Possible creation of new States and Constitutions . . . . .	210

#### ESSAY IV

THE ACTION OF CENTRIPETAL AND CENTRIFUGAL FORCES ON POLITICAL CONSTITUTIONS . . . . .	216-262
The influence of aggregative and disjunctive forces on political societies . . . . .	216
Tendencies which may act either Centripetally or Centrifugally . . . . .	221
Influences of Interest and Sympathy . . . . .	222
Illustrations of the action of Racial and Religious sentiment . . . . .	224

	PAGE
In the progress of civilization, material interest and sentiment may be opposed . . . . .	228
How Constitutions may use the existing Centripetal and Centrifugal forces . . . . .	229
Illustrations from Commerce, Law and Religion . . . . .	232
Instances of the troubles caused by Racial or Religious sentiment . . . . .	238
Methods by which Constitutions may disarm or regulate the centrifugal forces : illustrations . . . . .	242
Difficulties due to differences of colour in races . . . . .	245
How the Constitutions of the United States and Switzerland have acted . . . . .	250
The Centripetal force generally, but not always, dominant in European history . . . . .	254
Effects of Conquest and of Dynastic Succession . . . . .	256
Probable future strength of the centrifugal and centripetal forces respectively . . . . .	259
Present tendency to the enlargement or consolidation of States is not necessarily permanent . . . . .	261

#### ESSAY V

PRIMITIVE ICELAND . . . . .	263-300
Discovery and Settlement of Iceland . . . . .	263
Beginnings of a Polity : the Thing . . . . .	266
Rise of the Goði or Priest-Chieftain . . . . .	268
The first political constitution of the island . . . . .	271
Judicial organization and powers of the Althing . . . . .	274
The Speaker of the Law . . . . .	275
Thingvellir and the meetings of the Althing . . . . .	276
General character of the Icelandic Republic . . . . .	280
Growth and character of the law of Iceland . . . . .	282
Complexity of the constitution and the law . . . . .	283
Sources of our knowledge of the law . . . . .	287
Illustrations of features of the early law . . . . .	288
An action for the ejection of ghosts . . . . .	291
The Judicial Duel : Story of Gunnlaug Snake's Tongue and Helga the Fair . . . . .	292
The introduction of Christianity . . . . .	294
Reflections on the early history of Iceland . . . . .	296
Fall of the Republic : subsequent fortunes of the isle . . . . .	299

## ESSAY VI

	PAGE
THE CONSTITUTION OF THE UNITED STATES AS SEEN IN THE PAST . . . . .	301-358
Value of contemporary views of an institution . . . . .	301
The <i>Federalist</i> : Alex. Hamilton and James Madison . . . . .	302
The United States in A.D. 1788 . . . . .	303
Predictions of the opponents of the New Constitution . . . . .	307
Views of its supporters: dangers feared by them . . . . .	309
Examination of the predictions of 1788 . . . . .	314
Characteristic merits and defects of American Democracy only slightly foreseen . . . . .	317
The <i>Democracy in America</i> of Alexis de Tocqueville . . . . .	319
Merits and flaws in Tocqueville's study of the United States . . . . .	320
His insufficient knowledge of England . . . . .	323
His preoccupation with France . . . . .	324
The deficiencies observable in his book scarcely affect its present value . . . . .	327
Condition of the United States in Tocqueville's day . . . . .	328
His description of the salient features of the nation . . . . .	332
Advantages which he conceives Democracy to have secured . . . . .	337
Evils he discovers in American Democracy . . . . .	338
Causes which in his view maintain Republican government . . . . .	340
His forecasts: the negroes: weakness of the Federal Union . . . . .	341
Points omitted in his description . . . . .	345
Chief events in the United States since Tocqueville's time . . . . .	347
Chief political changes of the last sixty-seven years . . . . .	348
Examination of Tocqueville's predictions . . . . .	349
Summary of Tocqueville's conclusions . . . . .	355
General course of events in America since 1788 . . . . .	357
What Tocqueville would say to-day . . . . .	357

## ESSAY VII

TWO SOUTH AFRICAN CONSTITUTIONS . . . . .	359-390
Originality of the Constitutions of the two Dutch Republics . . . . .	359
Circumstances under which they arose . . . . .	361
Constitution of the Orange Free State . . . . .	364
Constitution of the South African Republic (Transvaal) . . . . .	369
Observations on the Constitution of the South African Re- public . . . . .	374

	PAGE
Is it a Rigid or a Flexible Constitution ? . . . . .	375
Controversy as to the so-called ' testing power ' . . . . .	378
The Constitution is certainly a Flexible one . . . . .	379
Observations upon both these Constitutions . . . . .	380
Comparison of these Constitutions with that of Britain and that of the United States . . . . .	383
Relations of Executive and Legislature in these Dutch Re- publics . . . . .	385
Practical Working of the Constitution of the Orange Free State . . . . .	387
Working of the Constitution of the South African Republic	388
Postscript . . . . .	389

### ESSAY VIII

THE CONSTITUTION OF THE COMMONWEALTH OF AU- STRALIA . . . . .	391-462
Interest attaching to the new Constitution of Australia . . . . .	391
Origin and progress of the movement for federalizing Au- stralia . . . . .	394
Causes which induced Federation . . . . .	398
Influence of a Pan-Australian sentiment . . . . .	401
Physical and racial conditions favouring Federation . . . . .	403
Comparison with the conditions of the United States and of Canada . . . . .	406
Two leading types of Federal Government . . . . .	408
Distribution of powers between the Nation and the States in the Australian Constitution . . . . .	410
Position of the Australian States under the Constitution . . . . .	413
Differences from the Federal systems of the United States and of Canada . . . . .	416
The National Government : few restrictions on its powers . . . . .	419
The Legislature : Representation of the States in the Senate . . . . .	420
The House of Representatives . . . . .	422
The Executive . . . . .	424
The Judiciary . . . . .	425
Question as to Constitutional Appeals : the British Govern- ment yield to Australian sentiment . . . . .	426
Intended working of the scheme of Government : The Cabinet . . . . .	428
Provision against legislative deadlocks . . . . .	431

	PAGE
Relations of the Two Houses . . . . .	432
Financial provisions : railways and rivers . . . . .	436
Location of the national capital : admission of New States . . . . .	436
Mode of amending the Constitution . . . . .	437
Relations of the Australian Commonwealth to the British Crown . . . . .	438
General comparison of the Australian Constitution with that of the United States . . . . .	440
Comparison with that of the Dominion of Canada . . . . .	440
Further observations on the Constitution . . . . .	443
It is less strictly Federal and more National than that of the United States . . . . .	445
Its highly democratic character . . . . .	447
It contemplates a party system . . . . .	450
Difficulties which may arise from the existence of a third party . . . . .	451
What political issues are likely to arise in Australia ? . . . . .	452
Probable prominence of Economic questions . . . . .	455
Possible creation and admission of New States . . . . .	457
Will New Zealand enter the Federation ? . . . . .	458
Tendencies to consolidation may be strengthened by dis- putes with foreign powers . . . . .	460
Future relations of Australia to Britain . . . . .	460

## ESSAY IX

OBEDIENCE . . . . .	463-502
Different Theories of the Nature of Political Obedience . . . . .	463
The grounds of compliance in general : Indolence . . . . .	467
Deference and Sympathy . . . . .	469
Reason and Fear . . . . .	472
Respective strength of these springs of Obedience . . . . .	474
Will as a political force : Illustrations from the East . . . . .	475
Formation of the habit of Obedience in the individual . . . . .	478
Influences forming Obedience in early societies . . . . .	479
Slight interest of men in liberty for its own sake . . . . .	482
Is the tendency to obey likely to decrease ? . . . . .	484
Influences apparently making for subordination . . . . .	485
What may be hoped for the future of democratic govern- ment . . . . .	488
How a pessimist might view existing conditions . . . . .	489

	PAGE
Conclusion : The disposition to obey will be permanent . . . . .	496
Note on the application to the definitions of Jurisprudence of a theory of Obedience . . . . .	499

### ESSAY X

THE NATURE OF SOVEREIGNTY . . . . .	503-555
Confusions regarding the term Sovereignty . . . . .	503
Sovereignty <i>de iure</i> and <i>de facto</i> must be distinguished . . . . .	505
Sovereignty <i>de iure</i> exists in the sphere of law only, and is not concerned with obedience . . . . .	509
Sovereignty <i>de facto</i> : concrete instances . . . . .	511
Relations of Sovereignty <i>de iure</i> to that <i>de facto</i> . . . . .	515
Action and reaction of each on the other . . . . .	519
The Roman doctrine of Sovereignty : the people are the source of political power . . . . .	527
Mediaeval views of Sovereignty : Emperor and Pope . . . . .	529
New theories of the sixteenth and seventeenth centuries . . . . .	531
Bodin, Althaus, Hobbes . . . . .	533
Relation of Hobbes' system to the events of his time . . . . .	534
Bentham revives Hobbes' doctrine . . . . .	536
Views of John Austin : illustrations of their unsoundness . . . . .	537
Confusion of various questions regarding Sovereignty which are really distinct . . . . .	541
Rights in the moral sphere of Sovereignty <i>de iure</i> and Sove- reignty <i>de facto</i> . . . . .	544
Sovereignty in International Relations . . . . .	546
Sovereignty in a Federation . . . . .	549
Conclusion : Theoretical Controversies regarding Sove- reignty have mostly had their origin in current politics . . . . .	552

### ESSAY XI

THE LAW OF NATURE . . . . .	556-606
Origin of the notion of Nature as a ruling force . . . . .	556
It is different from modern conception of the Laws of Nature . . . . .	560
Nature as a force in human society . . . . .	563
The term 'Natural' as applied to Customs and Laws . . . . .	564
St. Paul and the Greek philosophers on Natural Law . . . . .	566
The Roman Law of the Nations ( <i>Ius Gentium</i> ) . . . . .	570
How the 'common law of the nations' was formed . . . . .	572
Cicero on the Law of the Nations and Law of Nature . . . . .	575

	PAGE
Growth of the idea of Natural Law among the jurists . . . . .	578
Practical identification of <i>Ius Gentium</i> and <i>Ius Naturae</i> . . . . .	581
Points of difference which remained: Slavery . . . . .	583
Extension of Roman citizenship removes the need for a <i>Ius Gentium</i> . . . . .	585
Senses in which the jurists use the term ' <u>Nature</u> ' . . . . .	586
Value and practical influence of the notion of Natural Law . . . . .	588
The Law of Nature and Law of God in the Middle Ages . . . . .	593
The Law of Nature in Modern Times . . . . .	597
Its relation to the Law of England . . . . .	599
Its influence on the rise of International Law . . . . .	602
'Natural Law' as meaning a Philosophy of Law . . . . .	604
Conclusion: Comparative quiescence of the idea in recent times . . . . .	604

## ESSAY XII

THE METHODS OF LEGAL SCIENCE . . . . .	607-637
No Philosophy of Law among the Roman Jurists; is such a Philosophy necessary or serviceable? . . . . .	607
Four Methods employed in Legal Science . . . . .	609
The Metaphysical Method: German <i>Naturrecht</i> . . . . .	609
The Analytic Method: the Benthamites . . . . .	612
Errors in John Austin's use of it . . . . .	614
The Historical Method . . . . .	617
The Comparative Method . . . . .	619
Value of these four Methods respectively . . . . .	622
How they may best be applied to Legal Study . . . . .	624
Did the Romans suffer from having no general Philosophy of Law? . . . . .	628
Merits observable in the Roman Jurists: comparison of their treatises with those of English lawyers . . . . .	630
Summary: The Roman Jurists are philosophical in spirit and in their practical handling of law . . . . .	636

## ESSAY XIII

THE RELATIONS OF LAW AND RELIGION . . . . .	638-668
Apparent Antagonism of Law and Religion . . . . .	638
Close connexion of Law and Religion in early states of Society . . . . .	640
Differences in this respect between different peoples . . . . .	643

	PAGE
The Jews in Roman times : primitive Christianity . . . . .	644
Islam ; identification of Law with Religion. . . . .	646
Illustrations from a Musulman University : the Mosque El Azhar at Cairo . . . . .	646
Description of El Azhar and its Teaching . . . . .	647
Course of Instruction : Graduation : Endowments . . . . .	651
Resemblances of El Azhar to the European Universities of the Middle Ages . . . . .	656
Causes of the arrested development of Musulman Univer- sities . . . . .	658
Nature and consequences of the Musulman identification of Law and Religion . . . . .	658
Identity of State and Church under Islam . . . . .	663
How Christianity avoided a similar identification . . . . .	665

## ESSAY XIV

W

METHODS OF LAW-MAKING IN ROME AND IN ENG- LAND . . . . .	669-744
Relations of the History of Law to the Constitutional or Political History of a Country . . . . .	669
Law-making Authorities in general . . . . .	670
Three main sources of Law : the Ruling Authority, the Magistrate, and the Legal Profession . . . . .	674
The Jurists as makers of Law in earlier times . . . . .	676
Changed position of the Jurists under the Empire . . . . .	677
Differences between the action of Roman and English Jurists	681
Roman Treatises compared with English Reports . . . . .	685
Magistrates and Judges : in what sense Law-makers . . . . .	687
The Praetor at Rome . . . . .	691
Nature and Working of the Praetor's Edict . . . . .	693
The English Chancellor . . . . .	695
Praetorian Edicts compared with English Case-Law . . . . .	698
Further observations on Praetorian methods . . . . .	703
Strong and weak points in the English Case-System . . . . .	705
Direct Legislation at Rome : its Organs . . . . .	708
The Popular Assembly : its method of legislating . . . . .	711
Merits of the Roman Statutes . . . . .	713
Legislation by the Senate : its characteristics . . . . .	716
Direct legislation by the Emperor . . . . .	720
Vast powers of the Emperor : his Privy Council . . . . .	724

	PAGE
Defects in Imperial legislation . . . . .	726
Profusion and inferiority of legislation under the later Emperors . . . . .	728
Direct legislation in England : its history . . . . .	731
Advantages of Parliament and Congress for legislation . . . . .	732
Strictures commonly passed on English and American Statutes . . . . .	734
Difficulties incident to Parliamentary legislation . . . . .	735
Reflections suggested by the history of English compared with that of Roman legislation . . . . .	739
Some branches of law better fitted than others to be handled by direct legislation . . . . .	741

## ESSAY XV

THE HISTORY OF LEGAL DEVELOPMENT AT ROME AND IN ENGLAND . . . . .	745-781
Roman and English Law have both been developed in a comparatively independent way . . . . .	745
Conspicuous epochs of legal change at Rome and in England . . . . .	747
Forces and influences chiefly active in determining legal changes . . . . .	750
Roman Legal History during the republican period . . . . .	751
Effect on the law of the establishment of the imperial auto- cracy . . . . .	755
Rise of Christianity : dissolution of the Empire in the West . . . . .	757
The decline in legal learning induced Codification . . . . .	758
Political events and External Influences are the chief sources of changes in Roman Law . . . . .	761
Causes of legal change operative in England : the periods of Henry II and Edward I . . . . .	762
The Reformation and the Civil War . . . . .	765
The Reform Act of 1832 and the Victorian Epoch . . . . .	767
The Law of Family and Inheritance at Rome and the Law of Land in England . . . . .	769
Effects of Territorial Expansion on Roman and on English Law . . . . .	771
Economic influences more generally potent in England : political in Rome . . . . .	773
Observations on France and Germany . . . . .	776

	PAGE
Private law is the branch least affected by political changes	778
Legal topics in which further advances may be looked for	779

## ESSAY XVI

MARRIAGE AND DIVORCE IN ROMAN AND IN ENGLISH	
LAW . . . . .	782-859
Diversity of the Law of Marriage in different countries . . . . .	782
Features generally characteristic of the institution in the ancient Mediterranean World . . . . .	784
Early Marriage law of the Romans . . . . .	786
Subordination of the Wife: the 'Hand Power' ( <i>Manus</i> ) . . . . .	787
Transition to a freer system . . . . .	789
Later Marriage Law: nature of the personal relation it creates . . . . .	791
Relation of the Consorts as respects Property . . . . .	794
General character of the Roman Conception of Marriage: its freedom . . . . .	798
Roman doctrine and practice regarding Divorce . . . . .	799
Influence of Christianity on Imperial Legislation . . . . .	803
Other Roman rules: prohibited degrees: <i>Concubinatus</i> . . . . .	806
Marriage under the Canon Law . . . . .	811
The English Law: jurisdiction of the Spiritual Courts . . . . .	814
Relations of the Consorts as respects Property under Eng- lish Law . . . . .	818
Amendment of English Matrimonial Law by courts of Equity and by Legislation . . . . .	821
Personal Liberty of the Wife now well established . . . . .	823
English law has wavered between different theories of the relation . . . . .	824
Divorce under the Canon Law . . . . .	825
History of Divorce in England . . . . .	827
Divorce Laws in the United States . . . . .	830
Laxity of Procedure in Divorce Cases . . . . .	832
Statistics of Divorce in the United States: causes for which it is granted . . . . .	834
Illustrations from the 'Western Reserve' counties of Ohio	836
Divorce in modern European countries . . . . .	839
Comparison of the phenomena of Divorce in the Roman and in the Modern World . . . . .	842

	PAGE
Causes now tending to weaken the permanence of the Marriage Tie . . . . .	846
Does the growth of Divorce betoken a moral decline? . . . . .	849
Influence of the Church and of the Law . . . . .	851
Does the English Divorce Law need amendment? . . . . .	852
Changes in Theory and in Sentiment regarding Marriage . . . . .	856
INAUGURAL LECTURE . . . . .	860
VALEDICTORY LECTURE . . . . .	887
INDEX . . . . .	909



## THE ROMAN EMPIRE AND THE BRITISH EMPIRE IN INDIA

IN several of the Essays contained in these volumes comparisons are instituted between Rome and England in points that touch the constitutions and the laws of these two great imperial States. This Essay is intended to compare them as conquering and ruling powers, acquiring and administering dominions outside the original dwelling-place of their peoples, and impressing upon these dominions their own type of civilization.

This comparison derives a special interest from a consideration of the position in which the world finds itself at the beginning of the twentieth century. The great civilized nations have spread themselves out so widely, and that with increasing rapidity during the last fifty years, as to have brought under their dominion or control nearly all the barbarous or semi-civilized races. Europe—that is to say the five or six races which we call the European branch of mankind—has annexed the rest of the earth, extinguishing some races, absorbing others, ruling others as subjects, and spreading over their native customs and beliefs a layer of European ideas which will sink deeper and deeper till the old native life dies out. Thus, while the face of the earth is being changed by the application of European science, so it seems likely that within a measurable time European forms of thought and ways of life will come to prevail everywhere, except possibly in China, whose

vast population may enable her to resist these solvent influences for several generations, perhaps for several centuries. In this process whose agencies are migration, conquest, and commerce, England has led the way and has achieved the most. Russia however, as well as France and Germany, have annexed vast areas inhabited by backward races. Even the United States has, by occupying the Hawaiian and the Philippine Islands, entered, somewhat to her own surprise, on the same path. Thus a new sort of unity is being created among mankind. This unity is seen in the bringing of every part of the globe into close relations, both commercial and political, with every other part. It is seen in the establishment of a few 'world languages' as vehicles of communication between many peoples, vehicles which carry to them the treasures of literature and science which the four or five leading nations have gathered. It is seen in the diffusion of a civilization which is everywhere the same in its material aspects, and is tolerably uniform even on its intellectual side, since it teaches men to think on similar lines and to apply similar methods of scientific inquiry. The process has been going on for some centuries. In our own day it advances so swiftly that we can almost foresee the time when it will be complete. It is one of the great events in the history of the world.

Yet it is not altogether a new thing. A similar process went on in the ancient world from the time of Alexander the Macedonian to that of Alaric the Visigoth. The Greek type of civilization, and to some extent the Greek population also, spread out over the regions around the eastern Mediterranean and the Euxine. Presently the conquests of Rome brought all these regions, as well as the western countries as far as Caledonia, under one government. This produced a uniform type of civilization which was Greek on the side of thought, of literature, and of art, Roman on the side of law and institutions. Then came Christianity which, in giving to all these

countries one religion and one standard of morality, created a still deeper sense of unity among them. Thus the ancient world, omitting the barbarous North and the semi-civilized heathen who dwelt beyond the Euphrates, became unified, the backward races having been raised, at least in the upper strata of their population, to the level of the more advanced. One government, one faith, and two languages, were making out of the mass of races and kingdoms that had existed before the Macedonian conquest, a single people who were at once a Nation and a World Nation.

The process was not quite complete when it was interrupted by the political dissolution of the Roman dominion, first through the immigrations of the Teutonic peoples from the north, then by the terrible strokes dealt at the already weakened empire by the Arab conquerors from the south-east. The results that had been attained were not wholly lost, for Europe clung to the Greco-Romano-Christian civilization, though in a lowered form and with a diminished sense of intellectual as well as of political unity. But that civilization was not able to extend itself further, save by slow degrees over the north and towards the north-east. Several centuries passed. Then, at first faintly from the twelfth century onwards, afterwards more swiftly from the middle of the fifteenth century, when the intellectual impulse given by the Renaissance began to be followed by the rapid march of geographical discovery along the coasts of Africa, in America, and in the further east, the process was resumed. We have watched its later stages with our own eyes. It embraces a far vaster field than did the earlier one, the field of the whole earth. As we watch it, we are naturally led to ask what light the earlier effort of Nature to gather men together under one type of civilization throws on this later one. As Rome was the principal agent in the earlier, so has England been in the later effort. England has sent her language, her commerce, her laws and institutions forth from herself over an even

wider and more populous area than that whose races were moulded into new forms by the laws and institutions of Rome. The conditions are, as we shall see, in many respects different. Yet there is in the parallel enough to make it instructive for the present, and possibly significant for the future.

The dominions of England beyond the seas are, however, not merely too locally remote from one another, but also too diverse in their character to be compared as one whole with the dominions of Rome, which were contiguous in space, and were all governed on the same system. The Britannic Empire falls into three territorial groups, the self-governing colonies, the Crown colonies, and the Indian territories ruled by or dependent on the sovereign of Britain. Of these three groups, since they cannot be treated together, being ruled on altogether different principles, it is one group only that can usefully be selected for comparison with the Roman Empire. India contains that one group. She is fitter for our purpose than either of the other two groups, because the self-governing colonies are not subject territories administered from England, but new Englands planted far away beyond the oceans, reproducing, each in its own way, the features of the constitution and government of the old country, while the Crown colonies are so scattered and so widely diverse in the character of their inhabitants that they cannot profitably be dealt with as one body. Jamaica, Cyprus, Basutoland, Singapore, and Gibraltar, have little in common except their dependence on Downing Street. Neither set of colonies is sufficiently like the dominion of Rome to make it possible for us to draw parallels between them and it. India, however, is a single subject territory, and India is compact, governed on the same principles and by the same methods over an area not indeed as wide as that of the Roman Empire but more populous than the Roman Empire was in its palmyest days. British India (including Burma) covers about 965,000 square miles, and the

protected States (including Kashmir, but not Nepal and Bhotan), about 600,000 square miles, making a total of (roughly) 1,565,000 square miles, with a population of nearly 290 millions. The area of the territories included in the Roman Empire at its greatest extent (when Dacia and the southern part of what is now Scotland belonged to it) may have been nearly 2,500,000 square miles. The population of that area is now, upon a very rough estimate, about 210 millions. What it was in ancient times we have no data even for guessing, but it must evidently have been much smaller, possibly not 100 millions, for although large regions, such as parts of Asia Minor and Tunisia, now almost deserted, were then filled by a dense industrial population, the increase in the inhabitants of France and England, for instance, has far more than compensated this decline.

The Spanish Empire in America as it stood in the sixteenth and seventeenth centuries was still vaster in area, as is the Russian Empire in Asia to-day. But the population of Spanish America was extremely small in comparison with that of the Roman Empire or that of India, and its organization much looser and less elaborate<sup>1</sup>. Both the Spanish and the Russian Empires, however, furnish illustrations which we shall have occasion presently to note.

Of all the dominions which the ancient world saw, it is only that of Rome that can well be compared with any modern civilized State. The monarchies of the Assyrian and Egyptian conquerors, like those of the Seleucid kings and of the Sassanid dynasty in Persia, stood on a far lower level of culture and administrative efficiency than did the Roman. Neither was there in the Middle Ages any far stretching dominion fit to be matched with that of Rome, for the great Omniad Khalifate and the Mogul monarchy in India were both of them mere aggregates of territories, not really unified

<sup>1</sup> The total area of the Russian Empire exceeds 8,000,000 square miles, and the population is about 130,000,000.

by any administrative system, while the authority or suzerainty of the Chinese sovereigns over Turkistan, Mongolia, and Tibet presents even fewer points of resemblance. So when we wish to examine the methods and the results of British rule in India by the light of any other dominion exercised under conditions even remotely similar, it is to the Roman Empire of the centuries between Augustus and Honorius that we must go.

When one speaks of conditions even remotely similar one must frankly admit the existence of an obvious and salient point of contrast. Rome stood in the middle of her dominions, Britain stands, by the Red Sea route, six thousand miles from the nearest part of hers. She can reach them only by water, and she conquered them by troops which had been sent around the Cape over some thirteen thousand miles of ocean. Here there is indeed an unlikeness of the utmost significance. Yet, without minimizing the importance of the contrast, we must remember that Britain can communicate more quickly with the most distant part of her territories than Rome could with hers. It takes only twenty-two days to reach any part of British India (except Kashmir and Upper Assam) from London. But it took a nimble, or as Herodotus says, a 'well girt traveller,' perhaps forty days from Rome to reach Derr on the Nile, the last fortress in Nubia where Roman masonry can be seen, or Gori, at the foot of the Caucasus, also a Roman stronghold, or Old Kilpatrick (near Dumbarton) where the rampart of Antoninus touches the Clyde; not to add that the sea part of these journeys might be much longer if the winds were adverse. News could be carried not much faster than an official could travel, whereas Britain is, by the electric telegraph, in hourly communication with every part of India: and the difference in speed between the movement of an army and that of a traveller was, of course, greater in ancient times than it is now.

Thus, for the purposes both of war and of administration, England is better placed than Rome was as respects

those outlying parts of the Roman Empire which were most exposed to attack. Dangers are more quickly known at head quarters; troops can reach the threatened frontier in a shorter time; errors in policy can be more adequately corrected, because explanations can be asked, and blundering officials can be more promptly dismissed. Nevertheless the remoteness of India has had results of the highest moment in making her relation to England far less close than was that of Rome to the provinces.

This point will be considered presently. Meantime our comparison may begin with the points in which the two Empires resemble and illustrate one another. The first of these turns upon the circumstances of their respective origins.

Empire is retained, says a famous maxim, by the same arts whereby it was won. Some Empires have been won easily. Spain acquired hers through the pertinacity and daring of a Genoese sailor. She had comparatively little fighting to do, for the only opponents she encountered, who added to valour some slight tincture of civilization, were the Mexicans.

Russia has met with practically no resistance in occupying her vast territories in Northern Asia; though she had some sharp tussles with the nomad Turkmans, and tedious conflicts both with Shamyl and with the Circassians in the Caucasus. But both Rome and England had to fight long and fight hard for what they won. The progress of Roman and British expansion illustrates the remark of Oliver Cromwell that no one goes so far as he who does not know whither he is going. Neither power set out with a purpose of conquest, such as Alexander the Great, and perhaps Cyrus, had planned and carried out before them. Just as Polybius, writing just after the destruction of Carthage in B. C. 146, already perceived that Rome was, by the strength of her government and the character of her people, destined to be the dominant power of the civilized world, so it was

prophesied immediately after the first victories of Clive that the English would come to be the masters of all India. Each nation was drawn on by finding that one conquest led almost inevitably to another because restless border tribes had to be subdued, because formidable neighbours seemed to endanger the safety of subjugated but often discontented provinces, because allies inferior in strength passed gradually into the position first of dependants and then of subjects.

The Romans however, though they did not start out with the notion of conquering even Italy, much less the Mediterranean world, came to enjoy fighting for its own sake, and were content with slight pretexts for it. For several centuries they were always more or less at war somewhere. The English went to India as traders, with no intention of fighting anybody, and were led into the acquisition of territory partly in order to recoup themselves for the expensive efforts they had made to support their first allies, partly that they might get revenue for the East India Company's shareholders, partly in order to counterwork the schemes of the French, who were at once their enemies in Europe and their rivals in the East. One may find a not too fanciful analogy to the policy of the English in the days of Clive, when they were drawn further and further into Indian conflicts by their efforts to check the enterprises of Dupleix and Lally, in the policy of the Romans when they entered Sicily to prevent Carthage from establishing her control over it. In both cases an effort which seemed self-protective led to a long series of wars and annexations.

Rome did not march so swiftly from conquest to conquest as did England. Not to speak of the two centuries during which she was making herself supreme in Italy, she began to conquer outside its limits from the opening of the First Punic War in B. C. 264, and did not acquire Egypt till B. C. 30, and South Britain till

A. D. 43-85<sup>1</sup>. Her Eastern conquests were all the easier because Alexander the Great's victories, and the wars waged by his successors, had broken up and denationalized the East, much as the Mogul conquerors afterwards paved the way for the English in India. England's first territorial gains were won at Plassy in A. D. 1757<sup>2</sup>: her latest acquisition was the occupation of Mandalay in 1885. Her work was done in a century and a quarter, while that of Rome took fully three centuries. But England had two great advantages. Her antagonists were immeasurably inferior to her in arms as well as in discipline. As early as A. D. 1672 the great Leibnitz had in a letter to Lewis XIV pointed out the weakness of the Mogul Empire; and about the same time Bernier, a French physician resident at the Court of Aurungzeb, declared that 20,000 French troops under Condé or Turenne could conquer all India<sup>3</sup>. A small European force, and even a small native force drilled and led by Europeans, was as capable of routing huge Asiatic armies as the army of Alexander had proved capable of overthrowing the immensely more numerous hosts of Darius Codomannus. Moreover, the moment when the English appeared on the scene was opportune. The splendid Empire of Akbar was crumbling to pieces. The Mahratta confederacy had attained great military power, but at the battle of Paniput, in 1761, it received from the Afghans under Ahmed Shah Durani a terrific blow which for the time arrested its conquests. Furthermore, India, as a whole, was divided into numerous principalities, the feeblest of which lay on the coasts of the Bay of Bengal. These principalities were frequently at war with one another, and glad to obtain European aid in their strife.

<sup>1</sup> Dacia was taken by Trajan in A. D. 107, and lost in A. D. 251. Mesopotamia and Arabia Petraea were annexed by Trajan about the same time, but the former was renounced so soon afterwards that its conquest can hardly be considered a part of the regular process of expansion.

<sup>2</sup> Territorial authority may be said to date from the grant of the Diwani in 1765.

<sup>3</sup> See the admirably clear and thoughtful book of Sir A. C. Lyall, *Rise of British Dominion in India*, pp. 52 and 126.

And England had a third advantage in the fact that she encountered the weakest of her antagonists first. Had she, in those early days when her forces were slender, been opposed by the valour of Marathas or Sikhs, instead of by the feeble Bengalis and Madrassis, her ambitions might have been nipped in the bud. When she found herself confronted by these formidable foes she had already gained experience and had formed a strong native army. But when the Romans strove against the Achaean League and Macedon they had to fight troops all but equal to themselves. When Carthage was their antagonist, they found in Hamilcar a commander equal, in Hannibal a commander superior to any one they could send against him. These earlier struggles so trained Rome to victory that her later conquests were made more easily. The triumphs of the century before and the century after Julius Caesar were won either over Asiatics, who had discipline but seldom valour, or over Gauls, Iberians, Germans, and Caledonians, who had valour but not discipline. Occasional reverses were due to the imprudence of a general, or to an extreme disparity of forces; for, like the English, the Romans did not hesitate to meet greatly superior numbers. The defeat of Crassus by the Parthians and the catastrophe which befel Varus in the forests of Paderborn find a parallel in the disastrous retreat of the English army from Cabul in 1843. Except on such rare occasions the supremacy of Roman arms was never seriously challenged, nor was any great calamity suffered till the barbarian irruption into Italy in the reign of Marcus Aurelius. A still graver omen for the future was the overthrow of Valerian by the Persians in A. D. 260. The Persians were inferior in the arts of civilization and probably in discipline: but the composition of the Roman armies was no longer what it had been three centuries earlier, for the peasantry of Italy, which had formed the kernel of their strength, were no longer available. As the provincial subjects became less and less warlike, men from beyond the frontier

were enrolled, latterly in bodies under their native chiefs—Germans, or Arabs, or, in still later days, Huns—just as the native army in British India, which has now become far more peaceful than it was a century ago, is recruited by Pathans and Ghurkas from the hills outside British territory as well as by the most warlike among the Indian subjects of the Crown. The danger of the practice is obvious. Rome was driven to it for want of Roman fighting-men<sup>1</sup>. England guards against its risks by having a considerable force of British troops alongside her native army.

The fact that their dominions were acquired by force of arms exerted an enduring effect upon the Roman Empire and continues to exert it upon the British in imprinting upon their rule in India a permanently military character. The Roman administration began with this character, and never lost it, at least in the frontier provinces. The governors were pro-consuls or pro-praetors, or other officials, entrusted with the exercise of an authority in its origin military rather than civil. A governor's first duty was to command the troops stationed in the province. The camps grew into towns, and that which had been a group of *canabae* or market stalls, a sort of bazaar for the service of the camp, sometimes became a municipality. One of the most efficient means of unifying the Empire was found in the bringing of soldiers born in one part of it to be quartered for many years together in another. Military distinction was open to every subject, and military distinction might lead to the imperial throne. So the English in India are primarily soldiers. True it is that they went to India three centuries ago as traders, that it was out of a trading company that their power arose, and that this trading company did not disappear till 1858. The covenanted civil service, to which Clive for instance belonged, began as a body of commercial clerks. Nothing sounds more paci-

<sup>1</sup> And indeed the employment of these barbarians to resist the outer barbarians probably prolonged the life of the Empire.

fic. But the men of the sword very soon began to eclipse the men of the quill and account book. Being in the majority, they do so still, although for forty years there have been none but petty frontier wars. Society is not in India, as it is in England, an ordinary civil society occupied with the works and arts of peace, with an extremely small military element. It is military society, military first and foremost, though with an infusion of civilian officials, and in some towns with a small infusion of lawyers and merchants, as well as a still smaller infusion of missionaries. Military questions occupy every one's thoughts and talk. A great deal of administrative or diplomatic work is done, and often extremely well done, by officers in civil employment. Many of the railways are primarily strategic lines, as were the Roman roads. The railway stations are often placed, for military reasons, at a distance from the towns they serve: and the cantonments where the Europeans, civilians as well as soldiers, reside, usually built some way off from the native cities, have themselves, as happened in the Roman Empire, grown into regular towns. The traveller from peaceful England feels himself, except perhaps in Bombay, surrounded by an atmosphere of gunpowder all the time he stays in India.

Before we pass from the military aspects of the comparison let it be noted that both Empires have been favoured in their extension and their maintenance by the frontiers which Nature had provided. The Romans, when once they had conquered Numidia, Spain, and Gaul, had the ocean and nothing but the ocean (save for the insignificant exception of barbarous Mauretania) to the west and north-west of them, an awesome and untravelled ocean, from whose unknown further shore no enemy could appear. To the south they were defended by the equally impassable barrier of a torrid and waterless desert, stretching from the Nile to the Atlantic. It was only on the north and east that there were frontiers to be defended; and these two sides

remained the quarters of danger, because no natural barrier, arresting the progress of armies or constituting a defensible frontier, could be found without pushing all the way to the Baltic in one direction or to the ranges of Southern Kurdistan, perhaps even to the deserts of Eastern Persia in the other. The north and the east ultimately destroyed Rome. The north sent in those Teutonic tribes which occupied the western provinces and at last Italy herself, and those Slavonic tribes which settled between the Danube, the Aegean, and the Adriatic, and permeated the older population of the Hellenic lands. Perhaps the Emperors would have done better for the Empire (whatever might have been the ultimate loss to mankind) if, instead of allowing themselves to be disheartened by the defeat of Varus, they had pushed their conquests all the way to the Baltic and the Vistula, and turned the peoples of North and Middle Germany into provincial Romans. The undertaking would not have been beyond the resources of the Empire in its vigorous prime, and would have been remunerative, if not in money, at any rate in the way of providing a supply of fighting-men for the army. So too the Emperors might possibly have saved much suffering to their Romanized subjects in South Britain had they followed up the expedition of Agricola and subdued the peoples of Caledonia and Ierne, who afterwards became disagreeable as Picts and Scots. The east was the home of the Parthians, of the Persians, so formidable to the Byzantine Emperors in the days of Kobad and Chosroes Anushirwan, and of the tribes which in the seventh and eighth centuries, fired by the enthusiasm of a new faith and by the prospect of booty, overthrew the Roman armies and turned Egypt, Syria, Africa, Spain, and ultimately the greater part of Asia Minor into Muhamadan kingdoms. Had Rome been menaced on the south and west as she was generally menaced on the east and sometimes on the north, her Empire could hardly have lived so long. Had she possessed a natural barrier on the

east like that which the Sahara provided on the south she might have found it easy to resist, and not so very hard even to subjugate, the fighting races of the north.

Far more fortunate has been the position of the English in India. No other of the great countries of the world is protected by such a stupendous line of natural entrenchments as India possesses in the chain of the Himalayas from Attock and Peshawur in the west to the point where, in the far east, the Tsanpo emerges from Tibet to become in Upper Assam the Brahmaputra. Not only is this mountain mass the loftiest and most impassable to be found anywhere on our earth; it is backed by a wide stretch of high and barren country, so thinly peopled as to be incapable of constituting a menace to those who live in the plains south of the Himalayas. And in point of fact the relations, commercial as well as political, of India with Tibet, and with the Chinese who are suzerains of Tibet, have been, at least in historical times, extremely scanty. On the east, India is divided from the Indo-Chinese peoples, Talains, Burmese and Shans, by a belt of almost impenetrable hill and forest country: nor have these peoples ever been formidable neighbours. It is only at its north-western angle, between Peshawur and Quetta (for south of Quetta as far as the Arabian Sea there are deserts behind the mountains and the Indus) that India is vulnerable. The rest of the country is protected by a wide ocean. Accordingly the masters of India have had only two sets of foes to fear; European maritime powers who may arrive by sea after a voyage which, until our own time, was a voyage of three or four months, and land powers who, coming from the side of Turkistan or Persia, may find their way, as did Alexander the Great and Nadir Shah, through difficult passes into the plains of the Punjab and Sindh. This singular natural isolation of India, as it facilitated the English conquest by preventing the native princes from forming alliances with or obtaining help from powers beyond the mountains or the

sea, so has it also enabled the English to maintain their hold with an army extraordinarily small in proportion to the population of the country. The total strength of the Roman military establishment in the days of Trajan, was for an area of some two and a half millions of square miles and population of possibly one hundred millions, between 280,000 and 320,000 men. Probably four-fifths of this force was stationed on the Rhine, the Danube, and the Euphrates. There were so few in most of the inner provinces that, as some one said, the nations wondered where were the troops that kept them in subjection.

The peace or 'established' strength of the British army in India is nearly 230,000 men, of whom about 156,000 are natives and 74,000 Englishmen. To these there may be added the so-called 'active reserve' of natives who have served with the colours, about 17,000 men, and about 30,000 European volunteers. Besides these there are of course the troops of the native princes, estimated at about 350,000 men, many of them, however, far from effective. But as these troops, though a source of strength while their masters are loyal, might under altered circumstances be conceivably a source of danger, they can hardly be reckoned as part of the total force disposable by the British Government. Recently, however, about 20,000 of them have been organized as special contingents of the British army, inspected and advised by British officers, and fit to take their place with regiments of the line.

It would obviously be impossible to defend such widely extended dominions by a force of only 230,000 or 250,000 men, but for the remoteness of all possibly dangerous assailants. The only formidable land neighbour is Russia, the nearest point of whose territories in the Pamirs is a good long way from the present British outposts, with a very difficult country between. The next nearest is France on the Mekong River, some 200 miles from British Burma, though a shorter distance from Native States under British influence. As for sea powers,

not only is Europe a long way off, but the navy of Britain holds the sea. It was by her command of the sea that Britain won India. Were she to cease to hold it, her position there would be insecure indeed.

In another respect also the sharp severance of India from all the surrounding countries may be deemed to have proved a benefit to the English. It has relieved them largely if not altogether from the temptation to go on perpetually extending their borders by annexing contiguous territory. When they had reached the natural boundaries of the Himalayas and the ranges of Afghanistan, they stopped. Beyond these lie rugged and unprofitable highlands, and still more unprofitable wildernesses. In two regions only was an advance possible: and in those two regions they have yielded to temptation. They have crossed the southern part of the Soliman mountains into Baluchistan in search for a more 'scientific' frontier, halting for the present on the Amram range, north-west of Quetta, where from the Khojak heights the eye, ranging over a dark-brown arid plain, descries seventy miles away the rocks that hang over Kandahar. They moved on from Arakhan and Tenasserim into Lower Burma, whence in 1885 they conquered Upper Burma and proclaimed their suzerainty over some of the Shan principalities lying further to the east. But for the presence of France in these regions, which makes them desire to keep Siam in existence as a so-called 'Buffer State,' manifest destiny might probably lead them ultimately eastward across the Menam and Mekong to Annam and Cochin China.

The Romans too sought for a scientific frontier, and hesitated often as to the line they should select, sometimes pushing boldly eastward beyond the Rhine and the Euphrates, sometimes receding to those rivers. Not till the time of Hadrian did they create a regular system of frontier defence, strengthened at many points by fortifications, among which the forts that lie along the Roman Wall from the Tyne to the Solway are perhaps

the best preserved. So the English wavered for a time between the line of the Indus and that of the Soliman range; so in the wild mountain region beyond Kashmir they have, within the last few years, alternately occupied and retired from the remote outpost of Chitral. It has been their good fortune to have been obliged to fortify a comparatively small number of points, and all of these are on the north-west frontier.

There have been those who would urge them to occupy Afghanistan and entrench themselves therein to resist a possible Russian invasion. But for the present wiser counsels have prevailed. Afghanistan is a more effective barrier in the hands of its own fierce tribes than it would be as a part of British territory. A parallel may be drawn between the part it has played of late years and that which Armenia played in the ancient world from the days of Augustus to those of Heraclius. Both countries had been the seats of short-lived Empires, Armenia in the days of Tigranes, Afghanistan in those of Ahmed Shah. Both are wild and rugged regions, the dwelling-places of warlike races. Christian Armenia was hostile from religious sentiment to the enemies whom Rome had to fear, the Persian Fire-worshippers. Musulman Afghanistan dreads the power of Christian Russia. But the loyalty or friendship of the Armenian princes was not always proof against the threats of the formidable Sassanids, and the action of the Afghans is an element of uncertainty and anxiety to the British rulers of India.

To make forces so small as those on which Rome relied and those which now defend British India adequate for the work they have to do, good means of communication are indispensable. It was one of the first tasks of the Romans to establish such means. They were the great—indeed one may say, the only—road builders of antiquity. They began this policy before they had completed the conquest of Italy; and it was one of the devices which assured their supremacy throughout the peninsula. They followed it out in Gaul, Spain, Africa, Britain,

and the East, doing their work so thoroughly that in Britain some of the roads continued to be the chief avenues of travel down till the eighteenth century. So the English have been in India a great engineering people, constructing lines of communication, first roads and afterwards railways, on a scale of expenditure unknown to earlier ages. The potentates of elder days, Hindu rajahs, and subsequently Pathans and Moguls, with other less famous Musulman dynasties, have left their memorials in temples and mosques, in palaces and tombs. The English are commemorating their sway by railway works, by tunnels and cuttings, by embankments and bridges. If India were to relapse into barbarism the bridges, being mostly of iron, would after a while perish, and the embankments would in time be swept away by torrential rains, but the rock-cuttings and the tunnels would remain, as the indestructible paving-stones of the Roman roads, and majestic bridges, like the Pont du Gard in Languedoc, remain to witness to the skill and thoroughness with which a great race did its work.

The opening up of India by railroads suggests not a few interesting questions which, however, I can do no more than indicate here. Railroad construction has imposed upon the Indian exchequer a strain all the heavier because some lines, especially those on the north-west frontier, having been undertaken from strategic rather than commercial motives, will yield no revenue at all proportionate to their cost. It has been suggested that although railroads were meant to benefit the peasantry, they may possibly have increased the risk of famine, since they induce the producer to export the grain which was formerly locally stored up in good years to meet the scarcity of bad years. The comparative quickness with which food can be carried by rail into a famine area does not—so it is argued—compensate for the loss of these domestic reserves. Railways, bringing the numerous races that inhabit India into a closer touch with one another than was possible before, are breaking down, slowly but

surely, the demarcations of caste, and are tending towards an assimilation of the jarring elements, racial and linguistic, as well as religious, which have divided India into a number of distinct, and in many cases hostile, groups. Centuries may elapse before this assimilation can become a source of political danger to the rulers of the country: yet we discern the beginnings of the process now, especially in the more educated class. The Roman roads, being highways of commerce as well as of war, contributed powerfully to draw together the peoples whom Rome ruled into one imperial nationality. But this was a process which, as we shall presently note, was for Rome an unmixed gain, since it strengthened the cohesion of an Empire whose inhabitants had every motive for loyalty to the imperial Government, if not always to the particular sovereign. The best efforts of Britain may not succeed in obtaining a similar attachment from her Indian subjects, and their union into a body animated by one national sentiment might become an element of danger against which she has never yet been required to take precautions.

The excellence of the highways of communication provided by the wise energy of the Romans and of the English has contributed not only to the easier defence of the frontiers of both Empires, but also to the maintenance of a wonderfully high standard of internal peace and order. Let any one think of the general state of the ancient world before the conquests of Rome, and let him then think of the condition not merely of India after the death of the Emperor Aurungzeb, but of the chief European countries as they stood in the seventeenth century, if he wishes to appreciate what Rome did for her subjects, or what England has done in India. In some parts of Europe private war still went on two hundred and fifty years ago. Almost everywhere robber bands made travelling dangerous and levied tribute upon the peasantry. Even in the eighteenth century, and even within our own islands, Rob Roy raided the farm-

ers of Lennox, and landlords in Connaught fought pitched battles with one another at the head of their retainers. Even a century ago the coasts of the Mediterranean were ravaged by Barbary pirates, and brigandage reigned unchecked through large districts of Italy. But in the best days of the Roman Empire piracy was unknown; the peasantry were exempt from all exactions except those of the tax-gatherer; and the great roads were practically safe for travellers. Southern and western Europe, taken as a whole, would seem to have enjoyed better order under Hadrian and the Antonines than was enjoyed again until nearly our own times. This was the more remarkable because the existence of slavery must have let loose upon society, in the form of runaway slaves, a good many dangerous characters. Moreover, there remained some mountainous regions where the tribes had been left practically to themselves under their own rude customs. These enclaves of barbarism within civilized territory, such as was Albania, in the central mountain knot of which no traces of Roman building have been found, and the Isaurian country in Asia Minor, and possibly the Cantabrian land on the borders of south-western Gaul and northern Spain, where the Basque tongue still survives, do not appear to have seriously interfered with the peace and well-being of the settled population which dwelt around them, probably because the mountaineers knew that it was only by good behaviour that they could obtain permission to enjoy the measure of independence that had been left to them. The parts of provincial Africa which lay near the desert were less orderly, because it was not easy to get behind the wild tribes who had the Sahara at their back.

The internal peace of the Roman Empire was, however, less perfect than that which has been established within the last sixty years in India. Nothing surprises the visitor from Europe so much as the absolute confidence with which he finds himself travelling unprotected across this vast country, through mountains and jungles,

among half savage tribes whose languages he does not know, and that without seeing, save at rare intervals, any sign of European administration. Nor is this confined to British India. It is almost the same in Native States. Even along the lofty forest and mountain frontier that separates the native (protected) principality of Sikkim from Nepal—the only really independent Indian State—an Englishman may journey unarmed and alone, except for a couple of native attendants, for a week or more. When he asks his friends at Darjiling, before he starts, whether he ought to take a revolver with him, they smile at the question. There is not so complete a security for native travellers, especially in Native States, for here and there bands of brigands called Dacoits infest the tracks, and rob, sometimes the wayfarer, sometimes the peasant, escaping into the recesses of the jungle when the police are after them. But dacoity, though it occasionally breaks out afresh in a few districts, has become much less frequent than formerly. The practice of Thuggi which seventy years ago still caused many murders, has been extirpated by the unceasing energy of British officers. Crimes of violence show a percentage to the population which appears small when one considers how many wild tribes remain. The native of course suffers from violence more frequently than does the European, whose prestige of race, backed by the belief that punishment will surely follow on any injury done to him, keeps him safe in the wildest districts <sup>1</sup>.

I have referred to the enclaves within the area of the Roman Empire where rude peoples were allowed to live after their own fashion so long as they did not disturb the peace of their more civilized neighbours. One finds the Indian parallel to these districts, not so much in the Native States, for these are often as advanced in the

<sup>1</sup> An incident like the murder in 1889 of the British Resident at Manipur, a small Protected State in the hill country between Assam and Burma, is so rare and excites so much surprise and horror as to be the best proof of the general tranquillity. In that case there had been some provocation, though not on the part of the Resident himself, an excellent man of conciliatory temper.

arts of life, and, in a very few instances, almost as well administered, as British territory, but rather in the hill tribes, which in parts of central, of north-western, and of southern India, have retained their savage or semi-savage customs, under their own chiefs, within the provinces directly subject to the Crown. These tribes, as did the Albanians and Basques, cleave to their primitive languages, and cleave also to their primitive forms of ghost-worship or nature-worship, though Hinduism is beginning to lay upon them its tenacious grasp. Of one another's lives and property they are not very careful. But they are awed by the European and leave him unmolested.

The success of the British, like that of the Roman administration in securing peace and good order, has been due, not merely to a sense of the interest which a government has in maintaining conditions which, because favourable to industry are favourable also to revenue, but also to the high ideal of the duties of a ruler which both nations have set before themselves. Earlier Empires, like those of the Persian Achaemenids or of the successors of Alexander, had been content to tax their subjects and raise armies from them. No monarch, except perhaps some of the Ptolemies in Egypt, seems to have set himself to establish a system from which his subjects would benefit. Rome, with larger and higher views, gave to those whom she conquered some compensations in better administration for the national independence she extinguished. Her ideals rose as she acquired experience, and as she came to feel the magnificence of her position. Even under the Republic attempts were made to check abuses of power on the part of provincial governors. The proceedings against Verres, which we know so well because Cicero's speeches against that miscreant have been preserved, are an instance of steps taken in the interests of a province whose discontent was so little likely to harm Rome that no urgent political necessity prescribed them. Those pro-

ceedings showed how defective was the machinery for controlling or punishing a provincial governor; and it is clear enough that a great deal of extortion and misfeasance went on under proconsuls and proprætors in the later days of the Republic, to the enrichment, not only of those functionaries, but of the hungry swarm who followed them, including men who, like the poet Catullus, were made for better things<sup>1</sup>. With the establishment of a monarchy administration improved. The Emperor had a more definite responsibility for securing the welfare and contentment of the provinces than had been felt by the Senate or the jurors of the Republic, swayed by party interest or passion, not to speak of more sordid motives. He was, moreover, able to give effect to his wishes more promptly and more effectively. He could try an incriminated official in the way he thought best, and mete out appropriate punishment. It may indeed be said that the best proof of the incompetence of the Republican system for the task of governing the world, and of the need for the concentration of powers in a single hand, is to be found in the scandals of provincial administration, scandals which, so far as we can judge, could not have been remedied without a complete change either in the tone and temper of the ruling class at Rome, or in the ancient constitution itself.

On this point the parallel with the English in India is interesting, dissimilar as the circumstances were. The English administration began with extortions and corruptions. Officials were often rapacious, sometimes unjust, in their dealings with the native princes. But the statesmen and the public opinion of England, even in the latter half of the eighteenth century, had higher standards than those of Rome in the days of Sulla and Cicero, while the machinery which the House of Commons provided for dealing with powerful offenders was

<sup>1</sup> Poems x and xxviii. It is some comfort to know that Catullus obtained in Bithynia only themes for some of his most charming verses (see poems iv and xvi). Gains would probably have been ill-gotten.

more effective than the Roman method of judicial proceedings before tribunals which could be, and frequently were, bribed. The first outbreak of greed and corruption in Bengal was dealt with by the strong hand of Clive in 1765. It made so great an impression at home as to give rise to a provision in a statute of 1773, making offences against the provisions of that Act or against the natives of India, punishable by the Court of King's Bench in England. By Pitt's Act of 1784, a Special Court, consisting of three judges, four peers, and six members of the House of Commons, was created for the trial in England of offences committed in India. This singular tribunal, which has been compared with the *quaestio perpetua* (*de pecuniis repetundis*) of Senators created by a Roman statute of B. C. 149 to try offences committed by Roman officials against provincials, has never acted, or even been summoned<sup>1</sup>. Soon after it came the famous trial which is more familiar to Englishmen than any other event in the earlier relations of England and India. The impeachment of Warren Hastings has often been compared with the trial of Verres, though Hastings was not only a far more capable, but a far less culpable man. Hastings, like Verres, was not punished. But the proceedings against him so fixed the attention of the nation upon the administration of India as to secure for wholesome principles of conduct a recognition which was never thereafter forgotten. The Act of 1784 in establishing a Board of Control responsible to Parliament found a means both for supervising the behaviour of officials and for taking the large political questions which arose in India out of the hands of the East India Company. This Board continued till India was placed under the direct sway of the British Crown in 1858. At the same time the appointment of Governors-General who were mostly men of wealth, and always men of rank and position at home, provided a safeguard against such misconduct as

<sup>1</sup> See Sir C. P. Ilbert's *Government of India*, p. 68. The provision creating this Court has never been repealed.

the proconsuls under the Roman Republic had been prone to commit. These latter had little to fear from prosecution when their term of office was over, and the opinion of their class was not shocked by offences which would have fatally discredited an English nobleman. The standard by which English public opinion judges the behaviour of Indian or Colonial officials has, on the whole, risen during the nineteenth century; and the idea that the government of subject-races is to be regarded as a trust to be discharged with a sense of responsibility to God and to humanity at large has become generally accepted. Probably the action of the Emperors, or at least of such men as Trajan and his three successors, raised the standard of opinion in the Roman Empire also. It was, however, not so much to that opinion as to their sovereign master that Roman officials were responsible. The general principles of policy which guided the Emperors were sound, but how far they were applied to check corruption or oppression in each particular case is a matter on which we are imperfectly informed. Under an indolent or vicious Emperor, a governor who had influence at Court, or who remitted the full tribute punctually, may probably have sinned with impunity.

The government of India by the English resembles that of her provinces by Rome in being thoroughly despotic. In both cases, whatever may have been done for the people, nothing was or is done by the people. There was under Rome, and there is in British India, no room for popular initiative, or for popular interference with the acts of the rulers, from the Viceroy down to a district official. For wrongs cognizable by the courts of law, the courts of law were and are open, doubtless more fully open in India than they were in the Roman Empire. But for errors in policy or for defects in the law itself, the people of a province had no remedy available in the Roman Empire except through petition to the sovereign. Neither is there now in India any recourse open to the inhabitants except an appeal to the

Crown or to Parliament, a Parliament in which the Indian subjects of the Crown have not been, and cannot be, represented. This was, and is, by the nature of the case, inevitable.

In comparing the governmental systems of the two Empires, it is hardly necessary to advert to such differences as the fact that India is placed under a Viceroy to whom all the other high functionaries, Governors, Lieutenant-Governors and Chief Commissioners, are subordinated, whereas, in the Roman world every provincial governor stood directly under the Emperor. Neither need one dwell upon the position in the English system of the Secretary of State for India in Council as a member of the British Cabinet. Such details do not affect the main point to which I now come.

The territories conquered by the Romans were of three kinds. Some, such as Egypt, Macedonia, and Pontus, had been, under their own princes, monarchies practically despotic. In these, of course, there could be no question of what we call popular government. Some had been tribal principalities, monarchic or oligarchic, such as those among the Iceni and Brigantes in Britain, the Arverni in Gaul, the Cantabrian mountaineers in Spain. Here, again, free institutions had not existed before, and could hardly have been created by the conqueror. The third kind consisted of small commonwealths, such as the Greek cities. These were fitted for self-government, which indeed they had enjoyed before they were subjected by Rome. Very wisely, municipal self-government was to a large extent left to them by the Emperors down till the time of Justinian. It was more complete in some cities than in others; and it was in nearly all gradually reduced by the equalizing pressure of the central authority. But they were all placed under the governor of the province; most of them paid taxes, and in most both the criminal and the higher civil jurisdiction were in the hands of imperial officials. Of the introduction of any free institutions for the empire at large, or

even for any province as a whole, there seems never to have been any question. Among the many constitutional inventions we owe to the ancient world representative government finds no place. A generation before the fall of the Republic, Rome had missed her opportunity when the creation of such a system was most needed and might have been most useful. After her struggle against the league of her Italian allies, she consented to admit them to vote in her own city tribes, instead of taking what seems to us moderns the obvious expedient of allowing them to send delegates to an assembly which should meet in Rome. So it befell that monarchy and a city republic or confederation of such republics remained the only political forms known to antiquity<sup>1</sup>.

India is ruled despotically by the English, not merely because they found her so ruled, but because they conceive that no other sort of government would suit a vast population of different races and tongues, divided by the religious animosities of Hindus and Musulmans, and with no sort of experience of self-government on a scale larger than that of the Village Council. No more in India than in the Roman Empire has there been any question of establishing free institutions either for the country as a whole, or for any particular province. But the English, like the Romans, have permitted such self-government as they found to subsist. It subsists only in the very rudimentary but very useful form of the Vil-

<sup>1</sup> The nearest approach to any kind of provincial self-government and also the nearest approach to a representative system was made in the Provincial Councils which seem from the time of Augustus down to the fifth century to have existed in all or nearly all the provinces. They consisted of delegates from the cities of each province, and met annually in some central place, where stood the temple or altar to Rome and Augustus. They were presided over by the priest of these divinities, and their primary functions were to offer sacrifices, provide for the expense of the annual games, and elect the priest for next year. However they seem to have also passed resolutions, such as votes of thanks to the outgoing priest or to a departing governor, and to have transmitted requests or inquiries to the Emperor. Sometimes they arranged for the prosecution of a governor who had misgoverned them. but on the whole their functions were more ceremonial and ornamental than practically important; nor would the emperors have suffered them to exert any real power, though they were valued as useful vehicles of provincial opinion (see Marquardt, *Römische Staatsverwaltung*, vol. i, and an article in *Eng. Hist. Review* for April, 1893, by Mr. E. G. Hardy).

lage Council just referred to, called in some parts of India the Panchayet or body of five. Of late years municipal constitutions, resembling at a distance those of English boroughs, have been given to some of the larger cities as a sort of experiment, for the sake of training the people to a sense of public duty, and of relieving the provincial government of local duties. So far the experiment has in most cities been only a moderate success. The truth is that, though a few intelligent men, educated in European ideas, complain of the despotic power of the Anglo-Indian bureaucracy, the people of India generally do not wish to govern themselves. Their traditions, their habits, their ideas, are all the other way, and dispose them to accept submissively any rule which is strong and which neither disturbs their religion and customs nor lays too heavy imposts upon them.

Here let an interesting contrast be noted. The Roman Emperors were despots at home in Italy, almost as much, and ultimately quite as much, as in the provinces. The English govern their own country on democratic, India on absolutist principles. The inconsistency is patent but inevitable. It affords an easy theme for declamation when any arbitrary act of the Indian administration gives rise to complaints, and it may fairly be used as the foundation for an argument that a people which enjoys freedom at home is specially bound to deal justly and considerately with those subjects to whom she refuses a like freedom. But every one admits in his heart that it is impossible to ignore the differences which make one group of races unfit for the institutions which have given energy and contentment to another more favourably placed.

A similar inconsistency presses on the people of the United States in the Philippine Isles. It is a more obtrusive inconsistency because it has come more abruptly, because it has come, not by the operation of a long series of historical causes, but by the sudden and little considered action of the American Republic itself, and because the American Republic has proclaimed,

far more loudly and clearly than the English have ever done, the principle contained in the Declaration of Independence that the consent of the governed is the only foundation of all just government. The Americans will doubtless in time either reconcile themselves to their illogical position or alter it. But for the present it gives to thoughtful men among them visions of mocking spirits, which the clergy are summoned to exorcize by dwelling upon the benefits which the diffusion of a pure faith and a commercial civilization will confer upon the lazy and superstitious inhabitants of these tropical isles.

Subject to the general principle that the power of the Emperor was everywhere supreme and absolute, the Romans recognized, at least in the earlier days of the Empire, considerable differences between the methods of administering various provinces. A distinction was drawn between the provinces of the Roman people, to which proconsuls or proprætors were sent, and the provinces of Caesar, placed under the more direct control of the Emperor, and administered in his name by an official called the *præses* or *legatus Caesaris*, or sometimes (as was the case in Judæa, at the time when it was ruled by Pontius Pilate) by a *procurator*, an officer primarily financial, but often entrusted with the powers of a *præses*. Egypt received special treatment because the population was turbulent and liable to outbursts of religious passion, and because it was important to keep a great cornfield of the Empire in good humour. These distinctions between one province and another tended to vanish as the administrative system of the whole Empire grew better settled and the old republican forms were forgotten. Still there were always marked differences between Britain, for instance, at the one end of the realm and Syria at the other. So there were all sorts of varieties in the treatment of cities and tribes which had never been conquered, but passed peaceably through alliance into subjection. Some of the Hellenic cities retained their republican institutions till far down in imperial times. Distinctions

not indeed similar, yet analogous, have existed between the different parts of British India. There is the old distribution of provinces into Regulation and Non-Regulation. The name 'Province,' one may observe in passing, a name unknown elsewhere in the dominions of Britain<sup>1</sup> (though a recent and vulgar usage sometimes applies it to the parts of England outside of London) except as a relic of French dominion in Canada, bears witness to an authority which began, as in Canada, through conquest. Though the names of Regulation and Non-Regulation provinces are now no longer used, a distinction remains between the districts to the higher posts in which none but members of the covenanted service are appointed, and those in which the Government have a wider range of choice, and also between those districts for which the Governor-General can make ordinances in his executive capacity, and those which are legislated for by him in Council in the ordinary way. There are also many differences in the administrative systems of the different Presidencies and other territories, besides of course all imaginable diversities in the amount of independence left to the different 'Protected States,' some of which are powerful kingdoms, like Hyderabad, while many, as for instance in Gujarat, are petty principalities of two or three dozen square miles.

The mention of these protected States suggests another point of comparison. Rome brought many principalities or kingdoms under her influence, especially in the eastern parts of the Empire; and dealt with each upon the basis of the treaty by which her supremacy had been acknowledged, allowing to some a wider, to some a narrower measure of autonomy<sup>2</sup>. Ultimately, however, all these, except a few on the frontiers, passed under her direct sway: and this frequently happened in cases where

<sup>1</sup> The use of the word to denote the two great ecclesiastical divisions of England (Province of Canterbury and Province of York) is a relic of the Roman imperial system.

<sup>2</sup> For instance, Cappadocia, Pontus, and Commagene were left as subject kingdoms till 17 A. D., 63 A. D., and 72 A. D. respectively.

the native dynasty had died out, so that the title lapsed to the Emperor. The Iceni in Britain seem to have been such a protected State, and it was the failure of male heirs that caused a lapse. So the Indian Government was wont, when the ruling family became extinct or hopelessly incompetent, to annex to the dominions of the British Crown the principality it had ruled. From the days of Lord Canning, however, a new policy has been adopted. It is now deemed better to maintain the native dynasties whenever this can be done, so a childless prince is suffered to adopt, or provide for the adoption of, some person approved by the Government; and the descendants of this person are recognized as rulers<sup>1</sup>. The incoming prince feels that he owes his power to the British Government, while adoption gives him a title in the eyes of his subjects.

The differences I have mentioned between the British provinces are important, not only as respects administration, but as respects the system of landholding. All over India, as in many other Oriental countries, it is from the land that a large part of revenue, whether one calls it rent or land tax, is derived. In some provinces the rent is paid direct to the Government by the cultivator, in others it goes to intermediary landlords, who in their turn are responsible to the State. In some provinces it has been permanently fixed, by what is called a Land-settlement<sup>2</sup>, and not always on the same principles. The subject is far too large and intricate to be pursued here. I mention it because in the Roman Empire also land revenue was the mainstay of the im-

<sup>1</sup> 'The extent to which confidence has been restored by Lord Canning's edict is shown by the curious fact that since its promulgation a childless ruler very rarely adopts in his own lifetime. An heir presumptive, who knows that he is to succeed and who may possibly grow restive if his inheritance is delayed, is for various obscure reasons not the kind of person whom an Oriental ruler cares to see idling about his palace, so that a politic chief oftens prefers leaving the duty of nominating a successor to his widows, who know his mind and have every reason for wishing him long life.'—Sir A. C. Lyall in *Law Quarterly Review* for October, 1893.

<sup>2</sup> One finds something similar to this Land-settlement in the Roman plan of determining the land revenue of a province by what was called the *lex provinciae*.

perial treasury. Where territory had been taken in war, the fact of conquest was deemed to have made the Roman people ultimate owners of the land so acquired, and the cultivators became liable to pay what we should call rent for it. In some provinces this rent was farmed out to contractors called *publicani*, who offered to the State the sum equivalent to the rent of the area contracted for, minus the expense of collection and their own profit on the undertaking, and kept for themselves whatever they could extract from the peasantry. This vicious system, resembling that of the tithe farmers in Ireland seventy years ago, was regulated by Nero and abolished by Hadrian, who placed the imperial procurator in charge of the land revenue except as regarded the forests and the mines. It exists to-day in the Ottoman Empire. Convenient for the State as it seems, it is wasteful, and naturally exposes the peasant, as is conspicuously the case in Asiatic Turkey, to oppressions perhaps even harder to check than are those of State officials. When the English came to India they found it in force there; and the present landlord class in Bengal, called *Zemindars*, are the representatives of the rent or land tax-farmers under the native princes who were, perhaps unwisely, recognized as landowners by the British a century ago. This kind of tax-farming is, however, no longer practised in India, a merit to be credited to the English when we are comparing them with the Romans of the Republic and the earlier Empire.

Where the revenue of the State comes from the land, the State is obliged to keep a watchful eye upon the condition of agriculture, since revenue must needs decline when agriculture is depressed. There was not in the Roman world, and there is not in India now, any question of agricultural depression arising from foreign competition, for no grain came into the Empire from outside, or comes now into India<sup>1</sup>. But a year of drought, or, in a long course of years, the exhaustion

<sup>1</sup> Rice, however, is sent from Lower Burma into India proper.

of the soil, tells heavily on the agriculturist, and may render him unable to pay his rent or land tax. In bad years it was the practice of the more indulgent Emperors to remit a part of the tax for the year: and one of the complaints most frequently made against harsh sovereigns, or extravagant ones like Justinian, was that they refused to concede such remissions. A similar indulgence has to be and is granted in India in like cases.

Finance was the standing difficulty of the Roman as it is of the Anglo-Indian administrator. Indeed, the Roman Empire may be said to have perished from want of revenue. Heavy taxation, and possibly the exhaustion of the soil, led to the abandonment of farms, reducing the rent derivable from the land. The terrible plague of the second century brought down population, and was followed by a famine. The eastern provinces had never furnished good fighting material: and the diminution of the agricultural population of Italy, due partly to this cause, partly to the growth of large estates worked by slave labour, made it necessary to recruit the armies from the barbarians on the frontiers. Even in the later days of the Republic the native auxiliaries were beginning to be an important part of a Roman army. Moreover, with a declining revenue, a military establishment such as was needed to defend the eastern and the northern frontiers could not always be maintained. The Romans had no means of drawing a revenue from frontier customs, because there was very little import trade; but dues were levied at ports and there was a succession tax, which usually stood at five per cent. In most provinces there were few large fortunes on which an income or property tax could have been levied, except those of persons who were already paying up to their capacities as being responsible for the land tax assessed upon their districts. The salt tax was felt so sorely by the poor that Aurelian was hailed as a benefactor when he abolished it.

India has for many years past been, if not in financial

straits, yet painfully near the limit of her taxable resources. There too the salt tax presses hard upon the peasant; and the number of fortunes from which much can be extracted by an income or property tax is, relatively to the population, very small. Comparing her total wealth with her population, India is a poor country, probably poorer than was the Roman Empire in the time of Constantine<sup>1</sup>. A heavy burden lies upon her in respect of the salaries of the upper branches of the Civil Service, which must of course be fixed at figures sufficient to attract a high order of talent from England, and a still heavier one in respect of military charges. On the other hand, she has the advantage of being able, when the guarantee of the British Government is given for the loan, to borrow money for railways and other public works, at a rate of interest very low as compared with what the best Native State would be obliged to offer, or as compared with that which the Roman Government paid.

Under the Republic, Rome levied tribute from the provinces, and spent some of it on herself, though of course the larger part went to the general expenses of the military and civil administration. Under the Emperors that which was spent in Rome became gradually less and less, as the Emperor became more and more detached from the imperial city, and after Diocletian, Italy was treated as a province. England, like Spain in the days of her American Empire and like Holland now, for a time drew from her Indian conquests a substantial revenue. An inquiry made in 1773 showed that, since 1765, about two millions a year had been paid by the

<sup>1</sup> The total revenue of British India was, in A. D. 1840, 200,000,000 of rupees, and in 1898-9, 1,014,427,000 rupees, more than a fourth of which was land revenue and less than one-fourth from railways. (The exchange value of the rupee, formerly about two shillings, is now about one shilling and four pence.) £190,000,000 has been expended upon railways in British India and the Native States. The land revenue is somewhat increasing with the bringing of additional land under cultivation. It is estimated that forty-two per cent. of the cultivable area is available for further cultivation. The funded debt of India is now £195,000,000, the unfunded about £12,000,000.

Company to the British exchequer. By 1773, however, the Company had incurred such heavy debts that the exchequer had to lend them money: and since that time Britain has drawn no tribute from India. She profits by her dominion only in respect of having an enormous market for her goods, industrial or commercial enterprises offering comparatively safe investments for her capital, and a field where her sons can make a career. Apart from any considerations of justice or of sentiment, India could not afford to make any substantial contribution to the expenses of the non-Indian dominions of the Crown. It is all she can do to pay her own way.

Those whom Rome sent out to govern the provinces were, in the days of the Republic and in the days of Augustus, Romans, that is to say Roman citizens and natives of Italy. Very soon, however, citizens born in the provinces began to be admitted to the great offices and to be selected by the Emperor for high employment. As early as the time of Nero, an Aquitanian chief, Julius Vindex, was legate of the great province of Gallia Lugdunensis. When the imperial throne itself was filled by provincials, as was often the case from Trajan onwards, it was plain that the pre-eminence of Italy was gone. If a man, otherwise eligible, was not a full Roman citizen, the Emperor forthwith made him one. By the time of the Antonines (A. D. 138-180) there was practically no distinction between a Roman and a provincial citizen; and we may safely assume that the large majority of important posts, both military and civil, were held by men of provincial extraction. Indeed merit probably won its way faster to military than to civil distinction, for in governments which are militant as well as military, promotion by merit is essential to the success of the national arms, and the soldier identifies himself with the power he serves even faster than does the civilian. So, long before full citizenship was granted to the whole Roman world (about A. D. 217), it is clear that not only

the lower posts in which provincials had always been employed, but the highest also were freely open to all subjects. A Gaul might be sent to govern Cilicia, or a Thracian Britain, because both were now Romans rather than Gauls or Thracians. The fact that Latin and Greek were practically familiar to nearly all highly educated civil servants, because Latin was the language of law as well as the tongue commonly spoken in the West, while Greek was the language of philosophy and (to a great extent) of letters, besides being the spoken tongue of most parts of the East, made a well-educated man fit for public employment everywhere, for he was not (except perhaps in Syria and Egypt and a few odd corners of the Empire) obliged to learn any fresh language. And a provincial was just as likely as an Italian to be highly educated. Thus the officials could easily get into touch with the subjects, and felt hardly more strange if they came from a distance than a Scotchman feels if he is appointed to a professorship in Quebec, or an Irishman if he becomes postmaster in a Norfolk village. Nothing contributed more powerfully to the unity and the strength of the Roman dominion than this sense of an imperial nationality.

The English in India have, as did the Romans, always employed the natives in subordinate posts. The enormous majority of persons who carry on the civil administration there at this moment are Asiatics. But the English, unlike the Romans, have continued to reserve the higher posts for men of European stock. The contrast in this respect between the Roman and the English policy is instructive, and goes down to the foundation of the differences between English and Roman rule. As we have seen, the City of Rome became the Empire, and the Empire became Rome. National independence was not regretted, for the East had been denationalized before the Italian conqueror appeared, and the tribes of the West, even those who fought best for freedom, had not reached a genuine

national life when Spain, Gaul, and Britain were brought under the yoke. In the third century A. D. a Gaul, a Spaniard, a Pannonian, a Bithynian, a Syrian called himself a Roman, and for all practical purposes was a Roman. The interests of the Empire were his interests, its glory his glory, almost as much as if he had been born in the shadow of the Capitol. There was, therefore, no reason why his loyalty should not be trusted, no reason why he should not be chosen to lead in war, or govern in peace, men of Italian birth. So, too, the qualities which make a man capable of leading in war or administering in peace were just as likely to be found in a Gaul, or a Spaniard, or a German from the Rhine frontier as in an Italian. In fact, men of Italian birth play no great part in later imperial history<sup>1</sup>.

It is far otherwise in India, though there was among the races of India no nation. The Englishman does not become an Indian, nor the Indian an Englishman. The Indian does not as a rule, though of course there have been not a few remarkable exceptions to the rule, possess the qualities which the English deem to be needed for leadership in war or for the higher posts of administration in peace<sup>2</sup>. For several reasons, reasons to be referred to later, he can seldom be expected to feel like an Englishman, and to have the same devotion to the interests of England which may be counted on in an Englishman. Accordingly the English have made in India arrangements to which there was nothing similar in the Roman Empire. They have two armies, a native and a European, the latter of which is never suffered to fall below a certain ratio to the former. The latter is composed entirely of Englishmen. In the former all military posts in line regiments above that of

<sup>1</sup> After the fifth century, Armenians, Isaurians, and Northern Macedonians figure more largely in the Eastern Empire than do natives of the provinces round the Aegæan.

<sup>2</sup> Among these exceptions may be mentioned Sir Syed Ahmed of Aligurh, and the late Mr. Justice Trimbak Telang of Bombay, both men of remarkable force and elevation of character.

subahdar (equivalent to captain) are reserved to Englishmen<sup>1</sup>. The artillery and engineer services are kept in English hands, *i.e.* there is hardly any native artillery. It is only, therefore, in the native contingents already referred to that natives are found in the higher grades. These contingents may be compared with the auxiliary barbarian troops under non-Roman commanders whom we find in the later ages of Rome, after Constantine. Such commanders proved sometimes, like the Vandal Stilicho, energetic defenders of the imperial throne, sometimes, like the Suevian Ricimer, formidable menaces to it<sup>2</sup>. But apart from these, the Romans had but one army; and it was an army in which all subjects had an equal chance of rising.

In a civil career, the native of India may go higher under the English than he can in a military one. A few natives, mostly Hindus, and indeed largely Bengali Hindus, have won their way into the civil service by passing the competitive Indian Civil Service examination in England, and some of these have risen to the posts of magistrate and district judge. A fair proportion of the seats on the benches of the Supreme Courts in Calcutta, Madras, Bombay, Allahabad, and Lahore have been allotted to native barristers of eminence, several of whom have shown themselves equal in point of knowledge and capacity, as well as in integrity, to the best judges selected from the European bar in India or sent out from the English bar. No native, however, has ever been thought of for the great places, such as those of Lieutenant-Governor or Chief Commissioner, although all British subjects are legally eligible for any post in the service of the Crown in any part of the British Dominions.

<sup>1</sup> The subahdar, however, is rather a non-commissioned than a commissioned officer, and is not a member of the British officers' mess.

<sup>2</sup> Russia places Musulmans from the Caucasian provinces in high military posts. But she has no army corresponding to the native army in India, and as she has a number of Musulman subjects in European Russia it is all the more natural for her to have a Colonel Temirhan Shipsheff at Aralykh and a General Alikhanoff at Merv,

Regarding the policy of this exclusion there has been much difference of opinion. As a rule, Anglo-Indian officials approve the course which I have described as that actually taken. But I know some who think that there are natives of ability and force of character such as to fit them for posts military as well as civil, higher than any to which a native has yet been advanced, and who sees advantages in selecting a few for such posts. They hold, however, that such natives ought to be selected for civil appointments, not by competitive examination in England but in India itself by those who rule there, and in respect of personal merits tested by service. Some opposition to such a method might be expected from members of the regular civil service, who would consider their prospects of promotion to be thereby prejudiced.

Here we touch an extremely interesting point of comparison between the Roman and the English systems. Both nations, when they started on their career of conquest, had already built up at home elaborate constitutional systems in which the rights of citizens, both public and private civil rights, had been carefully settled and determined. What was the working of these rights in the conquered territories? How far were they extended by the conquerors, Roman and English, and with what results?

Rome set out from the usual practice of the city republics of the ancient world. No man enjoyed any rights at all, public or private, except a citizen of the Republic. A stranger coming to reside in the city did not, no matter how long he lived there, nor did his son or grandson, obtain those rights unless he was specially admitted to become a citizen. From this principle Rome, as she grew, presently found herself obliged to deviate. She admitted one set of neighbours after another, sometimes as allies, sometimes in later days, as conquered and incorporated communities, to a citizenship which was sometimes incomplete, including only private civil rights, sometimes

complete, including the right of voting in the assembly and the right of being chosen to a public office. Before the dictatorship of Julius Caesar practically all Italians, except the people of Cisalpine Gaul, which remained a province till B. C. 43, had been admitted to civic rights. Citizenship, complete or partial (*i. e.* including or not including public rights) had also begun to be conferred on a certain number of cities or individuals outside Italy. Tarsus in Cilicia, of which St. Paul was a native, enjoyed it, so he was born a Roman citizen. This process of enlarging citizenship went on with accelerated speed, in and after the days of the Flavian Emperors. Under Hadrian, the whole of Spain seems to have enjoyed civic rights. Long before this date the ancient right of voting in the Roman popular Assembly had become useless, but the other advantages attached to the status of citizen were worth having, for they secured valuable immunities. Finally, early in the third century A. D., every Roman subject was by imperial edict made a citizen for all purposes whatsoever. Universal eligibility to office had, as we have seen, gone ahead of this extension, for all offices lay in the gift of the Emperor or his ministers; and when it was desired to appoint any one who might not be a full citizen, citizenship was conferred along with the office. Thus Rome at last extended to all her subjects the rights that had originally been confined to her own small and exclusive community.

In England the principle that all private civil rights belong to every subject alike was very soon established, and may be said to have never been doubted since the final extinction of serfdom in the beginning of the seventeenth century. Public civil rights, however, did not necessarily go with private. Everybody, it is true, was (subject to certain religious restrictions now almost entirely repealed) eligible to any office to which he might be appointed by the Crown, and was also (subject to certain property qualifications which lasted till our own time) capable of being chosen to fill any elective

post or function, such as that of member of the House of Commons. But the right of voting did not necessarily go along with other rights, whether public or private, and it is only within the last forty years that it has been extended by a series of statutes to the bulk of the adult male population. Now when Englishmen began to settle abroad, they carried with them all their private rights as citizens, and also their eligibility to office; but their other public rights, *i. e.* those of voting they could not carry, because these were attached to local areas in England. When territories outside England were conquered, their free inhabitants, in becoming subjects of the Crown, became therewith entitled to all such rights of British subjects as were not connected with residence in Britain: that is to say, they had all the private civil rights of Englishmen, and also complete eligibility to public office (unless of course some special disqualification was imposed). The rights of an English settler in Massachusetts in the seventeenth and eighteenth centuries were those of an Englishman, except that he could not vote at an English parliamentary election because he was not resident in any English constituency; and the same rule became applicable to a French Canadian after the cession of Canada to the British Crown.

So when India was conquered, the same principles were again applied. Every free Indian subject of the Crown soon became entitled to the private civil rights of an Englishman, except so far as his own personal law, Hindu or Musulman or Parsi or Jain, might modify those rights; and if there was any such modification, that was recognized for his benefit rather than to his prejudice. Thus the process which the Romans took centuries to complete was effected almost at once in India by the application of long established doctrines of English law. Accordingly we have in India the singular result that although there are in that country no free institutions (other than those municipal ones previously

referred to) nor any representative government, every Indian subject is eligible to any office in the gift of the Crown anywhere, and to any post or function to which any body of electors may select him. He may be chosen by a British constituency a member of the British House of Commons, or by a Canadian constituency a member of the House of Commons of Canada. Two natives of India (both Parsis) have already been chosen, both by London constituencies, to sit in the British House. So a native Hindu or Musulman might be appointed by the Crown to be Lord Chief Justice of England or Governor-General of Canada or Australia. He might be created a peer. He might become Prime Minister. And as far as legal eligibility goes, he might be named Governor-General of India, though as a matter of practice, no Indian has ever been placed in any high Indian office. Neither birth, nor colour, nor religion constitutes any legal disqualification. This was expressly declared as regards India by the India Act of 1833, and has been more than once formally declared since, but it did not require any statute to establish what flowed from the principles of our law. And it need hardly be added that the same principles apply to the Chinese subjects of the Crown in Hong Kong or Singapore and to the negro subjects of the Crown in Jamaica or Zululand. In this respect at least England has worthily repeated the liberal policy of Rome. She has done it, however, not by way of special grants, but by the automatic and probably uncontrived operation of the general principles of her law.

As I have referred to the influence of English constitutional ideas, it is worth noting that it is these ideas which have led the English of late years not only to create in India city municipalities, things entirely foreign to the native Indian mind, but also to provide by statute (in 1892) for the admission of a certain number of nominated non-official members to the legislative councils of the Governors in Bengal, Bombay, Madras, the North-West Provinces and Oudh, and the Punjab. These

members are nominated, not elected, because it has been found difficult to devise a satisfactory scheme of election. But the provision made for the presence of native non-officials testifies to the wish of the English Government to secure not only a certain amount of outside opinion, but also a certain number of native councillors through whom native sentiment may be represented, and may obtain its due influence on the conduct of affairs.

The extension of the civil rights of Englishmen to the subjects of the Crown in India would have been anything but a boon had it meant the suppression and extinction of native law and custom. This of course it has not meant. Neither had the extension of Roman conquest such an effect in the Roman Empire; and even the grant of citizenship to all subjects did not quite efface local law and usage. As the position and influence of English law in India, viewed in comparison with the relation of the older Roman law to the Roman provinces, is the subject of another of these Essays, I will here pass over the legal side of the matter, and speak only of the parallel to be noted between the political action of the conquering nations in both cases.

Both have shown a prudent wish to avoid disturbing, any further than the fixed principles of their policy made needful, the usages and beliefs of their subjects. The Romans took over the social and political system which they found in each of the very dissimilar regions they conquered, placed their own officials above it, modified it so far as they found expedient for purposes of revenue and civil administration generally, but otherwise let it stand as they found it and left the people alone. In course of time the law and administration of the conquerors, and the intellectual influences which literature called into play, did bring about a considerable measure of assimilation between Romans and provincials, especially in the life and ideas of the upper classes. But this was the result of natural causes. The Romans did

not consciously and deliberately work for uniformity. Especially in the sphere of religion they abstained from all interference. They had indeed no temptation to interfere either with religious belief or with religious practice, for their own system was not a universal but a strictly national religion, and the educated classes had begun to sit rather loose to that religion before the process of foreign conquest had gone far. According to the theory of the ancient world, every nation had its own deities, and all these deities were equally to be respected in their own country. Whether they were at bottom the same deities under different names, or were quite independent divine powers, did not matter. Each nation and each member of a nation was expected to worship the national gods: but so long as an individual man did not openly reject or insult those gods, he might if he pleased worship a god belonging to some other country, provided that the worship was not conducted with shocking or demoralizing rites, such as led to the prohibition of the Bacchanalian cult at Rome<sup>1</sup>. The Egyptian Serapis was a fashionable deity among Roman women as early as the time of Catullus. We are told that Claudius abolished Druidism on account of its savage cruelty, but this may mean no more than that he forbade the Druidic practice of human sacrifices<sup>2</sup>. There was therefore, speaking broadly, no religious persecution and little religious intolerance in the ancient world, for the Christians, it need hardly be said, were persecuted not because of their religion but because they were a secret society, about which, since it was new, and secret, and Oriental, and rejected all the gods of all the nations alike, the wildest calumnies were readily believed. The first religious persecutors were the Persian Fire-worshipping kings of the Sassanid dynasty, who occasionally worried their Christian subjects.

<sup>1</sup> Constantine prohibited the immoral excesses practised by the Syrians of Heliopolis.

<sup>2</sup> 'Druidarum religionem apud Gallos dirae immanitatis et tantum civibus sub Augusto interdictam penitus abolevit.'—Sueton, *Vita Claud.* c. 25.

Neither, broadly speaking, was religious propagandism known to the ancient world. There were no missions, neither foreign missions nor home missions. If a man did not sacrifice to the gods of his own country, his fellow citizens might think ill of him. If he was accused of teaching that the gods did not exist, he might possibly, like Socrates, be put to death, but nobody preached to him. On the other hand, if he did worship them, he was in the right path, and it would have been deemed not only impertinent, but almost impious, for the native of another country to seek to convert him to another faith, that is to say, to make him disloyal to the gods of his own country, who were its natural and time-honoured protectors. The only occasions on which one hears of people being required to perform acts of worship to any power but the deities of their country are those cases in which travellers were expected to offer a prayer or a sacrifice to some local deity whose territory they were traversing, and whom it was therefore expedient to propitiate, and those other cases in which a sort of worship was required to be rendered to the monarch, or the special protecting deity of the monarch, under whose sway they lived. The edict attributed to Nebuchadnezzar in the book of Daniel may in this connexion be compared with the practice in the Roman Empire of adoring the spirit that watched over the reigning Caesar. To burn incense on the altar of the Genius of the Emperor was the test commonly proposed to the persons accused of being Christians.

All this is the natural result of polytheism. With the coming of faiths each of which claims to be exclusively and universally true, the face of the world was changed. Christianity was necessarily a missionary religion, and unfortunately soon became also, forgetting the precepts of its Founder, a persecuting religion. Islam followed in the same path, and for similar reasons. In India the strife of Buddhism with Hinduism gave rise to ferocious persecutions, which however were perhaps as

much political as religious. When the Portuguese and Spaniards began to discover and conquer new countries beyond the oceans, the spread of religion was in the mouths of all the adventurers, and in the minds of many of the baser as well as of the better sort. Spain accordingly forced her faith upon all her subjects, and found no great resistance from the American peoples, though of course their Christianity seldom went deep, as indeed it remains to-day in many parts of Central and South America, a thin veneer over the ancient superstitions of the aborigines. Portugal did the like, so far as she could, in India and in Africa. So too the decrees by which the French colonizing companies were founded in the days of Richelieu provided that the Roman Catholic faith was to be everywhere made compulsory, and that converted pagans were to be admitted to the full civil rights of Frenchmen<sup>1</sup>. But when the English set forth to trade and conquer they were not thinking of religion. The middle of the eighteenth century, when Bengal and Madras were acquired, was for England an age when persecution had died out and missionary propagandism had scarcely begun. The East India Company did not at first interfere in any way with the religious rites it found practised by the people, however cruel or immoral they might be. It gave no advantages to Christian converts, and for a good while it even discouraged the presence of missionaries, lest they should provoke disturbances. Bishops were thought less dangerous, and one was appointed, with three Archdeacons under him, by the Act of 1813. A sort of miniature church establishment, for the benefit of Europeans, still exists and is supported out of Indian revenues. After a time, however, some of the more offensive or harmful features of native worship began to be forbidden. The human sacrifices that occasionally occurred among the hill tribes were treated as murders, and the practice of Sutti—the self-immolation of the Hindu widow on her husband's

<sup>1</sup> I owe this fact to Sir A. C. Lyall (*op. cit.*, p. 66).

funeral pyre—was forbidden as far back as 1829. No hindrance is now thrown in the way of Christian missions: and there is perfect equality, as respects civil rights and privileges, not only between the native votaries of all religions, but also between them and Europeans.

So far as religion properly so-called is concerned, the policy of the English is simple and easy to apply. But as respects usages which are more or less associated with religion in the native mind, but which European sentiment disapproves, difficulties sometimes arise. The burning of the widow was one of these usages, and has been dealt with at the risk of offending Hindu prejudice. Infanticide is another; and the British Government try to check it, even in some of the protected States. The marriage of young children is a third: and this it has been thought not yet prudent to forbid, although the best native opinion is beginning to recognize the evils that attach to it. Speaking generally, it may be said that the English have, like the Romans but unlike the Spaniards, shown their desire to respect the customs and ideas of the conquered peoples. Indifferentism has served them in their career of conquest as well as religious eclecticism served the Romans, so that religious sentiment, though it sometimes stimulated the valour of their native enemies, has not really furnished any obstacle to the pacification of a conquered people. The English have, however, gone further than did the Romans in trying to deter their subjects from practices socially or morally deleterious.

As regards the work done by the English for education in the establishment of schools and Universities, no comparison with Rome can usefully be drawn: because it was not deemed in the ancient world to be the function of the State to make a general educational provision for its subjects. The Emperors, however, appointed and paid teachers of the liberal arts in some of the greater cities. That which the English have done, however, small as it may appear in comparison

with the vast population they have to care for<sup>1</sup>, witnesses to the spirit which has animated them in seeking to extend to the conquered the opportunities of progress which they value for themselves.

The question how far the triumphs of Rome and of England are due to the republican polity of the one, and the practically republican (though not until 1867 or 1885 democratic) polity of the other, is so large a one that I must be content merely to indicate it as well deserving a discussion. Several similar empires have been built up by republican governments of the oligarchic type, as witness the empire of Carthage in the ancient, and that of Venice in the later mediaeval world. One can explain this by the fact that in such governments there is usually, along with a continuity of policy hardly to be expected from a democracy, a constant succession of capable generals and administrators such as a despotic hereditary monarchy seldom provides, for a monarchy of that kind must from time to time have feeble or dissolute sovereigns, under whom bad selections will be made for important posts, policy will oscillate, and no adequate support will be given to the armies or fleets which are maintaining the interests of the nation abroad. A republic is moreover likely to have a larger stock of capable and experienced men on which to draw during the process of conquering and organizing. The two conspicuous instances in which monarchies have acquired and long held vast external dominions are the Empires of Spain and Russia. The former case is hardly an exception to the doctrine just stated, because the oceanic Empire of Spain was won quickly and with little fighting against opponents immeasurably inferior, and because it had no conterminous enemies to take advantage of the internal decay which soon set in. In the case of Russia the process

<sup>1</sup> There are in India five examining and degree-granting Universities, with about 8,000 matriculated students, nearly all of them taught in the numerous affiliated colleges. The total number of persons returned as receiving instruction in India is 4,357,000, of whom 402,000 are girls.

has been largely one of natural expansion over regions so thinly peopled and with inhabitants so backward that no serious resistance was made to an advance which went on rather by settlement than by conquest. It is only in the Caucasus and in Turkistan that Russia has had to establish her power by fighting. Her conflicts even with the Persians and the Ottoman Turks have been, as Moltke is reported to have said, battles of the one-eyed against the blind. But it must be added that Russia has shown during two centuries a remarkable power of holding a steady course of foreign policy. She sometimes trims her sails, and lays the ship upon the other tack, but the main direction of the vessel's course is not altered. This must be the result of wisdom or good fortune in the choice of ministers, for the Romanoff dynasty has not contained more than its fair average of men of governing capacity.

There is one other point in which the Romans and the English may be compared as conquering powers. Both triumphed by force of character. During the two centuries that elapsed between the destruction of Carthage, when Rome had already come to rule many provinces, and the time of Vespasian, when she had ceased to be a city, and was passing into a nation conterminous with her dominions, the Romans were the ruling race of the world, small in numbers, even if we count the peoples of middle Italy as Romans, but gifted with such talents for war and government, and possessed of such courage and force of will as to be able, not only to dominate the whole civilized world and hold down its peoples, but also to carry on a succession of bloody civil wars among themselves without giving those peoples any chance of recovering their freedom. The Roman armies, though superior in discipline to the enemies they had to encounter, except the Macedonians and Greeks, were not generally superior in arms, and had no resources of superior scientific knowledge at their command. Their adversaries in Africa, in Greece, and in Asia Minor were as far

advanced in material civilization as they were themselves. It was their strenuous and indomitable will, buoyed up by the pride and self-confidence born of a long succession of victories in the past, that enabled them to achieve this unparalleled triumph. The triumph was a triumph of character, as their poet felt when he penned the famous line, *Moribus antiquis stat res Romana virisque*. And after the inhabitants of the City had ceased to be the heart of the Empire, this consciousness of greatness passed to the whole population of the Roman world when they compared themselves with the barbarians outside their frontiers. One finds it even in the pages of Procopius, a Syrian writing in Greek, after the western half of the Empire had been dismembered by barbarian invasions.

The English conquered India with forces much smaller than those of the Romans; and their success in subjugating a still vaster population in a shorter time may thus appear more brilliant. But the English had antagonists immeasurably inferior in valour, in discipline, in military science, and generally also in the material of war, to those whom the Romans overcame. Nor had they ever either a first-rate general or a monarch of persistent energy opposed to them. No Hannibal, nor even a Mithradates, appeared to bar their path. Hyder Ali had no nation behind him; and fortune spared them an encounter with the Afghan Ahmed Shah and the Sikh Ranjit Singh. Their most formidable opponents might rather be compared with the gallant but untrained Celtic Vercingetorix, or the showy but incompetent Antiochus the Great. It was only when Europeans like Dupleix came upon the scene that they had men of their own kind to grapple with; and Dupleix had not the support from home which Clive could count on in case of dire necessity. Still the conquest of India was a splendid achievement, more striking and more difficult, if less romantic, than the conquest of Mexico by Hernan Cortez or the conquest of

Peru by Francisco Pizarro, though it must be admitted that the courage of these two adventurers in venturing far into unknown regions with a handful of followers has never been surpassed. Among the English, as among the Romans, the sense of personal force, the conscious ascendancy of a race so often already victorious, with centuries of fame behind them, and a contempt for the feebler folk against whom they were contending, were the main source of that dash and energy and readiness to face any odds which bore down all resistance. These qualities have lasted into our own time. No more brilliant examples were ever given of them than in the defence of the Fort at Lucknow and in the siege of Delhi at the time of the Indian Mutiny of 1857-8. And it is worth noting that almost the only disasters that have ever befallen the British arms have occurred where the general in command was either incompetent, as must sometimes happen in every army, or was wanting in boldness. In the East, more than anywhere else, confidence makes for victory, and one victory leads on to another.

It is by these qualities that the English continue to hold India. In the higher grades of the civil administration which they fill there are only about one thousand persons: and these one thousand control two hundred and eighty-seven millions, doing it with so little friction that they have ceased to be surprised at this extraordinary fact. The English have impressed the imagination of the people by their resistless energy and their almost uniform success. Their domination seems to have about it an element of the supernatural, for the masses of India are still in that mental condition which looks to the supernatural for an explanation of whatever astonishes it. The British Raj fills them with a sense of awe and mystery. That nearly three hundred millions of men should be ruled by a few palefaced strangers from beyond the great and wide sea, strangers who all obey some distant power, and who never, like the

lieutenants of Oriental sovereigns, try to revolt for their own benefit—this seems too wonderful to be anything but the doing of some unseen and irresistible divinity. I heard at Lahore an anecdote which, slight as it is, illustrates the way in which the native thinks of these things. A tiger had escaped from the Zoological Gardens, and its keeper, hoping to lure it back, followed it. When all other inducements had failed, he lifted up his voice and solemnly adjured it in the name of the British Government, to which it belonged, to come back to its cage. The tiger obeyed.

Now that we have rapidly surveyed the more salient points of resemblance or analogy between these two empires, it remains to note the capital differences between them, one or two of which have been already incidentally mentioned. On the most obvious of all I have already dwelt. It is the fact that, whereas the Romans conquered right out from their City in all directions—south, north, west, and east—so that the capital, during the five centuries from B. C. 200 (end of the Second Punic War) to A. D. 325 (foundation of Constantinople), stood not far from the centre of their dominions, England has conquered India across the ocean, and remains many thousands of miles from the nearest point of her Indian territory. Another not less obvious difference is perhaps less important than it seems. Rome was a city, and Britain is a country. Rome, when she stepped outside Italy to establish in Sicily her first province, had a free population of possibly only seventy or eighty thousand souls. Britain, when she began her career of conquest at Plassy, had (if we include Ireland, then still a distinct kingdom, but then less a source of weakness than she has sometimes since been) a population of at least eleven or twelve millions. But, apart from the fact that the distance from Britain to India round the Cape made her larger population less available for action in India than was the smaller population of Rome for action in the Mediterranean, the comparison must not

really be made with Rome as a city, but with Rome as the centre of a large Italian population, upon which she drew for her armies, and the bulk of which had, before the end of the Republic, become her citizens. On this point of dissimilarity no more need be said, because its significance is apparent. I turn from it to another of greater consequence.

The relations of the conquering country to the conquered country, and of the conquering race to the conquered races, are totally different in the two cases compared. In the case of Rome there was a similarity of conditions which pointed to and ultimately effected a fusion of the peoples. In the case of England there is a dissimilarity which makes the fusion of her people with the peoples of India impossible.

Climate offers the first point of contrast. Rome, to be sure, ruled countries some of which were far hotter and others far colder than was the valley of the Tiber. Doubtless the officer who was stationed in Nubia complained of the torrid summer, much as an English officer complains of Quetta or Multan; nor were the winters of Ardoch or Hexham agreeable to a soldier from Apulia. But if the Roman married in Nubia, he could bring up his family there. An English officer cannot do this at Quetta or Multan. The English race becomes so enfeebled in the second generation by living without respite under the Indian sun that it would probably die out, at least in the plains, in the third or fourth. Few Englishmen feel disposed to make India their home, if only because the physical conditions of life there are so different from those under which their earlier years were passed. But the Italian could make himself at home, so far as natural conditions went, almost anywhere from the Dnieper to the Guadalquivir.

The second contrast is in the colour of the races. All the races of India are dark, though individuals may be found among high-caste Brahmins and among the

Parsis of Poona or Gujarat who are as light in hue as many Englishmen. Now to the Teutonic peoples, and especially to the English and Anglo-Americans, the difference of colour means a great deal. It creates a feeling of separation, perhaps even of a slight repulsion. Such a feeling may be deemed unreasonable or unchristian, but it seems too deeply rooted to be effaceable in any time we can foresee. It is, to be sure, not nearly so strong towards members of the more civilized races of India, with their faces often full of an intelligence and refinement which witnesses to many generations of mental culture, as it is in North America towards the negroes of the Gulf Coast, or in South Africa towards the Kafirs. Yet it is sufficient to be, as a rule, a bar to social intimacy, and a complete bar to intermarriage.

Among the highest castes of Hindus and among the most ancient princely families, such as those famous Rajput dynasties whose lineage runs back further than does that of any of the royal houses of Europe, there is a corresponding pride of race quite as strong as that felt by the best-born European. So, too, some of the oldest Musulman families, tracing their origin to the relatives of the Prophet himself, are in respect of long descent equal to any European houses. Nevertheless, although the more educated and tactful among the English pay due honour to these families, colour would form an insurmountable barrier to intermarriage, even were the pride of the Rajputs disposed to invite it. The oldest of the Rajput dynasties, that of Udaipur, always refused to give a daughter in marriage even to the Mogul Emperors.

There was no severing line like this in the ancient world. The only dark races (other than the Egyptians) with whom the Romans came in contact were some of the Numidian tribes, few of whom became really Romanized, and the Nubians of the Middle Nile, also scarcely within the pale of civilization. The question,

therefore, did not arise in the form it has taken in India. Probably, however, the Romans would have felt and acted not like Teutons, but rather as the Spanish and Portuguese have done. Difference of colour does not repel members of these last-named nations. Among them, unions, that is to say legitimate unions, of whites with dark-skinned people, are not uncommon, nor is the mulatto or quadroon offspring kept apart and looked down upon as he is among the Anglo-Americans. Nothing contributed more to the fusion of the races and nationalities that composed the Roman Empire than the absence of any physical and conspicuous distinctions between those races, just as nothing did more to mitigate the horrors of slavery than the fact that the slave was usually of a tint and type of features not markedly unlike those of his master. Before the end of the Republic there were many freedmen in the Senate, though their presence there was regarded as a sign of declension. The son of a freedman passed naturally and easily—as did the poet Horace—into the best society of Rome when his personal merits or the favour of a great patron gave him entrance, though his detractors found pleasure in reminding one another of his origin. In India it is otherwise. Slavery, which was never harsh there, has fortunately not come into the matter, in the way it did in the Southern States of America and in South Africa. But the population is sharply divided into whites and natives. The so-called Eurasians, a mixed race due to the unions of whites with persons of Indian race, give their sympathies to the whites, but are treated by the latter as an inferior class. They are not numerous enough to be an important factor, nor do they bridge over the chasm which divides the rulers from the ruled. It is not of the want of political liberty that the latter complain, for political liberty has never been enjoyed in the East, and would not have been dreamt of had not English literature and English college teaching im-

planted the idea in the minds of the educated natives. But the hauteur of the English and the sense of social incompatibility which both elements feel, are unfortunate features in the situation, and have been so from the first. Even in 1813 the representatives of the East India Company stated to a committee of the House of Commons that 'Englishmen of classes not under the observation of the supreme authorities were notorious for the contempt with which, in their ignorance and arrogance, they contemplated the usages and institutions of the natives, and for their frequent disregard of justice and humanity in their dealings with the people of India <sup>1</sup>.' And the Act of 1833 requires the Government of India 'to provide for the protection of the natives from insult and outrage in their persons, religions, and opinions <sup>2</sup>.'

It may be thought that, even if colour did not form an obstacle to intermarriage, religion would. Religion, however, can be changed, and colour cannot. In North America blacks and whites belong to the same religious denominations, but the social demarcation remains complete. Still it is true that the difference of religion does constitute in India a further barrier not merely to intermarriage but also to intimate social relations. Among the Musulmans the practice, or at any rate the legal possibility of polygamy, naturally deters white women from a union they might otherwise have contemplated. (There have, however, been a few instances of such unions.) Hinduism stands much further away from Christianity than does Islâm; and its ceremonial rules regarding the persons in whose company food may be partaken of operate against a form of social intercourse which cements intimacy among Europeans <sup>3</sup>.

One must always remember that in the East religion constitutes both a bond of union and a dividing line

<sup>1</sup> See Ilbert's *Government of India*, p. 77.

<sup>2</sup> *Ibid.* p. 91.

<sup>3</sup> The number of Hindus in all India is estimated at 207 millions, that of Musulmans at fifty-seven millions, aboriginal races nine millions, Christians two millions.

of severance far stronger and deeper than it does in Western Europe. It largely replaces that national feeling which is absent in India and among the Eastern peoples (except the Chinese and Japanese) generally. Among Hindus and Musulmans religious practices are inwoven with a man's whole life. To the Hindu more especially caste is everything. It creates a sort of nationality within a nationality, dividing the man of one caste from the man of another, as well as from the man who stands outside Hinduism altogether. Among Musulmans there is indeed no regular caste (though evident traces of it remain among the Muhamadans of India); but the haughty exclusiveness of Islam keeps its votaries quite apart from the professors of other faiths. The European in India, when he converses with either a Hindu or a Musulman, feels strongly how far away from them he stands. There is always a sense of constraint, because both parties know that a whole range of subjects lies outside discussion, and must not be even approached. It is very different when one talks to a native Christian of the upper ranks. There is then no great need for reserve save, of course, that the racial susceptibilities of the native gentleman who does not belong to the ruling class must be respected. Community of religion in carrying the educated native Christian far away from the native Hindu or Muslim, brings him comparatively near to the European. Because he is a Christian he generally feels himself more in sympathy with his European rulers than he does with his fellow subjects of the same race and colour as himself.

Here I touch a matter of the utmost interest when one thinks of the more remote future of India. Political consequences greater than now appear may depend upon the spread of Christianity there, a spread whose progress, though at present scarcely perceptible in the upper classes, may possibly become much more rapid than it has been during the last century. I do not

say that Hinduism or Islam is a cause of hostility to British rule. Neither do I suggest that a Christian native population would become fused with the European or Eurasian population. But if the number of Christians, especially in the middle and upper ranks of Indian society, were to increase, the difficulty of ascertaining native opinion, now so much felt by Indian administrators, would be perceptibly lessened, and the social separation of natives and Europeans might become less acute, to the great benefit of both sections of the population.

When we turn back to the Roman Empire how striking is the absence of any lines of religious demarcation! One must not speak of toleration as the note of its policy, because there was nothing to tolerate. All religions were equally true, or equally useful, each for its own country or nation. The satirist of an age which had already lost belief in the Olympian deities might scoff at the beast-gods of Egypt and the fanaticism which their worship evoked. But nobody thought of converting the devotees of crocodiles or cats. A Briton brought up by the Druids, or a Frisian who had worshipped Woden in his youth, found, if he was sent to command a garrison in Syria, no difficulty in attending a sacrifice to the Syrian Sun-god, or in marrying the daughter of the Sun-god's priest. Possibly the first injunctions to have regard to religion in choosing a consort that were ever issued in the ancient world were such as that given by St. Paul when he said, 'Be not unequally yoked together with unbelievers.' Christianity had a reason for this precept which the other religions had not, because to it all the other religions were false and pernicious, drawing men away from the only true God. We may accordingly say that, old-established and strong as some of the religions were which the Romans found when they began to conquer the Mediterranean countries, religion did not constitute an obstacle to the fusion of the peoples of those countries into one Roman nationality.

When the Monotheistic religions came upon the scene, things began to change. Almost the only rebellions against Rome which were rather religious than political, were those of the Jews. When in the fourth, fifth, sixth, and seventh centuries, sharp theological controversies began to divide Christians, especially in the East, dangers appeared such as had never arisen from religious causes in the days of heathenism. Schisms, like that of the Donatists, and heresies, began to trouble the field of politics. The Arian Goths and Vandals remained distinct from the orthodox provincials whom they conquered. In Egypt, a country always prone to fanaticism, the Monophysite antagonism to the orthodoxy of the Eastern Emperors was so bitter that the native population showed signs of disaffection as early as the time of Justinian, and they offered, a century later, scarcely any resistance to those Musulman invaders from Arabia whom they disliked no more than they did their own sovereign at Constantinople.

A fourth agency working for fusion which the Roman Empire possessed, and which the English in India want, is to be found in language and literature. The conquests of Rome had been preceded by the spread of the Greek tongue and of Greek culture over the coasts of the Eastern Mediterranean. Even in the interior of Asia Minor and Syria, though the native languages continued to be spoken in the cities as late as the time of Tiberius<sup>1</sup>, and probably held their ground in country districts down till the Arab conquest, Greek was understood by the richer people, and was a sort of *lingua franca* for commerce from Sicily to the Euphrates<sup>2</sup>. Greek literature was the basis of education, and formed the minds of the cultivated class. It was indeed familiar to that class even in the western half of the Empire, through which, by the time of the Antonines, Latin had

<sup>1</sup> As in Lycaonia; cf. Acts xiv.

<sup>2</sup> There is a curious story that when the head of Crassus was brought to the Parthian king a passage from the *Bacchae* of Euripides was recited by a Greek who was at the Court.

begun to be generally spoken, except in remote regions such as the Basque country and the banks of the Vaal and North-Western Gaul. As the process of unification usually works downwards from the wealthier and better educated to the masses, it was of the utmost consequence that the upper class should have, in these two great languages, a factor constantly operative in the assimilation of the ideas of peoples originally distinct, in the diffusion of knowledge, and in the creation of a common type of civilization. Just as the use of Latin and of the Vulgate maintained a sort of unity among Christian nations and races even in the darkest and most turbulent centuries of the Middle Ages, so the use of Latin and Greek throughout the whole Roman Empire powerfully tended to draw its parts together. Nor was it without importance that all the subjects of the Empire had the same models of poetic and prose style in the classical writers of Greece and in the Latin writers of the pre-Augustan and Augustan age. Virgil in particular became the national poet of the Empire, in whom imperial patriotism found its highest expression.

Very different have been the conditions of India. When the British came, they found no national literature, unless we can apply that name to the ancient Sanskrit epics, written in a tongue which had ceased to be spoken many centuries before. Persian and Arabic were cultivated languages, used by educated Musulmans and by a few Hindu servants of the Musulman princes. The *lingua franca* called Hindustani or Urdu, which had sprung up in the camps of the Mogul Emperors, was becoming a means of intercourse over Northern India, but was hardly used throughout the South. Only a handful of the population were sufficiently educated to be accessible to the influences of any literature, or spoke any tongue except that of their own district. At present five great languages<sup>1</sup>, branches of the Aryan family, divide between them

<sup>1</sup> Hindi, Bengali, Marathi, Punjabi, and Gujarati.

Northern, North-Western, and Middle India, and four others<sup>1</sup> of the Dravidian type cover Southern India: while many others are spoken by smaller sections of the people. The language of the English conquerors, which was adopted as the official language in 1835, is the parent tongue of only about 250,000 persons out of 287,000,000, less than one in one thousand. An increasing number of natives of the educated class have learnt to speak it, but even if we reckon in these, it affects only the most insignificant fraction of the population. I have already observed that it was an advantage for England in conquering India, and is an advantage for her in ruling it, that the inhabitants are so divided by language as well as by religion and (among the Hindus) by caste that they could not combine to resist her. Rome had enjoyed, in slighter measure, a similar advantage. But whereas in the Roman Empire Greek and Latin spread so swiftly and steadily that the various nationalities soon began to blend, the absence in India of any two such dominant tongues and the lower level of intellectual progress keep the vast bulk of the Indian population without any general vehicle for the interchange of thought or for the formation of any one type of literary and scientific culture. There is therefore no national literature for India, nor any prospect that one will arise. No Cicero forms prose style, no Virgil inspires an imperial patriotism. The English have established places of higher instruction on the model not so much of Oxford and Cambridge as of the Scottish Universities and the new University Colleges which have recently sprung up in England, together with five examining Universities. Through these institutions they are giving to the ambitious youth of India, and especially to those who wish to enter Government employment or the learned professions, an education of a European type, a type so remote from the natural quality and proclivities of the Indian mind that it is not likely to give birth

<sup>1</sup> Telugu, Tamil, Kanarese, Malayalam.

to any literature with a distinctively Indian character. Indeed the chief effect of this instruction has so far been to make those who receive it cease to be Hindus or Musulmans without making them either Christians or Europeans. It acts as a powerful solvent, destroying the old systems of conventional morality, and putting little in their place. The results may not be seen for a generation or two. When they come they may prove far from happy.

If in the course of ages any one language comes to predominate in India and to be the language not only of commerce, law, and administration, but also of literature, English is likely to be that language; and English will by that time have also become the leading language of the world<sup>1</sup>. This will tend both to unify the peoples of India and (in a sense) to bring them nearer to their rulers. By that time, however, if it ever arrives, so many other changes will also have arrived that it is vain to speculate on the type of civilization which will then have been produced.

These considerations have shown us how different have been the results of English from those of Roman conquest. In the latter case a double process began from the first. The provinces became assimilated to one another, and Rome became assimilated to them, or they to her. As her individuality passed to them it was diluted by their influence. Out of the one conquering race and the many conquered races there was growing up a people which, though many local distinctions remained, was by the end of the fourth century A. D. tending to become substantially one in religion, one in patriotism, one in its type of intellectual life and of material civilization. The process was never completed, because the end of the fourth century was just the time when the Empire began, not from any internal dissensions, but from

<sup>1</sup> It is estimated that English is at present spoken by about 115 millions of persons, Russian by 80 millions, German by 70, Spanish by 50, French by 45. Of these English is increasing the most swiftly, Russian next, and then German.

financial and military weakness, to yield to invasions and immigrations which forced its parts asunder. But it was so far completed that Claudian could write in the days of Honorius: 'We who drink of the Rhone and the Orontes are all one nation.' In this one huge nation the city and people of Rome had been merged, their original character so obliterated that they could give their name to the world. But in India there has been neither a fusion of the conquerors and the conquered, nor even a fusion of the various conquered races into one people. Differences of race, language, and religion have prevented the latter fusion: yet it may some day come. But a fusion of conquerors and conquered seems to be forbidden by climate and by the disparity of character and of civilization, as well as by antagonisms of colour and religion. The English are too unlike the races of India, or any one of those races, to mingle with them, or to come to form, in the sense of Claudian's words, one people.

The nations and tribes that were overcome and incorporated by Rome were either the possessors of a civilization as old and as advanced as was her own, or else, like the Gauls and the Germans, belonged to stocks full of intellectual force, capable of receiving her lessons, and of rapidly rising to the level of her culture. But the races of India were all of them far behind the English in material civilization. Some of them were and are intellectually backward; others, whose keen intelligence and aptitude for learning equals that of Europeans, are inferior in energy and strength of will. Yet even these differences might not render an ultimate fusion impossible. It is religion and colour that seem to place that result beyond any horizon to which our eyes can reach. The semi-barbarous races of Southern Siberia will become Russians. The Georgians and Armenians of Transcaucasia, unless their attachment to their national churches saves them, may become Russians. Even the Turkmans of the Khanates will be Russians one day, as

the Tatars of Kazan and the Crimea are already on the way to become. But the English seem destined to remain quite distinct from the natives of India, neither mingling their blood nor imparting their character and habits.

So too, it may be conjectured, there will not be, for ages to come, any fusion of Americans with the races of the Philippine Isles.

The observation that Rome effaced herself in giving her name and laws to the world suggests an inquiry into what may be called the retroactive influence of India upon England. In the annals of Rome, war, conquest, and territorial expansion pervade and govern the whole story. Her constitutional, her social, her economic history, from the end of the Samnite wars onwards, is substantially determined by her position as a ruling State, first in Italy and then in the Mediterranean world. It was the influence upon the City of the phenomena of her rule in the provinces that did most to destroy not only the old constitution but the old simple and upright character of the Roman people. The provinces avenged themselves upon their conquerors. In the end, Rome ceases to have any history of her own, except an architectural history, so completely is she merged in her Empire. To a great extent this is true of Italy as well as of Rome. Italy, which had subjected so many provinces, ends by becoming herself a province—a province no more important than the others, except in respect of the reverence that surrounded her name. Her history, from the time of Augustus till that of Odovaker and Theodorich the Ostrogoth, is only a part of the history of the Empire. Quite otherwise with England. Though England has founded many colonies, sent out vast bodies of emigrants, and conquered wide dominions, her domestic history has been, since she lost Normandy and Aquitaine, comparatively little affected by these frequent wars and this immense expansion. One might compose a constitutional history

of England, or an economic and industrial history, or an ecclesiastical history, or a literary history, or a social history, in which only few and slight references would need to be made to either the colonies or India. England was a great European power before she had any colonies or any Indian territories: and she would be a great European power if all of these transmarine possessions were to drop off. Only at a few moments in the century and a half since the battle of Plassy have Indian affairs gravely affected English politics. Every one remembers Fox's India Bill, in 1783, and the trial of Warren Hastings, and the way in which the Nabobs seemed for a time to be demoralizing society and politics. It was in India that the Duke of Wellington first showed his powers. It was through the Indian opium trade that England first came into collision with China. The notion that Russian ambition might become dangerous to the security of Britain in India had something to do with the Crimean War, and with the subsequent policy towards the Turks followed by England down to 1880. The deplorable Afghan War of 1878-9 led, more perhaps than anything else, to the fall of Lord Beaconsfield's Ministry in 1880. Other instances might be added in which Indian questions have told upon the foreign policy of Great Britain, or have given rise to parliamentary strife; although, by a tacit convention between the two great parties in England, efforts are usually made—and made most wisely—to prevent questions of Indian administration from becoming any further than seems absolutely necessary matters of party controversy. Yet, if these instances be all put together, they are less numerous and momentous than might have been expected when one considers the magnitude of the stake which Britain holds in India. And even when we add to these the effect of Indian markets upon British trade, and the undeniable influence of the possession of India upon the thoughts and aspirations of Englishmen, strengthening in them a sense of pride and what is called an imperial spirit, we shall still be

surprised that the control of this vast territory and of a population more than seven times as large as that of the United Kingdom has not told more forcibly upon Britain, and coloured her history more deeply than it has in fact done. Suppose that England had not conquered India. Would her domestic development, whether constitutional or social, have taken a course greatly different from that which it has actually followed? So far as we can judge, it would not. It has been the good fortune of England to stand far off from the conquered countries, and to have had a population too large to suffer sensibly from the moral evils which conquest and the influx of wealth bring in their train<sup>1</sup>.

The remark was made at the outset of this discussion that the contact of the English race with native races in India, and the process by which the former is giving the material civilization, and a tincture of the intellectual culture of Europe to a group of Asiatic peoples, is only part of that contact of European races with native races and of that Europeanizing of the latter by the former which is going on all over the world. France is doing a similar work in North Africa and Madagascar. Russia is doing it in Turkistan and on the Amur; and may probably be soon engaged upon it in Manchuria. Germany is doing it in tropical Africa. England is doing it in Egypt and Borneo and Matabililand. The people of the United States are entering upon it in the Philippine Islands. Every one of these nations professes to be guided by philanthropic motives in its action. But it is not philanthropy that has carried any of them into these enterprises, nor is it clear that the result will be to increase the sum of human happiness.

It is in India, however, that the process has been in progress for the longest time and on the largest scale. Even after a century's experience the results cannot be adequately judged, for the country is in a state

<sup>1</sup> The absence of slavery and the existence of Christianity will of course present themselves to every one's mind as other factors in differentiating the conditions of the modern from those of the Roman world.

of transition, with all sorts of new factors, such as railways, and newspapers, and colleges, working as well upon the humbler as upon the wealthier sections of the people. Three things, however, the career of the English in India has proved. One is, that it is possible for a European race to rule a subject native race on principles of strict justice, restraining the natural propensity of the stronger to abuse their power. India has been, and is, ruled upon such principles. When oppression or cruelty is perpetrated, it is not by the European official but by his native subordinates, and especially by the native police, whose delinquencies the European official cannot always discover. Scorn or insolence is sometimes displayed towards the natives by Europeans, and nothing does more to destroy the good effects of just government than such displays of scorn. But again, it is seldom the European civil officials, but either private persons or occasionally junior officers in the army, who are guilty of this abuse of their racial superiority.

The second thing is that a relatively small body of European civilians, supported by a relatively small armed force, can maintain peace and order in an immense population standing on a lower plane of civilization, and itself divided by religious animosities bitter enough to cause the outbreak of intestine wars were the restraining hand withdrawn.

The third fact is that the existence of a system securing these benefits is compatible with an absolute separation between the rulers and the ruled. The chasm between them has in these hundred years of intercourse grown no narrower. Some even deem it wider, and regret the fact that the European official, who now visits England more easily and frequently, does not identify himself so thoroughly with India as did his predecessors some seventy years ago. As one of the greatest problems of this age, and of the age which will follow, is and must be the relation between the European races as a whole on

the one hand, and the more backward races of a different colour on the other hand, this incompatibility of temper, this indisposition to be fused, or, one may almost say, this impracticability of fusion, is a momentous result, full of significance for the future. It was quite otherwise with that first effort of humanity to draw itself together, which took shape in the fusion of the races that Rome conquered, and the creation of one Greco-Roman type of civilization for them. But the conditions of that small ancient world were very different from those by which mankind finds itself now confronted.

It is impossible to think of the future and to recall that first impulse towards the unity of mankind which closed fourteen centuries ago, without reverting once more to the Roman Empire, and asking whether the events which caused, and the circumstances which accompanied, its dissolution throw any light on the probable fate of British dominion in the East.

Empires die sometimes by violence and sometimes by disease. Frequently they die from a combination of the two, that is to say, some chronic disease so reduces their vitality that a small amount of external violence suffices to extinguish the waning life. It was so with the dominion of Rome. To outward appearance it was the irruption of the barbarians from the north that tore away the provinces in the west, as it was the assault of the Turks in 1453 that gave the last death blow to the feeble and narrowed Empire which had lingered on in the East. But the dissolution and dismemberment of the western Roman Empire, beginning with the abandonment of Britain in A. D. 411, and ending with the establishment of the Lombards in Italy in A. D. 568, with the conquest of Africa by the Arab chief Sidi Okba in the seventh century, and with the capture of Sicily by Musulman fleets in the ninth, were really due to internal causes which had been for a long time at work. In some provinces at least the administration had become inefficient or corrupt, and the humbler

classes were oppressed by the more powerful. The population had in many regions been diminished. In nearly all it had become unwarlike, so that barbarian levies, raised on the frontier, had taken the place of native troops. The revenue was unequal to the task of maintaining an army sufficient for defence. How far the financial straits to which the government was reduced were due to the exhaustion of the soil, how far to maladministration is not altogether easy to determine. They had doubtless been aggravated by the disorders and invasions of A. D. 260-282. Neither can we tell whether the intellectual capacity of the ruling class and the physical vigour of the bulk of the population may not have declined. But it seems pretty clear that the armies and the revenue that were at the disposal of Trajan would have been sufficient to defend the Empire three centuries later, when the first fatal blows were struck; and we may therefore say that it was really from internal maladies, from anaemia or atrophy, from the want of men and the want of money, perhaps also from the want of wisdom, rather than from the appearance of more formidable foes, that the Empire perished in the West.

British power in India shows no similar signs of weakness, for though the establishment of internal peace is beginning to make it less easy to recruit the native army with first-class fighting-men, such as the Punjab used to furnish, it has been hitherto found possible to keep that army up to its old standard of numbers and efficiency. Still the warning Rome has bequeathed is a warning not to be neglected. Her great difficulty was finance and the impoverishment of the cultivator. Finance and the poverty of the cultivator, who is always in danger of famine, and is taxed to the full measure of his capacity—these are the standing difficulties of Indian administration; and they do not grow less, for, as population increases, the struggle for food is more severe, and the expenditure on frontier

defence, including strategic railways, has gone on rapidly increasing.

As England seems to be quite as safe from rebellion within India as was Rome within her Empire, so is she stronger against external foes than Rome was, for she has far more defensible frontiers, viz. the sea which she commands, and a tremendous mountain barrier in whose barren gorges a comparatively small force might repel invaders coming from a distance and obliged to carry their food with them. There is really, so far as can be seen at present, only one danger against which the English have to guard, that of provoking discontent among their subjects by laying on them too heavy a burden of taxation. It has been suggested that when the differences of caste and religion which now separate the peoples of India from one another have begun to disappear, when European civilization has drawn them together into one people, and European ideas have created a large class of educated and restless natives ill disposed to brook subjection to an alien race, new dangers may arise to threaten the permanence of British power. Such possibilities, however, belong to a future which is still far distant.

It is, of course, upon England in the last resort that the defence of India rests. The task is well within her strength, though serious enough to make it fitting that a prudent and pacific spirit should guide her whole foreign and colonial policy, that she should neither embark on needless wars nor lay on herself the burden of holding down disaffected subjects.

England must be prepared to command the sea, and to spare 80,000 of her soldiers to garrison the country. Were she ever to find herself unable to do this, what would become of India? Its political unity, which depends entirely on the English Raj, would vanish like a morning mist. Wars would break out, wars of ambition, or plunder, or religion, which might end in the ascendancy of a few adventurers, not necessarily belong-

ing to the reigning native dynasties, but probably either Pathans, or Sikhs, or Musulmans of the north-west. The Marathas might rise in the West. The Nepalese might descend upon Bengal. Or perhaps the country would, after an interval of chaos, pass into the hands of some other European Power. To India severance from England would mean confusion, bloodshed, and pillage. To England however, apart from the particular events which might have caused the snapping of the tie, and apart from the possible loss of a market, severance from India need involve no lasting injury. To be mistress of a vast country whose resources for defence need to be supplemented by her own, adds indeed to her fame, but does not add to her strength. England was great and powerful before she owned a yard of land there, and might be great and powerful again with no more foothold in the East than would be needed for the naval fortresses which protect her commerce.

Happily, questions such as these are for the moment purely speculative.

## II

# THE EXTENSION OF ROMAN AND ENGLISH LAW THROUGHOUT THE WORLD

### I. THE REGIONS COVERED BY ROMAN AND ENGLISH LAW.

FROM a general comparison of Rome and England as powers conquering and administering territories beyond their original limits, it is natural to pass on to consider one particular department of the work which territorial extension has led them to undertake, viz. their action as makers of a law which has spread far out over the world. Both nations have built up legal systems which are now—for the Roman law has survived the Roman Empire, and is full of vitality to-day—in force over immense areas that were unknown to those who laid the foundations of both systems. In this respect Rome and England stand alone among nations, unless we reckon in the law of Islam which, being a part of the religion of Islam, governs Musulmans wherever Musulmans are to be found.

Roman law, more or less modified by national or local family customs or land customs and by modern legislation, prevails to-day in all the European countries which formed part either of the ancient or of the mediaeval Roman Empire, that is to say, in Italy, in Greece and the rest of South-Eastern Europe (so far as the Christian part of the population is concerned),

in Spain, Portugal, Switzerland, France, Germany (including the German and Slavonic parts of the Austro-Hungarian monarchy), Belgium, Holland. The only exception is South Britain, which lost its Roman law with the coming of the Angles and Saxons in the fifth century. The leading principles of Roman jurisprudence prevail also in some other outlying countries which have borrowed much of their law from some one or more of the countries already named, viz. Denmark, Norway, Sweden, Russia, and Hungary. Then come the non-European colonies settled by some among the above States, such as Louisiana, the Canadian province of Quebec, Ceylon, British Guiana, South Africa (all the above having been at one time colonies either of France or of Holland), German Africa, and French Africa, together with the regions which formerly obeyed Spain or Portugal, including Mexico, Central America, South America, and the Philippine Islands. Add to these the Dutch and French East Indies, and Siberia. There is also Scotland, which has since the establishment of the Court of Session by King James the Fifth in 1532 built up its law out of Roman Civil and (to some slight extent) Roman Canon Law<sup>1</sup>.

English law is in force not only in England, Wales, and Ireland but also in most of the British colonies. Quebec, Ceylon, Mauritius, South Africa, and some few of the West Indian islands follow the Roman law<sup>2</sup>. The rest, including Australia, New Zealand, and all Canada except Quebec, follow English; as does also the United States, except Louisiana, but with the Hawaiian Islands, and India, though in India, as we shall see, native law is also administered.

<sup>1</sup> There is scarcely a trace of Celtic custom in modern Scottish law. The law of land, however, is largely of feudal origin; and commercial law has latterly been influenced by that of England.

<sup>2</sup> In these West Indian islands, however, that which remains of Spanish law, as in Trinidad and Tobago, and of French law, as in St. Vincent, is now comparatively slight; and before long the West Indies (except Cuba and Puerto Rico, Guadeloupe and Martinique) will be entirely under English law. See as to the British colonies generally, C. P. Ilbert's *Legislative Methods and Forms*, chap. ix.

Thus between them these two systems cover nearly the whole of the civilized, and most of the uncivilized world. Only two considerable masses of population stand outside—the Musulman East, that is, Turkey, North Africa, Persia, Western Turkistan and Afghanistan, which obey the sacred law of Islam, and China, which has customs all her own. It is hard to estimate the total number of human beings who live under the English common law, for one does not know whether to reckon in the semi-savage natives of such regions as Uganda, for instance, or Fiji. But there are probably one hundred and thirty millions of civilized persons (without counting the natives of India) who do: and the number living under some modern form of the Roman law is still larger.

It is of the process by which two systems which had their origin in two small communities, the one an Italian city, the other a group of Teutonic tribes, have become extended over nine-tenths of the globe that I propose to speak in the pages that follow. There are analogies between the forms which the process took in the two cases. There are also contrasts. The main contrast is that whereas we may say that (roughly speaking) Rome extended her law by conquest, that is, by the spreading of her power, England has extended hers by settlement, that is, by the spreading out of her race. In India, however, conquest rather than colonization has been the agency employed by England, and it is therefore between the extension of English law to India and the extension of Roman law to the Roman Empire that the best parallel can be drawn. It need hardly be added that the Roman law has been far more changed in descending to the modern world and becoming adapted to modern conditions of life than the law of England has been in its extension over new areas. That extension is an affair of the last three centuries only, and the whole history of English law is of only some eleven centuries reckoning from Kings Ine and Alfred, let us say, to A. D. 1900, or of eight, if we begin

with King Henry the Second, whereas that of Roman law covers twenty-five centuries, of which all but the first three have witnessed the process of extension, so early did Rome begin to impose her law upon her subjects. To the changes, however, which have passed on the substance of the law we shall return presently. Let us begin by examining the causes and circumstances which induced the extension to the whole ancient world of rules and doctrines that had grown up in a small city.

## II. THE DIFFUSION OF ROMAN LAW BY CONQUEST.

The first conquests of Rome were made in Italy. They did not, however, involve any legal changes, for conquest meant merely the reduction of what had been an independent city or group of cities or tribes to vassalage, with the obligation of sending troops to serve in the Roman armies. Local autonomy was not (as a rule) interfered with; and such autonomy included civil jurisdiction, so the Italic and Greco-Italic cities continued to be governed by their own laws, which in the case at least of Oscan and Umbrian communities usually resembled that of Rome, and which of course tended to become assimilated to it even before Roman citizenship was extended to the Italian allies. With the annexation of part of Sicily in A. D. 230 the first provincial government was set up, and the legal and administrative problems which Rome had to deal with began to show themselves. Other provinces were added in pretty rapid succession, the last being Britain (invaded under Claudius in A. D. 43). Now although in all these provinces the Romans had to maintain order, to collect revenue and to dispense justice, the conditions under which these things, and especially the dispensing of justice, had to be done differed much in different provinces. Some, such as Sicily, Achaia, Macedonia and the provinces of Western Asia Minor, as well as Africa (*i. e.* such parts of that province as Carthage had per-

meated), were civilized countries, where law-courts already existed in the cities<sup>1</sup>. The laws had doubtless almost everywhere been created by custom, for the so-called Codes we hear of in Greek cities were often rather in the nature of political constitutions and penal enactments than summarized statements of the whole private law; yet in some cities the customs had been so summarized<sup>2</sup>. Other provinces, such as those of Thrace, Transalpine Gaul, Spain, and Britain, were in a lower stage of social organization, and possessed, when they were conquered, not so much regular laws as tribal usages, suited to their rude inhabitants. In the former set of cases not much new law was needed. In the latter set the native customs could not meet the needs of communities which soon began to advance in wealth and culture under Roman rule, so law had to be created.

There were also in all these provinces two classes of inhabitants. One consisted of those who enjoyed Roman citizenship, not merely men of Italian birth settled there but also men to whom citizenship had been granted (as for instance when they retired from military service), or the natives of cities on which (as to Tarsus in Cilicia, St. Paul's birthplace) citizenship had been conferred as a boon<sup>3</sup>. This was a large class, and went on rapidly increasing. To it pure Roman law was applicable, subject of course to any local customs.

The other class consisted of the provincial subjects who were merely subjects, and, in the view of the Roman law, aliens (*peregrini*). They had their own laws

<sup>1</sup> Cicero says of Sicily, 'Siculi hoc iure sunt ut quod civis cum cive agat, domi certet suis legibus; quod Siculus cum Siculo non eiusdem civitatis, ut de eo praetor iudices sortiatur'; *In Verrem*, ii. 13, 32.

<sup>2</sup> The laws of Gortyn in Crete, recently published from an inscription discovered there, apparently of about 500 B. C., are a remarkable instance. Though not a complete code, they cover large parts of the field of law.

<sup>3</sup> When I speak of citizenship, it is not necessarily or generally political citizenship that is to be understood, but the citizenship which carried with it private civil rights (those rights which the Romans call *connubium* and *commercium*), including Roman family and inheritance law and Roman contract and property law. Not only the civilized Spaniards but the bulk of the upper class in Greece seem to have become citizens by the time of the Antonines.

or tribal customs, and to them Roman law was primarily inapplicable, not only because it was novel and unfamiliar, so strange to their habits that it would have been unjust as well as practically inconvenient to have applied it to them, but also because the Romans, like the other civilized communities of antiquity, had been so much accustomed to consider private legal rights as necessarily connected with membership of a city community that it would have seemed unnatural to apply the private law of one city community to the citizens of another. It is true that the Romans after a time disabused their minds of this notion, as indeed they had from a comparatively early period extended their own private civil rights to many of the cities which had become their subject allies. Still it continued to influence them at the time (B. C. 230 to 120) when they were laying out the lines of their legal policy for the provinces.

Of that legal policy I must speak quite briefly, partly because our knowledge, though it has been enlarged of late years by the discovery and collection of a great mass of inscriptions, is still imperfect, partly because I could not set forth the details without going into a number of technical points which might perplex readers unacquainted with the Roman law. It is only the main lines on which the conquerors proceeded that can be here indicated.

Every province was administered by a governor with a staff of subordinate officials, the higher ones Roman, and (under the Republic) remaining in office only so long as did the governor. The governor was the head of the judicial as well as the military and civil administration, just as the consuls at Rome originally possessed judicial as well as military and civil powers, and just as the praetor at Rome, though usually occupied with judicial work, had also both military and civil authority. The governor's court was the proper tribunal for those persons who in the provinces enjoyed Roman citizenship, and in it Roman law was applied to such

persons in matters touching their family relations, their rights of inheritance, their contractual relations with one another, just as English law is applied to Englishmen in Cyprus or Hong Kong. No special law was needed for them. As regards the provincials, they lived under their own law, whatever it might be, subject to one important modification. Every governor when he entered his province issued an Edict setting forth certain rules which he proposed to apply during his term of office. These rules were to be valid only during his term, for his successor issued a fresh Edict, but in all probability each reproduced nearly all of what the preceding Edict had contained. Thus the same general rules remained continuously in force, though they might be modified in detail, improvements which experience had shown to be necessary being from time to time introduced<sup>1</sup>. This was the method which the praetors followed at Rome, so the provincial governors had a precedent for it and knew how to work it. Now the Edict seems to have contained, besides its provisions regarding the collection of revenue and civil administration in general, certain more specifically legal regulations, intended to indicate the action which the governor's court would take not only in disputes arising between Roman citizens, but also in those between citizens and aliens, and probably also to some extent in those between aliens themselves. Where the provisions of the Edict did not apply, aliens would be governed by their own law. In cities municipally organized, and especially in the more civilized provinces, the local city courts would doubtless continue to administer, as they had done before the Romans came, their local civil law; and in the so-called free cities, which had come into the Empire as allies, these local courts had for a long time a wide scope for their action. Criminal law, however, would seem to have fallen within the governor's jurisdiction, at any rate in most places and for the graver offences,

<sup>1</sup> As to this see *Essay XIV*, p. 692 sqq.

because criminal law is the indispensable guarantee for public order and for the repression of sedition or conspiracy, matters for which the governor was of course responsible<sup>1</sup>. Thus the governor's court was not only that which dispensed justice between Roman citizens, and which dealt with questions of revenue, but was also the tribunal for cases between citizens and aliens, and for the graver criminal proceedings. It was apparently also a court which entertained some kinds of suits between aliens, as for instance between aliens belonging to different cities, or in districts where no regular municipal courts existed, and (probably) dealt with appeals from those courts where they did exist. Moreover where aliens even of the same city chose to resort to it they could apparently do so. I speak of courts rather than of law, because it must be remembered that although we are naturally inclined to think of law as coming first, and courts being afterwards created to administer law, it is really courts that come first, and that by their action build up law partly out of customs observed by the people and partly out of their own notions of justice. This, which is generally true of all countries, is of course specially true of countries where law is still imperfectly developed, and of places where different classes of persons, not governed by the same legal rules, have to be dealt with.

The Romans brought some experience to the task of creating a judicial administration in the provinces, where both citizens and aliens had to be considered, for Rome herself had become, before she began to acquire territories outside Italy, a place of residence or resort for alien traders, so that as early as B. C. 247 she created a magistrate whose special function it became to handle suits between aliens, or in which one party was an alien. This magistrate built up, on the basis of mer-

<sup>1</sup> In St. Paul's time, however, the Athenian Areopagus would seem to have retained its jurisdiction; cf. Acts xvii. 19. The Romans treated Athens with special consideration.

cantile usage, equity, and common sense, a body of rules fit to be applied between persons whose native law was not the same; and the method he followed would naturally form a precedent for the courts of the provincial governors.

Doubtless the chief aim, as well as the recognized duty, of the governors was to disturb provincial usage as little as they well could. The temptations to which they were exposed, and to which they often succumbed, did not lie in the direction of revolutionizing local law in order to introduce either purely Roman doctrines or any artificial uniformity<sup>1</sup>. They would have made trouble for themselves had they attempted this. And why should they attempt it? The ambitious governors desired military fame. The bad ones wanted money. The better men, such as Cicero, and in later days Pliny, liked to be fêted by the provincials and have statues erected to them by grateful cities. No one of these objects was to be attained by introducing legal reforms which theory might suggest to a philosophic statesman, but which nobody asked for. It seems safe to assume from what we know of official human nature elsewhere, that the Roman officials took the line of least resistance compatible with the raising of money and the maintenance of order. These things being secured, they would be content to let other things alone.

Things, however, have a way of moving even when officials may wish to let them rest. When a new and vigorous influence is brought into a mixture of races receptive rather than resistant (as happened in Asia Minor under the Romans), or when a higher culture acts through government upon a people less advanced but not less naturally gifted (as happened in Gaul under the Romans), changes must follow in law as well as in other departments of human action. Here two forces

<sup>1</sup> One of the charges against Verres was that he disregarded all kinds of law alike. Under him, says Cicero, the Sicilians 'neque suas leges neque nostra senatus consulta neque communia iura tenuerunt'; *In Verr.* i. 4, 13.

were at work. One was the increasing number of persons who were Roman citizens, and therefore lived by the Roman law. The other was the increasing tendency of the government to pervade and direct the whole public life of the province. When monarchy became established as the settled form of the Roman government, provincial administration began to be better organized, and a regular body of bureaucratic officials presently grew up. The jurisdiction of the governor's court extended itself, and was supplemented in course of time by lower courts administering law according to the same rules. The law applied to disputes arising between citizens and non-citizens became more copious and definite. The provincial Edicts expanded and became well settled as respects the larger part of their contents. So by degrees the law of the provinces was imperceptibly Romanized in its general spirit and leading conceptions, probably also in such particular departments as the original local law of the particular province had not fully covered. But the process did not proceed at the same rate in all the provinces, nor did it result in a uniform legal product, for a good deal of local customary law remained, and this customary law of course differed in different provinces. In the Hellenic and Hellenized countries the pre-existing law was naturally fuller and stronger than in the West; and it held its ground more effectively than the ruder usages of Gauls or Spaniards, obtaining moreover a greater respect from the Romans, who felt their intellectual debt to the Greeks.

It may be asked what direct legislation there was during this period for the provinces. Did the Roman Assembly either pass statutes for them, as Parliament has sometimes done for India, or did the Assembly establish in each province some legislative authority? So far as private law went Rome did neither during the republican period<sup>1</sup>. The necessity was not felt,

<sup>1</sup> The *Lex Sempronia* mentioned by Livy, xxxv. 7, seems to be an exception, due to very special circumstances.

because any alterations made in Roman law proper altered it for Roman citizens who dwelt in the provinces no less than for those in Italy, while as to provincial aliens, the Edict of the governor and the rules which the practice of his courts established were sufficient to introduce any needed changes. But the Senate issued decrees intended to operate in the provinces, and when the Emperors began to send instructions to their provincial governors or to issue declarations of their will in any other form, these had the force of law, and constituted a body of legislation, part of which was general, while part was special to the province for which it was issued.

Meantime—and I am now speaking particularly of the three decisively formative centuries from B. C. 150 to A. D. 150—another process had been going on even more important. The Roman law itself had been changing its character, had been developing from a rigid and highly technical system, archaic in its forms and harsh in its rules, preferring the letter to the spirit, and insisting on the strict observance of set phrases, into a liberal and elastic system, pervaded by the principles of equity and serving the practical convenience of a cultivated and commercial community. The nature of this process will be found described in other parts of this volume<sup>1</sup>. Its result was to permeate the original law of Rome applicable to citizens only (*ius civile*) with the law which had been constructed for the sake of dealing with aliens (*ius gentium*), so that the product was a body of rules fit to be used by any civilized people, as being grounded in reason and utility, while at the same time both copious in quantity and refined in quality.

This result had been reached about A. D. 150, by which time the laws of the several provinces had also been largely Romanized. Thus each body of law—if we may venture for this purpose to speak of provincial law as a whole—had been drawing nearer to the other.

<sup>1</sup> See Essay XI, and Essay XIV, p. 706.

The old law of the city of Rome had been expanded and improved till it was fit to be applied to the provinces. The various laws of the various provinces had been constantly absorbing the law of the city in the enlarged and improved form latterly given to it. Thus when at last the time for a complete fusion arrived the differences between the two had been so much reduced that the fusion took place easily and naturally, with comparatively little disturbance of the state of things already in existence. One sometimes finds on the southern side of the Alps two streams running in neighbouring valleys. One which has issued from a glacier slowly deposits as it flows over a rocky bed the white mud which it brought from its icy cradle. The other which rose from clear springs gradually gathers colouring matter as in its lower course it cuts through softer strata or through alluvium. When at last they meet, the glacier torrent has become so nearly clear that the tint of its waters is scarcely distinguishable from that of the originally bright but now slightly turbid affluent. Thus Roman and provincial law, starting from different points but pursuing a course in which their diversities were constantly reduced, would seem to have become so similar by the end of the second century A. D. that there were few marked divergences, so far as private civil rights and remedies were concerned, between the position of citizens and that of aliens.

Here, however, let a difference be noted. The power of assimilation was more complete in some branches of law than it was in others; and it was least complete in matters where old standing features of national character and feeling were present. In the Law of Property and Contract it had advanced so far as to have become, with some few exceptions<sup>1</sup>, substantially identical. The same may be said of Penal Law and the system of legal procedure. But in the Law of

<sup>1</sup> Such as the technical peculiarities of the Roman *stipulatio*, and the Greek *syngraphe*.

Family Relations and in that of Inheritance, a matter closely connected with family relations, the dissimilarities were still significant; and we shall find this phenomenon reappearing in the history of English and Native Law in India.

Two influences which I have not yet dwelt upon had been, during the second century, furthering the assimilation. One was the direct legislation of the Emperor which, scanty during the first age of the monarchy, had now become more copious, and most of which was intended to operate upon citizens and aliens alike. The other was the action of the Emperor as supreme judicial authority, sometimes in matters brought directly before him for decision, more frequently as judge of appeals from inferior tribunals. He had a council called the Consistory which acted on his behalf, because, especially in the troublous times which began after the reign of Marcus Aurelius and presaged the ultimate dissolution of the Empire, the sovereign was seldom able to preside in person. The judgements of the Consistory, being delivered in the Emperor's name as his, and having equal authority with statutes issued by him, must have done much to make law uniform in all the provinces and among all classes of subjects <sup>1</sup>.

### III. THE ESTABLISHMENT OF ONE LAW FOR THE EMPIRE.

Finally, in the beginning of the third century A. D., the decisive step was taken. The distinction between citizens and aliens vanished by the grant of full citizenship to all subjects of the Empire, a grant however which may have been, in the first instance, applied only to organized communities, and not also to the backward sections of the rural population, in Corsica,

<sup>1</sup> These *decreta* of the Emperor were reckoned among his *Constitutiones* (as to which see Essay XIV, p. 720 sqq.). There does not seem to have been any public record kept and published of them, but many of them would doubtless become diffused through the law schools and otherwise. The first regular collections of imperial constitutions known to us belong to a later time.

for instance, or in some of the Alpine valleys. Our information as to the era to which this famous Edict of Caracalla's belongs is lamentably scanty. Gaius, who is the best authority for the middle period of the law, lived fifty or sixty years earlier. The compilers of Justinian's *Digest*, which is the chief source of our knowledge for the law as a whole, lived three hundred years later, when the old distinctions between the legal rights of citizens and those of aliens had become mere matters of antiquarian curiosity. These compilers therefore modified the passages of the older jurists which they inserted in the *Digest* so as to make them suit their own more recent time. As practical men they were right, but they have lessened the historical value of these fragments of the older jurists, just as the modern restorer of a church spoils it for the purposes of architectural history, when he alters it to suit his own ideas of beauty or convenience. Still it may fairly be assumed that when Caracalla's grant of citizenship was made the bulk of the people, or at least of the town dwellers, had already obtained either a complete or an incomplete citizenship in the more advanced provinces, and that those who had not were at any rate enjoying under the provincial Edicts most of the civil rights that had previously been confined to citizens, such for instance as the use of the so-called Praetorian Will with its seven seals.

How far the pre-existing local law of different provinces or districts was superseded at one stroke by this extension of citizenship, or in other words, what direct and immediate change was effected in the modes of jurisdiction and in the personal relations of private persons, is a question which we have not the means of answering. Apparently many difficulties arose which further legislation, not always consistent, was required to deal with<sup>1</sup>. One would naturally suppose that where

<sup>1</sup> See upon this subject the learned and acute treatise (by which I have been much aided) of Dr. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, Chap. VI.

Roman rules differed materially from those which a provincial community had followed, the latter could not have been suddenly substituted for the former.

A point, for instance, about which we should like to be better informed is whether the Roman rules which gave to the father his wide power over his children and their children were forthwith extended to provincial families. The Romans themselves looked upon this paternal power as an institution peculiar to themselves. To us moderns, and especially to Englishmen and Americans, it seems so oppressive that we cannot but suppose it was different in practice from what it looks on paper. And although it had lost some of its old severity by the time of the Antonines, one would think that communities which had not grown up under it could hardly receive it with pleasure.

From the time of Caracalla (A. D. 211-217) down till the death of Theodosius the Great (A. D. 395) the Empire had but one law. There was doubtless a certain amount of special legislation for particular provinces, and a good deal of customary law peculiar to certain provinces or parts of them. Although before the time of Justinian it would seem that every Roman subject, except the half-barbarous peoples on the frontiers, such as the Soanes and Abkhasians of the Caucasus or the Ethiopic tribes of Nubia, and except a very small class of freedmen, was in the enjoyment of Roman citizenship, with private rights substantially the same, yet it is clear that in the East some Roman principles and maxims were never fully comprehended by the mass of the inhabitants and their legal advisers of the humbler sort, while other principles did not succeed in displacing altogether the rules to which the people were attached. We have evidence in recently recovered fragments of an apparently widely used law-book, Syriac and Armenian copies of which remain, that this was the case in the Eastern provinces, and no doubt it was so in others also. In Egypt, for instance, it may be gathered from the

fragments of papyri which are now being published, that the old native customs, overlaid or re-moulded to some extent by Greek law, held their ground even down to the sixth or seventh century<sup>1</sup>. Still, after making all allowance for these provincial variations, philosophic jurisprudence and a levelling despotism had done their work, and given to the civilized world, for the first and last time in its history, one harmonious body of legal rules.

The causes which enabled the Romans to achieve this result were, broadly speaking, the five following:—

(1) There was no pre-existing body of law deeply rooted and strong enough to offer resistance to the spread of Roman law. Where any highly developed system of written rules or customs existed, it existed only in cities, such as those of the Greek or Graecized provinces on both sides of the Aegean. The large countries, Pontus, for instance, or Macedonia or Gaul, were in a legal sense unorganized or backward. Thus the Romans had, if not a blank sheet to write on, yet no great difficulty in overspreading or dealing freely with what they found.

(2) There were no forms of faith which had so interlaced religious feelings and traditions with the legal notions and customs of the people as to give those notions and customs a tenacious grip on men's affection. Except among the Jews, and to some extent among the Egyptians, Rome had no religious force to overcome such as Islam and Hinduism present in India.

(3) The grant of Roman citizenship to a community or an individual was a privilege highly valued, because it meant a rise in social status and protection against

<sup>1</sup> This is carefully worked out both as to Syria and to Egypt by Dr. Mitteis, *op. cit.* He thinks (pp. 30-33) that the law of the Syrian book, where it departs from pure Roman law as we find it in the *Corpus Iuris*, is mainly of Greek origin, though with traces of Eastern custom. He also suggests that the opposition, undoubtedly strong, of the Eastern Monophysites to the Orthodox Emperors at Constantinople may have contributed to make the Easterns cling the closer to their own customary law. The Syrian book belongs to the fifth century A.D., and is therefore earlier than Justinian (Bruns und Sachau, *Syrisch-römisches Rechtsbuch aus dem fünften Jahrhundert*).

arbitrary treatment by officials. Hence even those who might have liked their own law better were glad to part with it for the sake of the immunities of a Roman citizen.

(4) The Roman governor and the Roman officials in general had an administrative discretion wider than officials enjoy under most modern governments, and certainly wider than either a British or an United States legislature would delegate to any person. Hence Roman governors could by their Edicts and their judicial action mould the law and give it a shape suitable to the needs of their province with a freedom of handling which facilitated the passage from local law or custom to the jurisprudence of the Empire generally.

(5) Roman law itself, *i.e.* the law of the city, went on expanding and changing, ridding itself of its purely national and technical peculiarities, till it became fit to be the law of the whole world. This process kept step with, and was the natural expression of, the political and social assimilation of Rome to the provinces and of the provinces to Rome.

At the death of Theodosius the Great the Roman Empire was finally divided into an Eastern and a Western half; so that thenceforward there were two legislative authorities. For the sake of keeping the law as uniform as possible, arrangements were made for the transmission by each Emperor to the other of such ordinances as he might issue, in order that these might be, if approved, issued for the other half of the Empire. These arrangements, however, were not fully carried out: and before long the Western Empire drifted into so rough a sea that legislation practically stopped. The great Codex of Theodosius the Second (a collection of imperial enactments published in A.D. 438) was however promulgated in the Western as well as in the Eastern part of the Empire, whereas the later Codex and Digest of Justinian, published nearly a century later, was enacted only for the East, though presently extended (by re-conquest) to Italy, Sicily, and Africa. Parts of the

Theodosian Codex were embodied in the manuals of law made for the use of their Roman subjects by some of the barbarian kings. It continued to be recognized in the Western provinces after the extinction of the imperial line in the West in A. D. 476: and was indeed, along with the manuals aforesaid, the principal source whence during a long period the Roman population drew their law in the provinces out of which the kingdoms of the Franks, Burgundians, and Visigoths were formed.

Then came the torpor of the Dark Ages.

#### IV. THE EXTENSION OF ROMAN LAW AFTER THE FALL OF THE WESTERN EMPIRE.

Upon the later history of the Roman law and its diffusion through the modern world I can but briefly touch, for I should be led far away from the special topic here considered. The process of extension went on in some slight measure by conquest, but mainly by peaceful means, the less advanced peoples, who had no regular legal system of their own, being gradually influenced by and learning from their more civilized neighbours to whom the Roman system had descended. The light of legal knowledge radiated forth from two centres, from Constantinople over the Balkanic and Euxine countries between the tenth and the fifteenth centuries, from Italy over the lands that lay north and west of her from the twelfth to the sixteenth century. Thereafter it is Germany, Holland, and France that have chiefly propagated the imperial law, Germany by her universities and writers, France and Holland both through their jurists and as colonizing powers.

In the history of the mediaeval and modern part of the process of extension five points or stages of especial import may be noted.

The first is the revival of legal study which began in

Italy towards the end of the eleventh century A. D., and the principal agent in which was the school of Bologna, famous for many generations thereafter. From that date onward the books of Justinian, which had before that time been superseded in the Eastern Empire, were lectured and commented on in the universities of Italy, France, Spain, England, Germany, and have continued to be so till our own day. They formed, except in England where from the time of Henry the Third onwards they had a powerful and at last a victorious rival in the Common Law, the basis of all legal training and knowledge.

The second is the creation of that vast mass of rules for the guidance of ecclesiastical matters and courts—courts whose jurisdiction was in the Middle Ages far wider than it is now—which we call the Canon Law. These rules, drawn from the canons of Councils and decrees of Popes, began to be systematized during the twelfth century, and were first consolidated into an ordered body by Pope Gregory the Ninth in the middle of the thirteenth<sup>1</sup>. They were so largely based on the Roman law that we may describe them as being substantially a development of it, partly on a new side, partly in a new spirit, and though they competed with the civil law of the temporal courts, they also extended the intellectual influence of that law.

The third is the acceptance of the Roman law as being of binding authority in countries which had not previously owned it, and particularly in Germany and Scotland. It was received in Germany because the German king (after the time of Otto the Great) was deemed to be also Roman Emperor, the legitimate successor of the far-off assemblies and magistrates and Emperors of old Rome; and its diffusion was aided by the fact that German lawyers had mostly received their legal training at Italian universities. It came in gradually as subsidiary to Germanic customs, but the

<sup>1</sup> Other parts were added later.

judges, trained in Italy in the Roman system, required the customs to be proved, and so by degrees Roman doctrines supplanted them, though less in the Saxon districts, where a native law-book, the *Sachsenspiegel*, had already established its influence. The acceptance nowhere went so far as to supersede the whole customary law of Germany, whose land-rights, for instance, retained their feudal character. The formal declaration of the general validity of the *Corpus Iuris* in Germany is usually assigned to the foundation by the Emperor Maximilian I, in 1495, of the Imperial Court of Justice (Reichskammergericht). As Holland was then still a part of the Germanic Empire, as well as of the Burgundian inheritance, it was the law of Holland also, and so has become the law of Java, of Celebes, and of South Africa. In Scotland it was adopted at the foundation of the Court of Session, on the model of the Parliament of Paris, by King James the Fifth. Political antagonism to England and political attraction to France, together with the influence of the Canonists, naturally determined the King and the Court to follow the system which prevailed on the European continent.

The fourth stage is that of codification. In many parts of Gaul, though less in Provence and Languedoc, the Roman law had gone back into that shape of a body of customs from which it had emerged a thousand years before; and in Northern and Middle Gaul some customs, especially in matters relating to land, were not Roman. At last, under Lewis the Fourteenth, a codifying process set in. Comprehensive Ordinances, each covering a branch of law, began to be issued from 1667 down to 1747. These operated throughout France, and, being founded on Roman principles, further advanced the work, already prosecuted by the jurists, of Romanizing the customary law of Northern France. That of Southern France (the *pays du droit écrit*) had been more specifically Roman, for the South had been less affected by Frankish conquest and settlement. The five Codes

promulgated by Napoleon followed in 1803 to 1810<sup>1</sup>. Others reproducing them with more or less divergence have been enacted in other Romance countries.

In Prussia, Frederick the Second directed the preparation of a Code which became law after his death, in 1794. From 1848 onwards parts of the law of Germany (which differed in different parts of the country) began to be codified, being at first enacted by the several States, each for itself, latterly by the legislature of the new Empire. Finally, after twenty-two years of labour, a new Code for the whole German Empire was settled, was passed by the Chambers, and came into force on the first of January, 1900. It does not, however, altogether supersede pre-existing local law. This Code, far from being pure Roman law, embodies many rules due to mediaeval custom (especially custom relating to land-rights) modernized to suit modern conditions, and also a great deal of post-mediaeval legislation<sup>2</sup>. Some German jurists complain that it is too Teutonic; others that it is not Teutonic enough. One may perhaps conclude from these opposite criticisms that the codifiers have made a judiciously impartial use of both Germanic and Roman materials.

Speaking broadly, it may be said that the groundwork of both the French and the German Codes—that is to say their main lines and their fundamental legal conceptions—is Roman. Just as the character and genius of a language are determined by its grammar, irrespective of the number of foreign words it may have picked up, so Roman law remains Roman despite the accretion of the new elements which the needs of modern civilization have required it to accept.

The fifth stage is the transplantation of Roman law in

<sup>1</sup> Among the States in which the French Code has been taken as a model are Belgium, Italy, Spain, Portugal, Mexico, and Chili. See an article by Mr. E. Schuster in the *Law Quarterly Review* for January, 1896.

<sup>2</sup> An interesting sketch of the 'reception' of Roman law in Germany (by Dr. Erwin Grüber) may be found in the Introduction to Mr. Ledlie's translation of Sohm's *Institutionen* (1st edition).

its modern forms to new countries. The Spaniards and Portuguese, the French, the Dutch, and the Germans have carried their respective systems of law with them into the territories they have conquered and the colonies they have founded; and the law has often remained unchanged even when the territory or the colony has passed to new rulers. For law is a tenacious plant, even harder to extirpate than is language; and new rulers have generally had the sense to perceive that they had less to gain by substituting their own law for that which they found than they had to lose by irritating their new subjects. Thus, Roman-French law survives in Quebec (except in commercial matters) and in Louisiana, Roman-Dutch law in Guiana and South Africa.

The cases of Poland, Russia and the Scandinavian kingdoms are due to a process different from any of those hitherto described. The law of Russia was originally Slavonic custom, influenced to some extent by the law of the Eastern Roman Empire, whence Russia took her Christianity and her earliest literary impulse. In its present shape, while retaining in many points a genuinely Slavonic character, and of course far less distinctly Roman than is the law of France, it has drawn so much, especially as regards the principles of property rights and contracts, from the Code Napoléon and to a less degree from Germany, that it may be described as being Roman 'at the second remove,' and reckoned as an outlying and half-assimilated province, so to speak, of the legal realm of Rome. Poland, lying nearer Germany, and being, as a Catholic country, influenced by the Canon Law, as well as by German teaching and German books, adopted rather more of Roman doctrine than Russia did<sup>1</sup>. Her students learnt Roman law first at Italian, afterwards at German Univer-

<sup>1</sup> In Lithuania the rule was that where no express provision could be found governing a case, recourse should be had to 'the Christian laws.' Speaking generally, one may say that it was by and with Christianity that Roman law made its way in the countries to the east of Germany and to the north of the Eastern Empire.

sities, and when they became judges, naturally applied its principles. The Scandinavian countries set out with a law purely Teutonic, and it is chiefly through the German Universities and the influence of German juridical literature that Roman principles have found their way in and coloured the old customs. Servia, Bulgaria and Rumania, on the other hand, were influenced during the Middle Ages by the law of the Eastern Empire, whence they drew their religion and their culture. Thus their modern law, whose character is due partly to these Byzantine influences—of course largely affected by Slavonic custom—and partly to what they have learnt from France and Austria, may also be referred to the Roman type.

#### V. THE DIFFUSION OF ENGLISH LAW.

England, like Rome, has spread her law over a large part of the globe. But the process has been in her case not only far shorter but far simpler. The work has been (except as respects Ireland) effected within the last three centuries; and it has been effected (except as regards Ireland and India) not by conquest but by peaceful settlement. This is one of the two points in which England stands contrasted with Rome. The other is that her own law has not been affected by the process. It has changed within the seven centuries that lie between King Henry the Second and the present day, almost if not quite as much as the law of Rome changed in the seven centuries between the enactment of the Twelve Tables and the reign of Caracalla. But these changes have not been due, as those I have described in the Roman Empire were largely due, to the extension of the law of England to new subjects. They would apparently have come to pass in the same way and to the same extent had the English race remained confined to its own island.

England has extended her law over two classes of territories.

The first includes those which have been peacefully settled by Englishmen—North America (except Lower Canada), Australia, New Zealand, Fiji, the Falkland Isles. All of these, except the United States, have remained politically connected with the British Crown.

The second includes conquered territories. In some of these, such as Wales, Ireland, Gibraltar, the Canadian provinces of Ontario and Nova Scotia, and several of the West India Islands, English law has been established as the only system, applicable to all subjects<sup>1</sup>. In others, such as Malta, Cyprus, Singapore, and India, English law is applied to Englishmen and native law to natives, the two systems being worked concurrently. Among these cases, that which presents problems of most interest and difficulty is India. But before we consider India, a few words may be given to the territories of the former class. They are now all of them, except the West Indies, Fiji and the Falkland Isles, self-governing, and therefore capable of altering their own law. This they do pretty freely. The United States have now forty-nine legislatures at work, viz. Congress, forty-five States, and three Organized Territories. They have turned out an immense mass of law since their separation from England. But immense as it is, and bold as are some of the experiments which may be found in it, the law of the United States remains (except of course in Louisiana) substantially English law. An English barrister would find himself quite at home in any Federal or State Court, and would have nothing new to master, except a few technicalities of procedure and the provisions of any statutes which might affect the points he had to argue. And the patriarch of American teachers of law (Professor C. C. Langdell of the Law School in Harvard Univer-

<sup>1</sup> It has undergone little or no change in the process. The Celtic customs disappeared in Wales; the Brehon law, though it was contained in many written texts and was followed over the larger part of Ireland till the days of the Tudors, has left practically no trace in the existing law of Ireland, which is, except as respects land, some penal matters, and marriage, virtually identical with the law of England.

sity), consistently declining to encumber his expositions with references to Federal or State Statutes, continues to discourse on the Common Law of America, which differs little from the Common Law of England. The old Common Law which the settlers carried with them in the seventeenth century has of course been developed or altered by the decisions of American Courts. These, however, have not affected its thoroughly English character. Indeed, the differences between the doctrines enounced by the Courts of different States are sometimes just as great as the differences between the views of the Courts of Massachusetts or New Jersey and those of Courts in England.

The same is true of the self-governing British colonies. In them also legislation has introduced deviations from the law of the mother country. More than forty years ago New Zealand, for instance, repealed the Statute of Uses, which is the corner-stone of English conveyancing; and the Australian legislatures have altered (among other things) the English marriage law. But even if the changes made by statute had been far greater than they have been, and even if there were not, as there still is, a right of appeal from the highest Courts of these colonies to the Crown in Council, their law should still remain, in all its essential features, a genuine and equally legitimate offspring of the ancient Common Law.

We come now to the territories conquered by England, and to which she has given her law whether in whole or in part. Among these it is only of India that I shall speak, as India presents the phenomena of contact between the law of the conqueror and that of the conquered on the largest scale and in the most instructive form. What the English have done in India is being done or will have to be done, though nowhere else on so vast a scale, by the other great nations which have undertaken the task of ruling and of bestowing what are called the blessings of civilization upon the backward races. Russia, France, Germany, and now the United

States also, all see this task before them. To them therefore, as well as to England, the experience of the British Government in India may be profitable.

## VI. ENGLISH LAW IN INDIA.

When the English began to conquer India they found two great systems of customary law in existence there, the Musulman and the Hindu. There were other minor bodies of custom, prevailing among particular sects, but these may for the present be disregarded. Musulman law regulated the life and relations of all Musulmans; and parts of it, especially its penal provisions, were also applied by the Musulman potentates to their subjects generally, Hindus included. The Musulman law had been most fully worked out in the departments of family relations and inheritance, in some few branches of the law of contract, such as money loans and mortgages and matters relating to sale, and in the doctrine of charitable or pious foundations called Wakuf.

In the Hindu principalities, Hindu law was dominant, and even where the sovereign was a Musulman, the Hindu law of family relations and of inheritance was recognized as that by which Hindus lived. There were also of course many land customs, varying from district to district, which both Hindus and Musulmans observed, as they were not in general directly connected with religion. In some regions, such as Oudh and what are now the North-West provinces, these customs had been much affected by the land revenue system of the Mogul Emperors. It need hardly be said that where Courts of law existed, they administered an exceedingly rough and ready kind of justice, or perhaps injustice, for bribery and favouritism were everywhere rampant.

There were also mercantile customs, which were generally understood and observed by traders, and which, with certain specially Musulman rules recog-

nized in Musulman States, made up what there was of a law of contracts.

Thus one may say that the law (other than purely religious law) which the English administrators in the days of Clive and Warren Hastings found consisted of—

First, a large and elaborate system of Inheritance and Family Law, the Musulman pretty uniform throughout India, though in some regions modified by Hindu custom, the Hindu less uniform. Each was utterly unlike English law and incapable of being fused with it. Each was closely bound up with the religion and social habits of the people. Each was contained in treatises of more or less antiquity and authority, some of the Hindu treatises very ancient and credited with almost divine sanction, the Musulman treatises of course posterior to the Koran, and consisting of commentaries upon that Book and upon the traditions that had grown up round it.

Secondly, a large mass of customs relating to the occupation and use of land and of various rights connected with tillage and pasturage, including water-rights, rights of soil-accretion on the banks of rivers, and forest-rights. The agricultural system and the revenue system of the country rested upon these land customs, which were of course mostly unwritten and which varied widely in different districts.

Thirdly, a body of customs, according to our ideas comparatively scanty and undeveloped, but still important, relating to the transfer and pledging of property, and to contracts, especially commercial contracts.

Fourthly, certain penal rules drawn from Musulman law and more or less enforced by Musulman princes.

Thus there were considerable branches of law practically non-existent. There was hardly any law of civil and criminal procedure, because the methods of justice were primitive, and would have been cheap, but for the prevalence of corruption among judges as well as witnesses. There was very little of the law of Torts or Civil

Wrongs, and in the law of property of contracts and of crimes, some departments were wanting or in a rudimentary condition. Of a law relating to public and constitutional rights there could of course be no question, since no such rights existed.

In this state of facts the British officials took the line which practical men, having their hands full of other work, would naturally take, viz. the line of least resistance. They accepted and carried on what they found. Where there was a native law, they applied it, Musulman law to Musulmans, Hindu law to Hindus, and in the few places where they were to be found, Parsi law to Parsis, Jain law to Jains. Thus men of every creed—for it was creed, not race nor allegiance by which men were divided and classified in India—lived each according to his own law, as Burgundians and Franks and Romanized Gauls had done in the sixth century in Europe. The social fabric was not disturbed, for the land customs and the rules of inheritance were respected, and of course the minor officers, with whom chiefly the peasantry came in contact, continued to be natives. Thus the villager scarcely felt that he was passing under the dominion of an alien power, professing an alien faith. His life flowed on in the same equable course beside the little white mosque, or at the edge of the sacred grove. A transfer of power from a Hindu to a Musulman sovereign would have made more difference to him than did the establishment of British rule; and life was more placid than it would have been under either a rajah or a sultan, for the marauding bands which had been the peasants' terror were soon checked by European officers.

So things remained for more than a generation. So indeed things remain still as respects those parts of law which are inwoven with religion, marriage, adoption (among Hindus) and other family relations, and with the succession to property. In all these matters native law continues to be administered by the Courts the English have set up; and when cases are appealed

from the highest of those Courts to the Privy Council in England, that respectable body determines the true construction to be put on the Koran and the Islamic Traditions, or on passages from the mythical Manu, in the same business-like way as it would the meaning of an Australian statute<sup>1</sup>. Except in some few points to be presently noted, the Sacred Law of Islam and that of Brahmanism remain unpolluted by European ideas. Yet they have not stood unchanged, for the effect of the more careful and thorough examination which the contents of these two systems have received from advocates, judges, and text-writers, both native and English, imbued with the scientific spirit of Europe, has been to clarify and define them, and to develop out of the half-fluid material more positive and rigid doctrines than had been known before. Something like this may probably have been done by the Romans for the local or tribal law of their provinces.

In those departments in which the pre-existing customs were not sufficient to constitute a body of law large enough and precise enough for a civilized Court to work upon, the English found themselves obliged to supply the void. This was done in two ways. Sometimes the Courts boldly applied English law. Sometimes they supplemented native custom by common sense, *i.e.* by their own ideas of what was just and fair. The phrase 'equity and good conscience' was used to embody the principles by which judges were to be guided when positive rules, statutory or customary, were not forthcoming. To a magistrate who knew no law at all, these words would mean that he might follow his own notions of 'natural justice,' and he would probably give more satisfaction to suitors than would his more learned

<sup>1</sup> It is related that a hill tribe of Kols, in Central India, had a dispute with the Government of India over some question of forest-rights. The case having gone in their favour, the Government appealed to the Judicial Committee. Shortly afterwards a passing traveller found the elders of the tribe assembled at the sacrifice of a kid. He inquired what deity was being propitiated, and was told that it was a deity powerful but remote, whose name was Privy Council.

brother, trying to apply confused recollections of Blackstone or Chitty. In commercial matters common sense would be aided by the usage of traders. In cases of Tort native custom was not often available, but as the magistrate who dealt out substantial justice would give what the people had rarely obtained from the native courts, they had no reason to complain of the change. As to rules of evidence, the young Anglo-Indian civilian would, if he were wise, forget all the English technicalities he might have learnt, and make the best use he could of his mother-wit<sup>1</sup>.

For the first sixty years or more of British rule there was accordingly little or no attempt to Anglify the law of India, or indeed to give it any regular and systematic form. Such alterations as it underwent were the natural result of its being dispensed by Europeans. But to this general rule there were two exceptions, the law of Procedure and the law of Crimes. Courts had been established in the Presidency towns even before the era of conquest began. As their business increased and subordinate Courts were placed in the chief towns of the annexed provinces, the need for some regular procedure was felt. An Act of the British Parliament of A. D. 1781 empowered the Indian Government to make regulations for the conduct of the provincial Courts, as the Court at Fort William (Calcutta) had already been authorized to do for itself by an Act of 1773. Thus a regular system of procedure, modelled after that of England, was established; and the Act of 1781 provided that the rules and forms for the execution of process were to be accommodated to the religion and manners of the natives.

As respects penal law, the English began by adopting that which the Musulman potentates had been accustomed to apply. But they soon found that many

<sup>1</sup> For the facts given in the following pages I am much indebted to the singularly lucid and useful treatise of Sir C. P. Ilbert (formerly Legal Member of the Viceroy's Council) entitled *The Government of India*.

of its provisions were such as a civilized and nominally Christian government could not enforce. Mutilation as a punishment for theft, for instance, and stoning for sexual offences, were penalties not suited to European notions; and still less could the principle be admitted that the evidence of a non-Musulman is not receivable against one of the Faithful. Accordingly a great variety of regulations were passed amending the Musulman law of crimes from an English point of view. In Calcutta the Supreme Court did not hesitate to apply English penal law to natives; and applied it to some purpose at a famous crisis in the fortunes of Warren Hastings when (in 1775) it hanged Nuncomar for forgery under an English statute of 1728, which in the opinion of many high authorities of a later time had never come into force at all in India. It was inevitable that the English should take criminal jurisdiction into their own hands—the Romans had done the same in their provinces—and inevitable also that they should alter the penal law in conformity with their own ideas. But they did so in a very haphazard fashion. The criminal law became a patchwork of enactments so confused that it was the first subject which invited codification in that second epoch of English rule which we are now approaching.

Before entering on this remarkable epoch, one must remember that the English in India, still a very small though important class, were governed entirely by English law. So far as common law and equity went, this law was exactly the same as the contemporaneous law of England. But it was complicated by the fact that a number of Regulations, as they were called, had been enacted for India by the local government, that many British statutes were not intended to apply and probably did not apply to India (though whether they did or not was sometimes doubtful), and that a certain number of statutes had been enacted by Parliament expressly for India. Thus though the law under which the

English lived had not been perceptibly affected by Indian customs, it was very confused and troublesome to work. That the learning of the judges sent from home to sit in the Indian Courts was seldom equal to that of the judges in England was not necessarily a disadvantage, for in traversing the jungle of Indian law the burden of English case lore would have too much impeded the march of justice.

The first period of English rule, the period of rapid territorial extension and of improvised government, may be said to have ended with the third Maratha war of 1817-8. The rule of Lord Amherst and Lord William Bentinck (1823-35) was a comparatively tranquil period, when internal reforms had their chance, as they had in the Roman Empire under Hadrian and Antoninus Pius. This was also the period when a spirit of legal reform was on foot in England. It was the time when the ideas of Bentham had begun to bear fruit, and when the work begun by Romilly was being carried on by Brougham and others. Both the law applied to Englishmen, and such parts of native law as had been cut across, filled up, and half re-shaped by English legal notions and rules, called loudly for simplification and reconstruction.

The era of reconstruction opened with the enactment, in the India Charter Act of 1833, of a clause declaring that a general judicial system and a general body of law ought to be established in India applicable to all classes, Europeans as well as natives, and that all laws and customs having legal force ought to be ascertained, consolidated, and amended. The Act then went on to provide for the appointment of a body of experts to be called the Indian Law Commission, which was to inquire into and report upon the Courts, the procedure and the law then existing in India. Of this commission Macaulay, appointed in 1833 legal member of the Governor-General's Council, was the moving spirit: and with it the work of codification began. It prepared

a Penal Code, which however was not passed into law until 1860, for its activity declined after Macaulay's return to England and strong opposition was offered to his draft by many of the Indian judges. A second Commission was appointed under an Act of 1853, and sat in England. It secured the enactment of the Penal Code, and of Codes of Civil and of Criminal Procedure. A third Commission was created in 1861, and drafted other measures. The Government of India demurred to some of the proposed changes and evidently thought that legislation was being pressed on rather too fast. The Commission, displeased at this resistance, resigned in 1870; and since then the work of preparing as well as of carrying through codifying Acts has mostly been done in India. The net result of the sixty-six years that have passed since Macaulay set to work in 1834 is that Acts codifying and amending the law, and declaring it applicable to both Europeans and natives, have been passed on the topics following:—

Crimes (1860).

Criminal Procedure (1861, 1882, and 1898).

Civil Procedure (1859 and 1882).

Evidence (1872).

Limitation of Actions (1877).

Specific Relief (1877).

Probate and Administration (1881).

Contracts (1872) (but only the general rules of contract with a few rules on particular parts of the subject).

Negotiable Instruments (1881) (but subject to native customs).

Besides these, codifying statutes have been passed which do not apply (at present) to all India, but only to parts of it, or to specified classes of the population, on the topics following:—

Trusts (1882).

Transfer of Property (1882).

Succession (1865).

Easements (1882).

## Guardians and Wards (1890).

These statutes cover a large part of the whole field of law, so that the only important departments not yet dealt with are those of Torts or Civil Wrongs (on which a measure not yet enacted was prepared some years ago); certain branches of contract law, which it is not urgent to systematize because they give rise to lawsuits only in the large cities, where the Courts are quite able to dispose of them in a satisfactory way; Family Law, which it would be unsafe to meddle with, because the domestic customs of Hindus, Musulmans, and Europeans are entirely different; and Inheritance, the greater part of which is, for the same reason, better left to native custom. Some points have, however, been covered by the Succession Act already mentioned. Thus the Government of India appear to think that they have for the present gone as far as they prudently can in the way of enacting uniform general laws for all classes of persons. Further action might displease either the Hindus or the Musulmans, possibly both: and though there would be advantages in bringing the law of both these sections of the population into a more clear and harmonious shape, it would in any case be impossible to frame rules which would suit both of them, and would also suit the Europeans. Here Religion steps in, a force more formidable in rousing opposition or disaffection than any which the Romans had to fear.

In such parts of the law as are not covered by these enumerated Acts, Englishmen, Hindus and Musulmans continue to live under their respective laws. So do Parsis, Sikhs, Buddhists (most numerous in Burma), and Jains, save that where there is really no native law or custom that can be shown to exist, the judge will naturally apply the principles of English law, handling them, if he knows how, in an untechnical way. Thus beside the new stream of united law which has its source in the codifying Acts, the various older streams of law, each representing a religion, flow peacefully on,

The question which follows—What has been the action on the other of each of these elements? resolves itself into three questions:—

How far has English Law affected the Native Law which remains in force ?

How far has Native Law affected the English Law which is in force ?

How have the codifying Acts been framed—*i.e.* are they a compromise between the English and the native element, or has either predominated and given its colour to the whole mass ?

The answer to the first question is that English influence has told but slightly upon those branches of native law which had been tolerably complete before the British conquest, and which are so interwoven with religion that one may almost call them parts of religion. The Hindu and Musulman customs which regulate the family relations and rights of succession have been precisely defined, especially those of the Hindus, which were more fluid than the Muslim customs, and were much less uniform over the whole country. Trusts have been formally legalized, and their obligation rendered stronger. Adoption has been regularized and stiffened, for its effects had been uncertain in their legal operation. Where several doctrines contended, one doctrine has been affirmed by the English Courts, especially by the Privy Council as ultimate Court of Appeal, and the others set aside. Moreover the Hindu law of Wills has been in some points supplemented by English legislation, and certain customs repugnant to European ideas, such as the self-immolation of the widow on the husband's funeral pyre, have been abolished. And in those parts of law which, though regulated by local custom, were not religious, some improvements have been effected. The rights of the agricultural tenant have been placed on a more secure basis. Forest-rights have been ascertained and defined, partly no doubt for the sake of the pecuniary interests which the Govern-

ment claims in them, and which the peasantry do not always admit. But no attempt has been made to Anglify these branches of law as a whole.

On the other hand, the law applicable to Europeans only has been scarcely (if at all) affected by native law. It remains exactly what it is in England, except in so far as the circumstances of India have called for special statutes.

The third question is as to the contents of those parts of the law which are common to Europeans and Natives, that is to say, the parts dealt by the codifying Acts already enumerated. Here English law has decisively prevailed. It has prevailed not only because it would be impossible to subject Europeans to rules emanating from a different and a lower civilization, but also because native custom did not supply the requisite materials. Englishmen had nothing to learn from natives as respects procedure or evidence. The native mercantile customs did not constitute a system even of the general principles of contract, much less had those principles been worked out in their details. Accordingly the Contract Code is substantially English, and where it differs from the result of English cases, the differences are due, not to the influence of native ideas or native usage, but to the views of those who prepared the Code, and who, thinking the English case-law susceptible of improvement, diverged from it here and there just as they might have diverged had they been preparing a Code to be enacted for England. There are, however, some points in which the Penal Code shows itself to be a system intended for India. The right of self-defence is expressed in wider terms than would be used in England, for Macaulay conceived that the slackness of the native in protecting himself by force made it desirable to depart a little in this respect from the English rules. Offences such as dacoity (brigandage by robber bands), attempts to bribe judges or witnesses, the use of torture by policemen, kidnapping, the offering

of insult or injury to sacred places, have been dealt with more fully and specifically than would be necessary in a Criminal Code for England. Adultery has, conformably to the ideas of the East, been made a subject for criminal proceedings. Nevertheless these, and other similar, deviations from English rules which may be found in the Codes enacted for Europeans and natives alike, do not affect the general proposition that the codes are substantially English. The conquerors have given their law to the conquered. When the conquered had a law of their own which this legislation has effaced, the law of the conquerors was better. Where they had one too imperfect to suffice for a growing civilization, the law of the conquerors was inevitable.

#### VII. THE WORKING OF THE INDIAN CODES.

Another question needs to be answered. It has a twofold interest, because the answer not only affects the judgement to be passed on the course which the English Government in India has followed, but also conveys either warning or encouragement to England herself. This question is—How have these Indian Codes worked in practice? Have they improved the administration of justice? Have they given satisfaction to the people? Have they made it easier to know the law, to apply the law, to amend the law where it proves faulty?

When I travelled in India in 1888-9 I obtained opinions on these points from many persons competent to speak. There was a good deal of difference of view, but the general result seemed to be as follows. I take the four most important codifying Acts, as to which it was most easy to obtain profitable criticisms.

The two Procedure Codes, Civil and Criminal, were very generally approved. They were not originally creative work, but were produced by consolidating and simplifying a mass of existing statutes and regulations,

which had become unwieldy and confused. Order was evoked out of chaos, a result which, though beneficial everywhere, was especially useful in the minor Courts, whose judges had less learning and experience than those of the five High Courts at Calcutta, Madras, Bombay, Allahabad and Lahore.

The Penal Code was universally approved; and it deserves the praise bestowed on it, for it is one of the noblest monuments of Macaulay's genius. To appreciate its merits, one must remember how much, when prepared in 1834, it was above the level of the English criminal law of that time. The subject is eminently fit to be stated in a series of positive propositions, and so far as India was concerned, it had rested mainly upon statutes and not upon common law. It has been dealt with in a scientific, but also a practical common-sense way: and the result is a body of rules which are comprehensible and concise. To have these on their desks has been an immense advantage for magistrates in the country districts, many of whom have had but a scanty legal training. It has also been claimed for this Code that under it crime has enormously diminished: but how much of the diminution is due to the application of a clear and just system of rules, how much to the more efficient police administration, is a question on which I cannot venture to pronounce<sup>1</sup>.

No similar commendation was bestowed on the Evidence Code. Much of it was condemned as being too metaphysical, yet deficient in subtlety. Much was deemed superfluous, and because superfluous, possibly perplexing. Yet even those who criticized its drafting admitted that it might possibly be serviceable to untrained magistrates and practitioners, and I have myself heard some of these untrained men declare that they

<sup>1</sup> The merits of this Code are discussed in an interesting and suggestive manner by Mr. H. Speyer in an article entitled *Le Droit Pénal Anglo-indien*, which appeared in the *Revue de l'Université de Bruxelles* in April, 1900.

did find it helpful. They are a class relatively larger in India than in England.

It was with regard to the merits of the Contract Code that the widest difference of opinion existed. Any one who reads it can see that its workmanship is defective. It is neither exact nor subtle, and its language is often far from lucid. Every one agreed that Sir J. F. Stephen (afterwards Mr. Justice Stephen), who put it into the shape in which it was passed during his term of office as Legal Member of Council, and was also the author of the Evidence Act, was a man of great industry, much intellectual force, and warm zeal for codification. But his capacity for the work of drafting was deemed not equal to his fondness for it. He did not shine either in fineness of discrimination or in delicacy of expression. Indian critics, besides noting these facts, went on to observe that in country places four-fifths of the provisions of the Contract Act were superfluous, while those which were operative sometimes unduly fettered the discretion of the magistrate or judge, entangling him in technicalities, and preventing him from meting out that substantial justice which is what the rural suitor needs. The judge cannot disregard the Act, because if the case is appealed, the Court above, which has only the notes of the evidence before it, and does not hear the witnesses, is bound to enforce the provisions of the law. In a country like India, law ought not to be too rigid: nor ought rights to be stiffened up so strictly as they are by this Contract Act. Creditors had already, through the iron regularity with which the British Courts enforce judgements by execution, obtained far more power over debtors than they possessed in the old days, and more than the benevolence of the English administrator approves. The Contract Act increases this power still further. This particular criticism does not reflect upon the technical merits of the Act in itself. But it does suggest reasons which would not occur to a European mind, why it may be inexpedient by making

the law too precise to narrow the path in which the judge has to walk. A stringent administration of the letter of the law is in semi-civilized communities no unmixed blessing.

So much for the rural districts. In the Presidency cities, on the other hand, the Contract Code is by most experts pronounced to be unnecessary. The judges and the bar are already familiar with the points which it covers, and find themselves—so at least many of them say—rather embarrassed than aided by it. They think it cramps their freedom of handling a point in argument. They prefer the elasticity of the common law. And in point of fact, they seem to make no great use of the Act, but to go on just as their predecessors did before it was passed.

These criticisms may need to be discounted a little, in view of the profound conservatism of the legal profession, and of the dislike of men trained at the Temple or Lincoln's Inn to have anything laid down or applied on the Hooghly which is not being done at the same moment on the Thames. And a counterpoise to them may be found in the educational value which is attributed to the Code by magistrates and lawyers who have not acquired a mastery of contract law through systematic instruction or through experience at home. To them the Contract Act is a manual comparatively short and simple, and also authoritative; and they find it useful in enabling them to learn their business. On the whole, therefore, though the Code does not deserve the credit which has sometimes been claimed for it, one may hesitate to pronounce its enactment a misfortune. It at any rate provides a basis on which a really good Code of contractual law may some day be erected.

Taking the work of Indian codification as a whole, it has certainly benefited the country. The Penal Code and the two Codes of Procedure represent an unmixed gain. The same may be said of the consolidation of the statute law, for which so much was done by the energy

and skill of Mr. Whitley Stokes. And the other codifying acts have on the whole tended both to improve the substance of the law and to make it more accessible. Their operation has, however, been less complete than most people in Europe realize, for while many of them are confined to certain districts, others are largely modified by the local customs which they have (as expressed in their saving clauses) very properly respected. If we knew more about the provinces of the Roman Empire we might find that much more of local custom subsisted side by side with the apparently universal and uniform imperial law than we should gather from reading the compilations of Justinian.

It has already been observed that Indian influences have scarcely at all affected English law as it continues to be administered to Englishmen in India. Still less have they affected the law of England at home. It seems to have been fancied thirty or forty years ago, when law reform in general and codification in particular occupied the public mind more than they do now, that the enactment of codes of law for India, and the success which was sure to attend them there, must react upon England and strengthen the demand for the reduction of her law into a concise and systematic form. No such result has followed. The desire for codification in England has not been perceptibly strengthened by the experience of India. Nor can it indeed be said that the experience of India has taught jurists or statesmen much which they did not know before. That a good code is a very good thing, and that a bad code is, in a country which possesses competent judges, worse than no code at all—these are propositions which needed no Indian experience to verify them. The imperfect success of the Evidence and Contract Acts has done little more than add another illustration to those furnished by the Civil Code of California and the Code of Procedure in New York of the difficulty which attends these undertakings. Long before Indian codification was talked of, Savigny

had shown how hard it is to express the law in a set of definite propositions without reducing its elasticity and impeding its further development. His arguments scarcely touch penal law, still less the law of procedure, for these are not topics in which much development need be looked for. But the future career of the Contract Act and of the projected Code of Torts, when enacted, may supply some useful data for testing the soundness of his doctrine.

One reason why these Indian experiments have so little affected English opinion may be found in the fact that few Englishmen have either known or cared anything about them. The British public has not realized how small is the number of persons by whom questions of legal policy in India have during the last seventy years been determined. Two or three officials in Downing Street and as many in Calcutta have practically controlled the course of events, with little interposition from outside. Even when Commissions have been sitting, the total number of those whose hand is felt has never exceeded a dozen. It was doubtless much the same in the Roman Empire. Indeed the world seldom realizes by how few persons it is governed. There is a sense in which power may be said to rest with the whole community, and there is also a sense in which it may be said, in some governments, to rest with a single autocrat. But in reality it almost always rests with an extremely small number of persons, whose knowledge and will prevail over or among the titular possessors of authority.

Before we attempt to forecast the future of English law in India, let us cast a glance back at the general course of its history as compared with that of the law of Rome in the ancient world.

## VIII. COMPARISON OF THE ROMAN LAW WITH ENGLISH LAW IN INDIA.

Rome grew till her law became first that of Italy, then that of civilized mankind. The City became the World, *Urbs* became *Orbis*, to adopt the word-play which was once so familiar. Her law was extended over her Empire by three methods:—

Citizenship was gradually extended over the provinces till at last all subjects had become citizens.

Many of the principles and rules of the law of the City were established and diffused in the provinces by the action of Roman Magistrates and Courts, and especially by the Provincial Edict.

The ancient law of the City was itself all the while amended, purged of its technicalities, and simplified in form, till it became fit to be the law of the World.

Thus, when the law of the City was formally extended to the whole Empire by the grant of citizenship to all subjects, there was not so much an imposition of the conqueror's law upon the conquered as the completion of a process of fusion which had been going on for fully four centuries. The fusion was therefore natural; and because it was natural it was complete and final. The separation of the one great current of Roman law into various channels, which began in the fifth century A.D. and has continued ever since, has been due to purely historical causes, and of late years (as we shall see presently) the streams that flow in these channels have tended to come nearer to one another.

During the period of more than four centuries (B.C. 241 to A.D. 211-7), when these three methods of development and assimilation were in progress, the original law of the City was being remoulded and amended in the midst of and under the influence of a non-Roman population of aliens (*peregrini*) at Rome and in the provinces, and that semi-Roman law which was ad-

ministered in the provinces was being created by magistrates and judges who lived in the provinces and who were, after the time of Tiberius, mostly themselves of provincial origin. Thus the intelligence, reflection, and experience of the whole community played upon and contributed to the development of the law. Judges, advocates, juridical writers and teachers as well as legislators, joined in the work. The completed law was the outcome of a truly national effort. Indeed it was largely through making a law which should be fit for both Italians and provincials that the Romans of the Empire became almost a nation.

In India the march of events has been different, because the conditions were different. India is ten thousand miles from England. The English residents are a mere handful.

The Indian races are in a different stage of civilization from the English. They are separated by religion; they are separated by colour.

There has therefore been no fusion of English and native law. Neither has there been any movement of the law of England to adapt itself to become the law of her Indian subjects. English law has not, like Roman, come halfway to meet the provinces. It is true that no such approximation was needed, because English law had already reached, a century ago, a point of development more advanced than Roman law had reached when the conquest of the provinces began, and the process of divesting English law of its archaic technicalities went on so rapidly during the nineteenth century under purely home influences, that neither the needs of India nor the influences of India came into the matter at all.

The Romans had less resistance to meet with from religious diversities than the English have had, for the laws of their subjects had not so wrapped their roots round religious belief or usage as has been the case in India. But they had more varieties of provincial custom

to consider, and they had, especially in the laws of the Hellenized provinces, systems more civilized and advanced first to recognize and ultimately to supersede than any body of law which the English found.

There is no class in India fully corresponding to the Roman citizens domiciled in the provinces during the first two centuries of the Roman Empire. The European British subjects, including the Eurasians, are comparatively few, and they are to a considerable extent a transitory element, whose true home is England. Only to a very small extent do they enjoy personal immunities and privileges such as those that made Roman citizenship so highly prized, for the English, more liberal than the Romans, began by extending to all natives of India, as and when they became subjects of the British Crown, the ordinary rights of British subjects enjoyed under such statutes as Magna Charta and the Bill of Rights. The natives of India have entered into the labours of the barons at Runnymede and of the Whigs of 1688.

What has happened has been that the English have given to India such parts of their own law (somewhat simplified in form) as India seemed fitted to receive. These parts have been applied to Europeans as well as to natives, but they were virtually applicable to Europeans before codification began. The English rulers have filled up those departments in which there was no native law worthy of the name, sometimes, however, respecting local native customs. Here one finds an interesting parallel to the experience of the Romans. They, like the English, found criminal law and the law of procedure to be the departments which could be most easily and promptly dealt with. They, like the English, were obliged to acquiesce in the retention by a part of the population of some ancient customs regarding the Family and the Succession to Property. But this acquiescence was after all partial and local; whereas the English have neither applied to India the more technical parts of their own law, such as that

relating to land, nor attempted to supersede those parts of native law which are influenced by religion, such as the parts which include family relations and inheritance. Thus there has been no general fusion comparable to that which the beginning of the third century A. D. saw in the Roman Empire.

As respects codification, the English have in one sense done more than the Romans, in another sense less. They have reduced such topics as penal law and procedure, evidence and trusts, to a compact and well-ordered shape, which is more than Justinian did for any part of the Roman law. But they have not brought the whole law together into one *Corpus Iuris*, and they have left large parts of it in triplicate, so to speak, that is to say, consisting of rules which are entirely different for Hindus, for Musulmans, and for Europeans.

Moreover, as it is the law of the conquerors which has in India been given to the conquered practically unaffected by native law, so also the law of England has not been altered by the process. It has not been substantially altered in India. The uncodified English law there is the same (local statutes excepted) as the law of England at home. Still less has it been altered in England itself. Had Rome not acquired her Empire, her law would never have grown to be what it was in Justinian's time. Had Englishmen never set foot in India, their law would have been, so far as we can tell, exactly what it is to-day.

Neither have those natives of India who correspond to the provincial subjects of Rome borne any recognizable share in the work of Indian legal development. Some of them have, as text-writers or as judges, rendered good service in elucidating the ancient Hindu customs. But the work of throwing English law into the codified form in which it is now applied in India to Europeans and natives alike has been done entirely by Englishmen. In this respect also the more advanced civilization has shown its dominant creative force.

## IX. THE FUTURE OF ENGLISH LAW IN INDIA.

Here, however, it is fit to remember that we are not, as in the case of the Romans, studying a process which has been completed. For them it was completed before the fifth century saw the dissolution of the western half of the Empire. For India it is still in progress. Little more than a century has elapsed since English rule was firmly established; only half a century since the Punjab and (shortly afterwards) Oudh were annexed. Although the Indian Government has prosecuted the work of codification much less actively during the last twenty years than in the twenty years preceding, and seems to conceive that as much has now been done as can safely be done at present, still in the long future that seems to lie before British rule in India the equalization and development of law may go much further than we can foresee to-day. The power of Britain is at this moment stable, and may remain so if she continues to hold the sea and does not provoke discontent by excessive taxation.

Two courses which legal development may follow are conceivable. One is that all those departments of law whose contents are not determined by conditions peculiar to India will be covered by further codifying acts, applicable to Europeans and natives alike, and that therewith the process of equalization and assimilation will stop because its natural limits will have been reached. The other is that the process will continue until the law of the stronger and more advanced race has absorbed that of the natives and become applicable to the whole Empire.

Which of these two things will happen depends upon the future of the native religions, and especially of Hinduism and of Islam, for it is in religion that the legal customs of the natives have their roots. Upon this vast and dark problem it may seem idle to speculate; nor can it be wholly dis severed from a consideration

of the possible future of the religious beliefs which now hold sway among Europeans. Both Islam and Hinduism are professed by masses of human beings so huge, so tenacious of their traditions, so apparently inaccessible to European influences, that no considerable declension of either faith can be expected within a long period of years. Yet experience, so far as it is available, goes to show that no form of heathenism, not even an ancient and in some directions highly cultivated form like Hinduism, does ultimately withstand the solvent power of European science and thought. Even now, though Hinduism is growing every day, at the expense of the ruder superstitions among the hill-folk, it is losing its hold on the educated class, and it sees every day members of its lower castes pass over to Islam. So Islam also, deeply rooted as it may seem to be, wanes in the presence of Christianity, and though it advances in Central Africa, declines in the Mediterranean countries. It has hitherto declined not by the conversion of its members to other faiths, but by the diminution of the Muslim population; yet one must not assume that when the Turkish Sultanate or Khalifate has vanished, it may not lose much of its present hold upon the East. Possibly both Hinduism and Islam may, so potent are the new forces of change now at work in India, begin within a century or two to show signs of approaching dissolution. Polygamy may by that time have disappeared. Other peculiar features of the law of family and inheritance will tend to follow, though some may survive through the attachment to habit even when their original religious basis has been forgotten.

In the Arctic seas, a ship sometimes lies for weeks together firmly bound in a vast ice-field. The sailor who day after day surveys from the masthead the dazzling expanse sees on every side nothing but a solid surface, motionless and apparently immoveable. Yet all the while this ice-field is slowly drifting to the south, carrying with it the embedded ship. At last,

when a warmer region has been reached and the south wind has begun to blow, that which overnight was a rigid and glittering plain is in the light of dawn a tossing mass of ice-blocks, each swiftly melting into the sea, through which the ship finds her homeward path. So may it be with these ancient religions. When their dissolution comes, it may come with unexpected suddenness, for the causes which will produce it will have been acting simultaneously and silently over a wide area. If the English are then still the lords of India, there will be nothing to prevent their law from becoming (with some local variations) the law of all India. Once established and familiar to the people, it will be likely to remain, whatever political changes may befall, for nothing clings to the soil more closely than a body of civilized law once well planted. So the law of England may become the permanent heritage, not only of the hundreds of millions who will before the time we are imagining be living beyond the Atlantic, but of those hundreds of millions who fill the fertile land between the Straits of Manaar and the long rampart of Himalayan snows.

We embarked on this inquiry for the sake of ascertaining what light the experience of the English in India throws upon the general question of the relation of the European nations to those less advanced races over whom they are assuming dominion, and all of whom will before long own some European master<sup>1</sup>.

These races fall into two classes, those which do and those which do not possess a tolerably complete system of law. Turks, Persians, Egyptians, Moors, and Siamese belong to the former class; all other non-European races to the latter.

As to the latter there is no difficulty. So soon as Kafirs or Mongols or Hausas have advanced sufficiently to need a regular set of legal rules, they will (if their

<sup>1</sup> Among the 'less advanced races' one must not now include the Japanese, but one may include the Turks and the Persians. The fate of China still hangs in the balance. It is not to be assumed that she will be ruled, though she must come to be influenced, and probably more and more influenced, by Europeans.

European masters think it worth while) become subject to the law of those masters, of course more or less differentiated according to local customs or local needs. It may be assumed that French law will prevail in Madagascar, and English law in Uganda, and Russian law in the valley of the Amur.

Where, however, as is the case in the Musulman and perhaps also in the Buddhist countries belonging to the former class, a legal system which, though imperfect, especially on the commercial side, has been carefully worked out in some directions, holds the field and rests upon religion, the question is less simple. The experience of the English in India suggests that European law will occupy the non-religious parts of the native systems, and will tend by degrees to encroach upon and permeate even the religious parts, though so long as Islam (or Brahmanism) maintains its sway the legal customs and rules embedded in religion will survive. No wise ruler would seek to efface them so far as they are neither cruel nor immoral. It is only these ancient religions—Hinduism, Buddhism, and especially Islam—that can or will resist, though perhaps only for a time, and certainly only partially, the rising tide of European law.

#### X. PRESENT POSITION OF ROMAN AND ENGLISH LAW IN THE WORLD.

European law means, as we have seen, either Roman law or English law, so the last question is: Will either, and if so which, of these great rival systems prevail over the other?

They are not unequally matched. The Roman jurists, if we include Russian as a sort of modified Roman law, influence at present a larger part of the world's population, but Bracton and Coke and Mansfield might rejoice to perceive that the doctrines which they expounded are being diffused even more swiftly, with the swift

diffusion of the English tongue, over the globe. It is an interesting question, this competitive advance of legal systems, and one which would have engaged the attention of historians and geographers, were not law a subject which lies so much outside the thoughts of the lay world that few care to study its historical bearings. It furnishes a remarkable instance of the tendency of strong types to supplant and extinguish weak ones in the domain of social development. The world is, or will shortly be, practically divided between two sets of legal conceptions of rules, and two only. The elder had its birth in a small Italian city, and though it has undergone endless changes and now appears in a variety of forms, it retains its distinctive character, and all these forms still show an underlying unity. The younger has sprung from the union of the rude customs of a group of Low German tribes with rules worked out by the subtle, acute and eminently disputatious intellect of the Gallicized Norsemen who came to England in the eleventh century. It has been much affected by the elder system, yet it has retained its distinctive features and spirit, a spirit specially contrasted with that of the imperial law in everything that pertains to the rights of the individual and the means of asserting them. And it has communicated something of this spirit to the more advanced forms of the Roman law in constitutional countries.

At this moment the law whose foundations were laid in the Roman Forum commands a wider area of the earth's surface, and determines the relations of a larger mass of mankind. But that which looks back to Westminster Hall sees its subjects increase more rapidly, through the growth of the United States and the British Colonies, and has a prospect of ultimately overspreading India also. Neither is likely to overpower or absorb the other. But it is possible that they may draw nearer, and that out of them there may be developed, in the course of ages, a system of rules of private law which

shall be practically identical as regards contracts and property and civil wrongs, possibly as regards offences also. Already the commercial law of all civilized countries is in substance the same everywhere, that is to say, it guarantees rights and provides remedies which afford equivalent securities to men in their dealings with one another and bring them to the same goal by slightly different paths.

The more any department of law lies within the domain of economic interest, the more do the rules that belong to it tend to become the same in all countries, for in the domain of economic interest Reason and Science have full play. But the more the element of human emotion enters any department of law, as for instance that which deals with the relations of husband and wife, or of parent and child, or that which defines the freedom of the individual as against the State, the greater becomes the probability that existing divergences between the laws of different countries may in that department continue, or even that new divergences may appear.

Still, on the whole, the progress of the world is towards uniformity in law, and towards a more evident uniformity than is discoverable either in the sphere of religious beliefs or in that of political institutions.

### III

## FLEXIBLE AND RIGID CONSTITUTIONS<sup>1</sup>

### I. THE CONSTITUTIONS OF ROME AND ENGLAND.

ROME and England are the two States whose constitutions have had the greatest interest for the world, and have exerted the greatest influence upon it. Out of the republic on the Tiber, a city with a rural territory round it no bigger than Surrey or Rhode Island, grew a World Empire, and the framework of that Empire retained till its fall traces of the institutions under which the little republic, circled and threatened by a crowd of hostile States, had risen to show herself the strongest of them all. In England a monarchy, first tribal and then feudal, developed from very small beginnings into a second World Empire of a wholly different type, while at the same time the ancient form of government, through a series of struggles and efforts, guided by an only half-conscious purpose, slowly developed itself into a system monarchical only in name. That system became in the eighteenth century the starting-point for all modern political philosophy<sup>2</sup>, and in the nineteenth the model for nearly all the schemes of free

<sup>1</sup> This Essay was delivered, in the form of two lectures, in 1884, and the names Flexible and Rigid were then suggested for the two types of Constitution here described. It has been enlarged and revised and brought up to date, but the substance remains the same.

<sup>2</sup> The interest which the English Constitution excited in Montesquieu may be compared with that which the Roman excited in Polybius.

representative polity that have arisen in the Old World as well as for many in the newer countries.

It is, however, not merely the range of their influence, nor merely the fact that, as the Roman Constitution worked upon the whole of the ancient, so the English Constitution has worked upon the whole of the modern world, that makes these two systems deserve constant study. Constitutions are the expression of national character, as they in their turn mould the character of those who use them; and the same causes which made both peoples great have made their political institutions also strong and rich, specially full of instruction for all nations in all times. There were in the fifth century B. C. hundreds of commonwealths in the Mediterranean countries with republican frames of government, many of which bore a general resemblance to that of Rome. There were in the fourteenth century A. D. several monarchies in Europe similar in their constitutional outlines to that of England, and with what seemed an equal promise of rich and free development. Of the former, Rome alone survived, destroying or absorbing all the rest. Of the latter, that of England is the only one which had at the end of the eighteenth century grown into a system at once broad-based and strong, a system which secured both public order and the freedom of the individual citizen, and in which the people were able to make their voice heard and to influence the march of national policy. All the others had either degenerated into despotisms or remained comparatively crude and undeveloped. Thus when, after the flood of Napoleonic conquest had subsided, the peoples of the European continent began to essay the establishment of free constitutions, they found in that of England the model fittest to be followed, and sought to adapt its principles to their own several conditions.

England, moreover, has been the parent of free governments in a further sense. Though she has not, like Rome, stretched her system of government till it

embraced the world, she has reproduced it in those parts of her transoceanic dominions where her children have been able to form self-governing communities. Reduced copies of the British Constitution have been created in seventeen self-governing colonies. Seven of these have in North America been united in a Federation whose frame of government is built on British lines. Six others, in Australia, have been similarly grouped in another Federal Government of a not less distinctively British type. And an independent Republic, far vaster in population than all these colonies put together, has, less closely, but yet in the main and essential points, reproduced the principles, although not the form, of the institutions of the motherland. It is, therefore, to Rome and to England that the eye of the student of political constitutions will most often turn. They represent the most remarkable developments of ordered political life for the ancient and for the modern world respectively. And whoever attempts to classify Constitutions and to note the distinctive features of the principal types they present, will find that it is from Rome and from England that illustrations can most frequently and most profitably be drawn<sup>1</sup>.

## II. THE TRADITIONAL CLASSIFICATION OF CONSTITUTIONS.

The old-fashioned classification of Constitutions which has come down to our own times is based on the distinction of Written and Unwritten Law, itself an ill-expressed and rather confusing distinction, because *ius non scriptum* is intended to denote customs: and when customs have been recorded in writing, they can hardly continue to be called unwritten. This classification places in the category of Written Constitutions those which are expressly set forth in a specially important

<sup>1</sup> As to the countries or peoples in which Constitutions in the proper sense can be said to exist, see Note at the end of this Essay.

document or documents, and in the category of Unwritten those which began, not in formal agreements, but in usage, a usage which lives in men's recollections, and which, even when it has been to a large extent defined, and secured against error, by being committed to writing, is recorded as embodying that which men have observed, and are deemed likely to continue to observe, not as that to which they have bound themselves formally by a law.

These terms are, however, not happy terms, although the distinction they aim at expressing is a real distinction. The line which they attempt to draw between the two classes of Constitutions is not a clear or sharp line, because in all Written Constitutions there is and must be, as we shall presently see, an element of unwritten usage, while in the so-called Unwritten ones the tendency to treat the written record of custom or precedent as practically binding is strong, and makes that record almost equivalent to a formally enacted law, not to add that Unwritten Constitutions, though they began in custom, always include some statutes. Moreover, these names, while they dwell on a superficial distinction, ignore a more essential one to be presently mentioned. Let us therefore try to find a better classification.

If we survey Constitutions generally, in the past as well as in the present, we find them conforming to one or other of two leading types. Some are natural growths, unsymmetrical both in their form and in their contents. They consist of a variety of specific enactments or agreements of different dates, possibly proceeding from different sources; intermixed with customary rules which rest only on tradition or precedent, but are deemed of practically equal authority. Other Constitutions are works of conscious art, that is to say, they are the result of a deliberate effort on the part of the State to lay down once for all a body of coherent provisions under which its government shall be established and conducted. Such Constitutions are usually comprised in one instrument—

possibly, however, in more than one—an instrument solemnly enacted whose form and title distinguish it from ordinary laws. We may provisionally call these two types the Old and the New, because all ancient and mediæval as well as some few recent Constitutions are of the former kind, while most modern ones belong to the latter. The distinction corresponds roughly to that drawn, in England and America, between common law and statute law, or to the Roman distinction between *ius* and *lex*, so that we might describe the types as Common Law Constitutions and Statutory Constitutions respectively. Yet the line of demarcation is not always a plain one. In countries with constitutions of the Common Law type, statutes are frequently passed, declaring or modifying or abolishing antecedent usage, which supersede and replace parts, possibly large parts, of the common law maxims, so that at last most of the leading rules can be found in a few great statutes. On the other hand, the Statutory Constitutions become developed by interpretation and fringed with decisions and enlarged or warped by custom, so that after a time the letter of their text no longer conveys their full effect. It is, therefore, desirable to have some more definite and characteristic test or criterion whereby to mark off the two types which have been just described in general terms.

### III. A PROPOSED NEW CLASSIFICATION OF CONSTITUTIONS.

Such a criterion may be found in the relation which each Constitution bears to the ordinary laws of the State, and to the ordinary authority which enacts those laws. Some constitutions, including all that belong to the older or Common Law type, are on the level of the other laws of the country, whether those laws exist in the form of statutes only, or also in the form of recorded decisions defining and confirming a custom. Such con-

stitutions proceed from the same authorities which make the ordinary laws ; and they are promulgated or repealed in the same way as ordinary laws. In such cases the term ' Constitution ' denotes nothing more than such and so many of the statutes and customs of the country as determine the form and arrangements of its political system. And (as will presently appear) it is often difficult to say of any particular law whether it is or is not a part of the political Constitution.

Other constitutions, most of them belonging to the newer or Statutory class, stand above the other laws of the country which they regulate. The instrument (or instruments) in which such a constitution is embodied proceeds from a source different from that whence spring the other laws, is repealable in a different way, exerts a superior force. It is enacted, not by the ordinary legislative authority, but by some higher or specially empowered person or body. If it is susceptible of change, it can be changed only by that authority or by that special person or body. When any of its provisions conflict with a provision of the ordinary law, it prevails, and the ordinary law must give way. These are features, partly political, partly legal, which mark off the two types of Constitution from one another ; and although it will appear that in some few cases the question to which type the Constitution of a particular State belongs may be a nice one, still the general legal criteria to be applied are clear and definite. In a State possessing a constitution of the former—the older—type, all laws (excluding of course by-laws, municipal regulations, and so forth) are of the same rank and exert the same force. There is, moreover, only one legislative authority competent to pass laws in all cases and for all purposes. But in a State whose Constitution belongs to the latter—the newer—type, there are two kinds of laws, one kind higher than the other, and more universally potent ; and there are likewise two legislative authorities, one superior and capable of legislating for all purposes whatsoever, the

other inferior and capable of legislating only so far as the superior authority has given it the right and function to do so.

The difference of these two types is best explained by illustrative instances. At Rome in the second century B. C. there was but one kind of enactment. All *leges* passed by the general assembly (whether *comitia centuriata* or *comitia tributa*) were of the same generality and the same force. There was but one legislative authority, the people voting in the *comitia*. So in England, during the last few centuries, there has been but one direct legislative authority, viz. Parliament, which is supreme, and all whose acts bind every citizen everywhere. Accordingly in England the laws called constitutional differ only in respect of their subject-matter from other laws, but are of no higher order. Each of such laws, though we call them in their totality 'the British Constitution,' is alterable by the ordinary legislative authority at any moment, just like other laws. Between an Act for making a railway from Manchester to Liverpool and an Act extending the electoral suffrage to all householders or disestablishing the Protestant Episcopal Church in Ireland there is no difference whatever in point of form or in degree of authority. In Switzerland, however, and in France the case is different. The Constitution of the Swiss Confederation is a document which was enacted by the people, and any amendment of which needs to be similarly enacted by them, whereas ordinary laws are passed by the Federal legislature of two Houses<sup>1</sup>. The present Constitution of the French Republic was enacted by the two Chambers sitting together as a Constituent Assembly, and can be amended only by the Chambers sitting together in that capacity, after each Chamber has separately resolved that revision is needed, whereas ordinary laws are passed by

<sup>1</sup> It is unnecessary for the present purpose to call attention to the complication introduced in Switzerland by the application of the Referendum plan to ordinary laws.

the two Chambers sitting separately. Thus both in Switzerland and in France there is a distinction in the enacting authority, and therewith also a distinction in the quality and force of the laws enacted, the law which is called the Constitution being entirely superior to the other laws which are passed by the legislature in the ordinary every-day course of its action.

What in the case of each State of the latter or newer type may be the higher (and indeed supreme) authority which is alone competent to enact a Constitution depends upon the provisions of each particular system. It may be the whole people, voting by what is sometimes, though not very happily, called a plebiscite. It may be a body specially elected for the purpose, which dissolves when its work has been completed. It may be certain local bodies, each voting separately on the same instrument submitted to them. It may be, as in the case just mentioned of France, the ordinary legislature sitting in a peculiar way, or acting by a prescribed majority, or rendering several successive votes to the same effect at prescribed intervals of time. These are matters of detail. The essential point is that in States possessing Constitutions of the newer type that paramount or fundamental law which is called the Constitution takes rank above the ordinary laws, and cannot be changed by the ordinary legislative authority.

I have sought in many quarters for names, necessarily metaphorical names, suitable to describe these two types of Constitution. They might be called Moving and Stationary, because those of the older kind are virtually never at rest, but are always undergoing some sort of change, however slight, in the course of ordinary legislation, while those of the newer type abide fixed and stable in their place. Or they might be described, the former as Fluid, and the latter as Solid or Crystallized. When a man desires to change<sup>1</sup> the composition of a liquid, he pours in some other liquid or dissolves a solid

<sup>1</sup> *I. e.* to change mechanically, not necessarily chemically.

in the liquid, and shakes the mixture. But he who wishes to alter the composition of a solid must first dissolve it or fuse it, and then, having got it into a liquid or gaseous state, must mix in or extract (as the case may be) the other substance. The analogy between these two processes and those whereby a Constitution of the older and one of the newer type are respectively changed might justify these names. But there is another and simpler metaphor, which, though not quite perfect, seems on the whole preferable. Constitutions of the older type may be called Flexible, because they have elasticity, because they can be bent and altered in form while retaining their main features. Constitutions of the newer kind cannot, because their lines are hard and fixed. They may therefore receive the name of Rigid Constitutions: and by these two names I propose that we shall call them for the purposes of this inquiry. If the characteristics of the two types have not been made sufficiently clear by what has been already said, they will probably become clear in the more detailed examination of them, to which we may now proceed.

I begin with Flexible Constitutions, not only because they are more familiar to students of Roman history and to Englishmen, but also because they are anterior in date. They are indeed the only constitutions which the ancient world possessed, for although, in the absence of Aristotle's famous treatise *On Politics*, we know comparatively little about most of the constitutions even of the more famous Greek cities (except Athens), and practically nothing about any others, save those of Rome and Carthage, there are reasons, to be given presently, why we may safely assume that all of them belonged to the Flexible type. But in the modern world they have become rare. Excluding despotically governed countries, such as Russia, Turkey, and Montenegro, there are now only three in Europe, those of the United Kingdom, of Hungary—an ancient and very interesting Constitution, presenting remarkable analogies to that

of England—and of Italy, whose constitution, though originally set forth in one document, has been so changed by legislation as to seem now properly referable to the Flexible type. Elsewhere than in Europe, all Constitutions would appear to be Rigid<sup>1</sup>.

But a preliminary objection deserves to be first considered. Can we properly talk of a Constitution at all in States which, like Rome and England, draw no formal and technical distinction between laws of different kinds? Since there was at Rome and is in England but one legislative authority, and all its statutes are of equal force, how distinguish those which relate to the general frame of government from those which embody the minor details of administration? The great Reform Act of A. D. 1832, for instance—and the same remark applies to the parliamentary reform Acts of 1867 and 1884—was clearly a constitutional statute. But it contained minor provisions which no one could call fundamental, and some of which were soon changed by other statutes which would scarcely be described as constitutional. There are many statutes of which, as of the Municipal Reform Act of 1834 (and I may add as of the Local Government Acts of 1888 and 1894), it would be hard to say whether they are or are not constitutional statutes, and there are statutes which would not be termed constitutional (such as the Scottish Universities Act of 1852), which have in fact modified such a momentous constitutional document as the Act of Union with Scotland (5 Anne, c. 6, art. xxv).

Technically, therefore, we cannot draw a distinction between constitutional and other laws. There was in strictness no Roman Constitution. There is no British Constitution. That is to say, there are no laws which can be definitely marked off as Fundamental Laws, defining and distributing the powers of government, the mode of creating public authorities, the rights and immu-

<sup>1</sup> Except that of the South African Republic (Transvaal). The cases of the British self-governing colonies will be presently referred to.

nities of the citizen. That which we call the Constitution of the Roman State, that which we now call the Constitution of the United Kingdom, is a mass of precedents, carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon the methods of government, together with a certain number of statutes, some of them containing matters of petty detail, others relating to private just as much as to public law, nearly all of them presupposing and mixed up with precedents and customs, and all of them covered with a parasitic growth of legal decisions and political habits, apart from which the statutes would be almost unworkable, or at any rate quite different in their working from what they really are. The most skilful classifier could not draw up a list that would bear criticism of Roman or of British statutes embodying the Constitution of either State: and even if such a list were prepared, the statutes so classified would fail to contain some cardinal doctrines and rules. Such a list, for instance, of British statutes would contain nothing about the Cabinet, and very little about the relations of the House of Commons to the House of Lords. On such subjects as the control of the House of Commons over foreign affairs, the obligation of the Crown to take, or the possible right of the Crown in certain cases to overrule, the advice of its ministers, no light would be thrown. Yet the statutes form the clearest and most manageable part of the materials which make up the British Constitution. Those other materials which have been referred to are by their very nature vague and indeterminate, unsusceptible of classification, and in many instances incapable of being set forth in definite rules<sup>1</sup>. A certain part of them is already, or is on the way to become, obsolete. Another part is matter of controversy between different schools of jurists or historians. The same thing was true of Rome, for at Rome

<sup>1</sup> This point has been brought out with admirable force in Mr. Dicey's *Law of the Constitution*.

it would seem that no statute defined the power of the consuls, nor their relation to the Senate, nor set limits to the quasi-legislative authority of that great magistrate the Praetor. So far from being clearly ascertained were the powers of the Senate, that in Cicero's time it was matter of constitutional debate whether its decrees had or had not the full force of law<sup>1</sup>; and men took one view or the other according to their political proclivities, just as in England men at one time differed regarding the right of the House of Lords to deal with money bills.

These facts are of course obvious enough to-day to every English lawyer, and indeed to those laymen who have some tincture of historical or legal knowledge. It is otherwise with the general public. To them the word Constitution seems to represent something definite and positive. Much of the current talk about the danger of altering the British Constitution<sup>2</sup> seems to spring from the notion that the name represents a concrete thing, an ascertainable and positive definite body of rules laid down in black and white. The Romans had no single word to convey what we mean by 'Constitution.' Even in the last days of the Republic Cicero had to use such phrases as *forma*, or *ratio*, or *genus rei publicae*, or *leges et instituta*; and what we call 'constitutional law' appears in the jurists of the Empire as *ius quod ad statum rei Romanae spectat*<sup>3</sup>.

The objection, however, which we have been considering, goes only to misconceptions that may arise from the word 'Constitution,' not to the use of the word itself, for some such word is indispensable. The thing exists, and there must be a name to describe it. A thing is not the less real because its limits cannot be sharply defined. A hill is a hill and a plain a plain, though you cannot fix the point where the hill subsides into the plain.

<sup>1</sup> See as to this, Essay XIV, p. 716.

<sup>2</sup> I have allowed these lines to remain, though they were more applicable in 1884 than they are in 1900, when so many changes have been effected that arguments about the danger of changing the Constitution are less frequently heard.

<sup>3</sup> Ulpian in *Digest*, i. 1, 2.

The aggregate of the laws and customs through and under which the public life of a State goes on may fitly be called its Constitution; and even the still vaguer phrases, 'Spirit of the Constitution,' 'Principles of the Constitution,' may properly be used, since they too describe a general quality or tendency pervading the whole mass of laws and customs that rule a State which gives to this mass a character differing from that of the Constitution of any other State; just as each great nation has what we call a National Character, though this character can be more easily recognized than defined.

#### IV. THE ORIGIN OF FLEXIBLE CONSTITUTIONS.

Now let us return to consider the history and the attributes of Flexible Constitutions. We have seen that they are older than those of the Rigid type. It may be thought that this is so because they are more compatible with a rude condition of society, and because springing out of custom, always the first source of law, they are the simplest and most obvious form which regular political society can take. This is true, but does not fully explain the phenomena.

A Constitution properly so called is a frame of political society organized through and by law, that is to say, one in which law has established permanent institutions with recognized functions and definite rights. Now such forms of organized political society appear first in small communities, whether Urban, like the City States of Greece, or Rural, like those of early England or mediaeval Switzerland. Wherever in the earlier stages of civilization we find large communities, like Egypt, Assyria, Peru, Russia in the sixteenth century, we find that a tribal organization has passed into a despotism<sup>1</sup>, appa-

<sup>1</sup> I use the term 'despotism' for convenience, but of course no monarchy is absolutely despotic, and least of all perhaps in the ruder ages; for monarchs are always amenable to public opinion, and most so when they are the leaders of a tribe or people in arms. The real distinction is between a government checked

rently without passing through the intermediate stage of a more or less restricted monarchy. Now in a small area men usually organize themselves in a regular community by vesting legal authority in a mass meeting of the citizens. The Folk Mot of our Teutonic ancestors, like the still surviving Landsgemeinde of Uri or Appenzell, represents in a rural community what the *ἀγορά* represents in Homeric Greece, what the *ἐκκλησία* represents in the later Greek cities, and what the *comitia* represent at Rome; I might add, what (in a more rudimentary form) the popular meeting represents to-day in Albania and what the similar meeting called a *Pitso* represents among the Basuto and Bechuana Kafirs. Such meetings, like the New England Town Meeting, are Primary, not Representative. They consist of all the freemen within the community, though, in their earlier stage, it is in practice the leading men who determine the action of the whole assembly. They make such laws as there are. Being not only the supreme, but the only legislative authority, they can at any moment change the laws they deem fundamental, if there are any such laws, for the more backward races remain in the stage of mere custom, and do not reach the conception of a fundamental law. Whether the system of their government is formally embodied in one group of specially important laws, or, as more often happens, is left to be collected from a number of enactments connected and supplemented by usages, that system remains on a level with all the other laws and usages, because it emanates from the same source, viz. the governing primary assembly. It is not till the growth of some scheme of representation has made familiar the distinction between the authority of the people themselves and that of their

by religious sentiment consecrating ancient usage and by the fear of insurrection, and a government checked by well-established institutions and legal rules. As to Russia, it may be noted that though she has no Constitution in the proper sense, there are said to exist three Fundamental Laws of the Empire—that declaring the sovereign's autocratic power, that requiring him (or her) to be a member of the Orthodox Church of the East, and that fixing the rule of succession to the throne.

representatives that truly Rigid Constitutions appear, for it is not till then that a method suggests itself of enacting a kind of law which shall be superior to that which the ordinary legislative body creates. Accordingly the Primary Assembly, whether in ancient Greece and Italy or in mediæval Europe, works for some time, and may create by its constant action what is practically a Constitution (*i.e.* a set of established rules embodying and directing the practice of government), before the idea of a regular political Constitution emerges. That idea comes into being when in the progress of political thought and of jurisprudence men begin to distinguish between laws and customs which relate to the structure of the State and the management of its affairs and those which relate to other matters, such as the civil rights of individuals; and when they also distinguish between rules and usages which are fixed and settled, because generally observed and regularly applied to recurrent facts, and the particular decisions taken in particular cases. In this sense the Romans may have begun to feel they had a Constitution before they had gone far in the conquest of Italy. Our English ancestors reached the same consciousness in the fourteenth century, when much stress began to be laid upon political precedents, and Parliament, by this time a Representative body, and thereby entitled to speak for the nation, had definitely established its rights as against the Crown<sup>1</sup>. The Confirmation of the Charters together with the statute *De Tallagio Non Concedendo* of A. D. 1297 is often taken as marking the first form of the plainly settled English Constitution, but perhaps the successful resistance of Parliament to King Edward the Third sixty years later is a better point to choose. Anyhow the language of Chief

<sup>1</sup> The history of England illustrates what is here said regarding small and large communities. The Folk Mot of the West Saxons when it passed into the *Magnum Concilium* of all England, though it remained in theory a Primary Assembly, was practically no longer a meeting of all freemen. It could not have continued to embody and safeguard the constitutional rights of the people but for the later invention of Representation, which made it again a virtually Popular though no longer a Primary Assembly.

Justice Fortescue (under Henry the Sixth) shows how clearly drawn the main lines of the Constitution had become in his time. When this stage has been reached, efforts are sometimes made to give to these constitutional rules, or to certain among them, an exceptional degree of force and permanence. Such rules may be embodied in a document of special sanctity; or they may be protected by oaths. But the creation of a truly Rigid Constitution comes later, when some system of representation has appeared. I shall presently return to examine the causes which produce it.

#### V. THE STRENGTH AND WEAKNESS OF FLEXIBLE CONSTITUTIONS.

The names 'Flexible' or 'Fluid,' which I have suggested for Constitutions of this type, seem to suggest that they are unstable, with no guarantee of solidity and permanence. They are in a state of perpetual flux, like the river of Heraclitus, into which a man cannot step twice. Not only are new laws constantly passed which more or less affect them, but their mere working tends to alter them daily. Just as every man's character is being every day insensibly modified by the acts he does, by the thoughts he cherishes, by the emotions which each new experience of life brings with it, so every decade saw the Constitution of Rome, and sees the Constitution of England, slightly different at the end of even so short a period from what it was at the beginning. Even a deliberately conservative policy cannot arrest this process of variation. If the change does not for a time appear in the laws, it is in progress in the minds of men, and may have all the more violent a working when it begins to tell upon legislation. A reaction, such as that carried through by Lucius Cornelius Sulla at Rome, or that which followed the fall of the Cromwellian Protectorate in England, is almost as fertile in change as a time of revolution. The past can never be effaced, since the

recollection of it is an element in shaping the future, and the measures taken to restore a *status quo ante* always contain much which was not in that *status quo ante*, much which is in itself new, and the source of further novelties. The only cases in which constitutional development can be said to stop are those where, as at Venice and in some of the cities of post-mediaeval Switzerland, an oligarchy gets control of the government, and, in extinguishing the spirit and the habits of freedom, arrests the natural processes of movement and development until some powerful neighbour overthrows the State, or internal economic changes induce a revolution. Even under a despotism, the system of government changes insensibly from century to century, as it did in the old French monarchy, and as it has recently done among a people so stagnant as the Turks. But despotic systems, being scarcely classifiable as Constitutions, do not come within our present inquiry.

These things being so, it seems natural to assume that Flexible (the so-called 'unwritten') Constitutions, having been enacted and being alterable by the ordinary legislative authority, and not being contained in any specially sacred instrument, will in fact be subject to frequent and large changes, and will moreover be so readily transgressed in practice, that they will furnish an insufficient guarantee for public order and for the protection of private rights.

The facts, however, do not support this assumption. Let us take our two typical instances, Rome and England. The Roman Constitution is an extreme case of a Frame of Government capable of being changed in the quickest and simplest way. Nothing was needed but a vote of the *comitia*, on the proposition of a competent magistrate, accompanied by the silence of the tribunes. No doubt any single tribune could paralyse the action of the *comitia*, but in such a community as Rome became in the later days of the Republic it must often have been easy for those who desired a change

to 'get at,' or to remove, an obnoxious tribune. Yet the Constitution of Rome, regarded on its legal side, changed comparatively little in the three centuries that lie between the Licinian laws and the age of Sulla, for most of those deviations from ancient usage which, as we can now see, were working towards its fall, were in form quite legal, being merely occasional resorts to expedients which the Constitution recognized, though they had been more rarely and more cautiously used in older and better days. So in England, the exercise of the sovereign power is lodged in an assembly which can, on occasion, act with extraordinary promptitude, as when some while ago (April 9, 1883) the Explosives Act was passed through the House of Commons in a few hours (the standing orders having been suspended), and having been forthwith passed by the House of Lords also, received the royal assent next day. So the most sacred rules and principles of the Constitution might with perfect legality of form be abolished—Magna Charta and the Bill of Rights and the Act of Settlement included—just as quickly as the Explosives Act was passed. Yet the main lines of the English frame of government have since 1689 and 1701 remained legally the same; and the most important changes made since the latter year have been effected after long and strenuous controversies<sup>1</sup>. We all know how hard it is to secure even small constitutional improvements, such as the abolition of the provision, confessedly useless and certainly troublesome, which obliges a member of the House of Commons to vacate his seat and seek re-election on his being appointed a Minister of the Crown.

One explanation of this apparent paradox is (though sometimes neglected) obvious enough. The stability of any constitution depends not so much on its form as on the social and economic forces that stand behind and support it; and if the form of the constitution corre-

<sup>1</sup> The two most important changes, the Union with Scotland and the Union with Ireland, were, however, among those most quickly carried through.

sponds to the balance of those forces, their support maintains it unchanged. Two other reasons deserve to be more fully stated.

A Flexible or Common Law Constitution sometimes owes its stability to the very conditions which have enabled it to grow out of isolated laws and mere usages into a firmly settled Frame of Government. There have no doubt been many cases, such as those of most of the Greek cities of antiquity, where the eager restless spirit of the people and the violence of faction never allowed any system of government to last long enough to strike deep root. Such constitutions were often enacted all in one piece, and would have been made Rigid, had the citizens who enacted them known how to make them so. They were seldom the growth of long-continued usage. But the best instances of Flexible Constitutions have been those which grew up and lived on in nations of a conservative temper, nations which respected antiquity, which valued precedents, which liked to go on doing a thing in the way their fathers had done it before them. This type of national character is what enables the Flexible Constitution to develop; this supports and cherishes it. The very fact that the legal right to make extensive changes has long existed, and has not been abused, disposes an assembly to be cautious and moderate in the use of that right. Those who have always enjoyed power are least likely to abuse it<sup>1</sup>. This truth might be illustrated both from Rome and from England; and, indeed, from Switzerland also, though the argument which tries to prove the stupid conservatism of democracy from the habits of rural communities in the last-named country has been pressed too far by Sir H. Maine and others, since in rural communities, where nearly every one is a citizen, and well off, and most men about equally well off, the usual motives for making political changes do not exist.

A further reason may be found in the fact that a con-

<sup>1</sup> Ἀρχαιοπλούτων δεσποτῶν πολλὴ χάρις, Aesch. *Agam.* 1002.

stitution which has come down in the form of a mass of laws, precedents and customs is not only more mysterious, and therefore more august, to the minds of the ordinary citizens than one they can read in a document, but is not felt by them to lie at their mercy and to live only by their pleasure. A constitution embodied in a document which they have seen drafted, and have enacted by their votes, has no element of antiquity or mystery. It issues from the sovereignty of the people, it reminds them of their sovereignty, it suggests to them nothing more exalted. Perhaps it has been the work of one party in the State; and if that party becomes discredited, it may share the discredit. The dignity which a remote and half mythic origin gives to constitutions, as it does to royal families, was in the ancient world and the Middle Ages enhanced by religious associations. In Greece and Italy the tutelary deities of the city watched over the oldest laws. In mediæval countries the order of the State seemed an expression of the Will of God. Although these sentiments have vanished from the modern world, the fact that an old constitution represents a long course of progressive development, or, to use a somewhat vulgarized term, of evolution, gives it some claim on the respect of imaginative or philosophical minds. These sources of moral strength have been found sufficient in many countries to secure an enduring life for political institutions which the people, or a legislative body, had it in their power to change, and which, in some instances, ought to have been replaced by other institutions more suited to their altered environment.

It would, therefore, be an error to pronounce Flexible Constitutions unstable. Their true note, their distinctive merit, is to be elastic. They can be stretched or bent so as to meet emergencies, without breaking their framework; and when the emergency has passed, they slip back into their old form, like a tree whose outer branches have been pulled on one side to let a vehicle pass. Just because their form is not rigidly fixed, a temporary change

is not felt to be a serious change. The sentiment of respect for the established order is not shaken. The old habits are maintained, and the machine, modified perhaps in some detail which the mass of the people scarcely notice, seems to go on working as before.

Whether the working is really the same is another matter. During two centuries and a half, from Edward the Third till James the First, the Constitution of England remained in its legal aspect scarcely altered. Though at some moments within that period Parliament seemed to have mightily gained on the Crown, and at others the Crown seemed to be dominating Parliament, yet it was, until the Civil War, doubtful whether any permanent change had been effected. From the days of Queen Anne to those of William the Fourth the Constitution preserved a legal character practically the same. But it had been altered essentially in substance. So we may say that while the Flexible character of a constitution sometimes enables it to recover from shocks without injury, that character sometimes conceals the effects of a shock, since these effects may take the form of changes of usage and changes of opinion among the citizens which have not been expressed, perhaps hardly can be expressed, in a definite legal form. The relations to one another of the two Houses of the British Parliament, and the relations of Parliament to the now self-governing British Colonies, are instances in point.

No constitution illustrates these phenomena better than did that of Rome. It was a complicated piece of work, made of many pieces, firmly attached, yet each piece playing freely. It had to be bent, twisted, stretched in many ways, under the pressure of divers exigencies. But it stood the strain of being bent or stretched, and when the force that had bent it was withdrawn, could return so nearly to its original shape as to seem to have never been disturbed. The change from consuls to military tribunes, the frequent appointment of a dictator, the memorable episode of the Decemvirate, the creation

of new magistracies, even the admission of new and sometimes large masses of persons to citizenship and voting power, and the adaptation of its old machinery to the new task of governing conquered provinces, did not, during several centuries, permanently disturb its balance or seriously shake its main principles. Suspensions of the ordinary rights of the private citizen, extensions of the ordinary powers of the magistrate, which would have ruined most States by setting dangerous precedents, were at Rome found harmless because law and custom recognized them as expedients available in case of need, and, in legalizing them, took away their revolutionary character. Thus, being parts of the Constitution, though parts to be used only in emergencies, they did not shock conservative sentiment nor encourage attempts pernicious to freedom—did not, that is to say, until at last the character of the city population had so completely changed and the dominions of the Republic had so prodigiously grown that the old Constitution was obviously out of date, unfit for work immensely heavier than that for which it had been constructed.

A Greek city, or an Italian city of the Middle Ages, which delivered itself into the hands of a dictator when pressed by its neighbours, almost invariably found that it had given itself a master who refused to resign his power when the danger was past, but continued to rule as a Tyrant or Signore. This happened not merely because the people were passionate and the leading men ambitious, for there was plenty both of passion and of ambition among the Romans, but largely because in those cities no provision was made for such emergencies; so that when it became necessary to place extraordinary powers in one or few hands, the Constitution received a violent wrench, from which it might not recover. At Rome the contingency had been foreseen, and the mode of meeting it was legal. A spirit had been formed among the body of the people as well

as among the leading men which held ambition in check. The dictator was not intoxicated by his elevation. The citizens did not lose their faith in the soundness of their system; and it justified their confidence.

The elasticity of the British Constitution appears in somewhat different features, less striking perhaps than those which mark Rome, but not less useful. We English appoint no dictators, seeing that we have always fortunately had a permanent head of the Executive, though latterly one rather nominal than real, and have seldom been exposed to the dangers which the city-states of the ancient world had to fear. But we have kept in reserve a wide and vague prerogative, which, though it cannot in practice be put in force against the will of the representative House of Parliament, may be employed to effect things far more important than many other things for which express legislative authority is required. The control of the army and navy and the control of foreign policy are instances. There are, moreover, ways in which the normal powers of the Executive may be immensely increased. When a statute, such as the Habeas Corpus Act, is suspended, or when a Vote of Credit for a very large sum of money is passed, the control of the ordinary law and courts in the one case, and the control of the House of Commons in the other case, over the Ministers of the Crown, is for the time being (especially if Parliament is not sitting) and for some purposes practically suspended; and the Sovereign (or rather the Cabinet) of to-day is almost replaced in the position of the last Tudor or the first Stuart. Stringent measures to repress disorder may be taken at home, military operations may be threatened or begun abroad which would be beyond the legal competence of the Crown in the former case and its ordinary discretionary powers and functions, as fixed by custom, in the latter. So too when it became necessary in view, not of an emergency, but of the general convenience of administration, to delegate to inferior authorities the supreme legisla-

tive power of Parliament, advantage was taken of the old royal prerogative and of that ancient body the Privy Council. Parliament gave power to the Crown to issue Orders in Council dealing with large classes of matters which must otherwise have been dealt with by statute; and these Orders take effect sometimes at once, sometimes when a certain period has elapsed during which they have lain before Parliament and received from it no disapproval. In this way a vast mass of secondary legislation is annually enacted which, though it does not directly issue from Parliament, carries parliamentary authority, and does not infringe the principle that Parliament is the only true source of law. And, similarly, out of the ancient judicial functions of the Crown and of the Council which advised the Crown, functions which a century ago seemed to be lapsing into desuetude, there has been evolved a new system of judicature. A body called the Judicial Committee of the Privy Council, somewhat resembling the Consistory of the Roman Emperors, has been created, and now acts as a Supreme Court of Appeal for all the transmarine possessions of Britain, whether Indian or Colonial.

The merit of this elastic quality in such Constitutions as the Roman and the British is that it affords a means of preventing or minimizing revolutions by meeting them halfway. Let us note how each kind of Constitution, the Rigid and the Flexible, behaves when a serious crisis arrives, in which one section of the nation is bent on changing the Constitution, and the other on maintaining it. A Rigid Constitution, if the legal means provided for altering it cannot be used for the want of the prescribed legal majority, resists the pressure. It may of course resist successfully, but if so, probably after a conflict which has shaken the State and excited hostility to it in the minds of a large part of the people. It may, however, if the assailing forces are very strong, be broken, and if so, broken past mending. A Flexible Constitution, however, being more easily and promptly

alterable, and being usually a less firmly welded and cohesive structure, can bend without breaking, can be modified in such a way as to satisfy popular demands, can escape revolution by the practical submission of one of the contending forces in the particular dispute, that submission being recognized as a precedent which will be followed, even though it has not been embodied in any law or other formal document. The extinction of the right once claimed by the House of Lords to alter money bills is one instance. Or it may be made to evolve some organ which, though really new, conceals its novelty by keeping some of the old colour, and thus it may continue to work with no palpable breach of continuity. The knowledge that a constitution can be changed without any tremendous effort helps to make a party of revolution less violent and a party of resistance less stubborn, disposing both to some compromise. At Rome the resort to the appointment of military tribunes with consular power when the plebs demanded, and the patricians would not yet consent to the election of a plebeian Consul, delayed revolution till opinion had so changed that the danger of revolution had passed away. So, later, the compromise by which a Praetor was created with the functions of a Consul but with a special range of duties appeased conservative feeling and smoothed the passage from the old order to the new. The history of the English Constitution is a history of continual small changes, no single one of which, hardly even the Bill of Rights at the time of the so-called Revolution, or the Reform Act of 1832, made the system look substantially different. Something no doubt was cut away, and something was added, but the structure as a whole seemed the same, because far more of the old was left than there was added of the new.

The two main processes which have turned the government of England from the monarchy of the Tudors into what may be called the plutocratic democracy of to-day have been the limitation of the royal prerogative and the

transference of the right of suffrage from a few to the multitude. Both processes have gone on slowly, by a succession of steps, each comparatively small, but all in the same direction. Accordingly the strife of parties has been mitigated by the existence at all, or nearly all, moments, of a large body of persons who desired reform, but only a moderate reform. They are the persons who impose compromise on the extremists to the right and to the left of them, and they can do so because the Constitution permits small reforms to be easily effected. The party of change, which would be a party of revolution if it was obliged to have large changes or none, is apt to be divided, and its more moderate section is, or soon passes into, a party only of reform. The English Chartists of 1840-50 caused some alarm. But between them and the old Constitutional Whigs there were several sections of opinion passing by imperceptible gradations into one another; and when it was seen that the current was setting towards changes approximating to those which the Chartists demanded, their less violent men were by degrees reabsorbed into the general body of the Whig or Liberal party, the latter at the same time moving with the times; and some of those changes, in particular vote by ballot, were ultimately obtained with no great friction.

It must nevertheless be remembered that in the history of most States a crisis is apt to arrive when elasticity becomes a danger, in that it tempts people to abuse the facility for change. There is no better sign of strength in a man's physical constitution than his being able to make some short, sudden, and violent effort without suffering afterwards from doing so; and there is nothing of which the happy possessor of such strength is more proud. But those men who have reached middle life are aware that the temptation to strain one's strength in this exultant spirit is perilous. Repeated impunity is apt to encourage a man to go on trying experiments when the conditions are perhaps less favourable, or when the re-

serve of force is less abundant than it was in youth. The story goes that the famous Milo of Croton, passing alone through a forest, saw an oak into which woodmen who were preparing to fell it had driven wedges. Pulling out the wedges, he tried to rive it asunder. But he had no longer the fullness of his youthful strength. The returning tree caught him by the hands and held him fast till he died. In our own days Captain Webb, stimulated by his feat in swimming across the English Channel, sought still bolder exploits, and perished in the Whirlpool Rapid below Niagara Falls. So the Romans, having many a time given exceptional powers for special occasions to their magistrates, found at last that they had created precedents which enabled the old free Constitution to be in substance overthrown. Sulla became a dictator of a new kind. After a while he resigned his power, but the example showed that monarchy was not far off. Julius Caesar also received exceptional authority, and used it to form an army which extinguished the Republic. The dictatorship he had held passed under other forms into permanent absolutism, and what was practically a revolution was ultimately carried through with a certain deference to the old constitutional forms. In England, Parliament, during the sixteenth century, once or twice gave powers to the Crown which brought the Constitution into danger. In the seventeenth century the monarchy was abolished, and a Protectorate set up by revolutionary methods. This was the result of a war which had destroyed a vital part of the old machine, much to the regret of most of those who had in the first instance taken up arms. We have never since that date (except under King James the Second) seen the Constitution in any real danger.

It is, however, often suggested that the enormous power possessed by Parliament might be used to upset fundamental institutions with reckless haste, and that it might therefore be prudent to impose restrictions on parliamentary action. And those who note the way in

which Parliament bends and staggers under the increasing burden of work laid on it, coupled with the inadequacy of its rules to secure the prompt dispatch of business<sup>1</sup>, have frequently predicted that the House of Commons may one day deliver itself into the hands of the Cabinet, the power of party organization having grown so strong that the head of each Cabinet will be deemed a sort of dictator, drawing his authority, nominally of course, from the House of Commons, but really from a so-called direct 'mandate' of the electors<sup>2</sup>. Others draw a yet more horrible picture of a party machine, which they call the Caucus, dictating a policy to the electors on the one hand, and to the Cabinet on the other, itself reigning in the spirit of a tyrant, but under the forms of the Constitution. If the British Constitution, as we have hitherto known it, should perish, there is little reason to fear it will do so in this eminently ignoble fashion<sup>3</sup>.

When Flexible Constitutions come to an end, they do so in one of two ways. Sometimes they pass into an autocracy, either dying a violent death by revolution, or expiring in a more natural manner through the extension and development, under legal forms, of one of their organs, to a point at which it practically supercedes and replaces the other organs. Sometimes, on the other hand, they pass into Rigid Constitutions. The causes which induce this latter change belong,

<sup>1</sup> This was written in 1884. Since that year sweeping changes have been made in the procedure of the House of Commons which have greatly curtailed the rights and opportunities of private members while increasing the powers of the Ministry of the day. They have not, however, made that House able to discharge all or nearly all the work that falls on it; and it is becoming (under the new rules) less and less careful in the exercise of its powers of voting money.

<sup>2</sup> This apprehension was often expressed between 1880 and 1885. Nothing has occurred since to justify it so far as the dictatorship of any single person is concerned; and it may have in great part arisen from the fact that from 1867 to 1885 the headships of both the two great parties had been vested in exceptionally vigorous and influential leaders. There can however be no doubt that the power of the Cabinet as against the House of Commons has grown steadily and rapidly: and it appears (1901) to be still growing.

<sup>3</sup> Of this supposed danger also much less is heard now than in 1884. The thing that was then called the 'Birmingham Caucus' has ceased to be used to terrify the timid.

however, to the examination of that second type of Constitution; and will be considered when we have surveyed some further features characteristic of the Flexible type.

## VI. ARISTOCRACIES AND FLEXIBLE CONSTITUTIONS.

Flexible Constitutions have a natural affinity for an aristocratic structure of government. I do not mean merely that they spring up at times when power is in the hands of the well-born or rich, for the stage of society in which constitutions, properly so called, begin to exist, is nearly always oligarchic, even if there be a monarch at the head of it. But there is a sort of natural attraction between an aristocracy and an undefined and elastic form of government, as there has begun to be, in most modern countries, a natural repulsion between such a form and a pure democracy. It needs a good deal of knowledge, skill and experience to work a Flexible Constitution safely, and it is only in the educated classes that these qualities can be looked for. The masses of a modern nation seldom appreciate the worth of ancient usages and forms, or the methods of applying precedents. In small democratic communities, such as are the Forest Cantons of Switzerland, this attachment to custom may be found, because there traditions have passed into the life of the people, and the maintenance of ancient forms has become a matter of local pride. But in a large nation it is only educated men who can comprehend the arrangements of a complicated system with a long history, who can follow its working, and themselves apply its principles to practice. The uninstructed like something plain, simple and direct. The *arcana imperii* inspire suspicion, a suspicion seldom groundless, because the initiated are apt to turn a knowledge of secrets to selfish purposes. Now a Common Law Constitution with its long series of precedents, some half obsolete, some of doubtful interpretation, is full of *arcana*. Even to-day, though the process of clarification and simplification has gone on fast

since 1832, dark places are still left in the British Constitution.

There is, however, a further reason why Common Law Constitutions accord better with aristocratic than with democratic sentiment. They allow a comparatively wide discretion to the chief officials of State, such as the higher magistrates at Rome and the Ministers of the Crown in England. The functions of these officials are not very strictly defined, because legal enactments, though they limit power in certain directions (far more rigidly now in England than was the case at Rome), do not draw a completely closed circle round it, but leave certain gaps, through which tradition and precedent permit it, so to speak, to shoot out and play freely. Aristocracies prize this latitude. They prize it because it is mainly to prominent members of their class that offices fall, and these persons are then able to act with freedom, to assert their individual wills, to carry out their views unchecked by the dread of transgressing a statute. On the other hand, the less conspicuous members of the upper class have at any rate little reason to fear harm from the wide authority of the officials, because their social position, and the influence of their family connexions, protect them from arbitrary treatment. The masses of the people have neither advantage. Very few of them can hope to enjoy power. Any one of them may suffer from an exercise of it, which, because not positively illegal, gives him no claim for redress. They have, therefore, everything to gain and nothing to lose if they can restrict it by those definite and fixed limitations which are congenial to Rigid rather than to Flexible Constitutions. And in the history of most peoples a time arrives when, the love of equality being reinforced by the distrust of authority, there is a movement to cut down the powers of the rulers to the lowest point compatible with the safety of the State. The extent to which this process has gone is in any nation a fair test of the gains made by the democratic principle upon the aristo-

cratic. But in this respect the course things have taken in England has been very unlike that which they took at Rome. One of the first events which the authentic history of Rome records is the effort of the plebeians to secure a limitation of the power of the Consuls by having statutes passed to define it. The effort failed. It is characteristic of the Romans that it should have failed. Statutes, known afterwards as the Laws of the Twelve Tables, were enacted, statutes which doubtless on the whole improved the position of the plebeians. But the powers of the Consuls remained wide and legally indefinite down till the time when life went out of them under the shadow of an autocrat who ruled for life. Limited of course these powers had to be as time went on and the popular element in the constitution was developed, but the limitations were imposed, not by narrowing the powers themselves, but by the introduction of new factors. The two Consuls, being chosen from a circle less narrow than in the old days, were more frequently at variance with one another. Other officials were set up over against the Consuls, who could (if they pleased) interfere to restrain the Consuls. And thirdly, the permanent non-representative Council of Elders (the Senate), composed mainly of ex-officials, increased its influence, and could generally hold the magistrates in check. Things went very differently in England. There the prerogative of the Crown was the force of which the nobles as well as the commons stood in dread, and they united in the effort to restrict it down till a time when the commons were strong enough to dispense with the help of more than a section of the landowning magnates. In steadily reducing the prerogative of the Crown, in lopping off some parts of it and strictly defining others, they restricted the powers of the Crown and its Ministers, until at last they had so firmly established the right of the representative assembly to prescribe to the Crown what persons it should employ as Ministers that the old motive for limiting the prerogative vanished. Those who had been

feared as masters were now trusted as servants. The people no longer disliked what was left of the royal prerogative, because their representatives could control the persons who wielded it, and the members of the ruling assembly began to feel that it was in the public interest, and not against their own personal interest, to maintain the powers of Ministers, because many things could be done more easily and more promptly through these powers than by the passing of statutes for dealing with each matter in detail. There may even be a danger, in this new condition of things, that the royal prerogative will be used too freely, because that prerogative now means the will of the leaders of the parliamentary majority, whose action might at a moment of excitement be applauded and sustained by their followers even should it transcend the limits fixed by constitutional usage.

It has been already remarked that the system of checks in the Roman Constitution differed essentially from that employed in the English. Every constitution must of course have a system of checks, else it will quickly perish, or, to vary the metaphor, it must so dispose the ballast as to enable the vessel to recover her equilibrium after a violent oscillation. At Rome the checks consisted in the coexistence of various magistrates who could arrest one another's action, and in a permanent Senate with a large though somewhat ill-defined control, while the popular assembly, in theory omnipotent, was in fact restrained by a number of curious features in its procedure which made it much less effective than was the primary popular assembly in most of the Greek republics. It could act only when convoked by a magistrate, could have its action stopped by another magistrate, and was frequently overreached or circumvented by the Senate. In England, on the other hand, the Crown, which before the conflicts of the seventeenth century had been the predominant power which needed to be checked, and which frequently was checked, by Parliament, becomes after that time capable only of occasionally baffling (and

that less and less as time went on) the now predominant Parliament, while the restraint on hasty or violent action by Parliament was found, partly in the division of Parliament into two Houses, and partly, especially after the Upper House had begun to lose moral weight, and had passed more and more under the control of one party in the State, in the fact that an assembly of representatives, nearly all of whom belonged to the wealthier and so-called upper classes, was pervaded by a conservative temper. A representative body, the members of which are mostly satisfied with the world as it is, and who are sufficiently instructed to respect the traditions of administration, is, except where a question arises which stirs class passions, less prone to ill-considered action than is an assembly of all the citizens, such as was the Ecclesia of Athens or Syracuse, where the large majority were humble folk, and where the sympathy of numbers made the ascendancy of emotion over reason doubly dangerous. Thus, as compared with the democracies of the city-states of antiquity, the representative character of the assemblies of modern Europe has been a moderating factor. But these assemblies are now changing their character, as the countries in which they exist have changed. The progress of science has, through the agency of railways and telegraphs, of generally diffused education, and of cheap newspapers, so brought the inhabitants of large countries into close and constant relations with one another and with their representatives, that the conditions of a small city-state are being reproduced. A man living at Kirkwall knows what happened last night in London, eight hundred miles away, sooner and more fully than a man living in Marathon (distant eight hours' walking) knew what had happened the day before in Athens. The same news reaches all the citizens at the same time, the same emotion affects all simultaneously, and is intensified by reverberation through the press. The nation is, so to speak, compressed into a much smaller space than it filled three centuries ago, and has

become much more like a primary assembly than it was then. If concurrently with this change there should come, as some presage, a closer and more constant control of the members of the representative assembly by their constituents, the representatives becoming rather delegates acting under instructions than men chosen to speak and vote because they are deemed trusty and intelligent, much of the moderative value which the representative system has possessed will disappear.

It need not be thought that in England at least there is any immediate risk of evils to be expected from the change which has been noted. Representatives have not yet become delegates, and if they do, it will be rather their own fault than that of the electors, for the electors respect courage and value independence. In England the power of party organizations over constituencies and members, if it grows, grows slowly. It is, in fact, not so much these organizations as small sections of opinion or organized 'interests,' seeking some advantage for themselves, that try to terrorize candidates. There is still a valuable check on possible recklessness on the part of Parliament in the fact that it is (unlike some popular assemblies) guided by responsible Ministers, who have hitherto seldom been mere demagogues, and who have experience behind them, prospects of future dignity before them, and the opinion of their own class around them. All that I wish to point out is that a change has passed on the conditions under which representative assemblies act, which in making them more swiftly responsive to public sentiment, increases some of the risks always incident to popular government. History has not spoken her last word about Flexible Constitutions. Rather may she be opening a new stage in their development.

## VII. THE INFLUENCE OF CONSTITUTIONS ON THE MIND OF A NATION.

We have been considering what are the conditions present in a nation which make it prefer a particular kind of constitution. Now let us approach the converse question, and inquire what will be the influence on the political ideas and habits of a nation of these Constitutions of the Common Law, or Flexible type, and what are the features of national character which will enable such constitutions to live on and prosper.

Forms of government are causes as well as effects, and give an intellectual and moral training to the peoples that live under them, as the character of a parent affects the children of the household. Now the Common Law Constitution, with its complexity, its delicately adjusted and balanced machinery, its inconsistencies, its *nuances*—one is driven to French because there is no English word to express the tendency of a tendency—its abundance of unsettled points, in which a refined sense can perceive what the decision ought in each case to be without being able to lay down a plain and positive rule—such a constitution must undoubtedly polish and mature in the governing class a sort of tact and judgement, a subtlety of discrimination and a skill in applying old principles to new combinations of facts, which make it safe for a people to leave wide powers to their magistrates or their governing assembly. A sense grows up among those who have to work the constitution as to what is and is not permissible under it, and that which cannot be expressed in the stiff phrases of a code is preserved in the records of precedents and shines through the traditions which form the minds of the rulers. This kind of constitution lives by what is called its Spirit. ‘The letter killeth, but the spirit giveth life.’

Evidently, however, it is only among certain nations with certain gifts that such a constitution will come to

maturity and become a subject for science as well as a work of art. Three things seem needful. One is legal-mindedness, a liking and a talent for law. Another is a conservative temper, by which I mean the caution which declines to make changes save when a proved need for change arises, so that changes are made not suddenly, but slowly and bit by bit. The third is that intellectual freshness and activity which refuses to be petrified by respect for law or by aversion to change. It is only where these three qualities are fitly mixed or evenly balanced that either a great system of law or a finely tempered and durable constitution can grow up. Many otherwise gifted peoples have, like the Athenians in ancient and, *longo intervallo*, the Spaniards in modern times, wanted one or other of these qualities, and have therefore failed to enrich the world by law or by constitutions. Perhaps it was partly owing to their possessing other gifts, scarcely compatible with these, that the Athenians did fail.

But although, when a nation has reached the point at which its law begins to be scientific, the law and the constitution become teachers, it must be remembered that the training they give is mainly given to the classes which practise law and administer the State. For though a nation as a whole may come to understand and appreciate in outline its constitution, and may attain to a fairly correct notion of the functions of each organ of government, only a comparatively small section comprehends the system well enough to work it or to criticize its working. For such comprehension there is needed not only some knowledge of history but also close and continuous observation of the machinery in motion, and either participation in the business of governing or association with those who are carrying on that business. The mass of the nation cannot be expected to possess this familiarity. They are like the passengers on board an ocean steamer, who hear the clank of the engine and watch the stroke of the piston and admire the

revolution of the larger wheels, and know that steam acts by expansion, but do not know how the less conspicuous but not less essential parts of the machinery play into the other parts, and have little notion of the use of fly-wheels and connecting-rods and regulators. They can see in what direction the vessel is moving, and can conjecture the rate of speed, but they must depend on the engineers for the management of boilers and engines, as they do on the captain for the direction of the ship's course. In the earlier stages of national life, the masses are usually as well content to leave governing to a small upper class as passengers are to trust the captain and the engineers. But when the masses obtain, and feel that they have obtained, the sovereignty of the country, this acquiescence can no longer be counted on. Men without the requisite knowledge or training, men who, to revert to our illustration, know no more than that steam acts by expansion and that a motion in straight lines has to be turned into a rotary one, men who are not even aware of the need for knowledge and training, men with little respect for precedents, and little capacity for understanding their bearing, may take command of engines and ship: and the representative assembly may be filled by those who have no sense of the dangers to which an abuse of the vast powers of the assembly may lead. If such a change arrives, it imposes a severe strain on the constitution; and that elasticity which has been its merit may prove its danger.

It may accordingly be said that one of three conditions is generally necessary for the salvation of a Flexible Constitution. Either (1) the supremacy must remain in the hands of a politically educated and politically upright minority, or (2) the bulk of the people must be continuously and not fitfully interested in and familiar with politics, or (3) the bulk of the people, though legally supreme, must remain content, while prescribing certain general principles, to let the trained minority manage the details of the business of governing. Of these conditions

the first has disappeared from nearly all civilized countries. The second has always been rare, and in large industrial countries is at present unattainable. The best chance of success is therefore to be found in the presence of the third; but it needs to be accompanied by a tone and taste and sense of public honour among the people which will recoil from the mere demagogue.

Both the influence of its constitution upon a nation and the need of certain qualities in order to work a Flexible Constitution are well illustrated in the history of the Roman commonwealth. Of all famous constitutions it was the most flexible. It lived long and overcame many perils because it grew up among a people who possessed in an eminent degree the three qualities of legalmindedness, of conservatism, and of keen practical intelligence. It trained the national mind to a respect for order and legality, and had doubtless much to do with the forming of that constructive genius which created the whole system of Roman private law. It fell at last because the mass of the citizens became unfit to discharge their function in the scheme. They did not, it is true, press into the inner circle of the governing class. The success first of the well-born and then of the rich in keeping the offices in their own hands all through is one of the most remarkable features of Roman history. But they were corrupt and reckless in the bestowal of power, and had really ceased to care for the freedom and welfare of the State. The ruling classes, on the other hand, were tempted by the demoralization of the masses to be their corrupters, and lost their old respect for legality. Even a conscientious philosopher like Cicero did not scruple to put prisoners to death without trial, and to justify himself by citing an act of lawless violence done four centuries before. The leading Romans of that day were as fit as ever to work the system, so far as skill and knowledge went, but they had not the old regard for its principles, nor the old sense of public duty; and the prizes which office offered now that Rome was mistress of the

world were too huge for average virtue to resist. The moral forces which had enabled the Roman Constitution to work in spite of its extraordinary complexity, and to live, in spite of the risks to which its own nature exposed it, were now fatally enfeebled. These abuses of power on the one hand, and on the other hand the deadlocks which the system of checks caused, grew more frequent and serious. Each successive wrench which the machine received became more violent, because neither faction had patriotism enough to try to ease them off, and so break the force of the shock. From the beginning of the Republic the chief danger had lain in the immense powers vested in the magistrates. These powers had been necessary, because the State was constantly exposed to attacks from without; and nothing but the sense of devotion to the interests of the State had controlled the party spirit which rages more fiercely within the walls of a city than it does in a large and scattered community. Now that Rome had vast dominions to rule, and now that her frontiers extended to the very verge of civilization, involving her in long wars with great monarchies or groups of tribes on those frontiers, large powers had to be entrusted to military chiefs, and entrusted for long periods. Thus the Republican constitution fell through the very faults which had always lain deep in its bosom, though an over-mastering patriotism had in earlier days kept them harmless.

It is never easy, in studying the history of an institution, to determine how much of its success or its failure is due to its own character, how much to the conditions, external and domestic, in the midst of which it has to work. The fortunes of the Roman Constitution would doubtless have been different had Rome been less pressed by foreign enemies in her earlier days, or had she been less of a conquering power in her later. So too it is hard to compare States so different as Rome—whose Constitution was always that of a City, and failed to widen itself so as to become a Constitution for Italy—

and England, whose Constitution has always since the days of Ecghbert and Alfred been that of a large and originally a rural and scattered community. If, however, the comparison is attempted, we may observe that England never, after the fourteenth century, recognized such vast powers in the Crown (whether in the Crown personally or as exercised by its Ministers) as Rome granted to her magistrates. In the sphere of public law England has applied more successfully than Rome did the conception of the inviolability of the rights of the citizen as against the organs of the State, although that conception is itself Roman. With all their legal genius the Romans were too much penetrated by the idea of the necessary amplitude of State power to fix just limits to the action of the Executive. When it was necessary to provide for checking a magistrate, they set up another magistrate to do it, instead of limiting magisterial powers by statute. Nor did they ever succeed as the English have done in disengaging the judicial from the executive department of government. In both these respects part of the merits of the English Constitution may be ascribed to Norman feudalism, whose precise definition of the respective rights of lord and vassal—all the lords but one being also vassals, and the greater vassals being also lords—helped to form and imprint deep the idea that powers, however strong within a definite sphere, may be strictly confined to that sphere, and that the limits of the sphere are fit matter for judicial determination. Perhaps the existence in the clergy of a large class of men enjoying specific immunities the exact range of which had to be settled, and, where possible, judicially settled, may have also contributed to train this habit of mind. The extent to which England, favoured no doubt by her insular position, was able to secure domestic freedom while leaving a large discretionary authority to the Crown, is usually credited to the rise of the House of Commons and the vigilance of its control. But much is also to be ascribed to that precise

definition of the rights of the individual which has made life and property secure from injury on the part of the State, to the habit of holding officials liable for acts done in excess of their functions, and to that ultimate detachment of the judiciary from the influence of the Crown which has enabled the individual to secure by legal process the enforcement of his rights. These principles have sunk deep into the mind of the nation, and have been of the utmost service in forming the habits of thought and action by which free constitutions have to be worked. They are just as strong as if they were embodied in a Rigid Constitution, instead of being legally at the mercy of Parliament. But that is because they have centuries of tradition behind them, and because the English are a people who respect tradition and have been trained to appreciate the value of the principles which their ancestors established.

#### VIII. CAPACITY OF CONSTITUTIONS FOR TERRITORIAL EXPANSION.

One point more remains to be mentioned before we quit constitutions of the Flexible type, viz. their suitability to a State which is expanding its territory and taking in other communities whether by conquest or by treaty.

Such constitutions seem especially well suited to countries which are passing through periods of change, whether internal or external. When new classes of the population have to be admitted to share in political power, or when the inhabitants of newly-acquired territories have to be taken in as citizens, this is most quickly and easily effected by the action of the ordinary legislature. Both Rome and England availed themselves of this flexibility in the earlier stages of their growth. England, itself created as a State by the expansion of the West Saxons, enlarged herself to include Wales with no disturbance of her former Constitution, and

similarly fused herself with Scotland in 1707 and with Ireland in 1800, in both cases altering the Constitution of the enlarged State no further than by the admission of additional members to the two Houses of Parliament, and by the suppression of certain offices in the smaller kingdoms. The ease with which the earlier expansions were effected may be attributed to the fact that in mediaeval times the prominence of the king made the submission of any tribe or territory to him carry with it the incorporation of that tribe or territory into his former dominions. The popular assembly of a community, such as were the South Saxons, for instance, sank into a secondary place as soon as the king was head of the South Saxons as well as of the West Saxons, for the council of the united people which he summoned and over which he presided became the national assembly for all his subjects. In later times, though Scotland and Ireland had their separate Parliaments, these could be readily united with that of England, because in all three countries the popular House was representative. Here, however, England has stopped. The vast dominions which she possesses beyond the oceans, while legally subject to her Crown and Parliament, have not been brought into the constitutional scheme of the motherland. Indeed they could hardly be brought in without a reconstruction of the present frame of government, which would probably have to be effected by the establishment of a Rigid Constitution.

Similarly the Roman State had its first beginnings in the union of neighbouring tribes, whose popular assemblies coalesced into one assembly. As time went on, the flexibility of the constitution permitted the extension of political rights to a number of communities which had lain outside the old Roman territory. But the process presently stopped (so far as effective political expansion was concerned), because the representative system had not yet been invented. When after the great revolt of the Allies in B. C. 90 Rome was compelled to grant full

citizenship to a large number of Italian communities, she did not take what moderns might think the obvious course of creating a representative assembly to which these allied communities might send elected delegates, but merely distributed the new citizens among her old tribes, an expedient which so far improved the position of the Allies that they became legally equal to Roman citizens, and acquired thereby various privileges and exemptions, but which extended to them practically no share in the government, since few could not come to Rome to give their votes in the assembly of the people. It may well have been that neither the oligarchs nor the leaders of the so-called popular party at Rome were willing to resign a substantial part of the power of the inhabitants of the City, with the opportunities of bribing and being bribed, in exchange for the primacy of a Federal or quasi-Federal Italian republic. But that the notion of a representative assembly had not crossed men's minds appears from the circumstance that the Italian Allies themselves, when in the course of their struggle they set up a rival government, merely reproduced the general lines of the Roman constitution, and did not create any representative council, excellently as it might have served their purpose. So strong was the influence of the idea of the city community in the ancient world, and (it may be added) so little power of invention do mankind display in the sphere of political institutions.

When an expanding State absorbs by way of treaty other communities already enjoying a government more or less constitutional, the process now usually takes the form of creating a Federation, and a Federation almost necessarily implies a Rigid Constitution. Cases where the Flexible Constitution of one State is stretched to take in another (as the Constitution of England was stretched to take in Scotland) are rare. The ancient Romano-Germanic Empire had a Flexible Constitution, which, already in an advanced stage of decay, was extinguished by Napoleon. When it was desired to re-

establish a German Empire out of a number of practically independent States, this had to be done by the creation of a federal system under a Rigid Constitution. No similar device was required in the case of Italy, because the communities which united themselves to the kingdom of Sardinia between 1859 and 1871 had not theretofore enjoyed constitutional government, had just dismissed their whilome sovereigns, were all eager for union, and in their eagerness for union cared but little for the maintenance of any local rights.

#### IX. THE ORIGIN OF RIGID CONSTITUTIONS.

We may now pass on to examine the other type of constitution, that for which I have suggested the name Rigid, the specific character whereof resides in the fact that every constitution belonging to it enjoys an authority superior to the authority of the other laws of the State, and can be changed only by a method different from that whereby those other laws are enacted or repealed. This type is younger than the Flexible type. The latter goes back to the very beginning of organized political societies, being the first form which the organization of such societies took. Rigid Constitutions, on the other hand, mark a comparatively advanced stage in political development, when the idea of separating fundamental laws from other laws has grown familiar, and when considerable experience in the business of government and in political affairs generally has been accumulated. Thus they have during the last hundred years been far more in favour than constitutions of the Flexible type.

In Europe they exist in every constitutional country except the United Kingdom, Hungary, and Italy. There are none in the Asiatic continent, but Asia, the cradle of civilization, possesses no constitutional self-governing State whatever, except Japan, the Constitution of which, established in 1889, bears some resemblance to that of

the German Empire. America, as a new continent, is appropriately full of them. The Republic of the United States has not only presented the most remarkable instance of this type in the modern world, but has by its success become a pattern which other republics have imitated, just as most modern States in the Old World took England for their model when they established, during the nineteenth century, governments more or less free. The Constitutions of all the forty-five States of the Union are Rigid, being not alterable by the legislatures of those States respectively. This is also true of the Constitution of the Dominion of Canada, which is alterable only by the Imperial Parliament. The Constitutions of the seven Canadian Provinces might, so far as their legislatures are concerned, be deemed Flexible, being (except as respects the office of Lieutenant-Governor) alterable by ordinary provincial statutes, but as all Provincial statutes are subject to a Dominion veto, they are not within the sole power of the legislatures. Mexico and the five republics of Central America, together with the nine republics of South America, have all adopted Constitutions which their legislatures have not received power to change. Africa is the most backward of the continents, but she has in the Orange Free State a tiny republic living under a Rigid Constitution. It has been contended that the Constitution of the South African Republic (Transvaal) is referable to the same category, but it is really *de iure*, and it has always been treated *de facto*, as being a Flexible Constitution<sup>1</sup>. The Constitutions of the Australasian colonies present legal questions of some difficulty, owing to the way in which the imperial Acts creating or confirming them have been drawn. So far as the method of changing these Constitutions has been prescribed by statutes of the colonies in which they exist, it would appear that each can also be changed by the legislature of the colony. Where those methods, however, are prescribed by the British Parliament, or by

<sup>1</sup> See Essay VII, p. 378.

instruments issuing from the Crown, the point is more doubtful, and would need a fuller discussion than it can receive here. Questions, however, touching the relations of a legally subordinate to a legally supreme legislature lie in a different plane, so to speak, from that with which we are here concerned: and we may say that if these colonial constitutions are regarded solely as respects the legislatures of the colonies themselves, they are referable to the Flexible type. As to the new Federal Constitution of Australia there is no doubt at all. It is Rigid<sup>1</sup>, for any alteration in it requires a majority of the States and a majority of the direct popular vote. All the acts of every British colony are subject to a power of disallowance by the Governor or the Crown, but (although it is sometimes provided that constitutional acts shall be 'reserved' for the pleasure of the Crown) this power is not confined to acts changing the constitution, conformably to the English habit of drawing little distinction between constitutional and other enactments.

All the above-mentioned constitutions are products of the last century and a quarter, and it is doubtful whether there existed in A. D. 1776 any independent State the constitution of which the ruling authority of that State could not have changed in the same way in which it changed its ordinary laws. The Swiss Confederation does not come into question, for that Confederation was, until the French laid hands on it in the last years of the eighteenth century, a League of States rather than a State, and could not be said to have any constitution in the proper sense, not to add that the republics of which the league consisted could alter the terms of their league in the same way in which they had formed it. The same remark applies to the confederation of the seven United Provinces of the Netherlands.

The beginnings of Rigid Constitutions may, however,

<sup>1</sup> See as to this Constitution Essay VIII, p. 397. As to the Constitutions of the several Australia and other British colonies, reference may be made to the book of the late Sir Henry Jenkyns, entitled *British Rule and Jurisdiction beyond the Seas*, the publication of which is announced for a very early date.

be traced back to the seventeenth century. The first settlers in the British colonies in North America lived under governments created by royal charters which the colonial legislatures could not alter, and thus the idea of an instrument superior to the legislature and to the laws it passed became familiar<sup>1</sup>. In one colony (Connecticut) the settlers drew up for themselves in 1638 a set of rules for their government, called the Fundamental Orders. These Orders, developed subsequently into a royal charter, were really a rudimentary constitution. And almost contemporaneously the conception appeared in England during the Civil War. The Agreement of the People, presented to the Long Parliament in 1647, contains in outline a Frame of Government for England which was meant to stand above Parliament and be not changeable by it. So Oliver Cromwell sought by his Instrument of Government, promulgated in 1653, to create a Rigid Constitution, some at least of whose provisions were to be placed beyond the reach of Parliament, and indeed apparently to be altogether unchangeable. But his own Parliament refused to recognize any part of it as outside their right of interference<sup>2</sup>.

From this rapid geographical survey we may now return to examine the circumstances under which constitutions of this type arise. Their establishment is usually due to one or more of the four following motives:—

(1) The desire of the citizens, that is to say, of the part of the population which enjoys political rights, to secure their own rights when threatened, and to restrain the action of their ruler or rulers.

(2) The desire of the citizens, or of a ruler who wishes to please the citizens, to set out the form of the pre-existing system of government in definite and positive terms precluding further controversy regarding it.

<sup>1</sup> Observations on this topic may be found in the author's *American Commonwealth*, chap. xxxvii.

<sup>2</sup> These documents are printed in Dr. S. R. Gardiner's *Constitutional Documents of the Puritan Revolution*. A concise account of the Instrument may be found in Mr. Goldwin Smith's *United Kingdom*, vol. i. pp. 605-8.

(3) The desire of those who are erecting a new political community to embody the scheme of polity under which they propose to be governed, in an instrument which shall secure its permanence and make it comprehensible by the people.

(4) The desire of separate communities, or of distinct groups or sections within a large (and probably loosely united) community, to settle and set forth the terms under which their respective rights and interests are to be safe-guarded, and effective joint action in common matters secured, through one government.

Of these four cases, the two former arise where an existing State changes its constitution. The two latter arise where a new State is created by the gathering of individuals into a community, or by the union of communities previously more or less separate into one larger community, as for instance by the forming of a Federation.

Note further that Rigid Constitutions arise in some one of four possible ways.

1. They may be given by a monarch to his subjects in order to pledge himself and his successors to govern in a regular and constitutional manner, avoiding former abuses. Several modern European constitutions have thus come into being, of which that of the Kingdom of Prussia, granted by King Frederick William the Fourth in 1850, is a familiar example. The *Statuto* or Fundamental Law of the Kingdom of Sardinia, now expanded into the Kingdom of Italy, was at one time deemed another instance. It is now, however, held to be a Flexible Constitution. Magna Charta would have been a fragment of such a constitution had it been legally placed out of the possibility of any change being made in it by the Great Council, then the supreme legislature of England, but it was enacted by the king in his Great Council, and has always been alterable by the same authority. The *Charte Constitutionnelle* for France issued by Louis the Eighteenth in 1814, and renewed in an

altered form on the choice of Louis Philippe as king in 1830, and the Constitutions granted by their respective kings to Spain and to Portugal, are similar instances.

2. They may be created by a nation for itself when it has thrown off (or been released from) its old form of government, and desires to create another entirely *de novo*. The various Constitutions of the various French Republics from 1790 downwards are instances, as is the Constitution of the Orange Free State<sup>1</sup> and the present (A. D. 1901) Constitution of Brazil. To this category also belong the Constitutions of the original thirteen States of the American Union. Two of these States, however, were content to retain the substance of the charter-constitutions under which they had lived as British Colonies, merely turning them into State constitutions, with nothing but the Confederation above them, that Confederation being then a mere League and not a National Government. The Constitution of the Austrian part of the Austro-Hungarian monarchy may also be referred to this category. It consists of five Fundamental Laws, enacted in 1867, and alterable by the legislature only in a specially prescribed manner.

3. They may be created by a new community, not theretofore a nation, when it deliberately and formally enters upon organized political life as a self-governing State, whether or no as also a member of any larger political body. Such are the Constitutions of the States of the American Union formed since 1790. Such was the original Constitution of Belgium, a country which had been previously a part of the Kingdom of Holland. Such is the Constitution of the Dominion of Canada, though it is a peculiar feature of this instrument—and the same is true of the Constitutions of all the self-governing British Colonies—that it has been created not by the community which it regulates but by an external authority, that of the Parliament of the United Kingdom, in a statute of A. D. 1867. Being unchange-

<sup>1</sup> See Essay VII, p. 362.

able by the Dominion Legislature, it is a Rigid Constitution within the terms of our definition, although changeable, like any other statute, by the British Parliament. The new Federal Constitution of Australia belongs to the same class and had a like origin<sup>1</sup>.

4. They may arise by the tightening of a looser tie which has theretofore existed between various self-governing communities. When external dangers or economic interests have led such communities to desire a closer union than treaties or federative agreements have previously created, such communities may unite themselves into one nation, and give that new nation a government by means of an instrument which is thereafter not only to hold them together but to provide for their action as a single body. This process of turning a League of States (*Staatenbund*) into a Federal State (*Bundesstaat*) is practically certain to create a Rigid Constitution, for the component communities which are so uniting will of course desire that the rights of each shall be safeguarded by interposing obstacles and delays to any action tending to change the terms of their union, and they will therefore place the constitution out of the reach of amendment by the ordinary legislature. Cases may, however, be imagined in which the component communities might be willing to forego this safeguard. The Achaean League did so; and its constitution was therefore a flexible one, but then the Achaean League can hardly be said to have been a single State in the strict sense of the word. It was rather a league, though a close league, of States, like the Swiss Confederation in the eighteenth century.

The most familiar instances of this fourth kind of origin are the United States of North America, the Federation of Mexico (unless it be referred to the second class), and the present Swiss Confederation. To this

<sup>1</sup> As to this Constitution see Essay VIII. Unlike the Constitution of Canada, it can be amended by the people of Australia without the aid of the Imperial Parliament.

class may also be referred the very peculiar case of the new German Empire, which by two steps, in 1866 and in 1871, has created itself out of the pre-existing Germanic Confederation of 1815, that Confederation having been formed by the decay into fragments of the ancient East Frankish or German kingdom, which had, throughout the Middle Ages, a Flexible Constitution resembling that of the England or France or Castile of the thirteenth century.

#### X. THE ENACTMENT AND AMENDMENT OF RIGID CONSTITUTIONS.

Before proceeding to consider the methods by which these constitutions may be enacted and changed, it is worth while to suggest an explanation of their comparative recent appearance in history. Documentary constitutions, *i.e.* those contained in one or several instruments prepared for the purpose, are old. There were many of them in the Greek cities; and efforts were sometimes made when they were enacted to secure their permanence by declaring them to be unchangeable. But in the old days when City States (and sometimes also small Rural States) were ruled by Primary Assemblies, consisting of all free citizens, there was no authority higher than the legislature that could be found to enact a constitution, seeing that the legislature consisted of the whole body of the citizens. In those days, accordingly, when it was decided to give peculiar permanence to some political arrangement, so that no subsequent assembly of the people should upset it, two expedients were resorted to. One was to make all the leading men, perhaps the whole people, swear solemnly to maintain it, and thereby to bring in the deities of the States as co-enacting or at least protecting and guaranteeing parties. Tradition attributed this expedient to Lycurgus at Sparta. The other was to provide in the law intended to be Fundamental that no proposal to repeal it should ever

be entertained, or to declare a heavy penalty on the audacious man who should make the proposal. The objection to both these expedients was that they debarred any amendment, however desirable, and however generally desired. Hence they were in practice little regarded, though the exceptionally pious or superstitious Spartans were deemed to be largely deterred from governmental changes by the fear of divine disapproval. Moreover, the second of the above-named devices or barriers could be easily turned by proposing to repeal, not the Fundamental law itself, but the prohibition and the penalty. These having been repealed—and of course the proposal would not be made unless its success were pretty well assured—the Fundamental Law would then itself be forthwith repealed. It must, however, be added that even if the Greek cities had adopted what seems to us the obvious plan of requiring a certain majority of votes (say two-thirds) for a change in the Fundamental Law, or had required it to be passed by four Assemblies in succession at intervals of three months, one may doubt whether such provisions would have restrained a majority in communities which were small, excitable, and seldom legally-minded.

Those who have suggested that the United Kingdom ought to embody certain parts of what we call the British Constitution in a Fundamental Statute (or Statutes) and to declare such a statute unchangeable by Parliament, or by Parliament acting under its ordinary forms, seem to forget that the Act declaring the Fundamental Statute to be Fundamental and unchangeable by Parliament would itself be an Act like any other Act, and could be repealed by another ordinary statute in the ordinary way. All that this contrivance would obtain would be to interpose an additional stage in the process of abolition or amendment, and to call the attention both of the people and the legislature in an emphatic way to the fact that a very solemn decision was being reversed. Some may think that such a security, if imperfect, would

be worth having. The restraint imposed would, however, be a moral not a legal one<sup>1</sup>,

A constitution placed out of the power of the legislature may or may not be susceptible of alteration in a legal manner. Sometimes no provision has been made, when it was first established, for any change whatever. There are instances of this among constitutions granted by a monarch to his subjects—such seems to be to-day the case in Spain—but in cases of this kind it might possibly be held that the grantor implicitly reserved the power to vary his grant, as there may not have been expressed in the document, and need not be, any bilateral obligation. As already observed, the Constitution of the present Kingdom of Italy was originally granted to the Kingdom of Sardinia by King Charles Albert in 1848; and it was for a long time held that the power to change it resided in the Crown only. It was extended by a succession of popular votes (1859 to 1871) to the rest of Italy, and some conceive that this sanction makes at least its fundamental parts unchangeable. But the view that it is alterable by legislation has prevailed, and it has in fact been so altered in some points. The *Charte Constitutionnelle* granted by Louis XVIII, under which the government of France was carried on for many years,

<sup>1</sup> Soon after the above lines were written, the point they deal with came up in Parliament in a practical form. In the debate on the Irish Home Rule Bill of 1886 the question emerged whether Parliament could in constituting a legislature for Ireland and assigning to that legislature a certain sphere of action legally debar itself from recalling its grant or from legislating, upon matters falling within that sphere, over the head of the Irish legislature. It was generally agreed by lawyers that Parliament could not so limit its own powers, and that no statute it might pass could be made unchangeable, or indeed could in any way restrict the powers of future Parliaments.

Upon the general question whether Parliament could so enact any new Constitution for the United Kingdom as to debar itself from subsequently repealing that Constitution, it may be suggested, for the consideration of those who relish technicalities, that Parliament could, if so disposed, divest itself of its present authority by a sort of suicide, *i.e.* by repealing all the statutes under which it is now summoned, and abolishing the common-law right of the Crown to summon it, and thereupon causing itself to be forthwith dissolved, having of course first provided means for summoning such an assembly, or assemblies, as the new Constitution created. There would then be no legal means of summoning another Parliament of the old kind, and the new Constitution, whatever it was, would therefore not be liable to be altered save in such manner as its own terms provided.

was intended to create a sort of parliamentary government, in the first instance by way of gift from the sovereign, but afterwards, under Louis Philippe, by way of a compact, or kind of covenant between monarch and people. The fact that it contained no provisions for alteration, having apparently been designed to last for ever, worked against it; and the discontents of France may have ripened the faster because no constitutional method had been provided for appeasing them by changes in the machinery of government. Nothing human is immortal; and constitution-makers do well to remember that the less they presume on the long life of their work the longer it is likely to live.

The Constitutions of Norway (created in 1814, but subsequently altered) and of Greece (created in 1864) declare that amendments are to be confined to matters not fundamental, but omit to specify the matters falling under that description.

The existing Constitution of France is so far legally unalterable that no proposition for abolishing the republican form of government can be entertained. If it be asked, What is a republican form? one may answer that if ever the question has to be answered, it will be not so much by the *via iuris* as by the *via facti*. So also the Constitution of the United States is in one respect virtually, if not technically, unchangeable. No State can without its own consent be deprived of its equal representation in the Senate. As no State is ever likely to consent to such a change, the change may be deemed legally unattainable; and that any State against which it was attempted to enforce a reduction of its representation effected by constitutional amendments to which it had refused assent would be legally justified in considering itself out of the Union. In accordance with this American precedent, the new Constitution of Australia declares that no State can have its proportionate representation in the Parliament, or the minimum number of its representatives in the House of

Representatives, reduced without the approval of a majority of its electors voting on a constitutional amendment<sup>1</sup>.

Among the methods by which constitutions of the Rigid type make, as they now almost invariably do, provision for their own amendment, four deserve to be enumerated.

The first is to give the function to the Legislature, but under conditions which oblige it to act in a special way, different from that by which ordinary statutes are passed. There may, for instance, be required a fixed quorum of members for the consideration of amendments. Belgium fixes this quorum at two-thirds of each House, while also requiring a two-thirds majority of each House for a change. Bavaria requires a quorum of three-fourths of the members of each House; Rumania one of two-thirds. Or again—and this is a very frequent provision, found even when that last-mentioned is wanting—a specified minimum majority of votes may be required to carry an amendment. Sometimes this majority is three-fourths (as in Greece and Saxony, and in the German Empire for a vote of the Federal Council): more frequently it is two-thirds, as in the United States Congress, in the Mexican Chambers, in Norway, Belgium, Rumania, Servia, Bulgaria. Another plan is to require a dissolution of the Legislature, so that the amendments carried in one session may come under the judgement of the electors at a general election, and be thereafter passed, or rejected, by the newly chosen Legislature. This arrangement, often combined with the two-thirds majority rule, prevails in Holland, Norway, Rumania, Portugal, Iceland, Sweden (where the amendment must have been passed in two ordinary successive sessions), and several other States, including some of the republics of Spanish America. It is in substance an appeal to the people as well as to their representatives, and therefore adds a further guarantee against hasty change. Finally,

<sup>1</sup> See Essay VIII.

the two Houses of the Legislature may sit together as a Constituent Assembly. Thus in France (Constitution of 1875) when each Chamber has resolved that the Constitution shall be revised, the two are for the moment fused, and proceed to debate and pass amendments. Haiti (Constitution of 1899) has a similar plan, which, oddly enough, was not borrowed from France, but is as old as 1843. Few will suspect France of borrowing from Haiti.

A second plan is to create a special body for the work of revision. In the United States, where a vast deal of constitution making and revising goes on in the several States, such a body is called a Convention, and is usually elected when it is desired to re-draft the whole constitution, the ultimate approval of the draft being, however, almost always reserved for the people<sup>1</sup>. In Servia and Bulgaria, after amendments have been twice passed by the ordinary Legislature, a sort of Special Assembly, similarly elected, but twice as large, called the Great Skuptschina (in Servia) or Great Sobranje (in Bulgaria), receives and finally decides on the proposed amendments.

The republics of Paraguay, Guatemala, Honduras, Nicaragua, and Salvador also prescribe Conventions, preceded in each case by votes of the Legislature, such votes usually requiring a two-thirds majority<sup>2</sup>.

A third plan is to refer the new constitution, or the amendments proposed (if the revision is partial), to a number of minor or local authorities for approval. This course is an obviously suitable one in a federation, and has accordingly been adopted by the United States, by Mexico, by Colombia, by Switzerland, and by the new

<sup>1</sup> But the Constitution of Mississippi of 1890 was enacted by a Convention only and never submitted to the people. See as to the United States the author's *American Commonwealth*, ch. xxxvii.

<sup>2</sup> On the whole subject of the modes of amending constitutions reference may be made to the valuable book of my friend M. Charles Borgeaud, Professor at Geneva, *Établissement et Revision des Constitutions*. See also Dareste, *Les Constitutions Modernes*. I owe to these books, and especially to the former, most of the facts here given regarding the minor States.

Australian Commonwealth, in all of which the component States are consulted, the United States requiring a three-fourths majority of States, Switzerland, Australia, and Mexico a bare majority. (Switzerland and Australia also require a majority of the citizens generally.) It is not, however, invariable in federal countries, for the Argentine Confederation entrusts amendment to a Convention, following on a three-fourths majority vote of the Legislature, and Brazil (now a federal country) leaves it to the Legislature alone, acting by a two-thirds majority in three successive debates. Neither is such a plan necessarily confined to a federation, for the existing Constitution of Massachusetts was (in 1780) submitted to the Towns (*i.e.* townships) of the State, acting as communities, and enacted by the majority of them.

The fourth plan is to refer amendments to the direct vote of the people. Originating in the New England States of America, where democracy earliest prevailed, this method has spread to Switzerland and to Australia, both of which require for alterations in the Fundamental Instrument a majority of the electors voting as well as a majority of the States. It prevails now not only in these two federations, but also in the several States of the United States (with very rare exceptions). A bare majority of votes is sufficient, except in Rhode Island, where three-fifths are required, and in Indiana and Oregon, which require a majority of all the qualified voters. The popular vote is also in use in the several Cantons of Switzerland. It was repeatedly employed in France during the first Revolution, and again (under the name of *plébiscite*) by Louis Napoleon under the Second Empire.

These variations in the mode of amending are interesting enough to deserve a few comments.

Broadly speaking, two methods of amendment are most in use: that which gives the function to the Legislature, usually requiring something more than a bare majority, and that which gives it to the People, *i.e.* the

qualified voters. The former of these methods often directs a dissolution of the Legislature to precede the final vote on amendments, and in this way secures for the people a means of delivering their judgement on the questions at issue. The latter method is, however, a more distinct and emphatic, because a more direct, recognition of Popular Sovereignty; and it has the advantage of making the constitution appear to be the work of the Nation as a whole, apart from faction, whereas in the Legislature it may have been by a party vote that the amendments have been carried. Thus it supplies the broadest and firmest basis on which a Frame of Government can rest. The Convention system is intermediate between the two others, and has struck no deep roots in the Old World, while in the United States it has been virtually superseded (as respects enactment) by that of the direct Popular Vote.

Geographically regarded, the method of revision by Legislature prevails over Europe and over most of Spanish America (being in the latter region sometimes combined with the Convention method). The Constitution which has most influenced others in Europe and become a type for them in this respect is that of Holland (1814), because it was the earliest one established after the revolutionary period. On the other hand, the United States (except the Federal Government) and the democratic governments of the Swiss and Australian Federations are ruled by the Popular method. The Constitution which has set the type of this method is that of Massachusetts of 1780.

As respects facility of change, it is interesting to note that the Constitutions which are most quickly and easily altered are those of Prussia, which prescribes no safeguard save that of two successive votes separated by an interval of at least twenty-one days, and that of France, which requires an absolute majority of each House for a proposal to revise, and an absolute majority of the two Houses sitting together for the carrying of any amend-

ment. The omission of the French Chambers in 1875 to submit to the people the constitution then framed, or to provide for their sanction to any future amendments, was due to the doubt which each party felt of the result of an appeal to the nation. The Republicans, though able to prevent the establishment of a monarchical constitution by the Legislature, were not quite sure that a republican one would be carried if submitted to a popular vote. Thus it has come about that France, which went further towards popular sovereignty in 1793 than any great country has ever done, has lived since 1875 under an instrument never ratified by the people, and which was originally regarded as purely provisional.

The Constitution which it is most difficult to change is that of the United States. It has in fact never been amended since 1809, except thrice between 1865 and 1870, immediately after and in consequence of the Civil War, and then under conditions entirely abnormal, because some States were under military duress.

The tendency of recent years has been towards easier and swifter methods than those which were in favour during the first half of the nineteenth century: and in Germany lawyers and publicists are now disposed to minimize the difference between constitutional changes and ordinary statutes, partly perhaps because doctrines of popular sovereignty obtain little sympathy from the school dominant in the new Empire. That Empire itself presents quite peculiar phenomena. So far as the Reichstag or Federal Assembly is concerned, the constitution can be altered by ordinary legislation. But in the Federal Council a majority is required large enough to enable either Prussia on the one hand or a combination of the smaller States on the other to prevent any change. This is because the component members of the Federation are not republics, as in America, Switzerland, and Australia, but are (except the three Hanse cities) monarchies, so that the Upper Federal House represents not

the people but the governments of the several German States.

It is evident that the greater or less stability of any given constitution will (other things being equal) be determined by the comparative difficulty or ease of carrying changes in one or other of the above methods. As one at least of them, that of committing the function of revision to a Constitutional Convention not followed by a popular vote, seems to interpose no more, and possibly even less, difficulty or delay than does the ordinary process of law-making by a two-chambered legislature, it may be asked why a constitution changeable in such a way should be called Rigid at all. Because inasmuch as the method of changing it is different from that of passing ordinary statutes, the people are led to realize the importance of the occasion, and may be deterred, by the trouble and formalities involved in creating the special body, from too lightly or frequently tampering with their fundamental laws. It seems a more momentous step to create this convention *ad hoc* than to carry a measure through a legislature which already exists, and is daily employed on legislative work. Experience has, moreover, shown in the United States, the country in which this method has been largely used for redrafting, or preparing amendments to, the Constitutions of the several States<sup>1</sup>, that a set of men can be found for the work of a Convention better than those who form the ordinary legislature of the State, and that their proceedings when assembled excite more attention and evoke more discussion than do those of a State Legislature, a body which now receives little respect, though perhaps as much as it deserves. Nowadays, however, a draft constitution prepared by a Convention is in an American State almost always submitted to the people for their approval.

<sup>1</sup> No Constitutional Convention has ever been held for revising the Federal Constitution of 1787-9, which was drafted by a Convention and adopted by the thirteen States in succession.

The French plan of using the two Houses sitting together as a Constituent Convention has a certain interest for Englishmen, because the suggestion has been made that disputes between their House of Lords and House of Commons might be settled by a vote of both sitting together, *i.e.* of the whole of the Great Council of the Nation<sup>1</sup> as it sat in the thirteenth century before it had formed the habit of debating and voting in two Houses. It still meets (but does not debate or vote) as one body when the Sovereign, or a Commission representing the Sovereign, is present, as happens at the beginning and at the end of each session.

To examine the distinctive qualities of Rigid Constitutions, as I must now do, is virtually to traverse again the same path which was followed in investigating those of the Flexible type, for the points in which the latter were found deficient are those in which Rigid Constitutions excel, while the merits of the Flexible indicate the faults of the Rigid. The inquiry may, therefore, be brief.

The two distinctive merits claimed for these Constitutions are their Definiteness and their Stability.

## XI. THE DEFINITENESS OF RIGID CONSTITUTIONS.

We have seen that the distinctive mark of these Rigid Constitutions is their superiority to ordinary statutes. They are not the work of the ordinary legislature, and therefore cannot be changed by it. They are embodied in one written document, or possibly in a few documents, so that their provisions are ascertainable without doubt by a reference to the documentary terms. This feature is a legitimate consequence of the importance which belongs to a law placed above all other laws. That which

<sup>1</sup> This plan would have more chance of being favourably entertained were the Upper House now, as it was in 1760, less than two hundred strong. As it is now nearly as large as the House of Commons, with a majority of about fourteen to one belonging to one political party, the party which is in a permanent minority might feel that the chances are not equal.

is to be the sheet-anchor of the State, giving permanent shape to its political scheme, cannot be left unwritten, and cannot be left to be gathered from a comparison of a considerable number of documents which may be confused or inconsistent. Whether it spring from the agreement of the citizens or from the free gift of a monarch, it must be embodied if possible in one, if not, at any rate in only a few solemn instruments. That which is to be a fundamental law, limiting the power of the legislature, must be set forth in specific and unmistakable terms—else how shall it be known when the legislature is infringing upon or violating it? A Flexible Constitution, which the legislature can modify or destroy at its pleasure, though it might conceivably be embodied in one document only, is in fact almost always to be collected from at least several documents, and is often, like the Flexible Constitution of England, scattered through a multitude of statutes and collections of precedents. But the benefits expected from a Rigid Constitution would be lost were its provisions left in similar confusion.

It is not, however, to be supposed that the citizen of a country controlled by a Rigid Constitution who desires to understand the full scope and nature of his government will find all that he needs in the document itself. No law ever was so written as to anticipate and cover all the cases that can possibly arise under it<sup>1</sup>. There will always be omissions, some left intentionally, because the points not specifically covered were deemed fitter for the legislature to deal with subsequently, some, again, because the framers of the constitution could not agree, or knew that the enacting authority would not agree, regarding them. Other omissions, unnoticed at the time, will be disclosed by the course of events, for questions are sure to arise which the imagination or foresight of those who prepared the constitution never contemplated. There will also be expressions whose meaning is ob-

<sup>1</sup> 'Neque leges neque senatus consulta ita scribi possunt, ut omnes casus qui quandoque inciderint comprehendantur.'—Julianus in *Digest* i. 3, 10.

scure, and whose application to unforeseen cases will be found doubtful when those cases have to be dealt with. Here let us distinguish three classes of omissions or obscurities:—

The first class includes matters, passed over in silence by the written constitution, which cannot be deemed to have been left to be settled either by the legislature or by any other organ of government, because they are too large or grave, as for instance matters by dealing with which the legislature would disturb the balance of the constitution and encroach on the province of the Executive, or the Judiciary, or (in a Federal Government) of the component States. Matters belonging to this class can only be dealt with by an amendment of the constitution itself.

The second class includes gaps or omissions relating to matters not palpably outside the competence of the legislature as defined by the constitution. Here the proper course will be for the legislature to regulate such matters by statute, or else to leave them to be settled by the action of the several organs of government each acting within its own sphere. These organs may by such action create a body of usage which, when well settled, will practically supplement the defects of the constitution, as statutes will do in like manner, so far as they are passed to cover the omitted cases.

The third class consists not of omissions but of matters which are referred to by the constitution, but in terms whose meaning is doubtful. Here the question is what interpretation is to be given to its words by the authority entitled to interpret, that authority being in some countries the legislature, in others the judicial tribunals. To the subject of Interpretation I shall presently return. Meantime, it must be noted that both Legislation and Usage in filling up the vacant spaces in the constitution, and Interpretation in explaining its application to a series of new cases as they arise upon points not expressly covered by its words, expand and develop a con-

stitution, and may make it after a long interval of time different from what it seemed to be to those who watched its infancy. The statutes, usages, and explanations aforesaid will in fact come to form a sort of fringe to the constitution, cohering with it, and possessing practically the same legal authority as its express words have. And it thus may happen that (as in the United States) a large mass of parasitic law grows up round the document or documents which contain the Constitution. Nevertheless there will still remain a distinction between this parasitic law and usage and the provisions of the constitution itself. The latter stand unchangeable, save by constitutional amendment. Statutes, on the other hand, can be changed by the legislature; usage may take a new direction; the decisions given interpreting the constitution may be recalled or varied by the authority that pronounced them. All these are in fact Flexible parasites growing upon a Rigid stem. Thus it will be seen that the apparent definiteness and simplicity of Documentary Constitutions may in any given case be largely qualified by the growth of a mass of quasi-constitutional matter which has to be known before the practical working of the constitution can be understood.

## XII. THE STABILITY OF RIGID CONSTITUTIONS.

The stability of a constitution is an object to be much desired both because it inspires a sense of security in the minds of the citizens, encouraging order, industry and thrift, and because it enables experience to be accumulated whereby the practical working of the constitution may be improved. Political institutions are under all circumstances difficult to work, and when they are frequently changed, the nation does not learn how to work them properly. Experiment is the soul of progress, but experiments must be allowed a certain measure of time. The plant will not grow if men frequently uncover the roots to see how they are striking. Constitutions em-

bodied in one legal document and unchangeable by the legislature, are intended to be, and would seem likely to be, peculiarly durable. Being definite, they do not give that opening to small deviations and perversions likely to arise from the vagueness of a Flexible or 'unwritten' Constitution, or from the probable discrepancies between the different laws and traditions of which it consists. They may be battered down, but they cannot easily (save by a method to be presently examined) be undermined. When an attack is made upon them, whether by executive acts violating their provisions, or by the passing of statutes inconsistent with those provisions, such an attack can hardly escape observation. It is a plain notice to the defenders of the constitution to rally and to stir up the people by showing the mischief of an insidious change. The principles on which the government rests, being set forth in a broad and simple form, obtain a hold upon the mind of the community, which, if it has been accustomed to give those principles a general approval, will be unwilling to see them tampered with. Moreover the process prescribed for amendment interposes various delays and formalities before a change can be carried through, pending which the people can reconsider the issues involved, and recede, if they think fit, from projects that may have at first attracted them. Both in Switzerland and in the States of the American Union it has repeatedly happened that constitutional amendments prepared and approved by the legislature have been rejected by the people, not merely because the mass of the people are often more conservative than their representatives, or are less amenable to the pressure of particular 'interests' or sections of opinion, but because fuller discussion revealed objections whose weight had not been appreciated when the proposal first appeared. In these respects the Rigid Constitution has real elements of stability.

Nevertheless it may be really less stable than it appears, for there is in its rigidity an element of danger.

It has already been noted that a constitution of the Flexible type finds safety in the elasticity which enables it to be stretched to meet some passing emergency, and then to resume its prior shape, and that it may disarm revolution by meeting revolution half-way. This is just what the Rigid Constitution cannot do. It is constructed, if I may borrow a metaphor from mechanics, like an iron railway-bridge, built solidly to resist the greatest amount of pressure by wind or water that is likely to impinge upon it. If the materials are sound and the workmanship good, the bridge resists with apparent ease, and perhaps without showing signs of strain or displacement, up to the highest degree of pressure provided for. But when that degree has been passed, it may break suddenly and utterly to pieces, as the old Tay Bridge did under the storm of December, 1879. The fact that it is very strong and all knit tightly into one fabric, while enabling it to stand firm under small oscillations or disturbances, may aggravate great ones. For just as the whole bridge collapses together, so the Rigid Constitution, which has arrested various proposed changes, may be overthrown by a popular tempest which has gathered strength from the very fact that such changes were not and under the actual conditions of politics could not be made by way of amendment. When a party grows up clamouring for some reforms which can be effected only by changing the constitution, or when a question arises for dealing with which the constitution provides no means, then, if the constitution cannot be amended in the legal way, because the legally prescribed majority cannot be obtained, the discontent that was debarred from any legal outlet may find vent in a revolution or a civil war. The history of the Slavery question in the United States illustrates this danger on so grand a scale that no other illustration is needed. The Constitution of 1787, while recognizing the existence of slavery, left sundry questions, and in particular that of the extension of slavery into new territories and States, unsettled. Thirty years

later these matters became a cause of strife, and after another thirty years this strife became so acute as to threaten the peace of the country. Both parties claimed that the Constitution was on their side. Had there been no Constitution embodied in an instrument difficult of change, or had it been practicable to amend the Constitution, so that the majority in Congress could have had, at an earlier stage, a free hand in dealing with the question, it is possible—though no one can say that it is certain—that the War of Secession might have been averted. So much may at any rate be noted that the Constitution, which was intended to hold the whole nation together, failed to do. There might no doubt in any case have been armed strife, as there was in England under its Flexible Constitution in 1641. But it is at least equally probable that the slave-holding party, which saw its hold on the government slipping away, hardened its heart because it held that it was the true exponent of the Constitution, and because the Constitution made compromise more difficult than it need have been in a country possessing a fully sovereign legislature.

Two opposing tendencies are always at work in countries ruled by these Constitutions, the one of which tends to strengthen, the other to weaken them. The first is the growth of the respect for the Constitution which increasing age brings. The remark is often made that if husband and wife do not positively dislike one another, and if their respective characters do not change under ill-health or misfortune, every year makes them like one another better. They may not have been warmly attached at first, but the memories of past efforts and hardships, as well as of past enjoyments, endear them more and more to one another, and even if jars and bickerings should unhappily recur from time to time, the strength of habit renders each necessary to the other, and makes that final severance which, at moments of exasperation, they may possibly have contemplated with equanimity, a severe blow when it arrives. So a nation,

though not contented with its Constitution, and vexed by quarrels over parts of it, may grow fond of it simply because it has lived with it, has obtained a measure of prosperity under it, has perhaps been wont to flaunt its merits before other nations, and to toast it at public festivities. The magic of self-love and self-complacency turns even its meaner parts to gold, while imaginative reverence for the past lends it a higher sanction. This is one way in which Time may work. But Time also works against it, for Time, in changing the social and material condition of a people, makes the old political arrangements as they descend from one generation to another a less adequate expression of their political needs. Nobody now discusses the old problem of the Best Form of Government, because everybody now admits that the chief merit of any form is to be found in its suitability to the conditions and ideas of those among whom it prevails. Now if the conditions of a country change, if the balance of power among classes, the dominant ideas of reflective men, the distribution of wealth, the sources whence wealth flows, the duties expected from the administrative departments of government, all become different, while the form and constitutionally-prescribed methods of government remain unmodified, it is clear that flaws in the Constitution will be revealed which were previously unseen, and problems will arise with which its arrangements cannot cope. The remedy is of course to amend the Constitution. But that is just what may be impossible; because the requisite majority may be unattainable; and the opponents of amendment, entrenched behind the ramparts of an elaborate procedure, may succeed in averting changes which the safety of the community demands. The provisions that were meant to give security may now be dangerous, because they stand in the way of natural development.

Even where no strong party interest is involved it may be hard to pass the amendments needed. The his-

tory of the United States again supplies a case in point. Two defects in its Constitution are admitted by most political thinkers. One is the absence of power to establish a uniform law of marriage and divorce over the whole Union. The other is the method of conducting the election of a President, a method which in 1876 brought the country to the verge of civil war, and may every four years involve the gravest risks. Yet it has been found impossible to procure any amendment on either point, because an enormous force of united public opinion is needed to ensure the concurrence of two-thirds of both Houses of Congress and three-fourths of the States. The first of these two changes excites no sufficient interest among politicians to make them care to deal with it. The second is neglected, because no one has a clear view of what should be substituted, and neither party feels that it has more to gain than has the other by grappling with the problem.

A historical comparison of the two types as regards the smoothness of their working, and the consequent tendency of one or other to secure a quiet life to the State, yields few profitable results, because the circumstances of different nations are too dissimilar to enable close parallels to be drawn, and because much depends upon the skill with which the provisions of each particular instrument have been drawn and upon the greater or less particularity of those provisions. The present Constitution of France, for instance, is contained in two very short and simple documents, which determine only the general structure of the government, and are in size not one-twentieth of the Federal Constitution of Switzerland. Hence it follows that a far freer play is left to the legislature and executive in France than in Switzerland; and that these two authorities have in the former State more power of meeting any change in the conditions of the country, and also more power of doing harm by hasty and unwise action, than is permitted in the latter. As Adaptability is the characteristic merit and insecurity

the characteristic defect of a Flexible Constitution, so the drawback which corresponds to the Durability of the Rigid is its smaller capacity for meeting the changes and chances of economic, social and political conditions. A provision strictly defining the structure of the government may prevent the evolution of a needed organ. A prohibition debarring the legislature from passing certain kinds of measures may prove unfortunate when a measure of that kind would be the proper remedy. Every security has its corresponding disadvantage.

### XIII. THE INTERPRETATION OF RIGID CONSTITUTIONS.

A well-drawn Rigid Constitution will confine itself to essentials, and leave many details to be filled in subsequently by ordinary legislation and by usage. But (as already observed) even the best-drawn instrument is sure to have omitted some things which ought to have been expressly provided for, to have imposed restrictions which will prove inconvenient in practice, to contain provisions which turn out to be susceptible of different interpretations when cases occur raising a point to which the words of those provisions do not seem to be directly addressed. When any of these things happen, the authorities, legislative and executive, who have to work the Constitution find themselves in a difficulty. Steps seem called for which the Constitution either does not give power to do, or forbids to be done, or leaves in such doubt as to raise scruples and controversies. The authorities, or the nation itself, have then three alternative courses open to them. The first is to submit to the restrictions which the Constitution imposes, and abandon a contemplated course of action, though the public interest demands it. This is disagreeable, but if the case is not urgent, may be the best course, though it tends to the disparagement of the Constitution itself. The second course is to amend the Constitution: and it is obviously the proper one, if it be possible. But it may be practically

impossible, because the procedure for passing an amendment may be too slow, the need for action being urgent, or because the majority that can be secured for amendment, even if large, may be smaller than the Constitution prescribes. The only remaining expedient is that which is euphemistically called Extensive Interpretation, but may really amount to Evasion. Evasion, pernicious as it is, may give a slighter shock to public confidence than open violation, as some have argued that equivocation leaves a man's conscience less impaired for future use than does the telling of a downright falsehood. Cases occur in which the Executive or the Legislature profess to be acting under the Constitution, when in reality they are stretching it, or twisting it, *i.e.* are putting a forced construction upon its terms, and affecting to treat that as being lawful under its terms which the natural sense of the terms does not justify. The question follows whether such an evasion will be held legal, *i.e.* whether acts done in virtue of such a forced construction as aforesaid will be deemed constitutional, and will bind the citizens as being legally done. This will evidently depend on a matter we have not yet considered, but one of profound importance, *viz.* the authority in whom is lodged the right of interpreting a Rigid Constitution.

On this point there is a remarkable diversity of theory and practice between countries which follow the English and countries which follow the Roman law. The English attribute the right to the Judiciary. As a constitutional instrument is a law, distinguished from other laws only by its higher rank, principle suggests that it should, like other laws, be interpreted by the legal tribunals, the last word resting, as in other matters, with the final Court of Appeal. This principle of referring to the Courts all questions of legal interpretation may be said to be inherent in the English Common Law, and holds the field in all countries whose systems are built upon the foundation of that Common Law. In particular, it holds good

in the United Kingdom and in the United States. As the British Parliament can alter any part of the British Constitution at pleasure, the principle is of secondary political importance in England, for when any really grave question arises on the construction of a constitutional law it is dealt with by legislation. However, the action of the Courts in construing the existing law is watched with the keenest interest when questions arise which the Legislature refuses to deal with, such, for instance, as those that affect the doctrine and discipline of the Established Church. So in the seventeenth century, when constitutional questions were at issue between the King and the House of Commons, which it was impossible to settle by statute, because the king would have refused consent to bills passed by the Commons, the power of the Judges to declare the rules of the ancient Constitution was of great significance. In the United States, where Congress cannot alter the Constitution, the function of the Judiciary to interpret the will of the people as set forth in the Constitution has attained its highest development. The framers of that Constitution perhaps scarcely realized what the effect of their arrangements would be. More than ten years passed before any case raised the point; and when the Supreme Court declared that an Act of Congress might be invalid because in excess of the power granted by the Constitution, some surprise and more anger were expressed. The reasoning on which the Court proceeded was, however, plainly sound, and the right was therefore soon admitted. Canada and Australia have followed the English doctrine, so the Bench has a weighty function under the constitutions of both those Federations.

On the European Continent a different view prevails, and the Legislature is held to be the judge of its own powers under the Constitution, so that no Court of law may question the authority of a statute passed in due form. Such is the rule in Switzerland. There, as in most parts of the European Continent, the separation of

the Judiciary from the other two powers has been less complete than in England, and the deference to what Englishmen and Americans call the Rule of Law less profound. The control over governmental action which the right of interpretation implies seems to the Swiss too great, and too political in its nature, to be fit for a legal tribunal. It is therefore vested in the National Assembly, which when a question is raised as to the constitutionality of a Federal Statute or Executive Act, or as to the transgression of the Federal Constitution by a Cantonal Statute, is recognized as the authority competent to decide. The same doctrine seems to prevail in the German Empire, though the point is there not quite free from doubt, and also in the Austrian Monarchy, in France, and in Belgium. In the Orange Free State, living under Roman-Dutch law, the Bench, basing itself on American precedents, claimed the right of authoritative interpretation, but the Legislature hesitated to admit it.

American lawyers conceive that the strength and value of a Rigid Constitution are greatly reduced when the Legislature becomes the judge of its own powers, entitled after passing a statute which really transgresses the Constitution to declare that the Constitution has in fact not been transgressed. The Swiss, however, deem the disadvantages of the American method still more serious, for they hold that it gives the last word to the judges, persons not chosen for or fitted for such a function, and they declare that in point of fact public opinion and the traditions of their government prevent the power vested in their National Assembly from being abused. And it must be added that the Americans have so far felt the difficulty which the Swiss dwell on, that the Supreme Court has refused to pronounce upon the action of Congress in 'purely political cases,' *i. e.* cases where the arguments used to prove or disprove the conformity to the Constitution of the action taken by Congress are of a political nature.

Returning to the question of legislative action alleged

to transgress the Constitution, it is plain that if the Legislature be, as in Switzerland, the arbiter of its own powers, so that the validity of its acts cannot be questioned in a court of law, there is no further difficulty. But where that validity can be challenged, as in the United States, it might be supposed that every unconstitutional statute will be held null, and that thus any such stretching or twisting of the Constitution as has been referred to will be arrested. But experience has shown that where public opinion sets strongly in favour of the line of conduct which the Legislature has followed in stretching the Constitution, the Courts are themselves affected by that opinion, and go as far as their legal conscience and the general sense of the legal profession permit—possibly sometimes even a little farther—in holding valid what the Legislature has done. This occurs most frequently where new problems of an administrative kind present themselves. The Courts recognize, in fact, that ‘principle of development’ which is potent in politics as well as in theology. Human affairs being what they are, there must be a loophole for expansion or extension in some part of every scheme of government; and if the Constitution is Rigid, Flexibility must be supplied from the minds of the Judges. Instances of this kind have occurred in the United States, as when some twenty years ago the Supreme Court recognized a power in a State Legislature to deal with railway companies not consistent with the opinions formerly enounced by the Court, though they disclaimed the intention of overruling those opinions <sup>1</sup>.

<sup>1</sup> A still more remarkable instance has been furnished, while these pages are passing through the press (June, 1901), by the decisions of the Supreme Court of the United States in the group of cases which arose out of questions relating to the applicability of the Federal Constitution to the island of Puerto Rico, recently ceded by Spain to the United States. The Court had to deal with a constitutional question raising large issues of national policy regarding the application of the Federal Constitution to territories acquired by conquest and treaty: and its judgments in these cases (given in every case by majorities only) have expanded the Constitution, *i.e.* have declared it to have a meaning which may well be its true meaning, but which was not previously ascertained, and certainly by many lawyers not admitted, to be its true meaning.

Does not a danger lurk in this? May not a majority in the Legislature, if and when they have secured the concurrence, honest or dishonest, of the Judiciary, practically disregard the Constitution? May not the Executive conspire with them to manipulate places on the highest Court of Appeal, so as to procure from it such declarations of the meaning of the Constitution as the conspiring parties desire? May not the Constitution thus be slowly nibbled away? Certainly. Such things may happen. It is only public opinion and established tradition that will avail to prevent them. But it is upon public opinion, moulded by tradition, that all free governments must in the last resort rely.

#### XIV. DEMOCRACIES AND RIGID CONSTITUTIONS.

The mention of traditions, that is to say of the mental and moral habits of judgement which a nation has formed, and which guide its political life, as the habits of each one of us guide his individual life, suggests an inquiry as to the effect of Documentary Constitutions on the ideas and habits of those who live under them. I will not venture on broad generalizations, because it is hard to know how much should be assigned to the racial tendencies of a nation, how much to the circumstances of its history, how much to its institutions. But the cases of Switzerland and the United States seem to show that the tendency of these instruments is to foster a conservative temper. The nation feels a sense of repose in the settled and permanent form which it has given to its government. It is not alarmed by the struggles of party in the legislature, because aware that that body cannot disturb the fundamental institutions. Accordingly it will often, contracting a dislike to change, negative the amendments which the legislature submits to it. This happens in Switzerland, as already observed; and the people of the United States, though liable to sudden and violent waves of political opinion, show so little disposition to innovate

that Congress has not proposed any amendments to the State Legislatures since 1870<sup>1</sup>. I may be reminded that the Constitutions of the several States of the Union are frequently recast or amended in detail. This is true, but the cause lies not so much in a restless changefulness as in the low opinion entertained of the State Legislatures. The distrust felt for these bodies induces the people to take a large part of what is really ordinary legislation out of their hands, and to enact themselves, in a form of a Constitution, the laws they wish. State Constitutions now contain many regulations on matters of detail, and have thus, in most States, ceased to be considered fundamental instruments of government. To revise or amend them has become merely a convenient method of direct popular legislation, similar to the Swiss Popular Initiative and Referendum. But the fundamental parts of these instruments are but slightly changed.

In estimating the influence of Flexible Constitutions in forming the political character of a nation, in stimulating its intelligence and training its judgement, it was remarked that only the governing class, a very small part of the nation even in democratic countries, are directly affected. This is less true of a Rigid Constitution. While a Flexible Constitution like the Roman or English requires much knowledge, tact and courage to work it, and develops these qualities in those who bear a part in the working of it, as legislators or officials or magistrates, a Rigid Constitution tends rather to elicit ingenuity, subtlety and logical acumen among the corresponding class of persons. It is apt to give a legal cast to most questions, and sets a high, perhaps too high, premium on legal knowledge and legal capacity. But it goes further. It affects a much larger part of the community than the Flexible Constitution does. Few even of the governing class can be expected to understand the latter. The average Roman voter in the *comitia* in the

<sup>1</sup> Something must, however, be allowed for the provisions which require large majorities for any amendment of the Constitution.

days of Cicero, like the average English voter at the polls to-day, probably knew but little about the legal structure of the government he lived under. But the average Swiss voter, like the average native American voter (for the recent immigrant is a different sort of creature), understands his government, can explain it, and has received a great deal of education from it. Talk to a Swiss peasant in Solothurn or Glarus, and you will be astonished at his mastery of principles as well as his knowledge of details. Very likely he has a copy of the Federal Constitution at home. He has almost certainly learnt it at school. It disciplines his mind much as the Shorter Catechism trained the Presbyterian peasantry of Scotland. As there is no mystery about a scheme of government so set forth, it may be thought that he will have little reverence for that which he comprehends. It is, however, his own. He feels himself a part of the Government, and seems to be usually imbued with a respect even for the letter of the instrument, a wholesome feeling, which helps to form that law-abiding spirit which a democracy needs.

A documentary Constitution appears to the people as the immediate outcome of their power, the visible image of their sovereignty. It is commended by a simplicity which contrasts favourably with the obscure technicalities of an old common law Constitution. The taste of the multitude, and especially of that class which outnumbered all other classes, the thinly-educated persons whose book-knowledge is drawn from dry manuals in mechanically-taught elementary schools, and who in after life read nothing but newspapers, or penny weeklies, or cheap novels—the taste of this class, and that not merely in Europe but perhaps even more in the new countries, such as Western America and the British Colonies, is a taste for ideas level with their comprehension, sentiments which need no subtlety to be appreciated, propositions which can be expressed in unmistakable posi-

tives and negatives. Thus the democratic man (as Plato would call him) is pleased to read and know his Constitution for himself. The more plain and straightforward it is the better, for so he will not need to ask explanations from any one more skilled. And a good reason for this love of plainness and directness may be found in the fact that the twilight of the older Constitutions permitted abuses of executive power against which the express enactments of a Rigid Constitution protect the people. Magna Charta, the Bill of Rights, the Twelve Tables, were all fragments, or rather instalments, of such a Constitution, rightly dear to the commons, for they represented an advance towards liberty and order <sup>1</sup>.

The theory of democracy assumes that the multitude are both competent and interested; competent to understand the structure of their government and their own functions and duties as ultimately sovereign in it, interested as valuing those functions, and alive to the responsibility of those duties. A Constitution set out in black and white, contained in a concise document which can be expounded and remembered more easily than a Constitution growing out of a long series of controversies and compromises, seems specially fitted for a country where the multitude is called to rule. Only memory and common sense are needed to master it. It can lay down general principles in a series of broad, plain, authoritative propositions, while in the case of the 'historical Constitution' they have to be gathered from various sources, and expressed, if they are to be expressed correctly, in a guarded and qualified form. Now the average man, if intelligent enough to comprehend politics at all, likes general principles. Even if, as some think, he overvalues them, yet his capacity for absorbing them gives him a sort of comprehension of his govern-

<sup>1</sup> The 'People's Charter' of 1848 was called for as another such onward step. Its Six Points were to be the basis of a democratic reconstruction of the government.

ment and attachment to it which are solid advantages in a large democracy.

Constitutions of this type have usually arisen when the mass of the people were anxious to secure their rights against the invasions of power, and to construct a frame of government in which their voices should be sure to prevail. They furnish a valuable protection for minorities which, if not liable to be overborne by the tyranny of the mass, are at any rate liable to be disheartened into silence by superior numbers, and so need all the protection which legal safeguards can give them. Thus they have generally been accounted as institutions characteristic of democracy, though the cases of Germany and Japan show that this is not necessarily true.

A change of view has, however, become noticeable within the last few years. In the new democracies of the United States and the British self-governing Colonies—and the same thing is true of popularly governed countries in Europe—the multitude no longer fears abuses of power by its rulers. It is itself the ruler, accustomed to be coaxed and flattered. It feels no need for the protection which Rigid Constitutions give. And in the United States it chafes under those restrictions on legislative power, embodied in the Federal Constitution or State Constitution (as the case may be), which have surrounded the rights of property and the obligation of subsisting contracts with safeguards obnoxious, not only to the party called Socialist, but to reformers of other types. As these safeguards are sometimes thought to prevent the application of needed remedies and to secure impunity for abuses which have become entrenched behind them, the aforesaid constitutional provisions have incurred criticism and censure from various sections, and many attempts have been made by State legislatures, acting at the bidding of those who profess to control the votes of working men, to disregard or evade the restrictions. These attempts are usually defeated by the action of the Courts, whence it

happens that both the Federal Constitution and the functions of the Judiciary are often attacked in the country which was so extravagantly proud of both institutions half a century ago. This strife between the Bench as the defender of old-fashioned doctrines (embodied in the provisions of a Rigid Constitution (Federal or State)) and a State Legislature acting at the bidding of a large section of the voters is a remarkable feature of contemporary America.

The significance of this change in the tendency of opinion is enhanced when we find that a similar change has been operative in the opposite camp. The very considerations which have made odious to some American reformers those restrictions on popular power, behind which the great corporations and the so-called 'Trusts' (and capitalistic interests generally) have entrenched themselves, have led not a few in England to applaud the same restrictions as invaluable safeguards to property. Realizing, a little late in the day, that political power has in England passed from the Few to the Many, fearing the use which the Many may make of it, and alarmed by the precedents which land legislation in Ireland has set, they are anxious to tie down the British legislature, while yet there is time, by provisions which shall prevent interference with a man's control over what he calls his own, shall restrict the taking of private property for public uses, shall secure complete liberty of contracting, and forbid interference with contracts already made. Others in England, in their desire to save political institutions which they think in danger, propose to arrest any sudden popular action by placing those institutions in a class by themselves, out of the reach of the regular action of Parliament. In other words, the establishment in Britain of a species of Rigid Constitution has begun to be advocated, and advocated by the persons least inclined to trust democracy. 'Imagine a country'—so they argue—'with immense accumulated wealth, and a great inequality of fortunes, a country which rules a vast

and distant Empire, a country which depends for her prosperity upon manufactures liable to be injured by bad legislation, and upon a commerce liable to be imperilled by unskilful diplomacy, and suppose that such a country should admit to power a great mass of new and untrained voters, to whose cupidity demagogues will appeal, and upon whose ignorance charlatans will practise. Will not such a country need something better for her security than a complicated and delicately-poised Constitution resting largely on mere tradition, a Constitution which can at any moment be fundamentally altered by a majority, acting in a revolutionary transient spirit, yet in a perfectly legal way? Ought not such a country to place at least the foundations of her system and the vital principles of her government out of the reach of an irresponsible parliamentary majority, making the procedure for altering them so slow and so difficult that there will be time for the conservative forces to rally to their defence before any fatal changes can be carried through?’

I refer to these arguments, which were frequently heard in England during some years after the extension of the ‘suffrage in 1884’<sup>1</sup>, with no intention of discussing their soundness, for that belongs to politics, but solely for the sake of illustrating how different are the aspects which the same institution may come to wear. A century ago revolutionists were the apostles, conservatives the enemies, of Rigid Constitutions. Even forty years ago it was the Flexibility of the historical British Constitution that was its glory in the eyes of admirers of the British system, its Rigidity that was the glory of the American Constitution in the eyes of fervent democrats.

<sup>1</sup> They are much less heard now (1900), partly because the public mind is occupied with matters of a different order, partly because the political party which professes to be opposed to innovation has latterly commanded a large majority in the British Legislature.

## XV. THE FUTURE OF THE FLEXIBLE AND RIGID TYPES.

A few concluding reflections may be devoted to the probable future of the two types that have been occupying our minds. Are both likely to survive? or if not, which of the two will prevail and outlast the other?

Two reasons suggest themselves for predicting the prevalence of the Rigid type. One is that no new Flexible Constitutions have been born into the world for many years past, unless we refer to this class those of some of the British self-governing colonies<sup>1</sup>. The other is that no country now possessing a Rigid Constitution seems likely to change it for a Flexible one. The footsteps are all the other way. Flexible Constitutions have been turned into Rigid ones. No Rigid one has become Flexible<sup>2</sup>. Even those who complain of the undue conservatism of the American Constitution do not propose to abolish that Constitution altogether, nor to place it at the mercy of Congress, but merely to expunge parts of it, though no doubt parts which (such as the powers of the Judiciary) have been vital to its working.

Against these two arguments may be set the fact that popular power has in most countries made great advances, and does not need the protection of an instrument controlling the legislature and the executive, which are already only too eager to bend to every breeze of popular opinion. If we lived in a time of small States, as the ancients did, the people would themselves legislate in primary assemblies. Why then, it may be asked, should they care to limit the powers of legislatures which are completely at their bidding? The old reasons for holding legislatures and executives in check have disappeared. Why should the people, safe and self-confident, impose a check on themselves? In this there may be

<sup>1</sup> The British self-governing Colonies (except the two great federations, see ante, pp. 168-9) have constitutions which may be changed in all or nearly all points by their respective legislatures, but they are not independent States, and the power of the legislatures to alter the constitutions is therefore not complete.

<sup>2</sup> The Constitution of Italy, already referred to, is scarcely an exception.

some truth. But it must be remembered that since modern States are larger than those of former times, and tend to grow larger by the absorption of the small ones, legislatures are necessary, for business could not be carried on by primary popular assemblies, even with the aid of 'plébiscites.' Now legislatures are nowhere rising in the respect and confidence of the people, and it is therefore improbable that any nation which has a documentary Constitution, holding its legislature in subjection, will abolish it for the benefit of the legislature, although it may wish to do more and more of its legislation by the direct action of the people, as it does in Switzerland and in some of the States of the American Union. On the whole, therefore, it seems probable that Rigid Constitutions will survive in countries where they already exist.

Two other questions remain. Will existing Flexible Constitutions remain? Are such new States as may arise likely to adopt Constitutions of the Rigid or of the Flexible type?

An inquiry whether countries which, like Hungary and Britain, now live under ancient Flexible Constitutions will exchange them for new documentary ones would resolve itself into a general study of the political prospects of those countries. All that can be said, apart from such a study, is that our age shows no such general tendency to change in this respect as did the revolutionary and post-revolutionary era of the first sixty years of the nineteenth century. Still, a few lines may be given to considering whether any such alteration of form is likely to pass on the Constitution which has long had the unquestioned pre-eminence in age and honour, that, namely, of the United Kingdom, which is really the ancient Constitution of England so expanded as to include Scotland and Ireland.

So far as internal causes and forces are concerned, this seems improbable. The people are not likely, despite the alarms felt and the advice tendered by the

uneasy persons to whom reference has already been made, to part with the free play and elastic power of their historical Cabinet and Parliamentary system. England has never yet made any constitutional change either on grounds of theory or from a fear of evils that might arise in the future. All the modifications of the frame of government have been gradual, and induced by actually urgent needs.

But there is another set of causes and forces at work which may, as some think, affect the question. It has already been noted that Rigid Constitutions have arisen where States originally independent or semi-independent have formed Confederations. These States, finding the kind of connexion which treaties had created insufficient for their needs, have united themselves into one Federal State, and expressed their new and closer relation in the form of a documentary Constitution. Such a Constitution has invariably been raised above the legislature it was creating, because the States which were uniting wished to guard jealously such autonomy as they respectively retained, and would not leave those rights at the mercy of the legislature. This happened in the United States in 1787-9, in Switzerland after the fall of Napoleon, in Germany when the North German Confederation and German Empire were created in 1866 and 1870-71. It has happened also in Canada and in Australia.

Two proposals of a federalizing nature have recently been made regarding the United Kingdom, one to split it up into a Federation of four States, the other to make it a member of a large Federation. Neither seems likely to be carried out at present, but both are worth mentioning, because they illustrate the occasions on which, and methods by which, constitutions may be transformed. The United Kingdom stands to its self-governing Colonies in what is practically a permanent alliance as regards all foreign relations, these relations being managed by the mother country, with complete

local legislative and administrative autonomy both for each Colony and for the mother country<sup>1</sup>. Many think that this alliance is not a satisfactory, and cannot well be a permanent, form of connexion, because at present almost the whole burden—and it is a heavy one—of naval and military defence falls upon Britain, while the Colonies have no share in the control of foreign relations, and may find themselves engaged in a war, or bound by a treaty, regarding which they have not been consulted. Thus the idea has grown up that some sort of confederation ought to be established, in which there would be a Federal Assembly, containing representatives of the (at present seven) component States<sup>2</sup>, and controlling those matters, such as foreign relations and a system of military and naval armaments, which would be common to the whole body. If this idea were ever to take practical shape, it would probably be carried out by a statute establishing a new Constitution for the desired Confederation, and creating the Federal Assembly. Such a statute would be passed by the Parliament of the United Kingdom, and (being expressed to be operative over the whole Empire) would have full legal effect for the Colonies as well as for the mother country. Now if such a statute assigned to the Federal Assembly certain specified matters, as for instance the control of imperial defence and expenditure or (let us say) legislation regarding merchant shipping and copyright, taking them away from the present and future British Parliament as well as from the parliaments of the several Colonies, and therewith debarring the British Parliament from recalling or varying the grant except by the

<sup>1</sup> This autonomy is, however, not legally complete as regards the Colonies, for the mother country may, though she rarely does, disallow colonial legislation. In Canada the Dominion Legislature cannot affect the rights of the several Provinces, the power to do so remaining with the Imperial Parliament which passed the Confederation Act of 1867. So too under the Constitution of the Australian Commonwealth the rights of each colony are protected by the instrument of federation.

<sup>2</sup> Viz. the United Kingdom, the two great Colonial Federations (Canada and Australia), and four comparatively small self-governing Colonies, viz. New Zealand, Cape Colony, Natal, and Newfoundland.

consent of the several Colonies (or perhaps of the Federal Assembly itself), it is clear that the now unlimited powers of the British Parliament would have been reduced. A part of the future British Constitution would have been placed beyond its control: and to that extent the British Constitution would have ceased to be a Flexible one within the terms of the definition already given<sup>1</sup>. Parliament would not be fully sovereign; and if either the British or a Colonial Parliament passed laws inconsistent with statutes passed by the Federal Assembly in matters assigned to the latter, the Courts would have to hold the transgressing laws invalid.

Doubtless, if such a Federal Constitution were established, a Supreme Court of Appeal on which some colonial judges should sit would be thought essential to it, and questions arising under the Federation Act (as to the extent of the powers of the Federal Assembly and otherwise) would go before it, sometimes in the first instance, sometimes by way of appeal from inferior Courts.

The other proposal is to turn the United Kingdom itself into a Federation by erecting England, Scotland, Ireland, and Wales into four States, each with a local legislature and ministry controlling local affairs, while retaining the Imperial Parliament as a Central or Federal Legislature for such common affairs as belong in the United States to Congress, and in Canada to the Dominion Parliament, and in Australia to the Commonwealth Parliament. If such a scheme provided, as it probably would provide, for an exclusive assignment to the local legislatures of local affairs, so as to debar the Imperial Parliament from interfering therewith, it would destroy the present Flexible British Constitution and substitute

<sup>1</sup> It may of course be observed (see p. 175, ante) that the British Parliament, while it continues to be elected as now, may be unable to divest itself of its general power of legislating for the whole Empire, and might therefore repeal the Act by which it had resigned certain matters to the Federal Assembly and resume them for itself. This is one of those *apices iuris* of which the Romans say *non sunt iura*; and in point of fact no Parliament can be supposed capable of the breach of faith which such a repeal would involve. The supposed legal difficulty might, however, be avoided by some such expedient as that previously suggested.

a Rigid one for it. Care would have to be taken to use proper legal means of extinguishing the general sovereign authority of the present Parliament, as for instance by directing the elections for the new Federal Legislature to be held in such a way as to effect a breach of continuity between it and the old Imperial Parliament, so that the latter should absolutely cease and determine when the new Constitution came into force. Upon this scheme also it would be for the Courts of Law to determine whether in any given case either the Federal or one of the Local Legislatures had exceeded its powers.

Some persons have proposed to combine both these proposals so as to make the four parts of the United Kingdom each return members, along with the Colonies, to a Pan-Britannic Federal Legislature, and to place the local legislatures of Scotland, for instance, or Wales, in a line with those of the Australian Commonwealth or New Zealand. On this plan also the British Constitution would become a Rigid one.

The difficulties, both legal and practical, with which these proposals, taken either separately or in conjunction, are surrounded, are greater than those who advocate them have as yet generally perceived.

#### XVI. ARE NEW CONSTITUTIONS LIKELY TO ARISE?

The remaining question, also somewhat speculative, relates to the prospects the future holds out to us of seeing new States with new Constitutions arise.

New States may arise in one of two ways, either by their establishment in new countries where settled and civilized government has been hitherto unknown, or by the breaking up of existing States into smaller ones, fragments of the old.

The opportunities for the former process have now been sadly curtailed through the recent appropriation by a few great civilized States of some two-thirds of the surface of the globe outside Europe. North America is

in the hands of three such States. Central and South America, though the States are all weak and most of them small in population, are so far occupied that no space is left. The last chance disappeared when the Argentine Republic asserted a claim to Patagonia, where it would have been better that some North European race should have developed a new colony, as the Welsh settlers were doing on a small scale. Australia is occupied. Asia, excluding China and Japan in the East, and the two dying Musulman powers in the West, is virtually partitioned between Britain and Russia, with France holding a bit of the south-east corner. So Africa has now been (with trifling exceptions) divided between five European Powers (Portugal, England, France, Germany, Italy). Thus there is hardly a spot of earth left on which a new independent community can establish itself, as the Greeks founded a multitude of new commonwealths in the eighth and seventh centuries B. C., and as the Teutonic invaders founded kingdoms during the dissolution of the Roman Empire.

If we turn to the possibilities of new States arising from the ruins of existing ones, whether by revolt or by peaceful separation, the prospect is not much more encouraging. There is indeed Turkey. Five out of the six new States that have arisen in Europe during this century have been carved out of the territories she claimed—viz. Greece, Rumania, Servia, Bulgaria, Montenegro: and there is material for one or two more in Europe and possibly for one or two in Asia, though it is more probable that both the Asiatic and European dominions of the Sultan will be partitioned among existing States than that new ones will spring out of them. The ill-compacted fabric of the Austro-Hungarian monarchy may fall to pieces. Parts of the Asiatic dominions of Russia may possibly (though in a comparatively distant future) become independent of the old Muscovite motherland, and the less civilized among the republics of Central and South America may be broken into parts

or combined into new States, though the saying 'plus cela change, plus c'est la même chose' is even more true of those countries than of that to which it was originally applied, and gives little hope of interesting novelties. But on the whole the tendency of modern times is rather towards the aggregation of small States than towards the division of large ones. Commerce and improved facilities of communication are factors of constantly increasing importance which work in this direction, and this general tendency for the larger States to absorb the smaller forbids us to expect the rise, within the next few generations, of more than a few new Constitutions which will provide matter for study to the historian or lawyer of the future.

What type of Constitution will these new States, whatever they be and whenever they come, be disposed to prefer? Upon this point it is relevant to observe that all the new States that have appeared since 1850 have adopted Rigid Constitutions, with the solitary exception of Montenegro, which has no Constitution at all, but lives under the paternal autocracy of the temporal ruler who has succeeded the ancient ecclesiastical Vladika<sup>1</sup>. Each of them, on beginning its independent life, has felt the need of setting out the lines of its government in a formal instrument which it has consecrated as fundamental by placing it above ordinary legislation. Similar conditions are likely to surround the birth of any new States, similar motives to influence those who tend their infancy. The only cases in which a Flexible Constitution is likely to arise would be the division of a country having such a Constitution into two or more fragments, each of which should cleave to the accustomed system; or the revolt of a people or community among whom, as they grow into a State, usages of government that had naturally sprung up might, when independence had been established, continue to be observed and so ripen into a Constitution. The chance that either of these cases will

<sup>1</sup> As to Italy, however, see above, pp. 171 and 176.

present itself is not very great. New States will more probably adopt documentary Constitutions, as did the insurgent colonies of England after 1776 and of Spain after 1811, and as the Christians of South-Eastern Europe did when they had rid themselves of the Turk. Upon the whole, therefore, it would seem that the future is rather with Rigid Constitutions than with those of the Flexible type.

It is hardly necessary to close these speculations by adding the warning that all prophecies in politics must be highly conjectural. Circumstances change, opinion changes; knowledge increases, though the power of using it wisely may not increase <sup>1</sup>.

The subtlety of nature, and especially the intricacy of the relations she develops between things that originally seemed to lie wide apart, far surpasses the calculating or predicting wit of man. Accordingly many things, both in the political arrangements of the world and in the beliefs of mankind, which now seem permanent may prove transitory. Democracy itself, though most people treat it as a thing likely to grow stronger and advance further, may suffer an eclipse. Human nature no doubt remains. But human nature has clothed itself in the vesture of every sort of institution, and may change its fashions as freely in the future as it has done in the past.

<sup>1</sup> Ἀπανθ' ὁ μακρὸς κἀναριθμητὸς χρόνος  
φύει τ' ἄδηλα καὶ φανέντα κρύπτεται.  
Soph. *Ajax*, 646.

## NOTE TO ESSAY III

### CONSTITUTIONAL AND OTHER GOVERNMENTS

THE races and nations of the world may, as respects the forms of Government under which they live, be distributed into four classes:—

I. Nations which have created and maintain permanent political institutions, allotting special functions to each organ of Government, and assigning to the citizens some measure of participation in the business of Government.

In these nations we discover Constitutions in the proper sense of the term. To this class belong all the States of Europe except Russia and Montenegro, and, outside Europe, the British self-governing Colonies, the United States and Mexico, the two republics of South Africa, Japan and Chili, possibly also the Argentine Republic.

II. Nations in which the institutions aforesaid exist in theory, but are seldom in normal action, because they are in a state of chronic political disturbance and mostly ruled, with little regard to law, by military adventurers. This class includes the republics of Central and South America, with the exception of Chili, and possibly of Argentina, whose condition has latterly been tolerably stable.

III. Nations in which, although the upper class is educated, the bulk of the population, being backward, has not begun to desire such institutions as aforesaid, and which therefore remain under autocratic monarchies.

To this class belong Russia and Montenegro. Japan has lately emerged from it: and two or three of the newest European States might, but for the interposition of other nations, have remained in it.

IV. Nations which are, for one reason or another, below the level of intellectual life and outside the sphere of ideas which the permanent political institutions aforesaid presuppose and need for their proper working. This class includes all the remaining peoples of the world, from intelligent races like the Chinese, Siamese, and Persians, down to the barbarous tribes of Africa.

Constitutions, in the sense in which the term is used in the preceding Essay, belong only to the first class, and in a qualified sense to the second. In the modern world they are confined to Europe and her Colonies, adding Japan, which has imitated Europe. In the ancient world they were confined to three races, Greeks, Italians, and Phoenicians, to whom one may perhaps add such races as the Lycians, who had learnt from the Greeks. Their range is somewhat narrower than that of law, that is to say, there are peoples which, like the Musulmans of Turkey, Egypt, and Persia, have law, but have no Constitutions.

No race that has ever lived under a lost Constitutional Government has permanently lost it, except those parts of the Roman Empire which now form part of the Turkish Empire; and the Roman Empire, though its Government never ceased to be in a certain sense constitutional, ultimately extinguished the habit of self-government among its subjects.

## IV

# THE ACTION OF CENTRIPETAL AND CENTRIFUGAL FORCES ON POLITICAL CONSTITUTIONS<sup>1</sup>

As every government and every constitution is the result of certain forces and tendencies which bring men together in an organized community, so every government and every constitution tends when formed to hold men together thenceforth, training them to direct their efforts to a common end and to sacrifice for that purpose a certain measure of the exercise of their individual wills. So strong is the aggregative tendency, that each community naturally goes on by a sort of law of nature to expand and draw in others, whether persons or groups, who have not previously belonged to it: nor is physical force the prime agent, for the great majority of mankind prefer some kind of political society, even one in whose management they have little or no share, to mere isolation. As this process of expansion and aggregation continues, the different political groups which it has called into being come necessarily in contact with one another. The weaker ones are overcome or peacefully absorbed by the stronger ones, and thus the number of groups is continually lessened. Where two communities of nearly equal strength encounter each other, each may for a time succeed in resisting the attraction of the

<sup>1</sup> This Essay was composed in the early part of 1885. It has been revised throughout, but the substance remains the same.

other. But in this changeful world it almost always happens that sooner or later one becomes so much stronger that the other yields to it: and thus in course of time the number of detached communities, *i.e.* of groups each with its own centre of attraction, becomes very small, because the weak have been swallowed up by the strong. This is the general, though, as we shall see, not the universal course of events. There is also another force at work, which has at some moments in history developed great strength.

#### I. HOW THE TENDENCIES TO AGGREGATION AND TO DISSOLUTION RESPECTIVELY AFFECT CONSTITUTIONS.

Of the many analogies that have been remarked between Law in the Physical and Law in the Moral World, none is more familiar than that derived from the Newtonian astronomy, which shows us two forces always operative in our solar system. One force draws the planets towards the sun as the centre of the system, the other disposes them to fly off from it into space. So in politics, we may call the tendency which draws men or groups of men together into one organized community and keeps them there a Centripetal force, and that which makes men, or groups, break away and disperse, a Centrifugal. A political Constitution or frame of government, as the complex totality of laws embodying the principles and rules whereby the community is organized, governed, and held together, is exposed to the action of both these forces. The centripetal force strengthens it, by inducing men (or groups of men) to maintain, and even to tighten, the bonds by which the members of the community are gathered into one organized body. The centrifugal assails it, by dragging men (or groups) apart, so that the bonds of connexion are strained, and possibly at last loosened or broken. That no community can be exempt from the former force is obvious. But neither can any wholly escape the latter. For every community

has been built out of smaller groups, and the members of such groups have seldom quite lost the attraction which each had to its own particular centre, such attraction being of course dissociative as regards the other groups and their members<sup>1</sup>. Moreover in no large community can there ever be a complete identity of views and wishes, of interests and feelings, between all the members. Many must have something to complain of, something which sets them against the rest and makes them desire to be, for some purposes, differently treated, or (in extreme cases) to be entirely separated. The existence of such a grievance constitutes a centre round which a group is formed, and this group is in so far an element of disjunction. Accordingly the history of every community and every constitution may be regarded as a struggle between the action of these two forces, that which draws together and that which pushes apart, that which unites and that which dissevers.

This subject, it may be thought, belongs either to History, in so far as history attempts to draw general conclusions from the facts she records, or to that branch of political science which may be called Political Dynamics, and is one with which the constitutional lawyer is not directly concerned. (The constitutional lawyer, however, must always, if he is to comprehend his subject and treat it fruitfully, be a historian as well as a lawyer. His legal institutions and formulae do not belong to a sphere of abstract theory but to a concrete world of fact. Their soundness is not merely a logical but also a practical soundness, that is to say, institutions and rules must represent and be suited to the particular phenomena they have to deal with in a particular country. It is through history that these phenomena are known. History explains how they have come to be what they are. History shows whether they are the result of tendencies still in-

<sup>1</sup> In the pages that follow the word Group is used to denote the section of persons within a larger community who may be held together by some tie, whether of interest or sentiment or race or local habitation, which makes them a sort of minor community inside the larger one.

creasing or of tendencies already beginning to decline. History explains them by parallel phenomena in other times and places. Thus the lawyer who has to consider and advise on any constitutional problem, and still more the lawyer who has to contrive a constitutional scheme for grappling with a political difficulty, must study the matter as a historian, otherwise he will himself err and mislead those whom he advises. Great lawyers often have so erred, and with lamentable results. A lawyer who shall deal with a constitutional problem as he would deal with a technical point in the law of real property will be as much astray as an advocate who should prosecute or defend a political prisoner with a sole regard to the law of treason or sedition which he may find in his books, heedless of the temper and opinion of those from among whom the jury will be drawn.)

An obvious illustration may be found in the fact that when any particular community is studied from the constitutional point of view, and the inquiry is raised whether it ought to have a Flexible or a Rigid Constitution, the question of the comparative actual strength of these two forces becomes a vital one. Where the centripetal force is palpably the stronger, either sort of constitution will do to hold the community together: and the choice between the two sorts may be made on other grounds. But where the centrifugal force is potent, and especially where there are reasons to apprehend its further development, the establishment of a Rigid Constitution may become desirable, and yet may be a matter of much delicacy and difficulty. If the constitution be framed in the interests of a centralizing policy, there is a danger that it may assume and require for its maintenance a greater strength in the centripetal forces than really exists, and that for the want of such strength the constitution may be exposed to a strain it cannot resist. Amid the constant change of phenomena, a Rigid Constitution necessarily represents the past, not the present; and if the tendencies actually operative are towards the

dissociation of the component groups of the community, a frame of government which fails to provide scope for these tendencies will soon become out of date and unfit for its work. Where, on the other hand, the existence of distinct groups, each desiring some control of its own affairs, is fully perceived and duly admitted as a factor in the condition of the community, and where it is desired to give legal recognition to the fact, and to protect the other local groups or sub-communities from being overridden by the largest among the groups, or by the community as a whole, the creation of a Rigid Constitution offers a valuable means of securing these objects. For such a constitution may be so drawn as to place the local groups under the protection of a fixed body of law, making their privileges an integral part of the frame of government, so that the whole Constitution must stand or fall with the maintenance of the rights enjoyed by the groups<sup>1</sup>. The familiar instance of such a form of Rigid Constitution is a Federal Constitution. It is specially adapted to the case of a country where the centrifugal forces are so strong that it is clear that the groups will not consent to be wholly merged and lost in one community, as under a Flexible Constitution might befall them, yet where they are sufficiently sensible of the advantages of combination to be willing to enter into a qualified and restricted union. And in these cases it has sometimes proved to be an efficient engine for further centralization. That is to say, the best way of strengthening in the long run the centripetal tendencies has been to give so much recognition and play to the centrifugal as may disarm them, and may allow the causes which make for unity to operate quietly without exciting antagonism.

It appears accordingly that the historian who studies constitutions, and still more the draftsman who frames them, must have his eye constantly fixed on these two

<sup>1</sup> Subject of course to any provisions for amending the Constitution which may have been inserted. See Essay III, p. 176 sqq.

forces. They are the matter to which the legislator has to give form. They create the state of things which a Constitution has to deal with, so laying down principles and framing rules as on the one hand to recognize the forces, and on the other hand to provide safeguards against their too violent action. Their action will preserve or destroy the Constitution,—preserve it, if it has given them due recognition and scope, destroy it, if its provisions turn out to be opposed to the sweep of irresistible currents. The forces that move society are to the constructive jurist or legislator what the forces of nature are (in the famous Baconian phrase) to man. He is their servant and interpreter. They can be overcome only by obeying them. If he defies or misunderstands them, they overthrow his work. If he knows how to use them, they preserve it. But his difficulty is greater than that of the physicist, because these social forces are more complex than those of inanimate nature, and vary in their working from generation to generation.

## II. TENDENCIES WHICH MAY OPERATE EITHER AS CENTRIPETAL OR AS CENTRIFUGAL FORCES.

Now let us see what are the chief among the tendencies which in political society are capable of playing the part either of centripetal or of centrifugal forces.

So far as individual men are concerned, all the tendencies that work on them may be said to be associative tendencies, that is to say, every thing tends to knit individual men together into a band or group, and to make them act together. The repulsion of man from man is so rare that we may ignore it. Even the keenest individualist desires to convert other men to his individualism, and forms a league for the purpose with others who are like-minded.

As regards political societies, the subject wherewith we are here concerned, the tendencies I am going to enumerate may be either associative or dissociative.

Whether in the case of any given State they act as agglutinative and consolidating forces or as splitting and rending forces depends upon whether they are at the moment giving their support to, or are enlisted in the service of, the State as a whole, or are strengthening the group or groups inside the State which are seeking to assert either their rights within the State or their independence of it. Even obedience, the readiness to submit and follow, which might seem primarily a centripetal force, may be centrifugal as against the State if it leads the partisans of a particular recalcitrant group to surrender their wills to the leaders of that group. Even the love of independence, the desire to let each man's individuality have full scope, may act as a centripetal force if it disposes men to revolt against the tyranny of a faction and maintain the rights and interests of the whole people against the attempts of that faction to have its own way. There are always two centres of attraction and two groupings to be considered, the larger, which we call the State, and the smaller, which may be either a subordinate community, such as a province, district or dependency, or only a party or faction. And the centripetal force which draws men to the smaller centre is a centrifugal force as regards the larger.

These two tendencies, which I have referred to as Obedience and Individualism, are so familiar, and the former is a disposition of human nature so generally pervasive, as to need no further discussion. The other tendencies which may operate either centrifugally or centripetally may be classed under the two heads of Interest and Sympathy. Under the head of Interest there fall all those influences which belong to the sphere of Property, including of course Industry and Commerce as means of acquiring property. These influences usually make for consolidation and assimilation. It is a gain to the trader or the producer that the area of consumers which he supplies without the hindrance of an interposed customs tariff should be as wide as possible. It is a gain

that communications by sea and land should be safe, easy, swift, and cheap, and these objects are better secured in a large country under a strong government. It is a gain that coinage, weights, and measures should be uniform over the largest possible area and that the standard of the currency should be upheld. It is a gain that the same laws and the same system of courts should prevail in every part of a State—and the larger the State the better, so far as these matters are concerned—and that the law should be steadily enforced and complete public order secured. All these things make not only for the growth of industry and the spread of trade, but also for the value of all kinds of property. And all these influences, derived from the consideration of such gains, which play upon the citizen's mind, are usually aggregative influences, disposing him to desire the extension of the State and the strength of its central authority. Considerations of Interest, therefore, usually operate as a centripetal force. It was through commercial interests that the States of Germany were, after the fall of the old Romano-Germanic Empire, drawn into that Zollverein which became a stage towards, and ultimately the basis of, the present German Empire. It was the increase of trade, after the union of Scotland and England, that by degrees reconciled the Scotch to a measure which was at first most unpopular among them as threatening to extinguish their national existence. It is the absence of any strong commercial motives for political union that has hampered the efforts of those who have striven, so far successfully, to keep Norway and Sweden united.

In exceptional cases, however, the influences of Interest may be centrifugal. A particular group of traders or landowners, for instance, living in a particular district, may think they will gain more by having the power to enact special laws for the conduct of their own affairs or for the exclusion of competing persons than they will by entering or by remaining under the uniform system of a

large State<sup>1</sup>. Trade considerations counted for something in making the planters of the Slave States of America desire to sever themselves from a government in which the protectionist party was generally dominant. It is partly on economic grounds that the various provinces of the Cis-Leithanian part of the Austro-Hungarian Monarchy have been allowed, and desire to maintain, each its autonomy. It was largely a divergence of economic views and interests that so long deterred the free trade colony of New South Wales from linking its fortunes in a federation with the protectionist colonies; nor were there wanting industrial grounds which made the adhesion of Queensland long doubtful.

To the head of Sympathy we must refer all the influences which flow not from calculation and the desire of gain, but from emotion or sentiment. The sense of community, whether of belief, or of intellectual conviction, or of taste, or of feeling (be it affection or aversion towards given persons or things), engenders sympathy, and draws men together. To the same class belong the recognition of a common ancestry, the use of a common speech, the enjoyment of a common literature. The importance of these factors has often been exaggerated. Some of the keenest Irish revolutionaries have been English by blood and Protestants by faith. The Borders of Northumberland and those of Berwickshire did not hate one another less because they were of the same stock and spoke the same tongue. The Celts of Inverness-shire and the Teutons of Lothian are now equally enthusiastic Scotchmen, though they disliked and despised one another almost down to the days of Walter

<sup>1</sup> The case of Ireland shows the same forces of industrial or commercial interest, real or supposed, operating partly as centripetal, partly as centrifugal. The Nationalist party conceive that economic benefits would result from a local legislature, which could aid local industries. The mercantile class, especially in the north-eastern part of the island, fear commercial loss from anything which could hamper their trade intercourse with Scotland and England, or which might be deemed prejudicial to commercial credit. With the soundness of either view I am not concerned; it is sufficient to note the facts.

Scott<sup>1</sup>. Mere identity of origin does not count for much, as witness the ardent Hungarian patriotism of most of the Germans and Jews settled in Hungary, with perhaps no drop of Magyar blood in their veins. Community of language does not any more than a common ancestry necessarily make for love, and indeed may increase hatred, because in an age of newspapers each of two disputant parties can read the injurious things said of it by the other. Civil wars are, like family quarrels, proverbially embittered. Tocqueville wrote, in 1833, that he could imagine no more venomous hatred than the Americans then felt for England. So it may be said that though the want of these elements of community is usually an obstacle to unity, their presence is no guarantee for its existence. Somewhat greater value belongs to identity of traditions and historical recollections, and to the possession of the materials for a common pride in past achievements. Most men find a personal satisfaction and take a personal pride in recalling the feats and struggles of the nation, or the tribe, or the party, or the sect, to which they belong, so the recollection of exploits or sufferings becomes an effective rallying point for a group. We all know how powerful a force such memories have been at various times in stimulating national feeling in Italy, in Germany, in Hungary, in Scotland, in Portugal, in Ireland.

Still less necessary is it to dwell upon the influence of Religion, which, as it touches the deepest chords of man's nature, is capable of educing the maximum of harmony or discord. No force has been more efficient in knitting factions and States together, or in breaking them up and setting the parts of a State in fierce antagonism to one another. Religion held together the Eastern Empire, originally a congeries of diverse races, in the midst of dangers threatening it from every side for

<sup>1</sup> A curious survival of the dislike of the Lowlander to the Highlander may be found in Carlyle's comments upon the Highland wife of his friend Thomas Campbell the poet.

eight hundred years. Religion now holds together the Turkish Empire in spite of the hopeless incompetence of its government. Religion split up the Romano-Germanic Empire after the time of Charles the Fifth. The instances of the Jews and the Armenians are even more familiar.

There remains a large and rather miscellaneous category of sources of sympathy which we may call by the general name of Elements of Compatibility. Traits of character, ideas, social customs, similarity of intellectual culture, of tastes, and even of the trivial usages of daily life, all contribute to link men together, and to assimilate them further to one another, as the absence of these things tends to differentiation and dissimilation, because it supplies points in which the members of one group, racial or local or social, feel themselves out of touch with the members of another, and possibly inclined to show contempt, or to think themselves contemned, on the ground of the divergence. The natural repulsion which the Germans usually feel for the Slavs, and the Slavs for the Germans, seems to have its root in a difference of character and temperament which makes it hard for either race to do full justice to the other. That repulsion is powerfully operative to-day in the Austrian Empire. In the ancient world the obstinate and passionate Egyptians seem to have displayed, and provoked, a similar antagonism in their contact with other races, and particularly with the arrogant Persians.

These influences of Sympathy, like those of Interest, may figure either as centripetal or centrifugal forces, according as the centre round which they group and towards which they draw men is the main centre of that larger circle represented by the State or the centre of the smaller circle represented by the tribe, the district, the province, the faith, the sect, the faction. The same feeling may play the one part or the other according to the accident of individual view, or taste, or environment. Thus in a University consisting of a number of autono-

mous colleges, one man may be a centralizer, and seek to bring the colleges into subordination, pecuniary and administrative, to the University, while another man may desire to maintain their independence, and yet both may set a high value on corporate spirit, and be filled with it themselves. In one man this spirit clings to the college, in another it glorifies the University. The patriotism which makes a Magyar desire that Hungary should absorb Croatia, and that which makes a Croat desire to sever his country from Hungary, are essentially the same sentiment, though, as regards the monarchy of the Hungarian Crown, the sentiment operates with the Magyar as an attractive, with the Croat as a repulsive force. This statement is generally true of that complex feeling, based upon affinities of race, of speech, of literature, of historic memories, of ideas, which we call the Sentiment of Nationality, a sentiment comparatively weak in the ancient world and in the Middle Ages, and which did not really become a factor of the first moment in politics till the religious passions of the sixteenth and seventeenth centuries had almost wholly subsided, and the gospel of political freedom preached in the American and French Revolutions had begun to fire men's minds. As regards the historical States of Europe, it is a sentiment which is both aggregative and segregative. It has contributed to create the German Empire: yet it is also a sentiment which makes Bavaria unwilling to merge in that Empire her individual existence. In Bavaria, and still more in the case of Scotland, which had a long and brilliant national history, the sentiment of local has been found compatible with a sentiment of imperial patriotism.

It is a remarkable feature of recent times that the tendency of a common interest to draw groups together and make them prize the unity of the State is often accompanied by the parallel development of an opposite tendency, based on sentiment, to intensify the life of the smaller group and in so far to draw it apart, and thereby

[weaken the unity of the State. This arises from the fact that the march of civilization is material on the one hand, intellectual and moral on the other. So far as it is material, it generally makes for unity. On its intellectual and social or moral side it works in two ways. It tends to break down local prejudices and to create a uniform type of habits and character over a wide area. But it also heightens the influence of historical memories. It is apt to rekindle resentment at old injuries. Filling men's minds with the notion of social and political equality, it disposes them to feel more keenly any social or political inferiority to which they may be subjected. Raising the estimate they set upon themselves as individuals and as a race, it makes them more bold in organizing themselves and claiming what they deem their rights. And so one notes the singular phenomenon that men are stirred to disaffection, or impelled towards separation, by grievances less acute than those which their ancestors, sunk in ignorance and despondency, bore almost without a murmur. The Roman Catholic Irish since 1782 and the Transylvanian Rumanians since 1848 are instances in point.

All these tendencies, pulling this way and that, are among the facts which a given Constitution has to deal with, are forces which it must use in order to secure its own strength and permanence. Where, in a free country, the system of government has grown up naturally, and can be readily modified by the normal action of the normal sovereign authority, *i.e.* where the Constitution is a Flexible one, the presumption is that the rules and usages of the Constitution conform to and represent the actual forces, and draw strength therefrom. Yet even in countries governed on this system there is a risk that the Constitution which the will of a majority has established may leave a minority discontented and unrestful, and that such discontent and unrest may impede the working of the machinery and create an element of instability. In such countries, it may be the part of wis-

dom for the majority to yield something to the minority, modifying the Constitution, so far as it can safely be modified, in order to remove the obstacles to harmony. A centrifugal force which is not strong enough to disrupt the State, because the centripetal forces are on the whole more powerful, may nevertheless be able to cause a harmful friction, and may even, if the State be exposed to external attacks, become a source of peril. Everybody can now see that Rome ought to have admitted the Italian allies to the franchise long before the Social War, that Catholic Emancipation ought to have been enacted by the Irish Parliament in 1796 or by the British Parliament immediately after the Union of 1800, that Denmark ought not to have waited till 1874 before she conceded a qualified autonomy to Iceland, that the same country might probably have retained Schleswig-Holstein if she had yielded long before the war of 1864 some of the demands made by the German inhabitants of those duchies. And, if we may apply the same principle to despotically governed countries, most people will agree that Austria ought to have retired from Lombardy before 1859, and that the Turks gained nothing by clinging to Bulgaria, and may be gaining nothing now by clinging to Macedonia.

### III. HOW CONSTITUTIONS MAY USE THE CENTRIPETAL FORCES TO PROMOTE NATIONAL UNITY.

As we are here dealing with constitutions considered in their relation to the forces and tendencies that rule in politics (*i.e.* as a part of political dynamics), we may now inquire what it is that Constitutions can accomplish in the way of regulating or controlling these forces.

Every political Constitution has three main objects.

One is to establish and maintain a frame of government under which the work of the State can be efficiently carried on, the aims of such a frame of government being on the one hand to associate the people with the

government, and, on the other hand, to preserve public order, to avoid hasty decisions and to maintain a tolerable continuity of policy.

Another is to provide due security for the rights of the individual citizen as respects person, property, and opinion, so that he shall have nothing to fear from the executive or from the tyranny of an excited majority. This object has fallen into the background since these rights came to be fully recognized. But in earlier times it was the chief purpose of constitutional provisions from Magna Charta down to the Bill of Rights and the Declaration of Independence. The safeguard for these rights which the Constitution of England provided, was the thing which, more perhaps than anything else, moved the admiration of foreign observers who studied that constitution during the eighteenth century.

The third object is to hold the State together, not only to prevent its disruption by the revolt or secession of a part of the nation, but to strengthen the cohesiveness of the country by creating good machinery for connecting the outlying parts with the centre, and by appealing to every motive of interest and sentiment that can lead all sections of the inhabitants to desire to remain united under one government.

In pursuing these objects, a constitution seeks to achieve by means of legal provisions that which in ruder times it was often necessary to accomplish by physical force. No doubt at all times the natural disposition to obey (the sources of which I have analysed elsewhere<sup>1</sup>) was an agent more constant and effective than physical force. Nevertheless, the latter was needed, sometimes from the side of the government to maintain order and compel subjects to bear their share of the public burdens, sometimes from the side of the subjects to abate the abuses into which the possession of power tempts rulers. Troops to keep order and quell revolts, and men handy with their weapons and ready to rise in insur-

<sup>1</sup> See *Essay IX*, p. 467 sqq.

rection to dethrone bad monarchs or expel bad ministers, were a necessary part of the equipment of political societies in the ruder ages.

A good constitution relieves the government from the necessity of frequently resorting to military force by securing that those who govern shall be persons approved by the bulk of the citizens, as well as by providing for the purposes of coercion machinery so promptly and effectively applicable, that the elements of disturbance either do not break forth or are quickly suppressed. Similarly it relieves the subjects from the need of rising in rebellion by providing machinery whereby the complaints of those who think themselves aggrieved shall be fully made known, and shall, if well founded, have due effect on the rulers by warning them to remove the grievances, or by displacing them if they fail to do so.

How constitutional machinery should be framed and worked for the attainment of the two former objects enumerated above, viz. the establishment of a proper frame of government and the safeguarding of private rights, is a matter which does not fall within the scope of our present inquiry. The third object does, so we have to ask how a constitution should be framed in order to enable it to maintain and strengthen the unity of a State.

It may do this in two ways. One is by setting various centripetal forces to work. The other is by preventing all or some of the centrifugal forces from working.

I have already enumerated the tendencies or influences which operate to draw men together and bind them into a community, be it greater or smaller, and have pointed out that these tendencies may in any given case operate in favour either of the State as a whole, in which case they preserve it, or in favour of some group or section within it, in which case they sap its unity. Let us now consider how the constitutional arrangements of a State may be so devised as to draw together all its members and all the minor groups within it.

The most generally available of these centripetal tendencies is trade, that interchange of commodities which benefits all the producers, by giving them a market, all the consumers by giving them the means of getting what they want, all the middlemen by supplying them with occupation. A Constitution can render no greater service to the unity as well as to the material progress of a nation than by enabling the freest interchange of products to go on within its limits. Nothing did more to keep the districts of each of the great European countries divided during the Middle Ages than the levying of tolls along the rivers and highways by petty potentates, or than the insecurity of those rivers and highways, as well as the want of good roads, for thus the market for the producers of the cheaper articles was narrowed to the small area immediately around them, and men were prevented from realizing, or benefiting by, the greatness of the country they belonged to. England, with an exceptionally strong and centralized government, suffered less from these tolls and this insecurity than did the large States of the Continent, and England arrived at unity sooner than they did. And so, conversely, nothing has done more to unify the vast territories of the United States than the provisions of the Federal Constitution which secure perfect freedom of trade within its limits, and empower the National Government to regulate the means of communication between the several States of the Union. So the Customs Union of the Germanic States, formed under the auspices of Prussia in A. D. 1829, did a great work in stimulating industry, while it showed the people the benefits of united action, and prepared the way for the formation of the new German Empire.

Another influence of moment is the establishment of a common law and a common system of courts. It is not an influence which can be reckoned on so invariably or confidently as can the influence of commerce, for any hasty attempt to change the law (whether customary or

statutory) to which men are accustomed may provoke resistance and retard the growth of unity. Great Britain has wisely forborne to impose her own law on the dominions she has acquired by conquest or purchase. Roman-Dutch law remains in South Africa, in Ceylon, and in Guiana; Roman-French law in Lower Canada. So the French Code was left in force not only in Alsace-Lorraine which Germany took in 1871 but also in the German country all along the left bank of the Lower Rhine, when that region was reunited to Germany in 1814. So Roman law has remained in Louisiana, which was once French. But where one legal system can, without exciting resentment, be extended over the whole of a country, it becomes a valuable unifying force. As respects the substance of law, this happens by the formation of certain habits of thought and action, certain ideas of justice and utility. As respects the administration of law, it happens by giving to the central executive an engine for making its power felt, and usually felt for good. In the Middle Ages, the jurisdiction of the king's courts was found the most effective means both in England, from Henry II onward, and (somewhat later) in France, of extending the power of the central government and accustoming the people to rally round the Crown as the representative of national unity as well as of justice. A somewhat similar process has been in progress during the last thirty years among those petty principalities which we call the Laos States, and which lie to the north of the kingdom of Siam. The princes of these States were practically independent, living in a country of forests and hills, and recognizing only a vague titular suzerainty as vested in the Siamese king at Bangkok. But when foresters from British Burma had come among them, desiring to cut down and export the teak trees in those forests which make their only wealth, and when disputes had arisen between the Laos chiefs and these timber traders, the Government of India found it needful to make treaties with the king of Siam, under

which a Court presided over by Siamese officials was set up in Chiengmai, the principal State. By means of this Court the Siamese Government has been able gradually to obtain complete control of the forest administration and the revenues thence arising, and incidentally to strengthen its general authority over these Laos States.

Similarly, the jurisdiction of the British Privy Council as a Supreme Court of Appeal from the Colonies and India, and the action of the Supreme Court of the United States as the final Court of Appeal for the whole Union (in certain classes of cases), have done something to make the members of these vast political aggregates realize the bond that links them together. In the case of the United States, respect for the Federal Courts and the keen interest with which their development of the law by judicial interpretation is followed by a large and powerful profession has been an important factor in strengthening the sense of national unity.

After law, religion, not as less potent, for it is more potent, but as more uncertain, because it has been as often a dissevering as a unifying influence. There is, however, a marked distinction between the earlier and the later forms of religion as regards the energy of the force they exert. In the earlier stages of civilization, when tradition and ritual counted for much, and abstract theology had not yet come into being, the worship of the gods of the nation or city was a part, a necessary and sometimes the most deep-rooted part, of the political constitution and the national life. In Egypt the rise or fall of a great deity is often the sign of the rise or fall of a dynasty. Moab, Edom, and Ammon, are each the people of a peculiar God. After the Captivity, when the minor Semitic peoples decline or vanish, Israel continues to be held together by the name of Jehovah, and by the Law He has given. Every Greek and every Italian city has its own distinctive public State worship. A race sometimes pays special honour to one out of its various deities, and the devotion of the Dorians to

Apollo, of the Athenians to the Virgin Goddess, finds a mediaeval parallel in that of the Swedes to Odin, of the Norwegians to Thor. As the Roman Empire included so many races and cities that no one deity or group of deities could be worshipped by all, altars were erected to the Goddess Rome, and the Guardian Spirit or Genius of the reigning Emperor became a common object of devotion for the whole mass of his subjects. In modern times the strong religions are (except Hinduism) World Religions, and therefore not national or local as were those of antiquity. But they exert an even greater political power. For monotheistic religions, however they may develop into elaborate rites and forms of ceremonial observance, are primarily philosophical religions, in which abstract ideas and beliefs take not only a firm but an exclusive grasp of the mind and heart of whosoever holds them. Hence they form a closer tie than did the worships of the ancient Italo-Hellenic world. Christianity created a new cohesion when the provinces of the Roman Empire were beginning to fall asunder. Islam formed a prodigious dominion out of many diverse peoples. The mutually hostile forms of a World Religion, such as the Sunnite and Shiite sects in Islam, act as consolidating or dissevering influences just as the religion itself did before schisms had arisen. When a faith grounded in peculiar dogmas or observances is held by one section of a people and hated by another section, it becomes a formidably centrifugal force. When the great mass of a people have embraced such a faith, their political cohesion is strengthened, and they may attract from other communities persons or groups who share their beliefs. The same principle applies to beliefs which cannot be called religious, but which exert a similar power over men's emotions. Even where no question of the supernatural is involved, the holding in common of certain ideas deemed supremely valuable whether for the individual or for society, may operate as a centrifugal or centripetal force.

A nation with a national religion which all or nearly all citizens cherish possesses a bond of unity which grows the more powerful the more its traditions become entwined with the national life. It is chiefly the influence of the Orthodox Church that has made a people so low in the scale of civilization as Russia was three centuries ago, to-day so united, so strong through its union, and so submissive to its sovereign, for it is not less as Head of the Church than as a secular prince that the Czar commands the reverence of his subjects<sup>1</sup>. Accordingly, whenever a State Church can be set up which embraces practically the whole of the people, and when it can be associated with the government and the movements of public life, the cohesion of the nation and the power of the government which controls the church will be increased. Of the possibly pernicious influence of such arrangements on such a church and on religion I do not speak; that is quite another matter. I am only pointing out that a Constitution will gain strength, and a nation unity, if the ecclesiastical arrangements can be linked to those of the secular government, assuming the people to be all attached to the same form of faith and worship.

Similarly, in so far as those who frame a Constitution can make it provide a system of education which will give the people common ideas and common aspirations, in so far as they can persuade the inhabitants to use a common language, if the country is one where more than one tongue has been spoken, or even to enjoy and meet for the enjoyment of common festivities and games, they will be availing themselves of influences not to be despised. The Prussian Government founded the University of Bonn immediately after the recovery of the left bank of the Rhine from France in 1814, and the University of Strassburg immediately after the recovery of Alsace in 1871, in both cases with the view of bene-

<sup>1</sup> There are of course dissenting sects in Russia, some of them counting many adherents, but they have seldom, and in no large measure, affected the political unity of the nation.

fitting these territories and of drawing them closer to the rest of the country by the afflux of students from other parts of it, an aim which was realized. Indeed the non-local character of the German Universities, each serving the whole of the lands wherein the German tongue was spoken, powerfully contributed to intensify the sentiment of a common German nationality throughout the two centuries (1648 to 1870) during which Germany had virtually ceased to be a State. The Olympian, Pythian, Isthmian, and Nemean games had no contemptible effect in fostering the sentiment of a common national unity, as against the barbarians, among the Greeks, who had never enjoyed and did not desire political union. The admission of the Macedonian king to strive at the Olympian games was a political event of high significance, for it enabled his descendants Philip and Alexander the Great to claim to belong to the Hellenic race.

Some of these various engines for promoting the cohesion of a nation may seem to lie rather in the sphere of governmental action than in that of a Constitution. Commercial freedom, however, as well as religious compulsion on the one hand, or religious freedom on the other hand, have been provided for by some Rigid Constitutions. So too has been the use of certain languages. Where the Constitution is a Flexible one, the question whether the laws regulating such matters are to be deemed a part of the Constitution depends entirely on the practical importance ascribed to them, since in such a Constitution there is no distinction of form between fundamental and other provisions.

#### IV. HOW CONSTITUTIONS MAY REDUCE OR REGULATE THE CENTRIFUGAL FORCES.

Now let us see what Constitutions may effect in the other of the two above specified ways, viz. what they may do to meet and grapple with, and if possible disarm,

the tendencies which make for disruption, *i.e.* the forces which, while drawing men together in minor groups within the State, are as regards the State itself centrifugal forces.

What are these tendencies? History tells us that the chief among them are race feeling, resentment for past injuries, grievances in respect of real or supposed ill-treatment in matters of industry, or of trade, or of education, or of language, or of religion, where these grievances or any of them press on a part only of the population. If they press on the whole population, or on the humbler classes as a whole, they are perturbing, but not necessarily nor even probably disruptive, *i.e.* they threaten disaffection or a general revolt against the government, rather than the severance of a particular province or the secession of a particular section of the people. It is only with grievances which affect one section or district, and make it desire an independence to be obtained by separation, that we have here to deal. There must be in every such case either a sentiment of dislike on the part of the disaffected section towards the rest of the nation, or else a belief that great material advantages will be obtained by separation; and the latter of these causes is almost sure to produce the former. When two or more of these tendencies combine in any given case, so much the stronger does the desire for separation become.

A few illustrations will explain better than a long abstract statement what I desire to convey. In the ancient world the thing which we call National Sentiment was seldom a powerful factor, perhaps because the more advanced peoples were divided into small city communities, while the backward peoples, living under large empires like the Persian or that of the Seleucid kings, were allowed to retain their own customs and religion, and often their native princes, feeling the weight of subjection only in having to pay tribute and send a contingent in war. The only nations that gave much trouble to the

Achaemenid kings of Persia were the Egyptians, a race very peculiar and very conceited, and the Greeks of Asia Minor. Under the Roman Empire there were wonderfully few national revolts, probably because the imperial government pressed equally upon all, conceded rights of citizenship pretty freely, and gave the subjects in exchange for their own national sentiment the higher pride of belonging to the majestic World State which had engulfed them. The chief source of disruptive attempts lay in the monotheistic religions. The Jews made more than one obviously hopeless rebellion. When Christianity became the religion of the Empire, schisms and heresies gave trouble. Africa was convulsed by the Donatist movement. Egypt was disaffected owing to Monophysitism, and no doubt gave herself the more readily to the Arab conquerors in respect of this disaffection. The persecuted Montanist sectaries of Phrygia revolted in the sixth century. It was the religious persecution of the Fire-worshipping Sassanid kings that provoked their Armenian vassals to rebellion<sup>1</sup>. So in the fifteenth and sixteenth centuries, the sentiment of nationality having not yet reached its full strength, it was chiefly by religious divisions that the unity of States was threatened. This was what lost the Dutch Netherlands to Spain. This was what split up the Romano-Germanic Empire, and made it, after the Thirty Years' War, the mere shadow of a State. It contributed to keep the Highlanders distinct from the Lowland population of Scotland after the Reformation (though other causes also were at work), and it was of course a still more potent force in Ireland. In our own time it nearly rent Switzerland in two in the war of the Sonderbund. Conversely, any one who notices how little the unity of the nation has been threatened in Spain, a country where the populations and dialects of the different provinces still present striking contrasts, and are accom-

<sup>1</sup> The dualistic Zoroastrianism of Persia seems to have taken many of the characteristics of a monotheistic religion.

panied by diversities of character, will be disposed to attribute this fact not merely to the absence of natural boundaries between the provinces, but also to the remarkable religious unity which the nation has always preserved.

In our own time, while religion is a less energetic factor, what is called national sentiment has begun to threaten loosely compacted States. It compelled the transformation in 1868 of the so-called Austrian Empire into the present Dual Monarchy. It shakes the Austrian half of that monarchy now, so sharp is the antagonism between the Czechs of Bohemia and the other Slavic populations of Cis-Leithania and the Germans of the Western and South-Western Crown Lands. Iceland differs from Denmark, with which she has been politically united since 1380 (or 1397), in language, in character, and in habits, and she has therefore struggled for autonomy, a large measure of which she obtained in 1874. She has had some economic grievances, but sentiment has been an even stronger element in her discontent, which, however, stopped short of a wish to separate, as she feels herself too small to stand alone. A strong party in Norway has desired to be divorced from Sweden, to which she was unnaturally yoked in 1814 by the Congress of Vienna, not merely in respect of specific complaints regarding the Foreign Office and the consular service, but also because her people, though Lutherans like the Swedes, are far more democratic in ideas and temper than the latter, and because their high national pride makes them unwilling to appear to be in any way subordinate to the sister kingdom. The case of Poland is a simple one, because she has the memory of an independent kingdom destroyed by force and fraud, and is different in religion, as well as in speech, from the Russians who have annexed her. Had the peasant population of the country shared the patriotism of the upper and middle classes, Poland might possibly have succeeded in shaking off the yoke. Even now her disaffec-

tion is a source of weakness to Russia. In Ireland several currents of discontent have joined to produce the passion and prolong the struggle for autonomy, or, in a very few of the more ardent minds, for independence. There is the diversity of faith, which remains, though that of language has almost vanished, a diversity embittered by recollections of persecution. There are economic grievances, the memory of the destruction of an industry in the last century, the more urgent resentment at the exactions of landlords, and the peasants' desire to have a grip of the soil. There is an incompatibility of character and temperament, due partly to historical conditions, partly to the old antagonism of Celt and Teuton. All these have gone to create a passion among the people to be recognized as a nation controlling its own affairs, a passion which is the same in essence among those who would be content with the possession of a subordinate legislature, and those, now fewer than formerly, who would like to go further.

If the sources of the centrifugal force in Ireland are easily explicable, and indeed so strong that had this force acted upon the whole nation instead of only upon a majority which consists mainly of the poorer and weaker part of the population, it would have before now prevailed, those which induced the secession of the Southern States of America are much less evident. Here there was no religious factor, nor any revengeful feeling, nor any sense of an unjust or oppressive control. The South had obtained more than its fair share of power and influence in the councils of the Union. But the planters had persuaded themselves that property in slaves and the whole slave-holding system were threatened by the growing strength in the Northern and Western States of an aversion to slavery, with a determination to check its extension; and the irritation of feeling which a long struggle had engendered, coupled with a growing dissimilarity of habits and ideas, enabled the hot-headed oligarchy which controlled the Southern

population to drive it into separation. Possibly these causes would not have been strong enough to provoke an armed conflict in a unified country. It was the existence of State Governments, and the conviction that the rights of the States, supposed to be guaranteed by the Constitution, furnished a legal basis for secession, that spurred the South into its desperate venture.

What then can the framing, or the manipulation in working, of a Constitution do to reduce the power of such disruptive tendencies as we have been considering?

They may of course be resisted by the employment of physical force. If a government is sufficiently strong and resolute, and is supported by the great majority of the nation, it may crush down the discontent of a province or a section. It is however an axiom in free governments, and ought to be an axiom in all governments, that physical force should never be used when peaceful means will suffice. Coercion usually seems easier, and naturally commends itself to the dull, the impatient, and the violent, to imperious princes, arrogant ministers, and excited majorities. But coercion, besides being a fatal expedient if it fails, is often a bad expedient when it appears to succeed, for it leaves smouldering discontent behind among the vanquished, and it is apt to inflict a moral injury upon the victors, perhaps to warp for the future their frame of government and to lower their political traditions. Accordingly whenever a Constitution can be so drawn and worked as to give the disjunctive tendencies just so much recognition as may disarm their violence, and bring all sections of the nation and all parts of the country to acquiesce in unity under one government, this course is to be preferred. It may sometimes fail. Every expedient may fail. But it has generally more promise of ultimate success than force has, for in a free country force is not a remedy, but a confession of past failures and a postponement of dangers likely to recur.

Among the methods which a Constitution may em-

ploy for the purpose indicated, the following find a place.

It may enact certain securities against oppression, whether by the executive or by the legislature, giving to such securities a specially solemn sanction, and thus reassuring the minds of the citizens. This was done by Magna Charta, by the Petition of Right, and again by the American Federal and State Constitutions, and by the French Declaration of the Rights of Man of 1789. It is usually done for the protection of all subjects or citizens alike, but of course the benefit of such a protection enures with special value for any section of the population, or any province or group of provinces, likely to be specially exposed at any given time to the abuses of power, because they are a minority whom the Government, or the majority, may view with disfavour.

A Constitution may provide means for varying the general institutions or laws of the State in such a way as to exempt particular parts of the State from any legislation that might be opposed to their special interests or feelings. The retention of Scotland as a distinct kingdom after the union of the crowns in 1603, and as a distinct part of the United Kingdom after the Treaty and Act of Union in 1707, has had most beneficial effects in enabling Scotland to be treated separately where it is fitting she should be. Her faith, her laws and judicature, her system of local government, have remained almost intact, to the satisfaction of her people, and with no injury to the cohesion of the united monarchy<sup>1</sup>. Similarly the maintenance of Finland as a separate Grand Duchy, with her own tongue, religion, laws and privileges, guaranteed by the coronation oath of the Czar, has made the Finns loyal and contented subjects, and has in no wise detracted from the strength of Russia<sup>2</sup>. The cases

<sup>1</sup> Though it must be admitted that the passing of legislation disapproved by the majority of Scotch representatives, or the omission to pass legislation which they demand, often elicits murmurs.

<sup>2</sup> This wise policy seems unfortunately to be now (1900) on the point of being abandoned, with results which every lover of freedom and progress must regret.

of Hungary as towards the Austrian Monarchy, and of Croatia as towards Hungary, are also in point.

It may provide for relegating certain classes of affairs to local legislatures, such as those of Croatia or Finland, areas which are not only, like Scotland, political divisions retaining their old laws, but also, unlike Scotland, since the Union, communities enjoying local autonomy.

All Federations are managed on this system; and one can see in the case of Canada the advantages it secures, for the Roman Catholics of Quebec are able to have legislation diverse from that which the Protestant majority desires in the other provinces of the Dominion.

It may assign certain administrative and, within limits, certain legislative functions also to the inhabitants of minor local areas, such as counties, empowering them to regulate their local affairs in their own way. Provisions of this nature are not usually embodied in European constitutional instruments. They are, however, to be found in the State Constitutions of the American States. And they are really, in substance, parts of any well-framed Constitution, for nothing contributes more to the smooth working of a central government and to the satisfaction of the people under it, than the habit of leaving to comparatively small local communities the settlement of as many questions as possible. The practice of local self-government and the love for it are not a centrifugal force, but rather tend to ease off any friction that may exist by giving harmless scope for independent action, and thus producing local contentment. It is only where there exist grievances fostering disruptive sentiments that the existence of local bodies with a pretty large sphere of activity need excite disquiet.

It may exclude certain matters altogether from the competence of the central government, and thereby keep them out of the range of controversy. This principle has been wisely followed in the American and Canadian and Swiss Federal Constitutions as regards religion in its relations to the State. In some federations it has

been similarly found desirable to disable the several legislatures from dealing with topics likely to produce dissensions among the members of the federation, or otherwise to affect the cohesion of the nation. Thus in the United States no State legislature can impose any duties on goods brought from one State to another, nor in any wise interfere with commerce between the States.

By these means a Constitution may prevent the disruptive forces in a country from threatening the stability of the central government or the unity of the State. To remove part of the material on which they might work is to weaken their working, and to divert into safe channels the political activity they would evoke. Although a Flexible Constitution may accomplish this, if those who work it respect certain fundamental principles and treat their querulous minorities in a conciliatory spirit, the work is best done, and usually has been done, by a Rigid Constitution, because this latter provides a guarantee to minorities, or to subdivisions of the country, stronger than they can have under an omnipotent legislature. In fact the existence of the grounds of contention and possibilities of disruption we have been considering is among the chief causes which have called Federal Governments and Rigid Constitutions into being.

One further observation should be made before quitting this part of the subject. Racial differences and animosities, which have played a large part in threatening the unity of States, are usually dangerous only when the unfriendly races occupy different parts of the country. If they live intermixed, in tolerably equal numbers, and if in addition they are not of different religions, and speak the same tongue, the antagonism will disappear in a generation or two by social intercourse and especially by intermarriage. When the right of full legal intermarriage had been established, the fusion of the patricians and the plebs at Rome began. So the Northmen in the tenth and eleventh centuries, so the Norman-French in the eleventh and twelfth centuries, became

blent with the English. The Magyars and Saxons, though generally occupying different parts of the country, and to some extent retaining each their own speech, have in Transylvania now begun to melt into one. It is the fact that they not only speak a different tongue but also profess a different faith that keeps the Rumans of that province apart from both Saxons and Magyars; and even these differences might in time cease to operate did not these Rumans look across the mountains to a large Ruman State into which they would gladly be absorbed. But in one set of cases no fusion is possible; and this set of cases forms the despair of the statesman. It presents a problem which no Constitution has solved. It is the juxtaposition on the same soil of races of different colour.

This is a recent phenomenon in history. In the ancient world, almost all the barbarous tribes whom Rome subdued and brought into her Empire were sufficiently near the Italians and Hellenized Asiatics in physical characteristics for intermarriage to go on freely. The Carthaginians, who to be sure were not numerous, seem to have soon lost their distinctive nationality: and that the Jews remained distinct was their own doing, not that of the conquerors<sup>1</sup>. Even as towards Egyptians and Numidians, who were certainly dark, one hears of little repulsion. Besides, both races were intelligent, and the former in their way highly civilized. With the African slave trade a new and a dolorous chapter in history opens. In our own time it is the settlement of Europeans in countries where the native holds his ground against the settler, as the Kafir does in South Africa, and the aboriginal Peruvians and Araucanians do in Western South America, or it is the influx of coloured immigrants, like that of the Chinese in Western America and the Hawaiian Isles, that raises, or threatens to raise in

<sup>1</sup> In two respects the Jews under the early Empire would seem to have been above the average level of the civilized subjects of Rome. There was apparently very little slavery among them; and there must have been an exceptionally large proportion of persons able to read.

the future, this problem in an acute form. A community in which there exist two or more race-elements physically contrasted and socially unsusceptible of amalgamation cannot grow into a really united State. If the coloured people are excluded from political rights, there is created a source of weakness, possibly of danger. If they are admitted, there is admitted a class who cannot fully share the political life of the more civilized and probably smaller element, who will not be consoled by political equality for social disparagement, and who may lower the standard of politics by their incompetence or by their liability to corruption. If the people of colour are dispersed over the country among the Europeans, instead of dwelling in masses by themselves, they may not act as a centrifugal force, threatening secession, but they are a serious hindrance to the working of any form of popular government that has been hitherto devised, for they divide the population, they complicate political issues, they prevent the growth of a genuinely national opinion.

The most noteworthy attempts that Constitutions have made to deal with these cases have been made in the United States, where the latest amendments to the Federal Constitution provide protection for the negroes and forbid the States to exclude any person from the electoral suffrage in respect of race or colour, and where several recent State Constitutions have devised ingenious schemes for disfranchising the vast mass of those whom these very amendments have sought to protect. So far as political rights are concerned, the problem is very far from having been solved in the United States. But as regards private civil rights, it has certainly been an advantage to the negroes that the Federal Constitution guarantees such rights to all citizens: and probably in any country where marked differences, with possible antagonisms, of race exist, it will be prudent to place the private civil rights of every class of persons under the equal protection of the laws, and to make the rights

themselves practically identical. It would lead me too far from the main subject to describe the ways in which similar problems have been dealt with in Algeria, in South Africa, and in some of the other colonies of European nations. Nowhere has any quite satisfactory solution been found<sup>1</sup>. But the case of New Zealand deserves to be mentioned as one in which the experiment has been tried of giving parliamentary representation to the natives, who mostly live apart on their own reserved lands. So far, the results have been good. The conditions are favourable, for the Maoris are a brave and intelligent race, and they are now too few in number to excite disquiet.

It was the good fortune of the Roman Empire that the vast majority of the races whom it conquered and absorbed had no conspicuous physical differences from the Italians which prevented intermarriage and fusion. Race and birthplace were no great obstacle to a man of force. Two or three of the Emperors were of African or Arab extraction. Moreover, the peoples of Southern Europe seem to have less repulsion of sentiment towards the dark-skinned races than the Teutons have. The Spanish and Portuguese intermarry not only with the native Indians of Central and Southern America, but also with the negroes. The French of Canada intermarried more freely with the Indians of North America than the English have done.

(Summing up, we may say that the aim of a well-framed Constitution will presumably be to give the maximum of scope to the centripetal and the minimum to the centrifugal forces.) But this presumption is subject to two countervailing considerations. One is that the energy of civic life may be better secured by giving ample range and sphere of play to local self-government, which will stimulate and train the political interest of the members of the State, and relieve the central au-

<sup>1</sup> In Algeria the electoral suffrage is limited ; but in some of the French tropical colonies it seems to have been granted irrespective of colour.

thority of some onerous duties. The other is that the centrifugal forces may, if too closely pent up, like heated water in the heart of the earth, produce at untoward moments explosions like those of a volcano. Hence it is well to provide, in the Constitution, such means of escape for the steam as can be made compatible with the general safety of the State. Where a Constitution, and especially a Rigid Constitution, has been framed with due regard to these considerations, and turns to account the methods already discussed, it may itself become a new centripetal force, a factor making for the unity and coherence of the community which lives under it. The Rigid Constitution has in this respect one advantage over the Flexible one, that it is more easily understood by the mass of the people, and more capable of coming to form a part of their political consciousness. When such a Constitution is so contrived and worked as to satisfy the bulk of the nation—and it will do so all the more if no single section dislikes it—it attracts the affection and pride of the people, their pride because it is their work, their affection because they enjoy good government under it. Time, if it does not weaken these feelings, strengthens them, because reverence comes with age. By providing a convenient channel or medium through or in which the centripetal forces may act, the Constitution increases the effective strength of those forces. It is a reservoir of energy, an accumulator, if the comparison be permissible, which has been charged by a dynamo, and will go on for some time discharging the energy stored up in it. But, like an accumulator, its energy becomes exhausted if there is not behind it an engine generating fresh power, that is to say, if the real social and political forces which called it into being have become feebler, and those which oppose it have become stronger.

## V. ILLUSTRATIONS FROM MODERN HISTORY OF THE ACTION OF CONSTITUTIONS.

The best instance of the capacity of a Constitution to reinforce and confirm existing centripetal tendencies is supplied by the history of the Rigid Constitution of the United States. That instrument was at first received with so little favour by the people that its ratification was, in many States, obtained with the greatest possible difficulty, and the original document secured acceptance only on the understanding, which was loyally carried out, that it should forthwith receive a number of amendments. Within fifteen years the party which had advocated it was overthrown in the country, and ultimately broke up and vanished. A generation passed away before it began to be generally popular. But after a time it secured so widespread a respect that even during the fierce and protracted struggle which ushered in the Civil War few attacked the Constitution itself, nearly all the combatants on one side or the other claiming that its provisions were really in their favour. It was not round the merits, but round the true construction, of the instrument that controversy raged. Since the Civil War, and the amendments which embodied the results of the Civil War, it has been glorified and extolled in all quarters<sup>1</sup>, and has unquestionably been a most potent influence in consolidating the nation, as well as in extending the range and the activity of the central government.

To what is this success due? Regarded as a Frame of Government, *i.e.* as a piece of mechanism for distributing powers between the Executive, the Legislature and the Judiciary, the American system has probably been praised beyond its deserts. Both the mode of electing the President and the working of Congress leave much to be desired. But the Constitution has had two conspicuous merits. It so judiciously estimated the

<sup>1</sup> Only since 1890 have complaints begun to be made: see Essay III, p. 202, ante.

centripetal and centrifugal forces as they actually stood at the time when it was framed, frankly recognizing the latter and leaving free play for them, and while throwing its own weight into the scale of the centripetal, doing this only so far as not to provoke a disjunctive reaction, that it succeeded in winning respect from the advocates both of States' Rights and of National Unity<sup>1</sup>. Thus it was able to add more strength to the centripetal tendency than it could have done had it been originally drawn on more distinctly centripetal lines. For—and here comes in the second merit—its provisions defining the functions of the central Government were expressed in such wide and elastic terms as to be susceptible of interpretation either in a more restricted or in a more liberal way, *i.e.* so as to allow either a less wide or a more wide scope of action for the Central Government. During the earlier years, when State sentiment was still stronger than National sentiment, the scope remained limited, because both the executive and the legislature wished to keep it so, and such extensions as there were came from judicial construction. But latterly, and especially since the prodigious development of internal communications has stimulated commerce, and since the death blow given to States' Rights doctrines by the Civil War, the scope has been widened, and has widened quite naturally and gradually, with no violence to the words of the Constitution, but according to that expansive interpretation of them which changing conditions and a corresponding change in national sentiment prescribed<sup>2</sup>.

Nowadays one hears in the United States less about the Constitution than about the Flag<sup>3</sup>. But that is

<sup>1</sup> It has been accused of having caused a civil war by omitting to deal with the questions out of which the Civil War arose, and by failing to negative the right of secession. But to this it may be answered that an attempt to deal with those questions or to negative that right might possibly have prevented it from having ever been accepted.

<sup>2</sup> This interpretation has sometimes been at variance with the views of the older interpreters, but no instance occurs to me in which an impartial jurist could have pronounced it inadmissible.

<sup>3</sup> This is still more so to-day (1900) than it was when this Essay was first composed.

partly because the Constitution has done its work, and made the Flag the popular badge of an Unity which it took nearly a century to endear to the nation.

One might go on to illustrate the efficiency of a Constitution in consolidating a people composed of disparate elements from the parallel case of Switzerland, where communities speaking three (it might almost be said four) different languages have been brought much closer together by the Constitutions of 1848 and 1874 than they were before, or could have been without some such arrangement. Switzerland, however, is a more complicated case, because much has turned on the external pressure towards unity exerted by the fear felt for several great bordering Powers. The formidable neighbours of the Confederation have, so to speak, squeezed together into a Swiss people the originally dissimilar Alemannic, Celto-Burgundian, Italian, and Romansch communities.

The two instances of the United States and Switzerland<sup>1</sup>, compared with those of unitary countries living under Rigid Constitutions, such as France, Belgium, Holland and Denmark, suggest the observation that the service which Rigid Constitutions may render in strengthening the centripetal tendency can best be rendered where a Federation is to be constructed. For in these cases what is needed is an arrangement by which the several rights of the component communities which are to form the State may be so protected that they need not fear to give their allegiance to the State and cordially support its Central Government. The exist-

<sup>1</sup> One would like to refer to the cases of the numerous so-called republics, most of them federal, of Spanish America. But apart from the difficulty of ascertaining their constitutional history, little of which has been written, some of these republics seem to pay so little regard to their constitutions, living generally in a state of revolution, whether subsiding, or actually raging, or apprehended, like the Atlantic during a series of cyclones following one another along the same track from the Bermudas to the Fastnet, that it is hard to draw any conclusions of value from them. They are in fact republics only in name: and it is surprising that Sir H. Maine in his *Popular Government* condescended to go to them for arguments to discredit democracy. They are military tyrannies, the product of peculiar historical, territorial and racial conditions.

ence of such communities is an expression of forces actually operative which are centrifugal as towards the State as a whole, and therefore need to be studied. By giving a carefully limited scope to these forces, and thereby diminishing their possibilities of danger, the Constitution subserves the cohesion of the States. In a truly unitary country this service is not needed. But there are cases in which States endeavouring to become unitary would have done better had they sought to apply the federal principle, placing it under the protection of a Rigid Constitution. I have already referred to Denmark. Holland might probably have saved Belgium by a concession of some such kind. Whether a similar contrivance might not have been profitably employed within the British Isles in A.D. 1782, or in A.D. 1800, or again later, is a question which will already have presented itself to one who has followed the argument thus far.

In dwelling upon the services which Constitutions may render, by fostering the centripetal forces, or by restraining the violence and softening the action of the centrifugal forces, we must not forget that no scheme of government can hope permanently to resist the action of either tendency if either develops much greater strength than it possessed when the Constitution was framed. If the centripetal forces grow, the Constitution whose provisions have recognized and given scope to the centrifugal will be practically, in some of those provisions, superseded. If the centrifugal grow, it may be overthrown. It is where the forces are nearly balanced, that the weight of the Constitution may turn the scale, and avert conflicts which would have rent the community, or caused a violent subjection of one part of it to the other. And in any case the Constitution ought, where dissimilative and disruptive forces are feared, to be so drawn as to enlist all available motives of interest, to shelter the law behind popular sentiment where possible, to oppose it to sentiment as little as possible, and

to avoid challenging at the same time the hostility of several kinds of sentiment.

#### VI. THE PROBABLE ACTION OF THE AGGREGATIVE AND THE DISJUNCTIVE TENDENCIES IN THE FUTURE.

Whether in the long run it is the centripetal or the centrifugal force that will prevail in politics, or, in other words, whether large States or small States are more likely to commend themselves to mankind, is a question which belongs rather to history than to the doctrines of constitutions, and which could be adequately discussed only after a long investigation. History shows us first one force dominant, then the other, though no doubt the centrifugal is usually more powerful in rude times and in hilly or mountainous countries, the centripetal in countries comparatively advanced in civilization, and in level and fertile regions where wealth is more easily acquired and stored, and where military operations are easier. When the mists of antiquity begin to rise sufficiently to show us the Mediterranean and south-west Asiatic world, we discover both a few great States and a multitude of small ones. The former have a low, the latter a high and intense political vitality. From the time of Menes down to that of Attila the tendency is generally towards aggregation: and the history of the ancient nations shows us, not only an enormous number of petty monarchies and republics swallowed up in the Empire of Rome, but that empire itself far more highly centralized than any preceding one had been. When the Roman dominion began to break up the process was reversed, and for seven hundred years or more the centrifugal forces had it their own way. Europe and Western Asia were divided up among innumerable petty potentates, and even the large monarchies, such as the two Khalifates, the Romano-Germanic Empire, the kingdoms of France and Hungary, possessed so feeble a royal authority that the real organs of government and

centres of attraction were to be sought rather in the vassals than in the nominal sovereign. From the thirteenth century onwards the tide begins to set the other way. One great State indeed—the Empire—first decays and then disappears under the action of centrifugal forces, but all the other chief States expand, absorbing their smaller neighbours, and giving themselves a compact and well-knit organization which makes the central power effective through the whole sphere of its action. This process culminates in the despotic monarchies of the eighteenth century, when the strength of feudal localism has been completely broken, though the picturesque relics of it still cumber the ground, and when at the same time the foundations are laid in the West of a gigantic State which proceeds to cover the temperate area of North America between the two oceans, and, in the East, of the dominion of a European nation which has absorbed the numerous and populous principalities of India. Immediately afterwards the doctrine of popular self-government and the doctrine of nationalities come upon the scene, threatening a disruption of some existing political aggregates. In point of fact, however, these new principles have done as much to unite as to sever, for though five States—Greece, Rumania, Servia, Montenegro and Bulgaria—have been cut off from an effete monarchy, and sixteen republics have been carved out of the American dominions of Spain and Portugal, the doctrine of nationality has substituted two new great States, more important than all the last-mentioned twenty-one put together, for the multitude of kingdoms and principalities which so late as 1859 filled Italy and Germany.

Thus neither Democracy nor the principle of Nationalities has, on the balance of cases, operated to check the general movement towards aggregation which marks the last six centuries.

It may, however, be said—and this question should be faced before we proceed to inquire whether the aggre-

gative movement is likely to continue—that in all this inquiry we have been ignoring two potent factors. One is Conquest—that is to say, military power. We have been examining the forces of Interest and Sympathy, which cover a number of influences social or economic, racial or sentimental. But after all it is Conquest, *i.e.* the might of the strongest, which has created most States as we find them. Is Conquest one of the centripetal forces? and if so, is it not the greatest of them?

The other factor is Family Succession, which both during the Middle Ages and since has done a great deal to consolidate principalities and kingdoms. The United Kingdom owes much to this agency, Austria and France even more.

Conquest and Dynastic Succession are hardly fit to be classed among the centripetal forces, because they are not susceptible of scientific treatment like the other influences. The disposition of the stronger to subdue and annex the weaker neighbour is of course a permanent fact in human nature, and therefore in history. But in each particular instance the success of one or other combatant depends on what may be called historical accidents—on the numbers or the discipline of troops, on the possession of a commander of military genius, on alliances with other states, on the internal dissensions of one state as compared with the unity of another. Physical force belongs to a different sphere from that in which political constitutions work. Constitutions may result from a conquest or may be maintained for a time by arms; but if they are obliged to rely on and have constant recourse to physical force in order to prevent their overthrow, they are, considered as Constitutions, failures; because the very nature and object of a constitutional Frame of Government is so to express and so to adjust to existing conditions the wishes and aims of the citizens as to make the majority, and if possible the vast majority, of the people desire to support it. According to the proverb, you can do anything with bayonets except sit down on

them. Physical force is of course needed to punish occasional infractions of the Constitution or to quell revolts against it. But the system of government which *ex hypothesi* corresponds to the permanently strongest among the moral forces, else it has no right to prevail in a free country, ought not to be surrounded by cannon.

Similarly, the devolution of princedoms or kingdoms by marriage and inheritance, much as it has done to bring States originally independent under one government, lies outside political science in the proper sense of the term. Like conquest, it brings about a new state of things by an event with which the ordinary political and constitutional phenomena of national life have nothing to do, coming into these phenomena as an incommensurable and (so to speak) irrational factor<sup>1</sup>.

So soon as either conquest or a union due to hereditary succession has taken place, the normal centripetal and centrifugal tendencies resume their action. Where the territory of one people has been forcibly acquired by another, as Lombardy was acquired by Austria in 1815, or has been occupied in virtue of a title based on succession, as Portugal was claimed by Spain in 1580, such centripetal forces as may exist have the advantage of physical force behind them. But this advantage may be unavailing against the stronger forces which sentiment sends forth to dissever the connexion. Austria lost Lombardy after forty-four years; Spain lost Portugal after sixty. In both cases there was fighting, but it was not so much the balance of military strength as the settled hostility of the subjected people which in both caused the severance. So the acquisition by the English kings of Aquitaine and the subsequent conquest

<sup>1</sup> The fact that the custom of a country permits or forbids succession through females makes a great difference in the importance of succession. The union of Castile with Aragon, like the union of England with Scotland, would not have occurred under a different rule of succession. So it may make a difference whether the throne of the larger country passes to the dynasty of the smaller, or vice versa. Had a king of England inherited the throne of Scotland, Scotland might have been more hostile to England. Had a king of Portugal inherited the throne of Spain, the two countries might have remained united.

of large part of France, the conquest by the Turks of Transylvania, the union of Holstein with Denmark, the union of Belgium with Holland, the union of Alsace with France, all effected without regard to the will of the people, were all in time brought to an end. The last-mentioned case is a peculiar one. It was not because the Alsatians wished to be reunited to Germany, but because the Germans wished to be reunited to Alsace that a connexion which had lasted nearly two centuries was dissolved in 1871. Military motives, decisive as regards the annexed part of Lorraine, had something to do with the taking of Alsace also; but if Alsace had not been German in language and habits, though not in sentiment, the popular voice of Germany would not have insisted on recovering it against the will of its inhabitants.

Speaking broadly, one may say that Conquest and Inheritance give an opportunity, better in the latter than in the former case, for centripetal forces to work. If the peoples on which they operate are backward, with no pronounced national feeling, that chance may be a good one, and the influences of free commerce, joint government (especially if it is good government), together with the kind of pride which common service in war often produces, may operate to weld two peoples together into a united State. Much depends on language, much on geographical position, much on external pressure from powerful neighbours. But if one of the peoples (or both) has already developed a strong sentiment of nationality, the prospect of fusion is but slender.

The Roman Empire is the capital instance of a vast dominion established by conquest. But there it was the weakness of the centrifugal forces that secured the cohesion of the Empire. The conquered countries were either, like Gaul, Spain and Britain, occupied by tribes between whom there existed so weak a bond that no general national feeling or combined national action was possible, or had been, as in the Eastern Mediterranean

World, ruled by dynasties, most of them sprung from military adventurers<sup>1</sup>, so that the sentiment of national life had not centred in the monarchy. The centrifugal forces of interest—the desire for peace, good government, facilities for commerce, and so forth—obtained free play under the imperial administration, and to these was added after a time the sense of pride in Roman citizenship, and in the greatness of a State which included all the highest civilization of the world. So too during the Middle Ages not a few conquests ended in an assimilation of the vanquished, which enlarged without weakening the conquering nation. But during the last three centuries the experience of military powers has been that the acquisition of masses of subjects who, being already civilized, are likely to resist absorption and to remain disaffected; is a doubtful gain and may become a danger to the conquering State. The last conspicuous instance is Poland, partitioned between three Powers, to all of whom her provinces have brought trouble. Conquests continue to be made, but they are now mostly of barbarous or semi-civilized races, so inferior to the conquerors in force and in national spirit that the centrifugal forces are, or at least seem to be, practically negligible.

Is it possible, then, to arrive at any conclusion regarding the respective strength which these two sets of forces are likely to display in the coming centuries? Will the tendency to aggregation continue, and does the future belong to great States? Or may new forces appear which will reverse the process, as it was reversed, though through causes most unlikely to reappear, at the fall of the Roman Empire?

At first sight the probabilities seem to point to further aggregation. Although none of the five great na-

<sup>1</sup> There were of course also a certain number of city republics, or leagues of republics, but these were too small to have developed national feeling in the modern sense; and the Roman system left most of them a certain measure of self-government which modified their regret for an independence the delight in which had been (in many cases) reduced by domestic disorders.

tional States—Russia, Germany, France, Italy, Britain—is in the least likely to be absorbed by any of the others, there is reason to think that within the next century some of the smaller states will have disappeared from the map of Europe. In one or two other parts of the world—as for instance in South and in Central America—the process by which the great States are expanding is not yet complete. The influences of swifter and cheaper communications by land and sea, of increasing commerce, and of the closer intercourse which commerce brings, of the power exerted by the printing press in extinguishing the languages which prevail over a small area and diffusing those spoken by vast masses of men—all these things make for unity within each of the great States and add to the attractive power which the greater have for the smaller. These influences, moreover, all promise to be permanent.

Against them we must set the fact that Conquest, so far as civilized peoples are concerned, seems likely to play a smaller rôle in the future than in the past, because it begins to be perceived how tenacious is the sentiment of nationality in a vanquished people, and how much the maintenance of that sentiment may endanger the victor State. As was observed in an earlier page, the progress of a community in civilization often tends to intensify both its capacity for political discontent and its peculiar national sentiment, thus counterworking the influences of trade and wealth. A people, or a nationality included in a large State, while feeling the centripetal forces of material interest, may nevertheless feel the repellent instinct of an unquenched attachment to its national traditions and cling to the hope of reviving its old national life.

The problem is, however, a far more complex one than any comparison of the influences of material interest on the one side and national sentiment on the other would suggest. Many phenomena may be imagined which would affect it as the world moves on. One is a change

in the conditions under which war is waged. Another is a removal of some of the causes which induce war, or a means, better than now exists, of averting its outbreak. Another is the growth of what is called Collectivism and a disposition to apply its principles in small rather than in large areas, seeing that there are obviously some things which can be better managed in the former. We are far from having exhausted the possibilities of the influence of scientific discovery upon economic life, and through it upon social and political life. Both the relations of Nations and States to one another and the relations of the groups or communities within each State to each other may be affected in ways as yet scarcely dreamt of. Neither can we foresee the modes in which the scientific way of looking at all questions may come ultimately to tinge and modify men's habits of thought even in social and political matters. No institution was at one time more generally prevalent over the world, or seemed more deeply rooted, than Slavery; and slavery, which has now vanished from civilized communities, will soon have vanished from all countries. There is indeed hardly any institution for which permanence can be predicted except—and some will not admit even this exception—the Family.

Imagine a world in which all the hitherto unappropriated territories had been allotted to one or other of the few strongest States. Imagine tariffs abolished and the principle of equality of trade-facilities among States established. Imagine a system of international arbitration created under which the risks of war were so greatly reduced that the prospects of war did not occupy men's minds and give a military and aggressive tinge to their patriotism. The present relations of centripetal and centrifugal forces would under such conditions be greatly altered, as respects both the wide theatre of the world and the internal conditions of each particular State.

Imagine also a great advance in the desire to use gov-

ernmental agencies for the benefit of the citizens, and a general conviction that such agencies could best be used by comparatively small communities rather than by the State as a whole. A new centrifugal force, centrifugal at least in respect of each State, would thereby have been called into action. No one will venture to foretell any of these things. But none of them is impossible; and it is plain that they might produce a set of conditions, and a play of forces, unlike the present, and unlike any period in the past. We must not therefore assume that the large States and the present structure and organization of States will be permanent.

Of the more remote future, History can venture to say little more than this—that it will never bring back the past. She recognizes that, as Heraclitus says, one cannot step twice into the same river. Even when she is able to declare that certain forces will assuredly be present, she cannot forecast their relative strength at any given moment, nor say what hitherto unobserved forces they may not, in their action upon one another, call into activity. All she can do for the lawyer, the statesman and the legislator, when they have to study and use the forces operative in their own time, is to indicate to them the nature and the character, the significant elements of strength and weakness, that belong to each and every force that has been heretofore conspicuous, so as to direct and guide them in observing and reflecting on the present. This is much less than has sometimes been claimed for history. Nevertheless it is a real service, for nothing is more difficult than to observe exactly, and the ripest fruit of historical study is that detachment of mind, created by the habit of scientific thinking, which prevents observation from being coloured by prejudice or passion.

## V

### PRIMITIVE ICELAND

ICELAND is known to most men as a land of volcanoes, geysers and glaciers. But it ought to be no less interesting to the student of history as the birthplace of a brilliant literature in poetry and prose, and as the home of a people who have maintained for many centuries a high level of intellectual cultivation. It is an almost unique instance of a community whose culture and creative power flourished independently of any favouring material conditions, and indeed under conditions in the highest degree unfavourable. Nor ought it to be less interesting to the student of politics and laws as having produced a Constitution unlike any other whereof records remain, and a body of law so elaborate and complex that it is hard to believe that it existed among men whose chief occupation was to kill one another.

With the exception of Madeira and the Azores, Iceland is the only part of what we call the Old World<sup>1</sup> which was never occupied by a prehistoric race, and in which, therefore, the racial origin of the population is historically known to us.

None of those rude tribes who dwell scattered over the north of Asia, Europe and America—Lapps, Samoyedes or Esquimaux—ever set foot in it. Adamnan, Abbot of Iona from A. D. 679 to 704, reports in his famous

<sup>1</sup> Though geographically Iceland belongs rather to North America than to Europe, geologically its affinities are with the Cape Verde Islands, the Canaries, Madeira, and possibly the Azores to the South, with Jan Mayen to the North, as it seems to owe its origin to a line of volcanic action stretching from the Cape Verde Islands to far beyond the Arctic Circle.

*Life of St. Columba*<sup>1</sup>, a prophecy of the saint regarding a holy man named Kormak, who, in Columba's days (A. D. 521-597), made three long voyages from Ireland in search of the 'Desert in the Ocean' (*eremum in Oceano*), a term so happily descriptive of Iceland that one is tempted to believe it to be the region referred to. A little later the Venerable Bede (A. D. 673-735) speaks of contemporaries of his own who, coming from the isle of Thule, declared that in it the sun could be seen at midnight for a few days<sup>2</sup>. Still later the Irish monk Dicuil (writing about A. D. 825) tells<sup>3</sup> of an isle lying far to the North-West where monks known to him had spent the summer some thirty years before. And our earliest Icelandic authority, the famous *Landnámabók* (Book of the Land-takings), mentions that when the first Norwegian settlers arrived they found a few hermits of Irish race already established there, who soon vanished from the presence of the stronger heathen, leaving behind books, bells and staves (probably croziers). The Norse settlers called them Papas (*i. e.* priests), or Westmen, a term used to describe the Scots of Ireland. No doubt, then, the earliest discoverers of the isle were these Celtic hermits, who had crossed the wide and stormy sea in their light coracles of wood and leather, consecrating themselves to prayer and fasting in this inclement wilderness. But they contributed no element to the population of the island, and can hardly be said to have a place in its history, which begins with the great Norwegian immigration.

The first Teuton to reach Iceland was a Norse Viking named Naddoð, who was driven to the isle by a storm in

<sup>1</sup> *Vita S. Columbae*, cap. vi.

<sup>2</sup> Comment. on 2 Kings xx. 9. The extreme northernmost point of Iceland just touches the Arctic Circle.

<sup>3</sup> In his book *De Mensura Orbis Terrae*, cap. 7, he identifies the isle with Thule; and the reports of the monks point rather to Iceland than to the Faeroe Isles, a group which Dicuil mentions elsewhere, and which therefore he cannot mean by his Thule. The name Thule has of course been applied by different writers to different lands. When Tacitus says that it was seen in the distance by the fleet of Agricola, he probably means either Shetland or the Fair Isle between the Shetlands and the Orkneys.

the latter half of the ninth century. He called it Snæland, or Snowland. A second visitor, a Swede named Gardar, sailed round it; a third (Flóki, a Norseman) landed, and gave it the name it still bears. But though the news of the discovery soon spread far and wide through the whole Northland, the isle might possibly have lain unoccupied but for the events that were passing in Norway. King Harald the Fairhaired was then in the full career of his conquests. The great battle of Hafsfjord had established his power in Central and Southern Norway, and he was traversing the fjords with his fleet, compelling the petty chieftains who stood at the head of the numerous small independent communities that filled the country to acknowledge his supremacy, and imposing a tax upon the land-holding freemen.

The proud spirit of the warriors who for more than a century had been ravaging the coasts of all Western Europe could not brook subjection, and, being unable to offer a united opposition, the boldest and bravest among them resolved to find freedom in exile. Some sought the Orkneys, Shetlands and Faeroe isles, already settled by Northmen. Some joined the Norwegian settlers in Ireland, and drove the Celtic population out of some districts on its eastern coast. Others, again, followed Hrolf Ganger (Göngu Hrolfr) ('the Walker'), or Rollo as our books call him, a Viking who, having incurred the wrath of Harald, sailed forth from his home on the fjords near Bergen to found in Northern Gaul a dynasty of Norsemen whence came the long line of Norman dukes and English kings, *Albanique patres atque altae moenia Romae*. And yet others, hearing the praises of the lately-discovered isle far off in the ocean, turned their prow to the west and landed on the solitary shores of Iceland. They embarked without any concert or common plan; each chieftain, or head of a household, taking his own family, and perhaps a group of friends or dependents; and they settled in the new land where they pleased, sometimes throwing overboard as they neared

the shore the wooden columns, adorned with figures of Thor and Oðin, of the high-seat in their old Norwegian hall, and disembarking at the point to which these were driven by the winds and currents. At first each took for himself as much land as he desired, but those who came later, when the better pastures had been already occupied, were obliged to buy land or to fight for it; and a curious custom grew up by which the extent of territory to which a settler was entitled was fixed. A man could claim no more than what he could carry fire round in a single day; a woman, than that round which she could lead a two-year-old heifer. So rapid was the immigration, many colonists from Norwegian Ireland and the Scottish isles, Orkneys, Shetlands and Hebrides (the two former groups being then Scandinavian) joining those who came direct from Norway, that in sixty years the population had risen (so far as our data enable it to be estimated) to about 50,000, a number which seems not to have been exceeded down to the census of A.D. 1823. With those who came from Ireland and the Hebrides there came some small infusion of Celtic blood, which we note in such names as Njál, Kjartan, and Kormak, given to men descended from the daughters of Irish chieftains.

Planting themselves in this irregular way, and in a country where the good land lay in scattered patches, and where deserts, glaciers and morasses, as well as torrents, passable only with difficulty or even danger, cut off one settlement from another, the first settlers did not create, and indeed felt little need of, any political or social organization. But after a time a sort of polity began to shape itself, and the process of its growth is one of the most interesting phenomena of mediæval history. The elements out of which it sprang were of course those two which the settlers had brought with them from Norway, and both of which were part of the common heritage of the Teutonic race—the habit of joint worship at a temple, and the habit of holding an assembly of all freemen to

discuss and dispatch matters of common interest, and more especially lawsuits<sup>1</sup>. This assembly resembled the Old English Folk Mot, and was called the Thing, a name which survives in our English word Hustings (Husting or House Thing), the platform from whence candidates spoke at parliamentary elections, which disappeared in A.D. 1872 when written nominations were prescribed by the statute which introduced vote by ballot. The þing<sup>2</sup> was held at the temple, usually dedicated to Thor, the favourite deity of the Norsemen as Oðin was of the Swedes; since the place of worship was the natural centre of the neighbourhood, and the þing was presided over by the local magnate or chief, who was usually also the owner or guardian of the local temple, there being among the Scandinavian peoples no special sacerdotal caste.

Now when a Norse chief settled himself in Iceland, one of his first acts was to erect a temple, often with the sacred pillars which he had brought from the ancestral temple in the old country. The temple soon became a place of resort, not only for his own immediate dependents, but also for those other settlers of the district who might not be rich enough to build and maintain a shrine of their own. Of this temple the chieftain and his descendants were the priests; and as the meetings of the local þing were held in it, he was the natural person to preside over such meetings, both because he was usually (though not invariably) eminent by his wealth and power, and also because he offered the sacrifices and kept the sacred temple-ring on which judicial oaths were taken, as at Rome men swore at the Ara Maxima of Hercules. Thus the priest acquired, if he had not already enjoyed it, the position of a sort of local chieftain or magnate, not unlike those kings of heroic Greece whom we read of in

<sup>1</sup> Not but what the habit of holding such an assembly has existed among peoples of very diverse race in many parts of the world. It existed among the Greeks. It exists among the Kafirs of South Africa.

<sup>2</sup> I use the Icelandic and Anglo-Saxon letter þ in this word to distinguish it from the common English word.

Homer, or those German tribe-princes whom Tacitus describes. Although his title was that of Goði<sup>1</sup> (originally Guði) or priest, a word derived from the name of the Deity, he lost in becoming the depositary of a certain measure of political power most of such religious character as his office had possessed. Nor did any sanctity attach to his person. In that age at least religion had come to sit rather lightly upon the Norsemen. Either from inner decay, or from the influence of the Christian peoples with whom they came in contact beyond the seas, the old faith was beginning to disintegrate. Worship was often cold or careless, and we read of men who regarded neither Þor nor Oðin, but trusted in their own might and main.

The Goði was therefore much more of a secular than of an ecclesiastical person, a chieftain rather than a priest in our sense of the word<sup>2</sup>. His powers as a chieftain were very indefinite, as indeed had been those of the local chieftains of Norway. He was only the first among a number of free and warlike land-owners, some of them equal or superior to him in lineage, with an official dignity which was little more than formal in the hands of a weak man, but might be turned to great account by a person of vigour and ability. As he presided in the Þing, so he was the appropriate person to see to the regularity of its judicial proceedings, to preserve order, and to provide for the carrying out of any measures of common concern on which it might determine. When any unforeseen danger or difficulty arose, he was looked to to advise or take the lead in action; the members of his Þing expected aid and protection from him, while he, like a thegn among the Teutons of contemporary England, expected support and deference from them. But he had no legal powers of coercion. Any one might op-

<sup>1</sup> The term *goði* does not seem to have been used in Norway, but Ulfila, in his translation of the Bible into Gothic (in the fourth century A. D.), renders *ιερευς* by *gudja*. The *ð* is pronounced like *th* in 'then.'

<sup>2</sup> It is true that as the Sagas whence we draw our knowledge of the Goði were all written down at a time when heathenism had vanished, it is possible that they may not fully represent the original character of the office.

pose him in the þing or out of it. Any þing-man might withdraw at pleasure, join himself to some other Goði, and become a member of some other þing<sup>1</sup>. There was, it must be noted, no territorial circumscription corresponding to the þing. Land had nothing to do with the position held by the Goði to the þingmen, and herein, as well as in the absence of the relation of commendation and homage, we see a capital difference between this system and feudality. Nor was the post of Goði a place whence much emolument could be drawn. The þingmen were indeed required to pay a sort of tax called the temple toll (*hof tollr*), but this did no more than meet the expenses to which the Goði was put in keeping up the temple, and feasting those who came to the sacrifices; it gave him no revenue which he could use to extend his authority. Accordingly, the Goðorð was regarded as implying power rather than property, and was not (after the introduction of Christianity) liable to the payment of tithe. A curious feature of the office was its alienability. Probably because it had arisen out of the ownership of the temple, it was regarded as a piece of private property which could be transferred by way of sale or gift, and could be vested in several persons jointly. And similarly a number of Goðorðs might by inheritance or purchase become vested in the same person.

Thus in the years immediately following the immigration there sprang up round the coasts of Iceland a great number of petty, unconnected and loosely aggregated groups of settlers. We must not venture to call them states, scarcely even communities, not principalities,

<sup>1</sup> The illustrious Konrad Maurer, to whose learned researches and sound judgement every one who writes about the constitutional antiquities of Iceland must feel infinitely indebted, thinks that the name of Goði was used in Norway before the emigration to Iceland, though probably the priest was there a less important person than he became in Iceland, where his custody of the temple put him to some extent in the position held in the Norwegian motherland by the hereditary chieftain, who was in Norway the natural president of the local Thing.

Those who desire to study the early history of Iceland may be referred to the writings of Dr. Maurer, and especially to his *Island bis zum Untergange des Freistaats* (Munich, 1874), and his *Beiträge zur Rechtsgeschichte des Germanischen Nordens* (Munich, 1852).

such as those which were beginning to spring up in Western Europe, not in a strict sense republics, yet nearer to republics than to principalities, organized, so far as they were organized at all, chiefly for the purposes of justice, and particularly for the exaction of fines for homicide, but with no settled plan of government, no written laws—if indeed writing was yet in use at all—no defined territory, and a comparatively weak cohesion among their own members, the Thingmen. The really effective tie was, in those ages, the tie of kindred; and the Þingmen of the same Goði were not kinsfolk, were not a clan or sept, like the Celtic communities of Scotland and Ireland. That tie was strong enough to involve a whole district in the blood-feud of a single man. For when any member of a family was killed, it was the duty of his nearest relatives to avenge his death, either by obtaining a full compensation in money, for which, if the offender refused to pay it, a lawsuit was brought in the Þing, or else by slaying the murderer or some member of his family. Thus a feud, like a *Vendetta* in Corsica or in Eastern Kentucky, might go on from generation to generation, each act of revenge drawing others in its train, and tending to draw more and more families into the feud, because when fights took place, the friends of each party often joined, and if some were killed, their relatives had a new blood-claim to prosecute.

Between the different communities that had thus sprung up there was no political tie whatever. There did not as yet exist any Icelandic nation, much less any common Icelandic State of which all the communities felt themselves members. Each was an independent body; and if a dispute arose between the members of two different Þings, there was no means of adjusting it except by voluntary submission to the award of some other Þing or else by open war. Seeing that slayings and plunderings and burnings were everyday occurrences in this fierce race, where Vikingry (*i.e.* piracy) was the most honoured pursuit, such cases were very frequent, espe-

cially as to take revenge for a kinsman's death was deemed a sacred duty.

Even when the offender belonged to the same Þing as the injured, it often happened that the influence of his kindred, or the favour of the Goði of the place, or some technical error in bringing the suit for compensation, prevented justice from being done. Accordingly the need for some remedy, for some further political, or rather judicial, organization of the island began to be generally felt, for however fond men may be of killing one another, the Norsemen were always also fond of money, and would often prefer a blood-fine to the satisfaction of killing their enemy, could the blood-fine be secured. Thus it came to pass that, about fifty years after the first colonization, a chief named Úlfjót, venerable from his age and abilities, came forward to propose a scheme. He urged the creation of one general Þing for the whole country, where all matters of common interest might be discussed, and all suits which could not be dispatched, or had not been fairly dealt with in the local Þings, might be decided. Travelling round the island, he brought over to his views the most influential Goðis and other leading men; and at their request, sailed to Norway to inquire into the laws prevailing there, and to draw up regulations for this new general Þing; somewhat as envoys were, according to the Roman story, sent from Rome to the Greek cities to bring back materials and suggestions for the legislation of the Decemvirs. At the same time Úlfjót's foster-brother, Grím Geitskór ('Goat's Shoe'), the fleetest man and nimblest rock-climber in Iceland, was commissioned to traverse the island in search of a place suitable for the meeting of the proposed assembly. After long wanderings, Goat's Shoe hit upon a spot to which the name of Þing Vellir<sup>1</sup>, 'the plains of the Þing,' has ever since belonged, in

<sup>1</sup> Thing Vellir is the nominative plural, Thing Valla—the form in which the word has become more familiar to Englishmen, and which remains in Thingwall (near Liverpool), Tynwald (in the Isle of Man), and Dingwall (in Rosshire)—is the genitive plural.

the south-west of the island, about eight hours' riding from where Reykjavik the present capital now stands, and within the district of the first temple that had been founded by Ingolf, the earliest Norwegian settler. This circumstance gave the place a sort of sacredness. There was plenty of water and pasture, and the lake which washed the plain of meeting abounded (as it does to this day) with trout and wild fowl. (It abounds also with most pernicious small black flies, whereon the trout grow fat, but which make fishing not always a pleasure.) Here, accordingly, Úlfjót having in the meantime returned from Norway with his materials for legislation, the first Alþing, or General Assembly of all Iceland, met in A. D. 930, and here it continued to meet, year after year, for a fortnight in the latter half of June, till the year 1800<sup>1</sup>, one of the oldest national assemblies in the civilized world, and one of the very few which did not, like the English Parliament and the Diet of the Romano-Germanic Empire, grow up imperceptibly and, so to speak, naturally, from small beginnings, but was formally and of set purpose established, by what would have been called, had paper existed, a paper constitution, that is to say by the deliberate agreement of independent groups of men, seeking to attain the common ends of order and justice.

There was thus created, before the middle of the tenth century, when Athelstan the Victorious<sup>2</sup> was reigning in England and defeating Scots and Northumbrians at Brunanburh by the help of the Icelandic warriors Thorolf and Egil, sons of Skallagrim<sup>3</sup>, when the Saxon king Henry the Fowler was repelling the Magyar hosts and laying the foundations of the German Kingdom, and

<sup>1</sup> Since this lecture was delivered the Alþing which since 1843 had led a feeble life at Reykjavik as a sort of advisory council, has been re-established as a representative governing assembly under a new constitution granted to Iceland in 1874. It now meets every second year at Reykjavik.

<sup>2</sup> The Saga of Egil calls him Aðalsteinn hinn Sigrsæli (*lit.* 'blessed with victory'). It is curious that this title should have been preserved in Iceland and apparently have been forgotten in England.

<sup>3</sup> See *Egils Saga Skallagrimssonar*, chap. 54.

when the power of the last Carolingians was beginning to pale in Gaul before the rising star of the Capetian line, a sort of republic embracing the whole isle of Iceland, a republic remarkable not only from its peculiar political structure, but also, as will presently appear, from the extremely limited range of its governmental activity. About thirty years later its constitution was amended in some important points, and forty years after that time, about the year 1004, further alterations were made, the details of which are too much disputed as well as too intricate to be explained here. Its general outline, in its completed shape, was the following. The total number of regular þings, and priest-chieftaincies or *Goðorðs*, was fixed at thirty-nine, nine for each of the four Quarters into which the island was divided, except the North Quarter, which, in order to allay certain local susceptibilities, was allowed twelve. Each of these thirty-nine local þings was presided over by its *Goði*. Then, for certain purposes, three of these þings were united to form a larger þing-district (*þingsokn*), of which there were therefore thirteen in all, viz. four for the North Quarter, and three for each of the other Quarters. There was also one still larger þing for each Quarter, called the *Fjórðungsþing*. It seems to have grown up before the institution of the *Alþing*, and to have represented the first stage in the organization of a larger community out of the small local þings. But it tended in course of time to lose its importance.

Ordinary lawsuits and questions of local interest were determined in these minor þings, while graver suits, or those in which the parties belonged to different þings, or where it was sought to reverse the decision of a local þing, as well as all proposals for alterations of the general law, were brought before the *Alþing*, at its annual meeting in June. It seems to have been therefore partly a court of first instance and partly a court of appeal. Now the *Alþing* was open, like other primary Teutonic and Hellenic assemblies, to all freemen who

chose to attend ; but its powers were practically exercised by a limited number of persons, viz. the Goðis and certain members nominated by them.

For judicial purposes, the Alþing acted through four Courts, one for each Quarter. Each Quarter Court (*fjorðungsdómr*) consisted, according to one view, of thirty-six members, viz. the Goðis of the Quarter with twenty-four nominees, and, according to another view, of nine persons nominated by the Goðis of the Quarter. There was also a fifth Court (called the *fimtardómr*), instituted later than the others (A. D. 1004), on the suggestion of the famous jurist Njál, son of Thorgeir. This Court, which exercised jurisdiction in cases where one of the other Courts had failed, was composed in a somewhat different way, acted under a more stringent oath, and gave its decisions by a majority, whereas in other Courts unanimity was required. It seems to have been intended not only to avert armed strife by providing a better method for settling disputes, but also to organize the country as a whole and give it something approaching to a central authority. This result, however, was not attained, the social and physical obstacles proving insuperable.

In these judicial committees of the Alþing lawsuits were brought and argued with an elaborate formality and a minute adherence to technical rules far more strict than is now practised anywhere in Europe, a fact which will appear the more extraordinary when we remember that in those days both the law and all the appropriate forms of words which the parties were obliged to employ were not written, but preserved solely by the memory of individual men.

For legislative purposes the Alþing acted through another committee of 144 persons, only one-third (forty-eight) of whom, being the thirty-nine Goðis and nine nominees, had the right of voting. The nine nominees were persons chosen by the Goðis of the East, South, and West Quarters, three by each Quarter, in order to give

each of these Quarters the same strength in the Committee as the North Quarter had with its twelve *Goðis*. Each of the forty-eight appointed two assessors who advised him, sitting one behind him and the other in front of him, so that he could readily seek their counsel, and thus the 144 were made up, the forty-eight being described as the Middle Bench. This Committee was called the *Lögrétta* (*lit.* 'Law Amending'), and by it all changes in the law were made, and all matters of common interest discussed. It was essentially an aristocratic body, as indeed the whole Constitution bore an aristocratic colour, though there was no such thing as a formal distinction of rank<sup>1</sup>, much less any titled nobility. After the introduction of Christianity in A. D. 1000, the two bishops were added to the *Lögrétta*, while at the head of all, making up the number of members to 147, stood an elected officer, called the Speaker of the Law.

This last-named personage, the solitary official of the republic, is one of the most curious parts of the system. He was called the *Lögsögumaðr*, literally 'Law-sayman,' or, as we may render it, Speaker, or Declarer, of the Law, and was the depositary and organ of the unwritten common law of the country. It was his duty to recite aloud, in the hearing of the greater number of those present at the *Þing*, the whole law of Iceland, going through it in the three years during which he held office; and to recite once in every year the formulas of actions, this being the part of the law which was of most practical importance. Besides this, he presided in the *Lögrétta*, giving a casting vote where the votes were equal; and he was bound to answer every one who asked him what the provisions of the law actually were, although not required to advise applicants as to the course they ought to follow in a given case. When in any suit a question of what was the legal rule arose, reference was made to him, and his decision was accepted as final.

<sup>1</sup> Although the penalty for killing a man of high lineage was heavier than that for an ordinary freeman; and one perceives from the Sagas how carefully genealogies were preserved and what great respect was paid to long descent.

For these labours he received a yearly salary of two hundred ells of Vaðmál (the blue woolen cloth which then served as currency, and which continued to do so, for some purposes, down to our own time), besides one-half of the fines imposed at the Alþing. He was of course selected from the most accomplished lawyers of the time. His declarations of the law were conclusive, at least during his three years' term of office, in all causes and over all persons. Thus he exercised a kind of quasi-judicial or quasi-legislative power, and has been fancifully compared to the Roman Praetor, also an officer elected for a term, also by his edicts the declarer of the law he had to administer<sup>1</sup>. But the Law-Speaker was in reality neither judge nor magistrate, nor, indeed, a legislator, except in so far as the right to enounce and interpret borders on legislation. He delivered no judgements, he had no power of enforcing a decision or of punishing an offender. He did not even open the Alþing and take the responsibility for keeping order at it, for these functions belonged to the Goði of the district, called, because the Alþing met within his jurisdiction, the Allsherjargoði (priest of the whole host). The Lögsögumaður was in fact nothing but the living voice of the law, enunciating those customary rules which had come down from the foretime, rules which all accepted, though they were not preserved in any written form, and though they must have been practically unknown to the great majority of the citizens.

The office, although more important in Iceland from the absence of a king or local prince, was one of which we find traces among other Scandinavian peoples, or at least among the Norsemen. It appears in Norway, in the Orkneys, and in the Hebrides (though there the name is Lögman, which in Iceland means merely one learned in the law).

Thingvellir, where the Alþing met from the year 930

<sup>1</sup> *Viva vox iuris civilis* was the description which the Romans used to give of their Praetor, as to whom see Essay XIV, p. 691.

down to a time within the memory of living men, is a spot not less remarkable physically than memorable for the stirring events of which it was the witness. It is a slightly undulating plain, some five miles long by three wide, washed on the south by a broad island-studded lake, and girdled in at its northern end by lofty mountains, their black volcanic rocks streaked here and there with snow-beds. The surface is all of lava, sometimes bare and rugged, sometimes covered with thin brushwood, dwarf birches and willows, sometimes smoothing itself out into sweeps of emerald pasture, but everywhere intersected by profound chasms, formed when the whole was a molten mass. East and west it is hemmed in by two lines of precipices, whose rugged sides seem to show that the plain between them has, at some remote period, perhaps when the lava-flood was cooling, sunk suddenly down, leaving these walls to be the edges of the plateau which stretches away backwards to the east and west. Under the western of these two walls, on the margin of the lake, just where it receives the stream which has flung itself in a sparkling cascade over the precipice, the place of meeting was fixed. The chieftains, who came from every corner of the island with a following of armed companions and dependents, because broils were frequent, and armed strife might interrupt the progress of a lawsuit, built their booths—erectations of stone and turf roofed for the time with cloth or canvas—along the banks of the Öxará river, and turned out their horses to pasture by the lake. Places were appointed for the holding of the several courts, while the Lögrétta or legislative committee sat on a spot which nature seemed to have herself designed for the purpose. Two of the extraordinary chasms by which the plain is seamed, each some eighty feet deep, and filled for the lower fifty feet by bright green water, enclose a narrow strip of lava some two hundred yards long, cutting it off, except at one point where there is a narrow entrance which three men might hold, from the surrounding land. The surface is nearly

level, covered by short grass now browsed by a few sheep; and there is nothing to tell that in this space, in the full sight of the assembled multitude, the heroes of ancient Iceland spoke and voted their laws, and gave their verdicts; while from an eminence in the midst of the enclosure, still called the Lögberg, or Hill of Laws, the Law-Speaker recited the law of the nation in the sight and hearing of the multitude that stood on the further side of the chasms<sup>1</sup>. Not only so: there is all round nothing whatever to show that the place has ever been different from what it is now. Between the Lögberg and the lake stand the little wooden church and its humble parsonage. No other house is near, nor any sign of human life. Only the islet is still pointed out in the river where the solemn duels which the laws of Iceland recognized were fought, and the deep green swirling pool into which women condemned for witchcraft were hurled from the brink of the precipice. In most of the spots to which the traveller is drawn, by memories of constitutional freedom or of political struggles, his imagination is aided by the remains of the buildings where assemblies met or monarchs sat enthroned. Here man has left nothing to speak of his presence, and it is hard to realize, when one looks on this silent and desolate scene, that it was once filled by so much strenuous life, and so often resounded to the clash of arms.

For the Alþing was not merely an assembly for the dispatch of business: it was the great annual gathering of the whole nation, a gathering all the more needed in a land where there are no towns, and most men live miles away from their nearest neighbours. To it chieftains rode with their wives and daughters and a band of armed retainers from the furthest corners of the country, taking, perhaps, as those must have done who came from the

<sup>1</sup> Since this was written, some eminent antiquaries, including my lamented friend Dr. Guðbrand Vigfússon, have argued that the true Lögberg is to be sought not in this spot which tradition indicates, but on the edge of the great lava rift called the Almagnagjá to the west of the river. See *The Saga Steads of Iceland*, by W. G. Collingwood and Jón Stefánsson, 1899, pp. 14-17.

East fjords along the northern edge of the great central desert, a fortnight or more on the way. Shipmasters from Norway or Ireland brought their wares for sale. Artisans plied their trades. We are told that even jugglers' sheds and drinking-booths were set up, and games of all kinds carried on. It was a great opportunity not only for the renewing of friendships between those who lived in distant parts of the country, but for the arranging of adoptions and marriages; and the Sagas mention numerous instances in which proposals were made or betrothals entered into at a meeting of the Alþing, in most of which instances the will of the maiden seems to have prevailed over that of her parents. It was midsummer, when there is in those latitudes no night, but the glare of day subsides for a few hours into an exquisitely rich and tender twilight, clothing the sky with colours never seen in our duller air. And we can fancy how those who followed their fathers to the Alþing found compensation for all the loneliness and gloom of the long winter in this one fortnight of vivid mirth and excitement.

The meeting of the Alþing was not only the centre of the political life of the Republic. It was, so to speak, the Republic itself, for it was only then that the Republic became visible before men's eyes or acted as a collective whole. During the rest of the year lawsuits and everything else of public concern were left to the Quarter þings and local þings, and to the local Goðis. The few laws or resolutions of general concern which the Alþing passed—they were few, because its legislative activity was chiefly occupied in regulating its own judicial proceedings—were probably meant to be accepted and observed over the whole island, but the Alþing did not attempt to enforce them, and indeed had no machinery by which it could do so. Each Goði was, in a loose way, a sort of executive magistrate over his own þingmen; but he did not derive his authority from the Central or Federal Alþing, and he was not responsible to the Alþing for its exercise. The Republic, if we may so call it, had no

Executive whatever. Its sole official was the Law-Speaker (of whom more anon), but his function was only to declare the law, and was exercised only while the Alþing was sitting. At other times the constituent Þings and Goðis were virtually quite independent, and might and often did carry on war with one another, subject to no penalty or liability for so doing, save in so far as an action for compensation might be brought against any one who had killed another. There was no police, no militia, no fleet, no army, nor any means, like those provided in the feudal kingdoms of contemporary Europe, of raising an army. The isle lay so far away from all other countries except Greenland, on which an Icelandic colony had been planted, that it happily did not need to have a foreign policy. There was neither public revenue nor public expenditure, neither exchequer nor budget. No taxes were levied by the Republic, as indeed no expenses were incurred on its behalf.

The Icelandic Republic was in fact a government developed only upon its judicial and (to a much smaller extent) upon its legislative side, omitting altogether the executive and international sides, which were in the Greek and Roman world, and have again in the modern world, become so important. For a community to exist with such an absence of administrative organization was obviously possible only in a region like Iceland, severed by a wide and stormy sea from the rest of the world, and with a very thin and scattered population; possible too only in a simple state of society where man's needs are few and every one fends for himself.

The system whose outlines I have sought to draw is full of interest and suggestion, as well to the student of legal theory as to the constitutional historian. Some modern theorists derive law from the State, and cannot think of law as existing without a State. A few among them have in England gone so far as to deny that Customary Law is law at all, and to define all Law as a Command issued by the State power. But here in Iceland we

find Law, and indeed (as will appear presently) a complex and highly developed legal system, existing without the institutions which make a State; for a community such as has been described, though for convenience it may perhaps be called a Republic, is clearly not a State in the usual sense of the word. Of Iceland, indeed, one may say that so far from the State creating the Law, the Law created the State—that is to say, such State organization as existed came into being for the sake of deciding lawsuits. There it ended. When the decision had been given, the action of the Republic stopped. To carry it out was left to a successful plaintiff; and the only effect a decision had, so far as the Courts were concerned, was to expose the person resisting it to the penalties of outlawry—that is to say, any one might slay him, like Cain, without incurring in respect of his death any liability on the footing of which his relatives could sue the slayer. Law in fact existed without any public responsibility for enforcing it, the sanction, on which modern jurists so often dwell as being vital to the conception of law, being found partly in public opinion, partly in the greater insecurity which attached to the life of the person who disregarded a judgement. Yet law was by no means ineffective. Doubtless it was often defied, and sometimes successfully defied. That happened everywhere in the earlier Middle Ages, and happens to-day in semi-civilized peoples. But the facts that the Alþing maintained so active a judicial life, that the field of law was cultivated so assiduously, and the details of procedure worked out with so much pains and art, that lawsuits were contested so keenly and skilfully—all these facts seem to prove that law must have in the main had its course and prevailed, for it is hard to suppose that all this time and pains would have been during two centuries or more devoted to a pursuit which had no practical result. The contemporary kingdoms and principalities of the earlier Middle Ages lived by the vigour of the executive. There was in them very little of a State administra-

tion, and the law was in most or all of them older than the State—that is to say, it had existed in the form of customs recognized and obeyed before efficient means were provided for enforcing it. So far they resembled Iceland; and the same may be said of the city republics of Italy and Germany. But Iceland is unique as the example of a community which had a great deal of law and no central Executive, a great many Courts and no authority to carry out their judgements.

The process by which the law of Iceland grew, though less exceptional than was its political constitution, illustrates very happily the origin of Customary Law and the first beginnings of legislation. Law springs out of usage. The gathering of the neighbours develops into the *Þing* or local assembly of Norway and the Folk Mot of early England. It treats of all matters of common concern; and as it is the body before whom complaints of wrong are laid, it adopts by degrees regular set forms of words for the statements of a grievance, and for the replies to those statements. The usages become recognized customs, prescribing the cases in which redress may be claimed and the defences by which the claims may be repelled. The forms of words grow more elaborate and come to be considered so essential that a variation from them vitiates the claim. The body of rules thus formed becomes so large that only a few men, devoting themselves to the subject, are able to carry the whole in their memory. These men, proud of their knowledge, elaborate the rules, and particularly the set forms of words, still further, and in their enjoyment of technicalities attach more and more importance to formal accuracy. Thus Custom, which was loose and vague while held in solution in the minds of the mass, becomes crystallized into precision by the labour of the few whose special knowledge gives them a sort of pre-eminence, and even a measure of power. Then it is found that there are diversities of opinion among the experts in the law, or instances arise which show that some custom

generally accepted is inconvenient. By this time Custom has acquired so much authority that the assembly, which has been also, and perhaps primarily, a law court, does not venture to transgress it, the men of legal learning being of course specially opposed to such a course. It therefore becomes necessary formally to change the Custom by a resolution of the body which is at once the Assembly and the Court. As this body consists of those who use, and whose progenitors have created, the custom, and as it continues to settle other matters of common concern affecting the district, it is the proper and only body to make the change. This, then, is legislation in its early stage. The law produced, which we may call Statute Law, is for many generations extremely small in proportion to the mass of law which rests upon Custom only. But the Statute Law is important because it is explicit, because it is sure to be remembered, because it deals with points comparatively large, since it would not be worth while to submit small ones to the assembly. Nevertheless legislation is among all peoples the smallest part of the work of primitive assemblies, be they *Þings* or Folk Mots or Agorai or Comitia. And the growth of the law of Iceland by custom, preserved and elaborated by a succession of law-sages, occasionally (though rarely) altered or added to by the vote of the *Alþing*, presents a lively picture of what must have been the similar process of the construction of early Roman law by the jurists (*prudentes*) and assembly (*comitia*).

Iceland, however, provided a means for the ascertainment and publicity of her law which Rome lacked. The *Lögsögumaðr* is an elegant (using the word in its strict Roman sense) complement to a system of Customary Law. His function was well designed to meet and cure the two chief defects in such a system, the uncertainty which existed as to what the rules accepted as law were and the difficulty which an individual desiring to take or defend legal proceedings found in discovering what the rule applicable to his case really was. The solemn reci-

tation of the whole law fixed it in the recollections of those who busied themselves with such matters, and gave everybody an opportunity of knowing what it covered. The right to interrogate the living depositary of the law as to any special point whereanent the querist desired to be informed was a great boon to private persons, who, since they might often have to suffer from the extreme technicality of procedure, needed all the more to be warned beforehand where the pitfalls lay. In these respects the Icelandic system contrasts favourably with those of early Rome and early England. Till the Twelve Tables were enacted the private citizen of Rome had no means of ascertaining the law except by asking some sage, who need not answer unless he pleased, and whose view had no authority beyond that which his personal reputation implied. Even after the Twelve Tables had reduced much of the ancient Customary Law to shape, and made it accessible to the citizens at large, many of the forms of procedure, and the rules as to the days on which legal proceedings could be taken, were kept concealed by the patrician men of law till divulged (at the end of the fourth century B.C.) by Cn. Flavius. In England there was indeed no similar effort to keep legal knowledge within the hands of a few. But the customs were numerous, and many of them were uncertain. There was no way of ascertaining them except by the judgement of a Court, a tedious and expensive process, which after all decided only the particular point that arose in the case that occasioned the judgement. That means of determining a custom to be valid and binding which the Icelanders had already secured through their official in the last half of the tenth century did not begin to be created by the action of the English Courts till the end of the twelfth, and centuries were needed to complete the process.

One of the things that most awakens our surprise in the Icelandic Constitution is its extreme complexity. In one sense simple and even rude, since it omits so much

we should have expected to find in a constitution, it is in another sense intricate, and puzzles us by the artificial character of the arrangements made for the composition of the various courts and of the legislative body, while the multiplicity of þings, and the distribution of powers among them, has given rise to many controversies among historians, some still unsettled. This phenomenon, however, finds a parallel in some of the constitutions of the Greek republics, not to speak of the elaborate systems of such cities as Florence and Venice in the fourteenth century. In Iceland the strong sense of independence which distinguished the Norsemen, and the jealousy the chiefs had of one another, made it necessary to devise means for securing equality and for preventing the influence of any group or district from attaining predominance. Herein the spirit of the Icelandic Constitution is singularly unlike that of the Roman. There, the intense realization of the unity of the city and the need for giving its government the maximum of concentration against neighbouring enemies caused vast powers to be entrusted first to the King and then to the Consuls or to a dictator. In Iceland, where no such need of defence existed, where there was no foreign enemy, and men lived scattered in tiny groups round the edges of a vast interior desert, no executive powers were given to anybody, and elaborate precautions were taken to secure the rights of the smaller communities which composed the Republic and of the priest-chieftains who represented them.

A like intricate character recurs in the system of legal procedure, but the cause is different and not peculiar to Iceland. The excessive technicality of Icelandic process, and the stress laid upon exact compliance with its rules, belong to that stage of the human mind in which form and matter have not yet been separated, and in which the respect for usage and tradition outweighs the sense of substantial justice. Simplicity in legal matters, instead of characterizing the state of nature, is the latest

legal achievement of a civilized age. In accounting for the strictness of adherence to the letter, we must allow something for the dread, natural enough in such an age, that if deviations from the letter of the law were overlooked, if what we should call a power of amendment on matters of form were entrusted to the Court, such discretion would be abused and confidence in the Courts destroyed. But the reason is chiefly to be found, as in the parallel case of those older forms of Roman procedure which continued terribly technical till the time of Cicero, and as in the case of our own older law, to the conservative spirit of the lawyers, attached to the forms they had received and studied, and taking a professional pride in working out their methods, a pride all the greater the more technical those methods were, because the more intricate the technicalities the higher the importance of the few who had mastered them. Substantial justice is all the layman cares for. With the lawyer it is otherwise. An eminent English judge used to remark that of the questions argued before him, counsel showed most interest in points of practice, costs came next, while the merits of the case were last. The late Baron Parke (Lord Wensleydale) was a type of the kind of mind which flourished in Iceland in the eleventh century; and it was a type useful in its way, a type which ought always to be represented in the legal profession, for reverence for tradition and an acute interest in the exactitude of form are hardly less necessary than a philosophic spirit and a zeal for progress.

How keen was the taste for legal subtleties and intricacies is shown, not only by the existence of schools of law in Iceland—young men gathering round sages like Njál or Skapti Thoroddsson, just as the well-born youth of Rome frequented the house of Tib. Coruncanius or Q. Mucius Scaevola—but also by the evident enjoyment which the authors of the Sagas show, and which their public must evidently have taken, in the steps in a lawsuit, or in the telling of some incident which

raises a nice point of procedure. In no other literature is fiction or history, by whichever name we describe the Sagas, so permeated by legal lore.

Our knowledge of the substance of early Icelandic law is derived partly from references or allusions in the Sagas, partly from some ancient law-books, the oldest of which belongs to the period of the Republic, and was compiled, probably about the middle of the twelfth century, out of materials some of them much older, and reaching back into the eleventh and even the tenth. Statutes had been passed during the course of the tenth century, and the *Úlfjótslög* of A.D. 930 is spoken of as a body of law prepared by *Úlfjót* after his journey to Norway and accepted by the *Alþing*, though it was probably a redaction of existing Norse customs, and does not seem to have been reduced to writing, as indeed it is improbable that any laws were written before the beginning of the twelfth century. The next effort at what has been called a codification of the law was made nearly two centuries after *Úlfjót* (about A.D. 1117), when a small commission was appointed which examined the customs, rejected some, approved or amended others, and created what is described as a sort of systematic collection. This is usually known as the *Hafliðaskrá*, from a prominent *Goði* and lawyer *Hafliði Mársson*, who was a member of the commission. This law is stated to have been accepted by the *Alþing*, and was no doubt preserved in writing, as the name *Skrá* (scroll) conveys.

The later book which used to be described as a Code survives in two MSS., differing a good deal from one another, and is commonly known as *Grágás* ('Grey-Goose')<sup>1</sup>. It is, however, really not a Code at all, and not even a single law-book, but a mass of matter of different dates and origins never reduced to any sort of

<sup>1</sup> The name *Grágás* (probably drawn from the binding in which a copy of it was preserved) seems to have originally belonged to a MS. of the *Frostaþingslög*, the law which prevailed round *Thronhjem* in Norway, and to have been applied by mistake in the seventeenth century to this Icelandic collection of customs, first published by the *Arnarnagacan* foundation in 1829.

unity. There are ordinances of the Alþing, decisions and declarations delivered by Law-Speakers, ecclesiastical regulations, formulas of legal procedure or legal transactions, memoranda of customs which seemed to those who recorded them to have obtained recognition and validity. It is full of instruction as a picture of primitive Teutonic institutions and life; and it throws a good deal of light both on the law of early England—English and Anglo-Norman—and upon some of the most curious features of early Roman law. Sometimes the references to the deliverances of a Law-Speaker as originating a rule make us think of the Roman Praetor, sometimes the concisely phrased records of what was settled by the Lögrétta remind us of our English reports of the judgements of the King's Courts in their early forms; while in one point the collection as a whole has a character which belongs to the earlier law-books as well of Rome as of England. Though the statutes of the Alþing are the most distinctly authoritative rules it contains, much whose authority would seem doubtful to a modern is set down in a way which clearly implies that it did possess authority. The line between absolutely binding law and all other law is not sharply drawn; indeed no such line exists. That which is recorded may be only a single instance of the observance of an alleged custom. It may be only the expression of the individual opinion of some learned lögmaðr (Lawman=jurist). Nevertheless it is a record which has come down from the past, and by which therefore the men of the present may seek to be guided.

In the law of Iceland, as it is presented in this ancient collection, we have, as in the Constitution of the island and the system of the Courts, a striking contrast between the rudeness of an extremely archaic society, in which private war is constantly going on, piracy is an honourable occupation, slavery exists, and there is no State administration and very little use of writing, and the refined intricacy of a system of law which makes

elaborate provision for the definition of legal rights and their investigation and determination by legal process. The time of day is fixed by guessing at the height of the sun above the horizon. The wife is purchased. A father may deliver his child into slavery, no doubt (as in early Rome), a qualified slavery, for the payment of his debts, and the insolvent debtor may be made a slave. But, on the other hand, there are rules, not unlike those of our modern Courts of Equity, regulating the guardianship of the property of a minor, and permitting a portion of it to be applied to the support of his indigent father, brother or sister<sup>1</sup>. There are careful distinctions as to who may sue for the penalty for homicide. If the slain man is an Icelander, the action goes first to the son, then to the nearest blood relation, then to the local Goði, then to any member of the same Quarter, then to any citizen (a sort of *actio popularis*). If the slain man was not an Icelander, but one who used the 'Danish (or northern) tongue,' *i.e.* if he was either a Norseman or a Dane or a Swede, then any relative may sue; if a stranger of any other nationality, only a father, son or brother may sue. But for the protection of persons coming in a ship, the comrade or partner<sup>2</sup> of the deceased, whom failing, the skipper who has the largest share in the ship, is a proper plaintiff.

It is curious to note that, although homicide and murder were common, the punishment of death is never prescribed, even as in two or three of the Southern States of America the death penalty is seldom inflicted, while 'shootings at sight' and lynchings abound. And an interesting resemblance to early Roman law may be found in the extreme severity of the law of slander and libel. The truth of a defamatory statement is no defence. To affix a nickname to a man is punishable by banish-

<sup>1</sup> This rule is ascribed to Guðmund Thorgeirsson, who was Law-Speaker from 1123 to 1135 A. D.

<sup>2</sup> Partner is félagi (English 'fellow'). Many further rules on this point are contained in the passage, Grágás, chap. xxxvii (vol. ii. pp. 71-73 of the Arnæmagnæan edition).

ment. No verses are to be made on a man, even in his praise, without his leave first obtained; and one who teaches or repeats the verses made by another incurs an equal penalty, the remedy extending even to verses made against the memory of the dead. A love poem addressed to a woman is actionable, the action being brought by her guardian if she is under twenty years of age<sup>1</sup>.

Of the ramifications of the system of procedure into all sorts of Courts, besides the regular Þings, I have no space to speak; but one singular illustration of the faith which the Icelanders had in the efficacy of legal remedies deserves to be given, because in it these remedies reach beyond the present life. It comes from the *Eyrbyggja Saga*, one of the most striking of the old tales.

A chief named Thorodd, living at Fró á in Breiðifjörð, on the west side of Iceland, had just before Yule-tide been wrecked and drowned with his boat-companions in the fjord. The boat was washed ashore, but the bodies were not recovered. Thereupon his wife Thurið and his eldest son Kjartan bade the neighbours to the funeral feast; but on the first night of the feast, as soon as the fire was lighted in the hall, Thorodd and his companions entered, dripping wet, and took their seats round it. The guests welcomed them: it was held that those would fare well with Rán (the goddess of the deep sea) who attended their own funeral banquet. The ghosts, however, refused to acknowledge any greetings, and remained seated in silence till the fire had burnt out, when they rose and left. Next night they returned at the same time and behaved in the same way, and did so, not only every night while the feast lasted, but even afterwards. The servants at last refused to enter the fire-hall, and no cooking could be done, for when a fire was lit in another room, Thorodd and his companions went there instead. At last Kjartan had a second fire lit in the hall, leaving the big one to the ghosts, so the cooking could now be

<sup>1</sup> See Grágás, chaps. civ-cviii, pp. 143-156 of vol. ii. in the Arnamagnæan edition.

done. But men died in the house, and Thurið herself fell ill, so Kjartan sought counsel of his uncle Snorri, an eminent lawyer and the leading Goði of Western Iceland. By Snorri's advice Kjartan and seven others with him went to the hall door and formally summoned Thorodd and his companions for trespassing within the house and causing men's deaths. Then they named a Door-Court (Dyradómr) and set forth the suits, following all the regular procedure as at a Þing-Court. Verdicts were delivered, the cases summed up and judgement given; and when the judgement word was given on each ghost, each rose and quitted the hall, and was never seen thereafter.

Ghosts have given much trouble in many countries, but it is only the Icelanders who have dealt with them by an action of ejection.

Although it is a remarkable evidence of the political genius of the Norsemen that they should have been able to work at all a legal system such as has been described, it need hardly be said that it did not work smoothly. The Icelanders were a people of warriors, little accustomed to restrain their passions, and holding revenge for a sacred duty. The maintenance of order at the Alþing was entrusted to the Goði of the spot, and it was strictly forbidden to wear arms while the meeting lasted. The closing of the Alþing was called Vápnatak (weapon-taking, wapentake), because the arms that had been laid aside were taken when men started to ride home from the þing. But the arms were after all only left in the booth, and more than once it happened that the party which found itself unsuccessful in a lawsuit seized sword and spear and fought out the issue in a bloody battle, from which sprang again new blood-feuds and new lawsuits. It is not very often that the Sagas give us a glimpse of the conduct of business at the Alþing; but one such lawsuit, followed by a combat, which arose when the suit broke down on a technical point, is described with wonderful force and spirit in the famous

Saga of Njál Thorgeirsson, a masterpiece of literature in the freshness and brilliance of its narrative.

We hear occasionally of the passing of particular laws at an Alþing. In A. D. 994, for instance, it was enacted that the suit for compensation for homicide which was brought, according to the general practice of the northern nations, by and for the benefit of the nearest relatives of the slain, a right which has survived in the law of Scotland under the name of Assythment, and has been partially introduced into the law of England by the Act 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act), should in future not be brought by a woman or by a child under sixteen years of age, but by the nearest male relative. This provision was suggested by a case that had occurred just before, when inadequate compensation had been recovered for the slaughter of a chieftain named Arnkel, owing to the mismanagement of the suit by his widow. Again, in A. D. 1006 we are told of the abolition of the judicial combat on the occasion of an indecisive duel between the poet and Viking Gunnlaug Ormstunga (Snake's tongue<sup>1</sup>) and another poet named Hrafn, the details of which are recorded in one of the most beautiful and touching of the early Sagas. Gunnlaug had been betrothed to Helga the Fair, one of the most famous heroines of Icelandic story, but having been detained in England by King Ethelred II, whose guest he had previously been in London<sup>2</sup> and whose praises he had been celebrating in verse, had failed to return at the appointed time, and found Helga, who had yielded to the importunities of her relatives, already married to Hrafn. According to the custom of the North, which then allowed any man to require another either to give up his wife and all his property or defend her and it by arms, Gunnlaug came to the Alþing and

<sup>1</sup> So called from his satirical powers.

<sup>2</sup> The Saga says (*Gunnlaugs Saga Ormstungu*, chap. vii) that in the days of Ethelred son of Edgar (Aðalráðr Játgeirsson) the same tongue was spoken in England and Denmark as in Norway, and that this continued in England till William the Bastard won England, after whom Welsh (Valsk = French) was spoken.

formally challenged Hrafn, and they fought, each with his second, a solemn duel on the island in the Öxará which was set apart for that purpose. A dispute arose after the first encounter, and the combatants were separated. Gunnlaug wished to resume the combat, but the law already referred to, prohibiting formal duels in future, was passed next day by the Lögrétta; and he unwillingly obeyed, for a breach of it would have exposed him to the penalties of outlawry. Helga, however, refused to live any longer with her husband Hrafn, and next year the two rivals sailed by agreement to Norway, just as, fifty years ago, persons fearing to fight a duel in England used to cross to Calais for the purpose. Years passed before they met in the wild country east of Throndhjem. There they fought out their quarrel. Gunnlaug smote off his enemy's foot, and then proposed to stop the combat. Hrafn however, supporting himself against a tree, wished to fight on, but as he was tortured by thirst, he besought his opponent to fetch him a draught of water from a brook hard by, promising not to deceive him. The chivalric Gunnlaug brought the water in his helmet, whereupon Hrafn, taking the water with his left hand, suddenly raised his sword and, with all his remaining strength, smote Gunnlaug on his bared head. 'Thou hast done ill and deceived me,' said Gunnlaug, 'seeing that I trusted you.' 'So is that,' answered Hrafn, 'but I grudged thee the love of Helga the Fair.' Then they fought on. Hrafn was slain, and in a few hours Gunnlaug died of his wounds<sup>1</sup>. The news was brought to Iceland, and after a time Helga, thinking ever of Gunnlaug, and often spreading out upon her knees a garment which Gunnlaug had given to her, pined away and died likewise.

Another striking scene at the Alþing has been pre-

<sup>1</sup> The Saga adds that very shortly after the combat, and long before the news of it could have reached Iceland, the ghosts both of Gunnlaug and of Hrafn appeared in dreams to their respective fathers in Iceland, and recited poems describing their deaths. Illugi the Black, Gunnlaug's father, remembered the poem he heard and repeated it aloud next day. The Saga gives both poems. This is one of the earliest Teutonic instances of a death-apparition.

served to us in the Saga which relates the introduction of Christianity. King Olaf Tryggvason, the most brilliant of all the Norwegian sovereigns, who, having been himself converted some ten years before, was hard at work converting the stubborn Norwegians by burning their houses and torturing themselves, had sent two missionaries to Iceland, one of whom, the priest Thangbrand, had been obliged to leave Norway on account of his violent life, and who signalized himself in Iceland by committing two murders in the course of his five months' stay, which was then summarily shortened. The unworthiness of the minister, however, does not seem to have injured the cause he championed. Several men of note embraced the new faith, which was of course well known to the Icelanders from their intercourse with Ireland and Britain, and had the promise of the future to recommend it. These men, and also some heathen chieftains who thought that acceptance was the best way of avoiding civil war, supported the envoys of Olaf, when, at the Alþing of the year 1000, they urged upon the assembly to decree the abolition of paganism. A story goes that, while the debate was at its height, a messenger arrived to tell that a volcano had broken out thirty miles to the south, and was pouring a flood of lava over the pastures. The heathen party accepted the news as an omen, and exclaimed, 'This is the wrath of the gods at these new rites; see what you have to expect from their anger!' 'With whom, then,' said Snorri, a leading Goði who had not yet declared himself, 'with whom were the gods angry when this rock was molten on which we stand?' (pointing to the deep lava rifts that lay around the Lögberg). By the interposition of the Law-Speaker Thorgeir, that which he described as a compromise, but which was in reality a surrender by the heathen party, was at the same Alþing accepted. The people were to be baptized and declare themselves Christians, and the temples and images of the old gods were to be destroyed; but those who liked to sacrifice at home

might continue to do so; and two heathen customs, the exposure of new-born infants and the eating of horse-flesh, were to be permitted. Some difficulty arose over the reluctance of those who came from the North and East Quarters of the island to submit to immersion in cold water; but this difficulty was happily overcome by the use of the hot springs at Reykir for the rite.

The century and a half that followed the introduction of Christianity was the most brilliant period in the history of the island. It was not indeed a time of peace, for the old passions and the old superstitions were but little altered. Slayings and burnings of houses with their inmates went on pretty much as before. But there was now added to the stimulus which their free republican life and their piratical expeditions gave to the national spirit the influence of the learning and ideas which came in the train of the new faith. The use of writing soon spread, and the magnificent Sagas, which are among the noblest monuments of Northern genius, were nearly all of them produced in this age, though some were not committed to parchment before the end of the twelfth century.

For many years the Constitution of the Republic seems to have undergone no great alteration. The establishment of Christianity did indeed throw considerable power into the hands of the two bishops, and eventually produced a strife between the Church and the temporal magnates resembling that which distracted both the Romano-Germanic Empire and England. This scarcely affected the position of the Goði, whose authority had now lost so much as it originally possessed of a religious character. Snorri, whose appeal to geology is said to have decided the Alþing against paganism, was himself the priest of the most famous heathen sanctuary of the island. But in the beginning of the thirteenth century the delicately-framed fabric of the Republican Constitution began to break up. The tendency of a federation usually is to become less of a federation and more

of a single united state. But in Iceland the federal bond, if one can use this name, was always weak, and when a powerful member became disobedient, there were no legal means of reducing him to submission. By degrees the number of priest-chieftainships diminished, the *Goðorðs*, which passed not only by inheritance but also by gift or sale, coming to be accumulated in the hands of a few great families, who thus acquired a predominant influence at the *Alþing*, were virtually masters of large districts of the country, and marched about like feudal lords attended by petty armies. Thus the old blood-feuds assumed more and more the aspect of civil wars. Piracy was now less practised, because the countries which had formerly been ravaged were better prepared for defence, so the energy that used to spend itself upon the coasts of Scotland and Ireland, of North Germany and Gaul, was now turned inward, and with fatal results.

I am not writing the history of Iceland, though indeed I wish I were doing so, for the theme is a fascinating one. But before closing these scattered observations, intended to stimulate rather than to satisfy curiosity, I will add three remarks suggested by the sketch that has been given.

The first remark is that Iceland presents one of the few instances in history of a breach in the continuity of institutional development. The settlers were all of Norse stock; and Norway had in its petty communities a rudimentary system of institutions not unlike that described by Tacitus in his account of Germany, or that which the conquering Angles and Saxons brought to Britain. Each community was an independent *Fylki* (folk). In each *Fylki* there was a number of nobles, one of whom stood foremost as hereditary chieftain, and a body of warlike freemen, as well as a certain number of slaves. In each there was a popular assembly, the *þing*, corresponding to our Saxon Folk Mot. Now owing to the way in which the settlers had planted themselves along the coasts of Iceland, and to the fact that they

were less closely aggregated there than men had been in Norway, this organization did not reappear in the new land. There was indeed everywhere a þing, for the habit of meeting to deal with lawsuits and other matters of common interest was cherished as the very foundation of society. But an Icelandic community was not a Fylki. It was not an old natural growth, but rather a group of families whose tie was at first only that of local proximity and thereafter that also of worship at a common temple. The Goði, though he became the centre of this group, was not a chieftain with a hereditary claim to leadership, and was not necessarily of any higher lineage than some of his þingmen. Such eminent and high-born men as Njál for instance and Egil Skallagrímsson were not Goðis. The Goðorð was really a new institution, due to the special circumstances of Iceland, and apparently without precedent among the Teutonic races. Still more plainly was the organization of the Republic with its scheme of Courts and its Lögrétta a new creation, due to the wisdom and public spirit of the leading men of the nation, and not a purely natural growth.

Secondly, as the Icelandic Republic is a new form of political society, so the Alþing, in which the unity of the Republic found visible expression, is a unique body, which cannot be referred to any one of the familiar types of assembly. It is not a Primary Assembly, for though all freemen are present, only a limited number of persons are entitled to exercise either judicial or legislative functions. Neither is it a Representative Assembly, for no one was elected to sit in it as a delegate from others. The Goðis sat each by his own right, and the other members as nominees of the Goðis. Neither again is it a sort of King's Council, like the Curia Regis of mediaeval England, consisting of magnates and official advisers summoned by a monarch. If parallels to it are to be sought, they are to be sought rather in bodies such as the Roman Senate may have been in its earlier form, a

sort of council of the heads of organized communities; yet the differences between the Roman *gentes* and the Icelandic Þingmen, and the absence of an executive magistrate like the Roman king, make the parallel anything but close. Still more remote is the resemblance which the Alþing might be deemed to bear to the council of a league, such as was the Swiss Confederation before 1799, or such as the Diet of the Romano-Germanic Empire in its later days.

The comparison of Iceland to a federation suggests a third question. Why did not the Republic develop into a united State, whether republican or monarchical, as did most of the nations of mediæval Europe?

Out of several reasons that might be assigned I will mention three only, two of them political, the third physical.

In Iceland there was no single great family with any hereditary claim to stand above the others, while all the leading families were animated by a high sense of pride and a pervading sentiment of equality. This love of equality remains among the sons of the old Norsemen both in Iceland and in Norway, and is indeed stronger there than anywhere else in Europe.

Iceland had not, and could not have, any foreign wars. There was therefore no external strife to consolidate her people, no opportunity for any leader to win glory against an enemy, or to create an army on which to base his power. All the wars were civil wars, and tended to disunion.

The third reason is to be found in the nature of the country. The island, larger than Ireland, has practically no land fit for tillage, and very little fit even for pasture. Neither has it any internal trade. The interior is occupied by snow mountains and glaciers and lava-fields and wastes of black volcanic sand or pebbles. Iceland is really one huge desert with some habitable spots scattered along its coasts. It was the Desert that most of all destroyed the chances of political unity under a re-

public by dividing the people into numerous small groups, far removed from one another, and in many places severed by rugged and barren wastes, or by torrents difficult to cross.

Nevertheless, although the Republic was evidently destined to perish, it is possible that had Iceland been left to herself the rivalry of the two or three great factions which divided it, and were usually in arms against one another, would have ended in the triumph of one of them, and in the establishment of a monarchy, or (less probably) of several independent rival principalities. But a new and more formidable figure now appeared on the scene. The successors of King Harald the Fair-haired had always held that the Icelanders, since their ancestors had come from Norway, ought to own their supremacy<sup>1</sup>, and they argued that as monarchical government was divinely appointed, and prevailed everywhere in Continental Europe, no republic had a right to exist. King Hákon Hákonsson (Hákon IV), one of the greatest among the kings of Norway, now found in the distracted state of the island a better opportunity of carrying out the plans which his predecessors Olaf Tryggvason and Olaf the Saint had been obliged, by the watchfulness of the Alþing, to abandon. By bribes and by threats, by drawing the leading Icelanders to his Court, and sending his own emissaries through the island, he succeeded in gaining over the few chiefs who now practically controlled the Alþing, and at the meeting of midsummer, A. D. 1262 (one year before the battle of Largs, which saved Scotland from the invasion of this very Hákon), the Southern, Western and Northern Quarters accepted the King of Norway as their sovereign, while in 1264 (the year of the summoning of the first representative Parliament of England by Earl Simon de Montfort) the remaining districts which had

<sup>1</sup> This claim of a Crown to the allegiance of emigrants who had passed into new lands reminds one of that made by the British Government, down to 1852 and 1854, as respects the Dutch farmers who had gone forth into the wilderness of South Africa in 1836.

not yet recognized the Norwegian Crown, now held by Magnus son of Hákon, made a like submission. Thenceforward Iceland has followed the fortunes first of Norway and then of Denmark. In 1814, when Norway was severed from the Danish and transferred to the Swedish Crown, Iceland ought to have gone with Norway. But nobody at the Congress of Vienna knew or cared about the matter<sup>1</sup>: and so Iceland remains attached to Denmark, for which she has little love.

With the free republic the literature which had given it lustre withered up and disappeared. Only one work of high merit, the religious poem called *The Lily*, was produced in the centuries that succeeded down to the Reformation, when the spirit of the people was again stirred, and a succession of eminent writers began which has never failed down to our own day. But in the darkest times, in the ignorance and gloom of the fifteenth century, in the pestilences and famine caused by the terrible volcanic eruptions of the eighteenth, which are said to have destroyed one-fifth of the population, the Icelanders never ceased to cherish and enjoy their ancient Sagas. No farmhouse wanted its tiny store of manuscripts, which were and still are read aloud in the long nights of winter, while the women spin and the men make nets and harness. And it is beyond doubt chiefly owing to the profusion and the literary splendour of these works of a remote antiquity—works produced in an age when England and Germany, Italy and France had nothing better than dull monkish annalists or the reciters of such a tedious ballad epic as the *Song of the Nibelungs*—that the Icelandic language has preserved its ancient strength and purity, and that the Icelandic nation, a handful of people scattered round the edge of a vast and dreary wilderness, has maintained itself, in face of the overwhelming forces of nature, at so high a level of culture, virtue and intelligence.

<sup>1</sup> The preliminaries to the Treaty of Kiel by which Norway was severed from the Danish Crown to be attached to the Swedish refer to Iceland, the Faeroe Isles, and Greenland as having 'never belonged to Norway.'

## VI

# THE UNITED STATES CONSTITUTION AS SEEN IN THE PAST

### THE PREDICTIONS OF HAMILTON AND TOCQUEVILLE

HE who desires to discover what have been the main tendencies ruling and guiding the development of American institutions, will find it profitable to examine what were the views held and predictions delivered, at different epochs in the growth of the Republic, by acute and well-informed observers. There is a sort of dramatic interest in this method of inquiry, and it is calculated to temper our self-confidence in judging the phenomena of to-day. Besides, it helps us to realize, better than we can do merely by following the course of events, what aspect the political landscape wore from time to time. When we read a narrative, we read into the events our knowledge of all that actually flowed from them. When we read what the contemporary observer expected from them as he saw them happening we reach a truer comprehension of the time.

To collect and set forth a representative anthology of political prophecies made at critical epochs in the history of the United States, would be a laborious undertaking, for one would have to search through a large number of writings, some of them fugitive writings, in order to present adequate materials for determining the theories and beliefs prevalent at any given period. I attempt

nothing so ambitious. I desire merely to indicate, by a comparatively simple example, how such a method may be profitably followed, disclaiming any pretensions to dig deep into even the obvious and familiar materials which students of American history possess.

For this purpose, then, I will take two famous books—the one written at the very birth of the Union by those who watched its cradle, and recording incidentally, and therefore all the more faithfully, the impressions and anticipations of the friends and enemies of the infant Constitution; the other a careful study of its provisions and practical working by a singularly fair and penetrating European philosopher. I choose these books not only because both are specially representative and of rare literary merit, but because they are easily accessible to European as well as American readers, who may, by referring to their pages, supply the omissions which want of space will compel me to make, and may thereby obtain a more full and graphic transcript of contemporary opinion. One of these books is *The Federalist*<sup>1</sup>—a series of letters recommending the proposed Constitution for adoption to the people of New York, written in 1788 by Alexander Hamilton, afterwards Secretary of the Treasury, James Madison, afterwards President from 1809 to 1817, and John Jay, afterwards Chief Justice from 1789 to 1795. They were all signed *Publius*. The other, which falls not quite halfway between 1788 and our own time, is the *Democracy in America* of Alexis de Tocqueville.

## I. THE UNITED STATES AT THE ADOPTION OF THE CONSTITUTION.

I begin by briefly summarizing the record which *The Federalist* preserves for us of the beliefs of the opponents and advocates of the Draft Constitution of 1787 regard-

<sup>1</sup> There are several good editions of *The Federalist*. The latest and one of the best known to me is that edited by Mr. Paul Leicester Ford (New York, 1898).

ing the forces then at work in American politics and the probable future of the nation.

To understand those beliefs, however, we must bear in mind what the people of the United States then were, and for that purpose I will recall the reader's attention to some of the more salient aspects of the Republic at the epoch when its national life began.

In 1783 the last British soldier quitted New York, the last stronghold that was held for King George. In 1787 the present Constitution of the United States was framed by the Convention at Philadelphia, and in 1788 accepted by the requisite number of States (nine). In 1789 George Washington entered on his Presidency, the first Congress met and the machine began to work. It was a memorable year for Europe as well as for America—a year which, even after the lapse of more than a century, we are scarcely yet ripe for judging, so many sorrows as well as blessings, *πολλὰ μὲν ἐσθλὰ μεμιγμένα, πολλὰ δὲ λυγρά*, were destined to come upon mankind from those elections of the States-General which were proceeding in France while Washington was being installed at Philadelphia.

All of the thirteen United States lay along the Atlantic coast. Their area was 827,844 square miles, their population 3,929,214, little more than half the population of New York State in 1900. Settlers had already begun to cut the woods and build villages beyond the Alleghanies; but when Kentucky was received as a State into the Union in 1792, she had a population of only 80,000. The population was wholly of English (or Anglo-Scottish) stock, save that a few Dutch were left in New York, a few persons of Swedish blood in Delaware, and some isolated German settlements in Pennsylvania. But in spite of this homogeneity the cohesion of the States was weak. Communication was slow, difficult and costly. The jealousies and suspicions which had almost proved fatal to Washington's efforts during the War of Independence were still rife. There was some real conflict,

and a far greater imagined conflict, of interests between the trading and the purely agricultural States, even more than between the slave States and those in which slavery had practically died out. Many competent observers doubted whether the new Federal Union, accepted only because the Confederation had proved a failure and the attitude of foreign powers was threatening, could maintain itself in the face of the strong sentiment of local independence animating the several colonies, each of which, after throwing off the yoke of Britain, was little inclined to brook any control but that of its own legislature. The new Constitution was an experiment, or rather a bundle of experiments, whose working there were few data for predicting. It was a compromise, and its own authors feared for it the common fate of compromises—to satisfy neither party and to leave open rents which time would widen. In particular, it seemed most doubtful whether the two branches of the Legislature, drawn from so wide an area and elected on different plans, would work harmoniously, and whether general obedience would be yielded to an executive President who must necessarily belong to and seem to represent one particular State and section of the country. Parties did not yet exist, for there was as yet hardly a nation; but within a decade they grew to maturity and ferocity. One of them claimed to defend local self-government, the rights of the people, democratic equality; the other, the principle of national unity and the authority of the Federal power. One sympathized with France, the other was accused of leaning to an English alliance. They were, or soon came to be, divided not merely on burning questions of foreign policy and home policy, but also—and this was an issue which mixed itself up with everything else—as to the extent of the powers to be allowed to the central Government and its relations to the States—questions which the curt though apparently clear language of the Constitution had by no means exhausted.

Slavery was not yet a burning question—indeed it existed to some slight extent in the Middle as well as in the Southern States, but the opposition of North and South was already visible. The Puritanism of New England, its industries and its maritime commerce, gave it different sentiments as well as different interests from those which dominated the inhabitants of the South, a population wholly agricultural, among whom the influence of Jefferson was strong, and theories of extreme democracy had made progress.

There was great diversity of opinion and feeling on all political questions in the America of those days, and the utmost freedom in expressing it. Over against the extreme democrats stood an illustrious group whose leader was currently believed to be a monarchist at heart, and who never concealed his contempt for the ignorance and folly of the crowd. Among these men, and to a less extent among the Jeffersonians also, there existed no small culture and literary power, and though the masses were all orthodox Christians and, except in Maryland, orthodox Protestants, there was no lack of scepticism in the highest circles. One may speak of highest circles, for social equality, though rapidly advancing and gladly welcomed, was as yet rather a doctrine than a fact: and the respect for every kind of authority was great. There were neither large fortunes nor abject poverty: but the labouring class, then far less organized than it is now, deferred to the middle class, and the middle class to its intellectual chiefs. The clergy were powerful in New England: the great colonial families enjoyed high consideration in New York, in Pennsylvania, and above all in Virginia, whose landowners seemed to reproduce the later semi-feudal society of England. Although all the States were republics of a hue already democratic, every State constitution required a property qualification for the holding of office or a seat in the Legislature, and, in most States, a similar condition was imposed even on the exercise of the

suffrage. Literary men (other than journalists) were rare, the universities few and old-fashioned in their methods, science scarcely pursued, philosophy absorbed in theology and theology dryly dogmatic. But public life was adorned by many striking figures. Five men at least of that generation, Washington, Franklin, Hamilton, Jefferson and Marshall, belong to the history of the world; and a second rank which included John Adams, Madison, Jay, Patrick Henry, Gouverneur Morris, Roger Sherman, James Wilson, Albert Gallatin, and several other gifted figures less familiar to Europe, must be mentioned with respect.

Everybody professed the principles of the Declaration of Independence, and therefore held a republican form of government to be the only proper, or at any rate the only possible form for the central authority as well as for the States. But of the actual working of republican governments there was very little experience, and of the working of democracies, in our present sense of the word, there was really none at all beyond that of the several States since 1776, when they broke loose from the British Crown. Englishmen are more likely than other Europeans to forget that in 1788 there was in the Old World only one free and no democratic nation<sup>1</sup>. In Europe there now remain but two strong monarchies, those of Russia and Prussia, while the Western hemisphere, scarcely excepting Dutch and British Guiana and Canada, is entirely (at least in name) republican. But the world of 1788 was a world full of monarchs—despotic monarchs—a world which had to go back for its notions of popular government to the commonwealths of classical antiquity. Hence the speculations of those times about the dangers, and merits, and tendencies characteristic of free governments, were and must needs be vague and fantastic, because the materials for a sound induction were wanting. Wise men,

<sup>1</sup> The Swiss Confederation was hardly yet a nation, and few of the cantons were governed democratically.

when forced to speculate, recurred to the general principles of human nature. Ordinary men went off into the air and talked at large, painting a sovereign people as reckless, violent, capricious on the one hand, or virtuous and pacific on the other, according to their own predilections, whether selfish or emotional, for authority or for liberty. Though no one has yet written the natural history of the masses as rulers, the hundred years since 1788 have given us materials for such a natural history surpassing those which Hamilton possessed almost as much as the materials at the disposal of Darwin exceeded those of Buffon. Hence in examining the views of the *Federalist* writers<sup>1</sup> and their antagonists, we must expect sometimes to find the diagnosis inexact and the prognosis fanciful.

## II. PREDICTIONS OF THE OPPONENTS AND ADVOCATES OF THE CONSTITUTION.

Those who opposed the Draft Constitution in 1787, a party both numerous and influential in nearly every State, were the men specially democratic and also specially conservative. They disliked all strengthening of government, and especially the erection of a central authority. They were satisfied with the system of sovereign and practically independent States. Hence they predicted the following as the consequences to be expected from the creation of an effective Federal executive and legislature<sup>2</sup>.

I. The destruction of the States as commonwealths. The central government, it was said, would gradually encroach upon their powers; would use the federal army

<sup>1</sup> Of these writers Hamilton must be deemed the leading spirit, not merely because he wrote by far the larger number of letters, but because his mind was more penetrating and commanding than either Madison's or Jay's. Madison rendered admirable service in the Philadelphia Convention of 1787, but afterwards yielded to the influence of Jefferson, a character with less balance but more force and more intellectual fertility.

<sup>2</sup> I take no account of those objections to the Constitution which may be deemed to have been removed by the first eleven amendments.

to overcome their resistance; would supplant them in the respect of their citizens; would at last swallow them up. The phrase 'consolidation of the Union,' which had been used by the Convention of 1787 to recommend its draft, was laid hold of as a term of reproach. 'Consolidation,' the absorption of the States by or into one centralized government, became the popular cry, and carried away the unthinking.

2. The creation of a despot in the person of the President. His legal authority would be so large as not only to tempt him, but to enable him, to extend it further, at the expense of the liberties both of States and of people. 'Monarchy,' it was argued, 'thrown off after such efforts, will in substance return with this copy of King George III, whose command of the federal army, power over appointments, and opportunities for intriguing with foreign powers on the one hand and corrupting the legislature on the other<sup>1</sup>, will render the new tyrant more dangerous than the old one. Or if he be more open to avarice than to ambition, he will be the tool of foreign sovereigns and the means whereby they will control or enslave America<sup>2</sup>.

3. The Senate will become an oligarchy. Sitting for six years, and not directly elected by the people, it 'must gradually acquire a dangerous pre-eminence in

<sup>1</sup> See *The Federalist*, No. LIV.

<sup>2</sup> *The Federalist*, No. LXVI, p. 667. 'Calculating upon the aversion of the people to monarchy, the writers against the Constitution have endeavoured to enlist all their jealousies and apprehensions in opposition to the intended President of the United States, not merely as the embryo but as the full-grown progeny of that detested parent. They have to establish the pretended affinity, not scrupled to draw resources even from the regions of fiction. The authority of a magistrate in few instances greater, in some instances less, than those of a Governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendour to those of a King of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.'

These were the days when Johnson and Gibbon ruled English style.

the government, and finally transform it into a tyrannical aristocracy<sup>1</sup>.’

4. The House of Representatives will also, like every other legislature, aim at supremacy. Elected only once in two years, it will forget its duty to the people. It will consist of ‘the wealthy and well-born,’ and will try to secure the election of such persons only as its members<sup>2</sup>.

5. The larger States will use the greater weight in the government which the Federal constitution gives them to overbear the smaller States.

6. The existence of a strong central government is not only likely, by multiplying the occasions of diplomatic intercourse with foreign powers, to give openings for intrigues by them dangerous to American independence, but likely also to provoke foreign wars, in which the republic will perish if defeated, or if victorious maintain herself only by vast expenditure, with the additional evil of having created in an army a standing menace to freedom.

That some of these anticipations were inconsistent with others of them was no reason why even the same persons should not resort to both in argument. Any one who wishes to add to the number, for I have quoted but a few, being those which turn upon the main outlines of the Philadelphia draft, may do so by referring to the record, known at Elliott’s Debates, of the discussions in the several State Conventions which deliberated on the new Constitution. It is an eminently instructive record.

I pass from the opponents of the Constitution to its advocates. Hamilton and its friends sought in it a remedy against what they deemed the characteristic dangers of popular government. It is by dwelling on these dangers that they recommend it. We can perceive, however, that, while lauding its remedial power,

<sup>1</sup> *The Federalist*, No. LXII.

<sup>2</sup> *The Federalist*, Nos. LVI and LIX.

they are aware how deep-seated such dangers are, and how likely to recur even after the adoption of the Constitution. The language which Hamilton held in private proves that he desired a more centralized government, which would have approached nearer to that British Constitution which he regarded as being, with all its defects (and partly owing to its corruptions!) the best model for free nations<sup>1</sup>. He feared anarchy, and thought that only a strong national government could avert it. And in a remarkable letter written in February, 1802, under the influence of disappointment with the course events were then taking, he describes, in his somewhat sweeping way, the Constitution he was 'still labouring to prop' as a 'frail and worthless fabric.'

We may therefore legitimately treat his list of evils to be provided against by the new Federal Government as indicating the permanently mischievous tendencies which he foresaw. Some of them, he is obliged to admit, cannot be wholly averted by any constitutional devices, but only by the watchful intelligence and educated virtue of the people.

The evils chiefly feared are the following:—

1. The spirit and power of faction, which is so clearly the natural and necessary offspring of tendencies always present in mankind, that wherever liberty exists it must be looked for<sup>2</sup>.

Its causes are irremovable; all you can do is to control its effects, and the best prospect of overcoming them is afforded by the representative system and the wide area of the United States with the diversities among its population.

2. Sudden impulses, carrying the people away and inducing hasty and violent measures<sup>3</sup>.

3. Instability in foreign policy, due to changes in the

<sup>1</sup> Though he, like other observers of that time, had not realized, and might not have relished, the supremacy, now become omnipotence, which the House of Commons had already won.

<sup>2</sup> *The Federalist*, No. X (written by Madison), and in other letters.

<sup>3</sup> *The Federalist*, No. LXII.

executive and in public sentiment, and rendering necessary the participation of a comparatively small council or Senate in the management of this department.

4. Ill-considered legislation. 'Facility and excess of law-making<sup>1</sup>,' and 'inconstancy and mutability in the laws<sup>2</sup>,' form the 'greatest blemish in the character and genius of our governments.'

5. The Legislature is usually the strongest power in free governments. It will seek, as the example of the English Parliament shows, to encroach upon the other departments; and this is especially to be feared from the House of Representatives as holding the power of the purse<sup>3</sup>.

6. The States, and especially the larger States, may overbear the Federal Government. They have closer and more constant relations with the citizen, because they make and administer the ordinary laws he lives under. His allegiance has hitherto belonged to them, and may not be readily given to the central authority. In a struggle, should a struggle come, State power is likely to prevail against Federal power.

7. There is in republics a danger that the majority may oppress the minority. Already conspicuous in some of the State governments, as for instance in Rhode Island, this danger may be diminished by the application of the federal system to the great area of the Union, where 'society will be broken into so many parts, interests, and classes of citizens, that the rights of individuals or of the minority will be in little danger from interested combinations of the majority<sup>4</sup>.'

8. Another source of trouble is disclosed by the rash

<sup>1</sup> *The Federalist*, No. LXI.

<sup>2</sup> *The Federalist*, No. LXXII.

<sup>3</sup> 'The Legislative Department is everywhere (*i. e.* in all the States) extending the sphere of its activity and drawing all power into its impetuous vortex. . . . It is against the enterprising ambition of this department that the People ought to indulge all their jealousy and exhaust all their precautions' (*The Federalist*, No. XLVII). The people have now begun to resort to precautions; but it is not the ambition of State legislatures that is feared, it is their subserviency to private interests or the party machine.

<sup>4</sup> *The Federalist*, No. L.

and foolish experiments which some States have tried in passing laws which threaten the validity of contracts and the security of property. There are also signs of weakness in the difficulty which State Governments have found in raising revenue by direct taxation<sup>1</sup>. Citizens whose poverty does not excuse their want of public spirit refuse to pay; and the administration fears to coerce them.

Not less instructive than the fears of *The Federalist* writers are their hopes. Some of the perils which have since been disclosed are not divined. Some institutions which have conspicuously failed are relied on as full of promise.

The method of choosing the President is recommended with a confidence the more remarkable because it was the point on which the Convention had been most divided and had been latest in reaching an agreement.

‘If the manner of the appointment of the Chief Magistrate be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be wished for. . . . The process of election affords a moral certainty that the office of President will never fall to the lot of any one who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honours in a single State, but it will require other talents and a different kind of merit to establish him in the confidence and esteem of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue<sup>2</sup>.’

<sup>1</sup> *The Federalist*, No. XII.

<sup>2</sup> *The Federalist*, No. LXVII. In A. D. 1800, twelve years after Hamilton wrote this passage, the contest for the Presidency lay between Jefferson and Aaron Burr, and Hamilton was compelled by his sense of Burr's demerits to

It is assumed that America will continue an agricultural and (to a less extent) a commercial country, but that she will not develop manufactures; and also that the fortunes of her citizens will continue to be small<sup>1</sup>. No serious apprehensions regarding the influence of wealth in elections or in politics generally are expressed.

The contingency of a division of the States into two antagonistic groups is not contemplated. When the possibility of State combinations is touched on, it is chiefly with reference to the action of small and of large States respectively. In particular no hint is dropped as to the likelihood of the institution of slavery becoming a bond to unite the Southern States and a cause of quarrel between them and the Northern. Yet slavery had given trouble in the Philadelphia Convention, and an opposition of North and South grounded upon it soon emerged.

Although the mischiefs of faction are dwelt on, nothing indicates that its embodiment in highly developed party systems, whose organizations might overshadow the legal government, had occurred to any one's mind. Still less, of course, is there any anticipation of the influence to be exerted on politics by the distribution of offices. Not till long afterwards were they treated as 'spoils of war.'

urge his party to vote (when the choice came before the House of Representatives) for Jefferson, his own bitter enemy. What he thought of Burr, who, but for his intervention, would certainly have obtained the chief magistracy of the nation (and by whose hand he ultimately died), may be inferred from the fact that he preferred as President the man of whom he thus writes: 'I admit that his (Jefferson's) politics are tinctured with fanaticism; that he is too much in earnest in his democracy; that he has been a mischievous enemy to the principal measures of our past administration; that he is crafty and persevering in his objects; that he is not scrupulous about the means of success, nor very mindful of truth; and that he is a contemptible hypocrite. But, &c.' (Letter to James A. Bayard, Jan. 16, 1801.)

After this it is superfluous, as it would be invidious, to dwell on the deficiencies of some recent Presidents or Presidential candidates.

<sup>1</sup> 'The private fortunes of the President and Senators, as they must all be American citizens, cannot possibly be sources of danger' (*The Federalist*, No. LIV).

## III. CRITICISM OF THE PREDICTIONS OF 1788.

Let us now see which of these views and forecasts have been verified by the event.

Of those put forth by the opponents of the Constitution not one has proved true. The States are still strong, the President is not a despot, though for a time during the Civil War he came near being one, nor has he ever fallen under the influence of any European power. The House does not consist of the 'wealthy and well-born.' The larger States do not combine against nor press hardly on the smaller. No great country has had so few wars or indeed so few foreign complications of any kind<sup>1</sup>. The Senate is still often called 'an oligarchy,' but this means only that it consists of comparatively few persons, most of them wealthy, and that it has a strong corporate feeling in favour of the personal interests of each of its members. It is really as dependent on public opinion as the House, perhaps even more afraid of public opinion, and as directly the creature of party machinery, though less directly of popular election.

One is surprised to find that of the many arrows of accusation levelled at the Constitution, all should have flown wide of the mark.

The deeper insight and more exact thinking of Hamilton and Madison fastened upon most of the real and permanent weaknesses in popular government. Yet even they could not foresee the particular forms which those weaknesses would assume in the new nation. To examine in detail the eight points specified above would involve an examination of American history for a century. I shall therefore simply indicate in a word or two the extent to which, in each case, the alarms or predictions of *The Federalist* may be deemed well grounded.

<sup>1</sup> Three wars since 1789; that of 1812, that of 1845, and that of 1898. Every one of these might no doubt have been avoided with honour, and two of them savoured of aggression, but the same may be said of nearly all the wars of European States.

1. The spirit of faction has certainly, as Madison expected, proved less intense over the large area of the Union than it did in the Greek republics of antiquity or in the several States from 1776 to 1789. On the other hand, the bonds of sympathy created by the Federal system have at times enabled one State to infect another with its own vehemence. But for South Carolina, there would have been no secession in 1861. Since 1880 the 'demon of faction' has been less powerful in the parties than at any previous date since the so-called 'Era of Good Feeling' in 1820.

2. Sudden popular impulses there have been. But finding a ready and constitutional expression in elections, they do not induce a resort to arms, while the elaborate system of checks on legislation seldom allows them to result in the passing of dangerous measures by Congress. In some States the risk of bad laws is serious, but it is lessened by the provisions of the Federal Constitution as well as by the veto power of the State Governor and the restrictions of recent State Constitutions.

3. The early history of the Union furnishes illustrations of feebleness and inconstancy in foreign policy, yet not greater than those which mark most monarchies. Royal caprice, or the influence of successive favourites, has proved more pernicious in absolute kingdoms or principalities than popular fickleness in republics. That the foreign policy of the United States was singularly consistent down till 1898, when it suddenly took an entirely 'new departure,' was not due to the Senate. It must be credited partly to the good sense of the people, partly to the fact that the position and interests of the nation prescribed certain broad and simple lines.

4. Whatever may be thought of its handling of private bills, Congress was seldom prone to haste or reckless expenditure in legislation on public matters, until it passed the amazing Pensions Act of 1890. Nor has it given the country too many laws. It has been on the whole more blameable for what it neglects or postpones

than for what it enacts. The censure is more true of the States, especially the newer Western States.

5. The House of Representatives has doubtless sought to extend its sway at the expense of other departments. Whether it has succeeded is a question on which competent observers in America itself differ; but the fact of their differing proves that the encroachments have not been considerable. Whenever the President is weak or unpopular, Congress seems to be gaining on the Executive Chief. When the latter is or seems strong, he can keep the Legislature at bay.

6. In the struggle which never quite ceases, though it is often scarcely noticed, between the States and the Federal Government, the States have on the whole lost ground. Nor are the larger States practically more formidable than the small ones. The largest is small compared with the immense Union. No State would now venture to brave the Federal Judiciary as Georgia did, and for a time did successfully (1832), in one of the painful cases regarding the Cherokee Indians.

7. The so-called Tyranny of the Majority, a subject too large to be fully examined here<sup>1</sup>, has not hitherto proved a serious evil in America. This, however, is due rather to the character and habits of the people and their institutions generally than to the mere extent and population of the Union, on which the *Federalist* writers relied.

8. There has been some unwise Congressional legislation, especially in currency matters, and, of course, much more of unwise State legislation. But property is secure, and the sense of civic duty seems, on the whole, to be improving.

It will appear from this examination, and from the fact (noted a few pages back) that some remarkable developments which political life has taken never crossed the minds of the authors of *The Federalist*, that these wisest men of their time did not foresee what strike us

<sup>1</sup> The subject is discussed in the author's *American Commonwealth*, chaps. lxxxiv and lxxxv.

to-day as the specially characteristic virtues and faults of American democracy. Neither the spoils system nor the system of party nominations by wire-pullers crossed their minds. They did not foresee the inordinate multiplication of elections, nor the evils of confining eligibility for a seat in the legislature to a person resident in the electing district, nor the disposition to 'play down' to the masses by seductive proposals. That the power which money might come to exert lay quite out of their view is not to be wondered at, for no large fortunes then existed. No student of history will deem that these omissions detract from their greatness, for history teaches nothing more plainly than the vanity of predictions in the realm of what we call the moral and political sciences, in religion, in ethics, in sociology, in government and politics. Deep thinkers help us when they unfold those permanent truths of human nature which come everywhere into play. Historians help us when, by interpreting the past, they demonstrate what are the tendencies that have gone to create the present. Observers keen enough to interpret the underlying phenomena of their own time may help us by showing which of the tendencies now at work are likely to become ruling factors in the near future. But beyond the near future—that is to say, beyond the lifetime of the generation which already holds power—no true philosopher will venture. He may indulge his fancy in picturing the details of the remoter landscape; but he knows that it is a region fit for fancy, not for science. In the works of great thinkers there are to be found some happy guesses about times to come; but these are few indeed, compared with the prophecies whose worthlessness was so soon revealed that men forgot they had ever been made, or the dreams which, like those of Dante, idealized an impossible future from an irrevocable past.

As regards the views of Hamilton and Madison, who, be it remembered, do not present themselves as prophets, but as the censors of present evils which they

are seeking to remedy, it may be added that the Constitution which they framed and carried checked some of these very evils (*e.g.* the unjust law-making and reckless currency experiments of the State Legislatures); and that it was obviously impossible till the Federal government had begun to work to say how the existing forces could adapt themselves to it. Hamilton remarks in one of his letters that he holds with Montesquieu that a nation's form of government ought to be fitted to it as a suit of clothes is fitted to its wearer<sup>1</sup>. He would doubtless have added that one cannot make sure of the fit until the suit has been tried on.

We must remember, moreover, that the causes which have affected the political growth of America are largely causes which were in 1788 altogether beyond human ken. The cotton gin, Napoleon's willingness to sell Louisiana, steam communications by water and land, Irish and German immigration, have swayed the course of that history; but even the first of these factors had not risen over the horizon in that year, and the last did not become potent till halfway through the nineteenth century<sup>2</sup>.

What the sages of the Convention do show us are certain tendencies they discern in their contemporaries, *viz.* :—

Recklessness and unwisdom in the masses, producing bad laws.

Unwillingness to submit to or support a strong government.

Abuse by the majority of its legal power over the minority.

Indifference to national as compared with local and sectional interests, and consequent preference of State loyalty to national loyalty.

<sup>1</sup> 'I hold with Montesquieu that a government must be fitted to a nation as much as a coat to the individual; and consequently that what may be good at Philadelphia may be bad at Paris and ridiculous at Petersburg.' To Lafayette, Jan. 6, 1799.

<sup>2</sup> The first cargo of cotton was sent from America to Europe in 1791, and the cotton gin invented in 1793.

That each of these tendencies then existed, and might have been expected to work for evil, admits of no doubt. But if we ask American history what it has to say about their subsequent course, the answer will be that the second and third tendencies have declined, and do not at present menace the public welfare, while the first, though never absent and always liable to marked recrudescence, as the annals of the several States prove, has done comparatively little harm in the sphere of national government. As to the fourth, which Hamilton seems to have chiefly feared, it ultimately took the form, not of a general centrifugal force, impelling each State to fly off from the system, but of a scheme for the separation of the Southern or slave-holding States into a separate Confederacy, and in this form it received, in 1865, a crushing and apparently final defeat<sup>1</sup>.

#### IV. TOCQUEVILLE AND HIS BOOK.

Fifty-one years after the recognition of the independence of the United States, sixty-seven years before the beginning of the twentieth century, Alexis de Tocqueville published his *Democracy in America*, one of the few treatises on the philosophy of politics which has risen to the rank of a classic. His book, therefore, stands rather further than halfway back between our own days and those first days of the Republic which we know from the writings of the Fathers, of Washington, Jefferson, Adams, Hamilton, Madison. It offers a means of measuring the changes that had passed on the country during the half-century from the birth of the Union to the visit of its most famous European critic, and again from the days of that critic to our own.

It is a classic, and because it is a classic, one may venture to canvas it freely without the fear of seeming

<sup>1</sup> When we come to Tocqueville, we shall find him touching but lightly on the two first of the above tendencies (partly, perhaps, because he attends too little to the State governments), but emphasizing the third and fearing from the fourth the dissolution of the Union.

to detract from the fame of its author. The more one reads Tocqueville, the more admiration does one feel for the acuteness of his observation, for the delicacy of his analysis, for the elegant precision of his reasonings, for the limpid purity of his style; above all, for his love of truth and the elevation of his character. He is not only urbane, but judicial; not only noble, but edifying. There is perhaps no book of the generation to which he belonged which contains more solid wisdom in a more attractive dress.

We have here, however, to regard the treatise, not as a model of art and a storehouse of ethical maxims, but as a picture and criticism of the government and people of the United States. And before using it as evidence of their condition seventy years ago, we must appraise the reliance to be placed upon it<sup>1</sup>.

First let it be observed that not only are Tocqueville's descriptions of democracy as displayed in America no longer true in many points, but that in certain points they never were true. That is to say, some were true of America, but not of democracy in general, while others were true of democracy in general, but not true of America. It is worth while to attempt to indicate the causes of such errors as may be discovered in his picture, because they are errors which every one who approaches a similar task has to guard against. Tocqueville is not widely read in the United States, where the scientific, historical, and philosophical study of the institutions of the country, apart from the legal study of the Constitution, is of comparatively recent growth. He is less read than formerly in England and even in France. But his views of the American government and people have so passed into the texture of our thoughts that we cannot shake off his influence, and, in order to profit by it, are bound to submit his conclusions and predictions to a searching though always respectful examination.

<sup>1</sup> Some interesting remarks upon Tocqueville's tour in America and upon his views of American affairs may be found in President Gilman's Introduction to a recent edition (1898) of the English translation of Tocqueville's book.

The defects of the book are due to three causes. He had a strong and penetrating intellect, but it moved by preference in the *a priori* or deductive path, and his power of observation, quick and active as it was, did not lead but followed the march of his reasonings. It will be found, when his method is closely scrutinized, that the facts he cites are rather the illustrations than the sources of his conclusions. He had studied America carefully and thoroughly. But he wanted the necessary preparation for that study. His knowledge of England, while remarkable in a native of continental Europe, was not sufficient to show him how much in American institutions is really English, and explainable only from English sources.

He wrote about America, and meant to describe it fully and faithfully. But his heart was in France, and the thought of France, never absent from him, unconsciously coloured every picture he drew. It made him think things abnormal which are merely un-French; it made him attach undue importance to phenomena which seemed to explain French events or supply a warning against French dangers.

He reveals his method in the introduction to his book. He draws a fancy sketch of a democratic people, based on a few general principles, passes to the condition of France, and then proceeds to tell us that in America he went to seek the type of democracy—democracy pure and simple—in its normal shape.

‘J’avoue que dans l’Amérique, j’ai vu plus que l’Amérique; j’y ai cherché une image de la démocratie elle-même, de ses penchants, de son caractère, de ses préjugés, de ses passions.’

Like Plato in the *Republic*, he begins by imagining that there exists somewhere a type or pattern of democracy, and as the American Republic comes nearest to this pattern, he selects it for examination. He is aware, of course, that there must be in every country and people many features special to the country which reappear

in its government, and repeatedly observes that this or that is peculiar to America, and must not be taken as necessarily or generally true of other democracies. But in practice he underrates the purely local and special features of America, and often, forgetting his own scientific cautions, treats it as a norm for democracy in general. Nor does he, after finding his norm, proceed simply to examine the facts and draw inferences from them. In many chapters he begins by laying down one or two large principles, he develops conclusions from them, and then he points out that the phenomena of America conform to these conclusions. Instead of drawing the character of democracy from the aspects it presents in America, he arrives at its character by a sort of intuitive method, and uses those aspects only to point and enforce propositions he has already reached. It is not democracy in America he describes, but his own theoretic view of democracy illustrated from America. He is admirably honest, never concealing or consciously evading a fact which he perceives to tell against his theories. But being already prepossessed by certain abstract principles, facts do not fall on his mind like seeds on virgin soil. He is struck by those which accord with, he is apt to ignore those which diverge from, his preconceptions. Like all deductive reasoners, he is peculiarly exposed to the danger of pressing a principle too far, of seeking to explain a phenomenon by one principle only when it is perhaps the result of an accidental concurrence of several minor causes. The scholasticism we observe in him is due partly to this deductive habit, partly to his want of familiarity with the actualities of politics. An instance of it appears in his tendency to overestimate the value of constitutional powers and devices, and to forget how often they are modified, almost reversed, in practice by the habits of those who use them. Though no one has more judiciously warned us to look to the actual working of institutions and the ideas of the men who work them rather than to their letter, he has him-

self failed to observe that the American Constitution tends to vary in working from its legal theory, and the name Legislature has prevented him, like so many other foreign observers, from seeing in the English Parliament an executive as well as a law-making body.

In saying that he did not know England, I fully admit that his knowledge of that country and its free government was far beyond the knowledge of most cultivated foreigners. He had studied its history and had gathered from his reading the sentiments of its aristocracy and of its literary men. But he did not know the ideas and habits of the English middle class, with whom the Americans of his time might better have been compared, and he was not familiar—as how could a stranger be?—with the details of English politics and the working of the English judicial system. Hence he has failed to grasp the substantial identity of the American people with the English. He perceives that there are many and close resemblances, and traces much that is American to an English source. He has seen and described with perfect justness and clearness the mental habits of the English and American lawyer as contrasted with those of the French lawyer. But he has not grasped, as perhaps no one but an Englishman or an American can grasp, the truth that the American people of 1830 was a branch of the English people, modified in some directions by the circumstances of its colonial life and its more popular government, but in essentials the same. Hence much that was merely English appeared to Tocqueville to be American or democratic. The functions of the judges, for instance, in expounding the Constitution (whether of the Federation or of a State) and disregarding a statute which conflicts therewith, the responsibility of an official to the ordinary courts of the land, the co-existence of laws of a higher and lower degree of authority, seem to him to be novel and brilliant inventions instead of mere instances of general doctrines of English law, adapted to the circumstances of a colony

dependent on a home Government, or of a State partially subordinated to a Federal Government. The absence of what the French call 'Administration,' and the disposition to leave people to themselves, which strike him, would not surprise an Englishman accustomed to the like freedom. Much that he remarks in the mental habits of the ordinary American, his latent conservatism for instance, his indifference to amusement as compared with material comfort, his commercial eagerness and tendency to take a commercial view of all things, might have been just as well remarked of the ordinary middle-class Englishman, and had nothing to do with a democratic government. Other features, which he ascribes to this last-named cause, such as habits of easy social intercourse, the disposition to prize certain particular virtues, the readiness to give mutual help, are equally attributable to the conditions of life that existed among settlers in a wild country where few persons were raised by birth or wealth above their fellows, and every one had need of the aid of others—conditions whose results remained in the temper of the people even when the community had passed into another phase, a phase in which inequalities of wealth were already marked, and temptations had begun to appear which did not beset the Puritans of the seventeenth century.

It is no reproach to this great author that France formed to him the background of every picture whose foreground was the New World. He tells us frankly in the Introduction that the phenomena of social equality, as they existed in France, and the political consequences to be expected from them, filled his mind when he examined the institutions of America; he hoped to find there lessons by which France might profit: 'J'ai voulu y trouver des enseignements dont nous puissions profiter.' But with this purpose before him, he could hardly avoid laying too much stress on points which seemed to have instruction for his own countrymen, and from fancying those things to be abnormal, or at least spe-

cially noteworthy, which stood contrasted with the circumstances of France. Tocqueville is, among eminent French writers, one of the least prone to assume the ways and ideas of his own country to be the rule, and those of another country the exception; yet even in him the tendency lurks. There is more than a trace of it in his surprise at the American habit of using without abusing political associations, and at the disposition of Legislatures to try experiments in legislation, a disposition which struck him chiefly by its contrast with the immutability which the Code of the First Empire seemed to have stamped upon the private law of France.

His constant reference to France goes deeper than the method of the book. It determines his scope and aim. The *Democracy in America* is not so much a political study as a work of edification. It is a warning to France of the need to adjust her political institutions to her social condition, and above all to improve the tone of her politics, to create a moral and religious basis for her national life, to erect a new fabric of social doctrine, in the place of that which, already crumbling, the Revolution had overthrown. We must not, therefore, expect to find in him a complete description and criticism, such as a German would have given, of the government of America in all its details and aspects. To note this is not to complain of the book. What Tocqueville has produced is more artistic, and possibly more impressive than such a description would have been, as a landscape gives a juster notion of scenery than a map. His book is permanently valuable, because its reflections and exhortations are applicable not merely to the Frenchmen of sixty-five years ago, but to mankind generally, since they touch upon failings and dangers permanently inherent in political society. Let it only be remembered that, in spite of its scientific form, it is really a work of art quite as much as a work of science, and a work suffused with strong, though carefully repressed, emotion.

The best illustration I can give of these tendencies in

our author will be found in a comparison of the first part of the book, published in 1834, and now included in the first and second volumes of recent editions, with the second part published in 1840, and now forming the third volume. In the first part the author keeps near his facts. Even when he has set out on the *a priori* road he presently brings his theory into relation with American phenomena: they give substance to, and (so to speak) steady the theory, while the theory connects and illumines them. But in the second part (third volume) he soars far from the ground, and is often lost in the clouds of his own sombre meditation. When this part was written, the direct impressions of his transatlantic visit had begun to fade from his mind. With all his finesse and fertility, he had neither sufficient profundity of thought, nor a sufficient ample store of facts gathered from history at large, to enable him to give body and substance to his reflections on the obscure problems wherewith he attempts to deal<sup>1</sup>. Hence, this part of the book is not so much a study of American democracy as a series of ingenious and finespun abstract speculations on the features of equality and its results on modern society and thought, speculations which, though they have been singled out for admiration by some high judges, such as Ampère and Laboulaye, will appear to most readers overfanciful, overconfident in their effort to construct a general theory applicable to the infinitely diversified facts of human society, and occasionally monotonous in their repetition of distinctions without differences and generalities too vague, perhaps too hollow, for practical use.

How far do these defects of Tocqueville's work affect its value for our present purpose, that of discovering from it what was the condition, political, social, intellectual, of the United States in 1833, and what the forces

<sup>1</sup> Sainte-Beuve remarks of him, 'Il a commencé à penser avant d'avoir rien appris: ce qui fait qu'il a quelquefois pensé creux.' Thiers once said, in the Chamber, 'Quand je considère intuitivement, comme dirait M. de Tocqueville.'

that were then at work in determining the march of the nation and the development of its institutions?

It is but slightly that they impair its worth as a record of facts. Tocqueville is so careful and so unprejudiced an observer that I doubt if there be a single remark of his which can be dismissed as either erroneous or superficial. There is always some basis for every statement he makes. But the basis is occasionally too small for the superstructure of inference, speculation, and prediction which he rears upon it. To borrow an illustration from chemistry, his analysis is always right so far as it is qualitative, sometimes wrong where it attempts to be quantitative. The fact is there, but it is perhaps a smaller fact than he thinks, or a transient fact, or a fact whose importance is, or shortly will be, diminished by other facts which he has not adequately recognized.

When we pass from description to argument he is a less safe guide. By the light of subsequent experience we can perceive that he mistook transitory for permanent causes. Many of the phenomena which he ascribes to democracy were due only to the fact that large fortunes had not yet grown up in America, others to the absence, in most parts of the country, of that higher education and culture which comes with wealth, leisure, and the settlement of society. I have already observed that he sometimes supposes features of American politics to be novel and democratic which are really old and English; that he does not allow sufficiently for the imprint which colonial life had left on the habits and ideas of the people, an imprint which, though it tends to wear off with time, is yet also modified into something which, while you may call it democratic, remains different from the democracy of an old European country, and is not an index to the character of democracy in general.

It need hardly be said that the worth of a book like his is not to be measured by the number of flaws which can be discovered under the critic's microscope. Even a sovereign genius like Aristotle cannot be expected to

foresee which of the influences he discerns will retain their potency: it is enough if his view is more piercing and more comprehensive than that of his greatest contemporaries, if his record shows the high-water mark of the learning and philosophy of the time. Had history falsified far more of Tocqueville's predictions than she has done, his work would still remain eminently suggestive and stimulating. And it is edificatory not merely because it contains precepts instinct with the loftiest morality. It is a model of that spirit of fairness and justice, that love of pure truth which is conspicuously necessary, and not less conspicuously difficult, in the discussion, even the abstract discussion, of the problems of political philosophy. Few books inspire a higher respect for their writer.

#### V. TOCQUEVILLE'S VIEW OF THE UNITED STATES.

Before we examine the picture of the social and political phenomena of America which Tocqueville has drawn, let us see what were the chief changes that had passed on the territory of the Union, on its material resources, on the habits and ideas of the people, during the forty-six years that elapsed from the publication of the *Federalist* to that of the *Démocratie en Amérique*.

The territory of the United States had been extended to include the whole valley of the Mississippi, while to the north-west it stretched across the Rocky Mountains as far as the Pacific. All beyond the Missouri was still wilderness, much of it wholly unexplored, but to the east of the Mississippi there were now twenty-four States with an area of 2,059,043 square miles and a population of fourteen millions. The new Western States, though rapidly increasing, were still so raw as to exercise comparatively little influence on the balance of national power, which vibrated between the free Northern and the Southern Slave States. Slavery was not an immediately menacing question, for the first wound it

made had been skinned over, so to speak, by the Missouri Compromise of 1820; but it was evidently pregnant with future trouble, for the number of slaves was rapidly increasing, and the slaveholders were already resolved to retain their political influence by the creation of new slave States. The great Federalist party had vanished, and the Republican-Democratic party, which had triumphed over it, had just been split into several bitterly hostile factions. Questions of foreign policy were no longer urgent, for Europe had ceased to menace America, who had now no neighbours on her own continent except the British Crown on the north and the Mexican Republic on the south and west. The protective tariff and the existence of the United States Bank were the questions most agitated, but the main dividing party lines were still those which connected themselves with the stricter or looser interpretation of the Federal Constitution—that is to say, they were questions as to the extent of Federal power on the one hand, as to the rights of the States on the other. New England was still Puritan and commercial, with a bias towards protective tariffs, the South still agricultural, and in favour of free trade. The rule of the masses had made its greatest strides in New York, the first, among the older States, which introduced the new methods of party organization and which thoroughly democratized her Constitution<sup>1</sup>. Everywhere property qualifications for office or the electoral franchise were being abolished, and even the judges formerly nominated by the State Governor or chosen by the State Legislature were beginning to be elected by manhood suffrage and for terms of years. In fact a great democratic wave was passing over the country, sweeping away the old landmarks, destroying the respect for authority, casting office and power more and more into the hands of the humbler classes, and causing the withdrawal from public life of men of education and refinement. State feeling was still

<sup>1</sup> The process of democratization was completed by the Constitution of 1846.

strong, especially in the South, and perhaps stronger than national feeling, but the activity of commerce and the westward movement of population were breaking down the old local exclusiveness, and those who saw steamboats plying on the Hudson and heard that locomotive engines were beginning to be run in England, might have foreseen that the creation of more easy, cheap, and rapid communications would bind the sections of the country together with a new and irresistible power. The time was one of great commercial activity and great apparent prosperity; but large fortunes were still few, while in the general pursuit of material objects science, learning, and literature had fallen into the background. Emerson was still a young Unitarian minister, known only to the circle of his own friends. Channing was just rising into note; Longfellow and Hawthorne, Prescott and Ticknor had not begun to write. Washington Irving was one of the few authors whose names had reached Europe. How disagreeable the manners of ordinary people (for one must of course except the cultivated circles of Boston and Philadelphia) seemed to the European visitor may be gathered from the diaries of Richard Cobden and Sir Charles Lyell, who travelled in America a year or two after Tocqueville. There was a good deal of ability among the ruling generation of statesmen—the generation of 1787 was just dying out with Madison—but only three names can be said to have survived in the world's memory, the names of three party leaders who were also great orators, Clay, Calhoun, and Webster<sup>1</sup>.

In those days America was a month from Europe and comparatively little affected by Europe. Her people walked in a vain conceit of their own greatness and freedom, and scorned instruction from the effete monarchies of the Old World, which in turn repaid them

<sup>1</sup> To none of whom, oddly enough, does Tocqueville refer. He is singularly sparing in his references to individuals, mentioning no one except President Jackson for blame and Livingston (author of the Louisiana Code and Secretary of State, 1831-3) for praise.

with contemptuous indifference. Neither continent had realized how closely its fortunes were to be interwoven with those of the other by trade and the movements of population. No wheat, no cattle were sent across the Atlantic, nor had the flow of immigration from Ireland, much less from Central Europe, as yet begun.

The United States of 1834 had made enormous advances in material prosperity. Already a great nation, it could become a great power as soon as it cared to spend money on fleets and armies. The Federal government had stood the test of time and of not a few storms. Its component parts knew their respective functions, and worked with less friction than might have been expected. The sense of national unity, powerfully stimulated by the war of 1812, was still growing. But the level of public life had not risen. It was now rather below than above that of average private society. Even in the realm of morality there were strange contrasts. A puritan strictness in some departments of conduct and a universal recognition of the sanctions of religion co-existed in the North with some commercial laxity, while the semi-civilized South, not less religious and valuing itself on its high code of honour, was disgraced by the tolerance accorded to duels and acts of murderous violence, not to speak of the darker evils which slavery brought in its train. As respects the government of States and cities, democratic doctrines had triumphed all along the line. The masses of the people had now realized their power, and entered into the full fruition of it. They had unlimited confidence in their wisdom and virtue, and had not yet discovered the dangers incidental to the rule of numbers. The wise elders, or the philosophic minds who looked on with distrust, were either afraid to speak out, or deemed it hopeless to try to stem the flowing tide. They stood aside (as Plato says) under the wall out of the storm. The party organizations had just begun to spread their tough yet flexible network

over the whole country; and the class of professional politicians, at once the creator and the creature of such organizations, was already formed. The offices had, three years before, been proclaimed to belong to the victors as spoils of war, but few saw to what consequences this doctrine was to lead. I will not say that it was a period of transition, for that is true of every period in America, so fast do events move even in the quietest times; but it was a period when that which had been democratic theory was passing swiftly into democratic practice, when the seeds sown long ago by Jefferson had ripened into a waving crop, when the forces which in every society react against extreme democracy were unusually weak, some not yet developed, some afraid to resist the stream.

#### VI. TOCQUEVILLE'S IMPRESSIONS AND PROPHECIES.

Let us see what were the impressions which the America of 1832 made on the mind of Tocqueville. I do not pretend to summarize his account, which every student ought to read for himself, but shall be content with presenting the more salient points that ought to be noted in comparing 1832 with 1788 on the one hand, and 1900 on the other.

He is struck by the thoroughness with which the principle of the sovereignty of the people is carried out. Seventy years ago this principle was far from having obtained its present ascendancy in Western Europe. In America, however, it was not merely recognized in theory, but consistently applied through every branch of local, State, and National government.

He is impressed by the greater importance to ordinary citizens of State government than of Federal government, and their warmer attachment to the former than to the latter. The Federal government seems comparatively weak, and in case of a conflict between the

two powers, the loyalty of the people would be given rather to the State<sup>1</sup>.

He finds the basis of all American government in the 'commune,' *i.e.* in local government, the ultimate unit of which is in New England the township, in the Southern and Middle States the county. It is here that the bulk of the work of administration is done, here that the citizens learn how to use and love freedom, here that the wonderful activity they display in public affairs finds its chief sphere and its constant stimulus.

The absence of what a European calls 'the administration' is remarkable. Public work is divided up between a multitude of petty and unrelated local officials: there is no 'hierarchy,' no organized civil service with a subordination of ranks. The means employed to keep officials to their work and punish offences are two—frequent popular election and the power of invoking the ordinary courts of justice to obtain damages for negligence or unwarranted action. But along with the extreme 'administrative decentralization' there exists a no less extreme 'governmental centralization,' that is to say, all the powers of government are collected into one hand, that of the people, the majority of the voters. This majority is omnipotent; and thus authority is strong, capable of great efforts, capable also of tyranny. Hence the value of local self-government, which prevents the abuse of power by a central authority: hence the necessity for this administrative decentralization, which atones for its want of skill in details by the wholesome influence it exerts on the character of the people.

The judges enjoy along with the dignity of their European brethren the singular but most salutary power of 'declaring laws to be unconstitutional,' and thus they serve to restrain excesses of legislative as well as of executive authority.

The President appears to our author to be a com-

<sup>1</sup> His insistence on this point makes it all the more strange that he does not give any description of a State as a commonwealth, nor characterize the general features of its government.

paratively weak official. No person, no group, no party, has much to hope from the success of a particular candidate at a Presidential election, because he has not much to give away[!]. The elective system unduly weakens executive authority, because a President who approaches the end of his four years' term feels himself feeble, and dares not take any bold step: while the coming in of a new President may cause a complete change of policy. His re-eligibility further weakens and abases him, for he must purchase re-election by intrigue and an unworthy pandering to the desires of his party. It intensifies the characteristic fault of democratic government, the predominance of a temporary majority.

The Federal Supreme Court is the noblest product of the wisdom of those who framed the Federal Constitution. It keeps the whole machine in working order, protecting the Union against the States, and each part of the Federal government against the aggressions of the others. The strength of the Federation, naturally a weak form of government, lies in the direct authority which the Federal courts have over the individual citizen: while the action of these Courts, even against a State, gives less offence than might be expected because they do not directly attack its statutes, but merely, at the instance of an individual plaintiff or defendant, secure to him rights which those statutes may have incidentally infringed.

The Federal Constitution is much superior to the State Constitutions; the Federal Legislature, Executive and Judiciary, are all of them more independent of the popular majority, and freer in their action than the corresponding authorities in the several States. Similarly the Federal government is better than those of the States, wiser, more skilful, more consistent, more firm.

The day of great parties is past: there is now a feverish agitation of small parties and a constant effort to create parties, to grasp at some principle or watchword under which men may group themselves, probably for selfish

ends. Self-interest is at the bottom of the parties, yet aristocratic or democratic sentiment attaches itself to each of them, that is to say, when a practical issue arises, the old antithesis of faith in the masses and distrust of the masses reappears in the view which men and parties take of it. The rich mix little in politics. Secretly disgusted at the predominance of the crowd, they treat their shoemaker as an equal when they meet him on the street, but in their luxurious homes lament the vulgarity of public life and predict a bad end for democracy.

Next to the people, the greatest power in the country is the press: yet it is less powerful than in France, because the number of journals is so prodigious, because they are so poorly written, because there is no centre like Paris. Advertisements and general news occupy far more of their space than does political argument, and in the midst of a din of opposing voices the ordinary citizen retains his dull fixity of opinion, the prejudices of his sect or party.

A European is surprised, not only at the number of voluntary associations aiming at public objects, but at the tolerance which the law accords to them. They are immensely active and powerful, and do not threaten public security as they would in France, because they admit themselves, by the very fact of their existence, to represent a minority of voters, and seek to prevail by force of argument and not of arms.

Universal suffrage, while it gives admirable stability to the government, does not, as people in Europe expect that it will, bring the best men to the top. On the contrary, the governors are inferior to the governed<sup>1</sup>. The best men do not seek either office or a seat in the House of Representatives, and the people, without positively hating the 'upper classes,' do not like them; and care-

<sup>1</sup> This is a common remark of visitors to America, but it arises from their mistaking the people they see in society for 'the governed' in general. They go carrying introductions to rich or educated people: if they mixed with the masses they would form a different notion of 'the governed,' as Tocqueville rather oddly calls the ordinary citizens.

fully keep them out of power. 'Il ne craint point les grands talents, mais il les goûte peu.'

— The striking inferiority of the House to the Senate is due to the fact that the latter is a product of double election, and it is to double election that democracies must come if they will avoid the evils inseparable from placing political functions in the hands of every class of the people <sup>1</sup>.

American magistrates are allowed a wider arbitrary discretion than is common in Europe, because they are more constantly watched by the sovereign people, and are more absolutely at their mercy <sup>2</sup>

Every office is, in America, a salaried office; nor can anything be more conformable to the spirit of a democracy. The minor offices are, relatively to Europe, well paid, the higher ones ill paid. Nobody wears any dress or displays any insignia of office <sup>3</sup>.

Administration has both an unstable and an unscientific character. Few records are kept of the acts of departments: little information is accumulated: even original documents are neglected. Tocqueville was sometimes given such documents in answer to his queries, and told that he might keep them. The conduct of public business is a hand to mouth, rule of thumb sort of affair <sup>4</sup>.

Not less instability reigns in the field of legislation. Laws are being constantly changed; nothing remains fixed or certain <sup>5</sup>.

<sup>1</sup> It is surprising that Tocqueville should have supposed this to be the cause of the excellence he ascribes to the Senate, considering that the more obvious, as well as the true, explanation is to be found in the fact that the wider powers and longer term of the Senate made the ablest men seek entrance to it.

<sup>2</sup> The only instance given of this is in the discretion allowed to the officers of the New England townships, whose functions are, however, unimportant. The statement cannot have been generally true.

<sup>3</sup> This remained true till very recent years as regards public officials, save and except the Judges of the Supreme Court when sitting at Washington. But lately the Supreme Court Judges of some States have begun to wear gowns.

<sup>4</sup> This has ceased to be true in Federal administration, and in that of the more advanced States.

<sup>5</sup> Tocqueville does not say whether he intends this remark to apply to State legislation only or to Federal legislation also. He quotes dicta of Hamilton, Madison, and Jefferson to the same effect, but these testimonies, or most of them, refer to a

It is a mistake to suppose that democratic governments are specially economical. They are parsimonious in salaries, at least to the higher officials, but they spend freely on objects beneficial to the mass of the people, such as education, while the want of financial skill involves a good deal of waste. You must not expect economy where those who pay the bulk of the taxes are a mere fraction of those who direct their expenditure. If ever America finds herself among dangers, her taxation will be as heavy as that of European monarchies.

There is little bribery of voters, but many charges against the integrity of politicians. Now the corruption of the 'governors' is worse than that of the 'governed,' for it lowers the tone of public morals by presenting the spectacle of prosperous turpitude.

The American democracy is self-indulgent and self-complacent, slow to recognize, still more slow to correct, its faults. But it has the unequalled good fortune of being able to commit reparable errors (*la faculté de faire des fautes réparables*). It can sin with impunity.

It is eminently ill-fitted to conduct foreign policy. Fortunately it has none.

The benefits which American society derives from its democratic government are summed up as follows:—

As the majority make the laws, their general tendency, in spite of many errors in detail, is to benefit the majority, because though the means may sometimes be ill chosen, the end is always the same. Hence the country prospers.

Every one is interested in the welfare of the country, because his own welfare is bound up with it. This patriotism may be only an enlarged egotism, but it is powerful nevertheless, for it is a permanent sentiment, independent of transient enthusiasms. Its character ap-

time anterior to the creation of the Federal Constitution. If it is true that State laws were being constantly changed in 1832, this can have been true only of administrative statutes, not of private law generally. One is tempted to believe that Tocqueville was unconsciously comparing America with France, where the Code has arrested legislation to an extent surprising to an English observer.

pears in the childish intolerance of criticism which the people display. They will not permit you to find fault with any one of their institutions or habits, not even if you praise all the rest <sup>1</sup>.

There is a profound respect for every political right, and therefore for every magistrate, and for the authority of the law, which is the work of the people themselves. If there be exceptions to this respect, they are to be found among the rich, who fear that the law may be made or used to their detriment.

The infinite and incessant activity of public life, the responsibilities it casts on the citizen, the sense of his importance which it gives him, have stimulated his whole nature, and made him enterprising in all private affairs also. Hence, in great measure, the industrial prosperity of the country. Democracy effects more for the material progress of a nation than in the way of rendering it great in the arts, or in poetry, or in manners, or in elevation of character, or in the capacity for acting on other nations and leaving a great name in history.

We now come to the darker side of the picture. In democracies, the majority is omnipotent, and in America the evils hence flowing are aggravated by the shortness of the term for which a legislature is chosen, by the weakness of the Executive, by the incipient disposition to choose even the judges by popular vote, by the notion universally accepted that the majority must be right. The majority in a legislature being unchecked, laws are hastily made and altered, administration has no permanence, officials are allowed a dangerously wide range of arbitrary authority. There is no escape from the tyranny of the majority. It dominates even thought, forbidding, not indeed by law, but through social penalties no less effective than legal ones, the expression of any opinion displeasing to the ordinary citizen. In the-

<sup>1</sup> Every one knows how frequently European visitors used to comment upon this American trait. It is now much less noticeable than formerly. I can even say from experience that it has sensibly diminished since 1870.

ology, even in philosophy, one must beware of any divergence from orthodoxy. No one dare tell an unwelcome truth to the people, for it will receive nothing but incense. Such repression sufficiently explains the absence of great writers and of great characters in public life. It is not therefore of weakness that free government in America will ever perish, but through excess of strength, the majority driving the minority to despair and to arms.

There are, however, influences which temper the despotism of the majority. One is the existence of a strong system of local self-government, whereby nearly all administration is decentralized. Another is the power of the lawyers, a class everywhere disposed to maintain authority and to defend that which exists, and specially so disposed in England and America because the law which they study and practise is founded on precedents and despises abstract reason. A third exists in the jury, and particularly the jury in its action in civil causes, for it teaches the people not only the regular methods of law and justice, but respect for law and for the judges who administer it.

Next we come to an enumeration of the causes which maintain republican government. They are, over and above the constitutional safeguards already discussed, the following:—

The absence of neighbouring States, and the consequent absence of great wars, of financial crises<sup>1</sup>, of invasions or conquests. How dangerous to republics is the passion for military glory is shown by the two elections of General Jackson to be President, a man of violent temper and limited capacity, recommended by nothing but the memory of his victory at New Orleans twenty years before<sup>2</sup>.

<sup>1</sup> This observation seems strange indeed to any one who remembers the commercial history of the United States since the great crisis of 1838.

<sup>2</sup> Jackson's popularity began with his military exploit: but his hold on the people was due to other causes also. His election coincided with the rise of the great democratic wave already referred to.

✓ The absence of a great capital.

✓ The material prosperity of the country, due to its immense extent and natural resources, which open a boundless field in which the desire of gain and the love of independence may gratify themselves and render the vices of man almost as useful to society as his virtues. The passions which really agitate America are commercial, not political.

✓ The influence of religion. American Protestantism is republican and democratic; American Catholicism no less so; for Catholicism itself tends to an equality of conditions, since it treats all men alike. The Catholic clergy are as hearty republicans as any others.

The indirect influence of religion on manners and morality. Nowhere is marriage so much respected and the relations of the sexes so well ordered. The universal acceptance of Christianity, an acceptance which imposes silence even on the few sceptics who may be supposed to exist there as everywhere, steadies and restrains men's minds. 'No one ventures to proclaim that everything is permissible in the interests of society. Impious maxim, which seems to have been invented in an age of liberty in order to give legitimacy to all tyrants to come.' The Americans themselves cannot imagine liberty without Christianity. And the chief cause why religion is so powerful among them is because it is entirely separated from the State<sup>1</sup>.

✓ The intelligence of the people, and their education, but especially their practical experience in working their local politics. However, though everybody has some education, letters and culture do not flourish. The Americans regard literature properly so called with disfavour: they are averse to general ideas. They have no great historian, not a single poet, legal commentators but no publicists, good artisans but very few inventors[!]

<sup>1</sup> I do not profess to summarise in these few lines all that Tocqueville says of the character and influence of Christianity in the United States, for he devotes many pages to it, and they are among the wisest and most permanently true that he has written.

Of all these causes, the most important are those which belong to the character and habits of the people. These are infinitely more important sources of well-being than the laws, as the laws are in turn more important than the physical conditions<sup>1</sup>.

Whether democracy will succeed in other parts of the world is a question which a study of America does not enable the observer confidently to answer. Her institutions, however suitable to her position in a world of her own, could not be transferred bodily to Europe. But the peace and prosperity which the Union enjoys under its democratic government do raise a strong presumption in favour of democracy even in Europe. For the passions and vices which attack free government are the same in America as in Europe, and as the legislator has overcome many of them there, combating envy by the idea of rights, and the presumptuous ignorance of the crowd by the practice of local government, he may overcome them here in Europe likewise.

One may imagine institutions for a democracy other than those the Americans have adopted, and some of them better ones. Since it seems probable that the peoples of Europe will have to choose between democracy and despotism, they ought at least to try the former, and may be encouraged by the example of America.

A concluding chapter is devoted to speculations on the future of the three races which inhabit the territories of the United States. I need not transcribe what he says of the unhappy Indian tribes. Their fate was then already certain: the process which he saw passing in Alabama and Michigan afterwards repeated itself in California and Oregon.

The presence of the blacks is the greatest evil that threatens the United States. They increase, in the Gulf States, faster than do the whites. They cannot be kept

<sup>1</sup> Like most of his contemporaries, Tocqueville failed to appreciate the enormous influence of physical environment, which has, however, doubtless increased, so far as America is concerned, through the scientific discoveries made since the date of his journey.

for ever in slavery, since the tendencies of the modern world run strongly the other way. They cannot be absorbed into the white population, for the whites will not intermarry with them, not even in the North where they have been free for two generations. Once freed, they would be more dangerous than now, because they would not long submit to be debarred from political rights. A terrible struggle would ensue. Hence the Southern Americans, even those who regret slavery, are forced to maintain it, and have enacted a harsh code which keeps the slave as near as possible to a beast of burden, forbidding him to be taught and making it difficult for him to be manumitted. No one in America seems to see any solution. The North discusses the problem with noisy inquietude. The South maintains an ominous silence. Slavery is evidently economically mischievous, for the free States are far more prosperous: but the South holds to slavery as a necessity.

As to the Federal Union, it shows many signs of weakness. The States have most of the important powers of government in their hands; they have the attachment of the people; they act with vigour and promptitude, while the Federal authority hesitates and argues. In every struggle that has heretofore arisen the Federal Government has given way, and it possesses neither the material force to coerce a rebellious State nor a clear legal right to retain a member wishing to dissolve the Federal tie. But although the Union has no national patriotism to support it (for the professions of such patriotism one hears in America are but lip-deep), it is maintained by certain interests—those material interests which each part of the country has in remaining politically united with the rest. Against these one finds no strong interests making for material severance, but one does find diversities, not indeed of opinion—for opinions and ideas are wonderfully similar over the whole country—but of character, particularly between Northern and Southern men, which increase the chances of discord.

And in the rapid growth of the Union there lies a real source of danger. Its population doubles every twenty-two years. Before a century has passed its territory will be covered by more than a hundred millions of people and divided into forty States<sup>1</sup>. Now all partnerships are more difficult to keep together the more the number of partners increases<sup>2</sup>. Even admitting, therefore, that this hundred millions of people have similar interests and are benefited by remaining united, still the mere fact that they will then form forty nations, distinct and unequally powerful, will make the maintenance of the Federal Government only a happy accident. 'I cannot believe in the duration of a government whose task is to hold together forty different peoples spread over a surface equal to the half of Europe, to avoid rivalries, ambitions, and struggles among them, and to unite the action of their independent wills for the accomplishment of the same plans<sup>3</sup>.'

The greatest danger, however, which the Union incurs as it grows is the transference of forces which goes on within its own body. The Northern States increase more rapidly than the Southern, those of the Mississippi Valley more rapidly still. Washington, which when founded was in the centre of the Union, is now at one end of it. The disproportionate growth of some States menaces the independence of others. Hence the South has become suspicious, jealous, irritable. It fancies itself oppressed because outstripped in the race of prosperity and no longer dominant. It threatens to retire from a partnership whose charges it bears, but whose profits it does not share<sup>4</sup>.

Besides the danger that some States may withdraw

<sup>1</sup> There are now forty-five, with a population of nearly eighty millions.

<sup>2</sup> No proof is given of this proposition, which is by no means self-evident, and which has indeed all the air of a premiss laid down by a schoolman of the thirteenth century.

<sup>3</sup> He has, however, nowhere attempted to prove that the States deserve to be called 'nations' or 'peoples.'

<sup>4</sup> The protective tariff was felt as a grievance by the South, being imposed in the interest of the Northern and Middle States. No doubt, the North got more pecuniary gain out of the Union than the South did.

from the Union (in which case there would probably be formed several federations, for it is highly unlikely that the original condition of State isolation would reappear), there is the danger that the central Federal authority may continue to decline till it has become no less feeble than was the old Confederation. Although Americans fear, or pretend to fear, the growth of centralization and the accumulation of powers in the hands of the Federal Government, there can be little doubt that the central authority has been growing steadily weaker, and is less and less able to face the resistance of a refractory State. The concessions of public territory made to the States, the hostility to the United States Bank, the (virtual) success of South Carolina in the Nullification struggle, are all proofs of this truth. General Jackson, now (1832) President, is at this moment strong, but only because he flatters the majority and lends himself to its passions. His personal power may increase, but that of the President declines. 'Unless I am strangely mistaken, the Federal Government of the United States tends to become daily weaker; it draws back from one kind of business after another, it more and more restricts the sphere of its action. Naturally feeble, it abandons even the appearance of force. On the other side, I think I perceive that in the United States the sentiment of independence becomes more and more lively in the States, and the love of provincial government more and more pronounced. People wish to keep the Union, but to keep it reduced to a shadow: they would like to have it strong for some purposes and weak for the rest—strong in war and almost non-existent in peace—forgetting that such alternations of strength and weakness are impossible.'

Nevertheless the time when the Federal power will be extinguished is still distant, for the continuance of the Union is desired, and when the weakness of the Government is seen to threaten the life of the Union, there may be a reaction in its favour.

Whatever may be the future of the Federation, that

of republicanism is well assured. It is deeply rooted not only in the laws, but in the habits, the ideas, the sentiments, even the religion of the people. It is indeed just possible that the extreme instability of legislation and administration may some day disgust the Americans with their present government, and in that case they will pass rapidly from republicanism to despotism, not stopping by the way in the stage of limited monarchy. An aristocracy, however, such as that of the old countries of Europe, can never grow up. Democratic equality will survive, whatever be the form which government may take.

This brief summary, which conveys no impression of the elegance and refinement of Tocqueville's reasonings, need not be pursued to include his remarks on the commercial and maritime greatness of the United States, nor his speculations on the future of the Anglo-American race. Still less shall I enter on the second part of the book, for (as has been observed already) it deals with the ideas of democracy and equality in a very abstract and sometimes unfruitful way, and it would need a separate critical study.

But before passing on to consider how far the United States now differs from the republic which the French philosopher described, we must pause to ask ourselves whether his description was complete.

It is a salutary warning to those who think it easy to get to the bottom of the political and social phenomena of a nation, to find that so keen and so industrious an observer as Tocqueville, who seized with unrivalled acuteness and described with consummate art many of the minor features of American politics, omitted to notice several which had already begun to show their heads in his day, and have since become of the first importance. Among these are—

The system of party organization. It was full grown in some States (New York for instance), and spreading quickly through the rest.

The influence of commercial growth and closer commercial relations in binding together different States of the Union and breaking down the power of State sentiment. He does in one passage refer to this influence, but is far from appreciating the enormous force it was destined to exercise, and must have exercised even without railways.

The results of the principle proclaimed definitely just before his visit, and already operative in some places, that public office was to be bestowed as a reward for political service, and held only so long as the party which bestowed it remained in power.

The assertion by President Monroe of the intention of the United States to regard as unfriendly (*i.e.* to do their best to resist) any extension of the 'European system' to the American Continent, and any further colonization thereof or intrusion by European powers thereon.

The rise of the Abolitionists (they had begun to organize themselves before 1830, and formed a National Anti-Slavery Society in 1833) and the intense hostility they aroused in the South.

The growth of the literary spirit, and the beginnings of literary production. The society which produced Washington Irving, Fenimore Cooper, Channing, Hawthorne, Emerson, Longfellow, Thoreau, Prescott, Ticknor, Margaret Fuller, Holmes, Lowell, Parkman—not to add some almost equally famous later names—deserved mention as a soil whence remarkable fruits might be expected which would affect the whole nation. Yet it is not once referred to, although one can perceive that Tocqueville had spent some time in Boston, for many of his views are evidently due to the conversations he held with the leading Whigs of that day there.

The influence of money on politics. It might surely have been foretold that in a country with such resources, and among a people whose restless commercial activity would be able to act on a vast scale, great piles of wealth

would soon be accumulated, that this wealth would perceive objects which it might accomplish by legislative aid, would seek to influence governments, and would find ample opportunities for doing so. But of the dangers that must thence arise we do not hear a word.

## VII. EXAMINATION OF TOCQUEVILLE'S VIEWS.

Such was the aspect of the United States in 1832, such the predictions which an unusually penetrating and philosophic mind formed of its future. I will not attempt to inquire how far the details of the picture are accurate, because it would be unprofitable to contest statements without assigning one's own reasons, while to assign them would lead me into a historical disquisition. A shorter and simpler course will be to inquire in what respects things have changed since his time, for thus we shall be in a position to discern which of the tendencies he noted have proved permanent, what new tendencies have come into being, what are the main tendencies which are now controlling the destinies of the Republic.

I have noted at the end of last section the phenomena which, already existing in Tocqueville's day, he omitted to notice or to appraise to their due value. Let us see what time has brought forward since his day to alter the conditions of the problem as he saw it.

The great events that have befallen since 1834 are these:—

The annexation of Texas in 1845.

The war with Mexico in 1846, leading to the enlargement of the United States by the vast territories which are now California, Nevada, Utah, Idaho, Arizona, and New Mexico.

The making of railways over the whole country, culminating with the completion of four or five great Trans-Continental roads (the first in 1869).

The establishment of lines of swift ocean steamers between America and Europe.

The immigration from Ireland (immensely increased after the famine of 1846), and from Germany (beginning somewhat later), and from Scandinavia, Austria-Hungary, and Russia (later still).

The War of Secession, 1861-65; together with the extinction of Slavery.

The laying of submarine cables to Europe, and the extension of telegraphic communication over the whole Union.

The settlement of the Alabama claims, an event scarcely less important in American history than in English, because it greatly diminished the likelihood of a war between the two countries. In Tocqueville's time the hatred of Americans to England was rancorous.

The growth of great cities. In 1830, only two had a population exceeding 100,000. There are now (census of 1900) thirty-eight which exceed that population<sup>1</sup>.

The growth of great fortunes, and of wealthy and powerful trading corporations; the extension of mining, especially silver and gold mining; the stupendous development of speculation, not to say gambling, in stocks and produce.

The growth of the universities and of many kindred literary and scientific institutions.

The war with Spain in 1898, and consequent annexation of Hawaii (which might probably not have been taken but for naval needs supposed to have been disclosed by the war), of Puerto Rico, and of the Philippine Isles.

These are events which have told directly or indirectly upon politics. I go on to enumerate the political changes themselves of the same sixty-seven years.

Democratization of State Constitutions, total abolition of property qualifications, choice of judges (in most States) by popular vote and for terms of years, restric-

<sup>1</sup> In 1790 there were only six cities with populations of at least 8,000. There are now 545. The percentage of urban to rural population (taking urban as that of a city of 8,000) was then 3.4 and is now 33.1.

tions on the power of State Legislatures, more frequent use of the popular vote or so-called Referendum<sup>1</sup>.

Development of the Spoils System, consequent degradation of the increasingly large and important civil service, both Federal, State, and Municipal.

Perfection and hierarchical consolidation, on nominally representative but really oligarchic lines, of party organizations; consequent growth of Rings and Bosses, and demoralization of city government.

Enfranchisement of the negroes through amendments to the Constitution.

Intensification of National (as opposed to State) sentiment consequent on the War of Secession; passion for the national flag; rejection of the dogmas of State sovereignty and right of nullification.

Increased importance of currency and other financial problems: emergence of industrial questions as bases for party organization: efforts to found a Labour Party and a 'People's Party.'

To these I add, as powerfully affecting politics, the development not only of literary, scientific and historical studies, but in particular of a new school of publicists, who discuss constitutional and economic questions in a philosophic spirit; closer intellectual relations with Europe, and particularly with England and Germany; resort of American students to German Universities; increased interest of the best class of citizens in politics; improved literary quality of the newspapers and of periodicals (political and semi-political) generally; growth of a critical and sceptical spirit in matters of religion and philosophy; diminished political influence of the clergy.

We may now ask which of Tocqueville's observations have ceased to be true, which of his predictions falsified. I follow the order in which they were presented in the last section.

<sup>1</sup> Especially in the form of the amendment of particular provisions of State Constitutions.

Although the powers of the several States remain in point of law precisely what they were (except as regards the Constitutional amendments presently to be noticed) and the citizen depends as much now as then upon the State in all that relates to person and property, to the conduct of family and commercial relations, the National or Federal Government has become more important to him than it was then. He watches its proceedings more closely, and, of course, thanks to the telegraph, knows them sooner and more fully. His patriotism is far more national, and in case of a conflict between one or more States and the Federal power, the sympathies of the other States would probably be with the latter.

Local government has been maintained in its completeness, but it seems to excite less interest among the people. In the larger cities it has fallen into the hands of professional politicians, who have perverted it into a grasping and sordid oligarchy.

There is still, as compared with Continental Europe, little 'administration,' though more than in Tocqueville's time. But the influence of Federal legislation on the business of the country is far greater than it was, for the tariff and the currency, matters of increased consequence ever since the war, are in its hands.

The dignity of the judicial bench has in most States suffered seriously from the system of popular election for comparatively short terms. In those States where nomination by the Executive has been retained, and in the case of the Federal Judges (nominated by the President), the position is perhaps the highest permanent one open to a citizen.

The President's authority received a portentous enlargement during the War of Secession, and although it has now returned to its normal condition, the sense of its importance has survived. His election is contested with increasing excitement, for his immense patronage and the magnitude of the issues he may influence by his veto power give individuals and parties the strongest

[grounds for hope and fear. Experience has, on the whole, confirmed the view that the re-eligibility of an acting President (*i.e.* the power of electing him for an immediately succeeding term) might well be dispensed with.]

The credit of the Supreme Court suffered somewhat from its pro-slavery decisions just before the war, and may possibly have suffered slightly since in respect of its treatment of the Legal Tender question. Nevertheless it remains respected and influential.

The State Constitutions, nearly all of which have been re-enacted or largely amended since 1834, remain inferior to the Federal Constitution, and the State legislatures are, of course (possibly with a very few exceptions in the New England States), still more inferior to Congress.

Two great parties reappeared immediately after Tocqueville wrote, and except for a brief interval before the Civil War when the Whig party had practically expired before its successor and representative the Republican party had come to maturity, they have continued to divide the country, making minor parties of slight consequence. Now and then an attempt is made to start a new party as a national organization, but it rarely becomes strong enough to maintain itself. The rich and educated renewed their interest in politics under the impulse of the Slavery and Secession struggle. After a subsequent interval of apathy they seem to be again returning to public life. The secret murmurs against democracy, whereof Tocqueville speaks, are confined to a handful of fashionable exquisites less self-complacent now than they were in the days when they learnt luxury and contempt for the people in the Paris of Louis Napoleon.

Although newspapers are better written than formerly and those of the great cities travel further over the country, the multitude of discordant voices still prevents the people from being enslaved by the press, which however

shows an alarming capacity for exciting them. The habit of association by voluntary societies maintains itself.

The defects of the professional politicians, a term which now more precisely describes those whom Tocqueville calls by the inappropriate European name of 'the governors,' continue at least as marked as in his time.

So, too, the House of Representatives continues less influential than the Senate, but for other reasons than those which Tocqueville assigns, and to a less degree than he describes. The Senate has not, since 1880, maintained the character he gives it; and the fact that it is still chosen in the way which he commended shows that the merits he ascribed to it were not due to its mode of choice. Indeed in the judgement of most thoughtful men, popular election in the States would give a better Senate than election by the State Legislatures now does.

American magistrates never did in general enjoy the arbitrary power Tocqueville ascribes to them. They assuredly do not enjoy it now, but in municipalities there is a growing tendency to concentrate power, especially the appointing power, in the hands of one or a few officers in order that the people may have some one person on whom responsibility can be fixed. Such power is sometimes very wide, but it cannot be called arbitrary. A few minor offices are unsalaried; the salaries of the greater ones have been raised, particularly in the older States.

The methods of administration, especially of Federal administration, have been much improved, but are still behind those of the most advanced European countries, one or two departments excepted.

Government is far from economical. The war of the Rebellion was conducted in the most lavish way: the high protective tariff raises a vast revenue, and direct local taxation takes more from the citizen than in most European countries. An enormous sum is spent upon

pensions to persons who purport to have served in the Northern armies during the Civil War<sup>1</sup>.

Congress does not pass many public statutes, nor do they greatly alter ordinary law within the sphere open to federal legislation. Many legislative experiments are tried in the newer States, but the ordinary private law is in no such condition of mutability as Tocqueville describes. The law of England suffered more changes between 1868 and 1885 than either the common or statute law of the older States of the Union.

The respect for the rights of others, for the regular course of legal process, for the civil magistrate, remains strong; nor have the rich (although of late years more threatened) seriously begun to apprehend any attacks on them, otherwise than as stockholders in great railway and other corporations.

The tyranny of the majority is not a serious evil in the America of to-day, though people still sometimes profess alarm at it. It cannot act through a State legislature so much as it may have done in Tocqueville's days, for the wings of these bodies have been effectively clipped by the newer State constitutions. Faint are the traces which remain of that intolerance of heterodoxy in politics, religion or social views whereon he dilates<sup>2</sup>. Politicians on the stump still flatter the crowd, but many home truths are told to it nevertheless in other ways and places, and the man who ventures to tell them need no longer fear social proscription (at least in time of peace) in the Northern or Western States, perhaps not even in the Southern.

The Republic came scatheless out of a terrible civil war, and although the laurels of the general who concluded that war twice secured for him the Presidency, they did not make his influence dangerous to freedom.

<sup>1</sup> In 1892 the expenditure on this head was \$155,000,000; in 1901 it was estimated at \$142,000,000.

<sup>2</sup> Competent American observers in Tocqueville's own time thought he greatly exaggerated this danger. See a letter from Jared Sparks printed in Professor Herbert B. Adams' interesting monograph *Jared Sparks and Alexis de Tocqueville*, in Johns Hopkins University Studies, 1808.

There is indeed no great capital, but there are cities greater than most European capitals, and the Republic has not been imperilled by their growth. The influence of the clergy on public affairs has declined: whether or no that of religion has also been weakened it is more difficult to say. But all Americans are still agreed that religion gains by its entire detachment from the State.

The negro problem remains, but it has passed into a new and for the moment less threatening phase. Neither Tocqueville nor any one else then living could have foreseen that manumission would come as a war measure, and be followed by the grant of political rights. It is no impeachment of his judgement that he omitted to contemplate a state of things in which the blacks have been made politically the equals of the whites, while inferior in most other respects, and destined, apparently, to remain wholly separate from them. He was right in perceiving that fusion was not possible, and that liberation would not solve the problem, because it would not make the liberated fit for citizenship. Fit—that is to say, as fit as a considerable part of the white population—they will probably in the long run become, but even then the social problem will remain. His remark that the repulsion between the races in the South would probably be greater under freedom than under slavery has so far been strikingly verified by the result.

All the forces that made for the maintenance of the Federal Union are now stronger than they were then, while the chief force that opposed it, viz., the difference of character and habits between North and South, largely produced by the existence of slavery, tends to vanish. Nor does the growth of the Union make the retention of its parts in one body more difficult. On the contrary, the United States is a smaller country now when it stretches from the Bay of Fundy to the Gulf of California, with its seventy-six millions of people, than it was then with its thirteen millions, just as the civilized world was larger in the time of Herodotus than it is now,

for it took twice as many months to travel from Persepolis or the Caspian Sea to the Pillars of Hercules as it does now to circumnavigate the globe, one was obliged to use a greater number of languages, and the journey was incomparably more dangerous. Before steamboats plied on rivers, and trains ran on railways, three or four weeks at least were consumed in reaching Missouri from Maine. Now one goes in six days of easy travelling right across the continent.

Nor has the increased number of States bred more dissensions. The forty-five States of to-day are not as Tocqueville assumes, and this is the error which vitiates his reasonings, forty-five nations. The differences in their size and wealth have become greater, but they work more harmoniously together than ever heretofore, because neither the lines which divide parties nor the substantial issues which affect men's minds coincide with State boundaries. The Western States are now, so far as population goes, the dominant section of the Union, and become daily more so. But their interests link them more closely than ever to the North Atlantic States, through which their products pass to Europe, and the notion once entertained of moving the capital from Washington to the Mississippi valley has been quietly dropped.

#### VIII. CONCLUDING SUMMARY.

Before bidding farewell to our philosopher, let us summarize his conclusions.

He sees in the United States by far the most successful and durable form of democratic government that has yet appeared in the world.

Its merits are the unequalled measure of freedom, freedom of action, but not of thought, which it secures to the ordinary citizen, the material and social benefits it confers on him, the stimulus it gives to all his practical faculties.

These benefits are likely to be permanent, for they rest upon the assured permanence of

Social equality;  
Local self-government;  
Republican institutions;  
Widely diffused education.

It is true that these benefits would not have been attained so quickly nor in such ample measure but for the extraordinary natural advantages of the New World. Nevertheless, these natural advantages are but subsidiary causes. The character of the people, trained to freedom by experience and by religion, is the chief cause, their institutions the second, their material conditions only the third; for what have the Spaniards made of like conditions in Central and South America <sup>1</sup>?

Nevertheless, the horizon is not free from clouds.

What are these clouds?

Besides slavery and the existence of a vast negro population they are—

[ The conceit and ignorance of the masses, perpetually flattered by their leaders, and therefore slow to correct their faults. ]

The withdrawal from politics of the rich, and inferior tone of 'the governors,' *i.e.* the politicians.

The tyranny of the majority, which enslaves not only the legislatures, but individual thought and speech, checking literary progress, and preventing the emergence of great men.

The concentration of power in the legislatures (Federal and State), which weakens the Executive, and makes all laws unstable.

The probable dissolution of the Federal Union, either by the secession of recalcitrant States or by the slow decline of Federal authority.

There is therefore warning for France in the example

<sup>1</sup> The conditions of most parts of the tropical regions of South and Central America are in reality quite different from those of the American Union taken as a whole.

of America. But there is also encouragement—and the encouragement is greater than the warning.

Of the clouds which Tocqueville saw, one rose till it covered the whole sky, broke in a thunderstorm, and disappeared. Others have silently melted into the blue. Some still hang on the horizon, darkening parts of the landscape.

Let us cast one glance back at the course which events have actually taken as compared with that which Hamilton first, and Tocqueville afterwards, expected.

The Republic fared far otherwise than as Hamilton and his friends either hoped or feared. In this there is nothing to impeach their wisdom. They saw the dangers of their own time, and like wise and patriotic men provided the best remedies which existing conditions permitted. Some dangers they overcame so completely, particularly the financial misdoings of State legislatures, that these have now passed out of memory. They could not foresee what the power of money would become, because there was then little money in the country. They could not foresee the astonishing development of party machinery, because it is a perfectly new thing in the history of the world: and human imagination never does more, at any rate in the field of politics and sociology, than body forth things a little bigger than, or in some other wise a little varying from, what they have been before. It cannot create something out of nothing. Least of all could they divine what the results would be of the coexistence of the money power and the party machine. Nor did even Tocqueville, writing half a century later, when wealth had already appeared and the party machine was in places beginning to work, perceive what both had in store.

How would Tocqueville amend his criticisms were he surveying the phenomena of to-day?

He would add to his praise of the United States that its people re-established their government on firm foundations after a frightful civil war, that their army went

back to its peaceful occupations, that they paid off their debt, that they have continued to secure a free field for an unparalleled industrial development and to maintain a hitherto unattained standard of comfort, that the level of knowledge and intellectual culture has risen enormously. He would admit that he had overrated the dangers to be feared from a tyrannical majority and had underrated the strength of the Union. But he would stand aghast, as indeed all the best citizens in the United States do now, at the mismanagement and corruption of city governments. He would perceive that the party organizations have now become the controlling force in the country, more important than the Legislature or the Executive. He would recognize the evils incident to the habit of regarding public office as a means of private advantage to its holder and the bestowal of it as a reward for party services. And he would, while gladly owning that the older forms of faction had ceased to be alarming, note a new development which the spirit of faction has taken in the tendency to look at and deal with both legislation and foreign affairs from the point of view of party advantage. Want of foresight or insight in those who direct the affairs of a mighty nation is at all times a misfortune: but when foresight and insight are set aside for the sake of some transitory party gain, the results may be even more serious.

This, however, is a tendency inherent in all schemes of government by party. It is familiar and formidable in European countries also.

## VII

# TWO SOUTH AFRICAN CONSTITUTIONS<sup>1</sup>

### I. THE CONDITIONS UNDER WHICH THESE CONSTITUTIONS AROSE.

THE old Greek saying, 'Africa is always bringing something new<sup>2</sup>,' finds an unexpected application in the fact that there exist in South Africa two Dutch republics possessing constitutions diverse in type from any of those which we find subsisting in other modern States. The system established by these two South African instruments resembles neither the English, or so-called 'Cabinet,' system of government,—which has been more or less imitated by the other free countries of Europe, and has been reproduced in the self-governing British colonies,—nor the American, or so-called 'Presidential,' system, as it exists in the United States and the several States of the American Union. And although it bears some resemblance to the constitution of the Swiss Confederation and to the constitutions of the cantons of Switzerland, this resemblance is not a close

<sup>1</sup> This Essay was composed early in 1896, and describes the Constitutions of the Orange Free State and South African Republic as they stood in December 1895, the month when the fatal invasion of the latter Republic by the police of the British S. Africa Company took place. I have left it, for obvious reasons, substantially unchanged, save that here and there I have corrected what seemed to be errors, have added one or two references to recent events, and have explained some constitutional points with more fullness. In its original form, the Essay appeared in the *Forum* in April 1896.

<sup>2</sup> Δέγεται τις παροιμία ὅτι ἀεὶ φέρει Διβύη τι καινόν. Arist. *Hist. Anim.* viii. 28.

one, and is evidently not due to conscious imitation, but to a certain similarity of phenomena suggesting similar devices. The constitutions of these two Dutch republics are the product, the pure and original product, of African conditions, having drawn comparatively little from the experience of older countries, or from the models their schemes of government afford. Moreover, these South African constitutions grew up upon a perfectly virgin soil. There was no pre-existing political organization, such as the old feudal polities supplied in some countries of Europe, out of which these Republics could develop themselves. There were no charters or guilds or companies, such as those which gave their earliest form to the governments of several of the older American States. Nor was there any home pattern to be copied, as the British colonies have, by the aid of statutes of the Imperial Parliament, copied the constitution of the United Kingdom.

This is one of the most interesting features of these Constitutions. They are not specifically Dutch. Neither are they English. Nothing is more uncommon in history than an institution starting *de novo*, instead of being naturally evolved out of some earlier form. The simple farmers who drafted the documents which I propose to describe, knew little about the systems either of Europe or of America. Few possessed any historical, still fewer any legal, knowledge. Many were uneducated men, though with plenty of rough sense and mother wit. They would have liked to get on without any government, and were resolved to have as little as possible. Circumstances, however, compelled them to form some sort of organization; and in setting to work to form one, with little except their recollections of the local arrangements of Cape Colony to guide or to assist them, they came as near as any set of men ever have come to the situation which philosophers have so often imagined, but which has so rarely in fact occurred—that of free and independent persons uniting in an absolutely new social

compact for mutual help and defence, and thereby creating a government whose authority has had, and can have had, no origin save in the consent of the governed.

A few preliminary words are needed to explain the circumstances under which the constitutions of the Orange Free State and of the South African Republic (commonly called the Transvaal) were drawn up.

As early as 1820 a certain number of farmers, mostly of Dutch origin, living in the north-eastern part of Cape Colony, were in the habit of driving their flocks and herds into the wilderness north of the Orange River, where they found good fresh pasture during and after the summer rains. About 1828 a few of these farmers established themselves permanently there, still of course remaining subjects of the British Crown, which had acquired Cape Colony first by conquest and then by purchase in 1806 and 1814. In 1835-6, however, a much greater number of farmers migrated from the colony; some in larger, some in smaller bodies. They had various grievances against the British Government, some dating back as far as 1815: and they desired to live by themselves in their own way, untroubled by the Governors whom it sent to rule the country<sup>1</sup>. Between 1835 and 1838 a considerable number of these emigrants moved into the country beyond the Orange River, some remaining there, others pushing still further to the north-east into the hitherto unknown regions beyond the Vaal River, while a third body, perhaps the largest, moved down into what was then a thinly peopled Kafir land, and is now the British colony of Natal. This is not the place in which to relate the striking story of their battles with the Zulu king and of their struggle with the British Government for the possession of Natal. It is enough to say that this third body ultimately quitted Natal to join the other emigrants north of the moun-

<sup>1</sup> A concise account of these grievances and a sketch of the subsequent history of the emigrants may be found in Dr. Theal's *Story of South Africa* (published by Messrs. Putnam), and in my *Impressions of South Africa*, chaps. xi and xii. See also Dr. Theal's larger *History of the Boers in South Africa*.

tains; and that, after many conflicts between those emigrants and the native tribes, and some serious difficulties with successive Governors of Cape Colony, the British Government finally, by a Convention signed at Sand River in 1852, recognized the independence of the settlers beyond the Vaal River, while, by a later Convention signed at Bloemfontein in 1854, it renounced the sovereignty it had claimed over the country between the Orange River and the Vaal River, leaving the inhabitants of both these territories free to settle their own future form of government for themselves.

These two Conventions are the legal and formal starting-points of the two republics in South Africa, and from them the history of those republics, as self-governing states, recognized in the community of nations by international law, takes its beginning. The emigrant farmers had, however, already been driven by the force of circumstances to establish some sort of government among themselves. As early as 1836 an assembly of one of the largest emigrant groups then dwelling in the Orange River Territory, elected seven persons to constitute a body with legislative and judicial power. In 1838 the Natal emigrants established a *Volksraad* (council of the people) which consisted of twenty-four members, elected annually, who met every three months and had the general direction of the affairs of the community, acting during the intervals between the meetings by a small committee called the *Commissie Raad*. All important measures were, however, submitted to a general meeting called the *Publiek*, in which every burgher was entitled to speak and vote. It was a primary assembly, like the Old English Folk Mot, or the *Landesgemeinde* of the older Swiss Cantons. A somewhat similar system prevailed among the farmers settled in the country beyond the Vaal River. They too had a *Volksraad*, or sometimes—for they were from time to time divided into separate and practically independent republican communities—several *Volksraads*; and each

district or petty republic had a commandant-general. Their organization was really more military than civil, and the commandant-general with his Krygsraad (council of war), consisting of the commandants and field cornets within the district, formed the nearest approach to a regular executive. I have unfortunately been unable to obtain proper materials for the internal political history, if such a term can be used, of these communities before they proceeded to enact the constitutions to be presently described, and fear that such materials as do exist are very scanty. But, speaking broadly, it may be said that, in all the communities of the emigrant farmers, supreme power was deemed to be vested in an assembly of the whole male citizens, usually acting through a council of delegates, and that the permanent officials were generally a magistrate, called a landrost, in each village, a field cornet in each ward, and a commandant in each district. All these officials were chosen by the people<sup>1</sup>. In these primitive arrangements consisted the materials out of which a constitutional government had to be built up.

From this point the history of the Orange River Territory, which by the Convention of 1854 was recognized as the Orange Free State, and that of the Transvaal Territory begin to diverge. In describing the constitutions of the republics, I take first that of the Orange Free State, because it dates from 1854, while the existing constitution of the Transvaal is four years younger, having been adopted in 1858. The former is also by far the simpler and shorter document.

When the British Government in 1854 voluntarily divested itself of its rights over the Orange River Territory, greatly against the will of some of its subjects there, the inhabitants of that Territory were estimated at 15,000 Europeans, most of them of Dutch, the rest of

<sup>1</sup> I am indebted for most of these facts regarding the early organization of the emigrants to Dr. G. M. Theal's *History of the Boers in South Africa*, a book of considerable merit and interest, which, however, carries its narrative down only to 1854.

British origin. (The number of native Kafirs was much larger, but cannot now be estimated.) The great majority were farmers, pasturing their sheep and cattle on large farms, but five small villages already existed, one of which, Bloemfontein, has grown to be a town of 5,800 people, and is now the capital. The Volksraad, or assembly of delegates of the people, framed, and on April 10, 1854, enacted, a constitution for the new republic. This constitution was revised and amended in 1866, and again in 1879, but the main features of the original instrument remain. I proceed to deal with it as it now stands.

## II. CONSTITUTION OF THE ORANGE FREE STATE.

This Constitution, which is in the Dutch language, and is called *De Constitutie*, is a terse and straightforward document of sixty-two articles, most of which are only a few lines in length<sup>1</sup>. It begins by defining the qualifications for citizenship and the exercise of the suffrage (articles 1 to 4), and incidentally imposes the obligation of military service on all citizens between the ages of sixteen and sixty. Only whites can be citizens. New-comers may obtain citizenship if they have resided one year in the state and have real property to the value of at least £150 sterling (\$750), or if they have resided three successive years and have made a written promise of allegiance.

Articles 5 to 27 deal with the composition and functions of the Volksraad, or ruling assembly, which is declared to possess the supreme legislative authority. It consists of representatives (at present fifty-eight in number), one from each of the wards or Field Cornetcies, and one from the chief town or village of each of the (at present nineteen) districts. They are elected for four

<sup>1</sup> My thanks are due to the distinguished Chief Justice of the Free State (Mr. Melius de Villiers) for much information kindly furnished to me regarding this Constitution.

years, one-half retiring every two years. Twelve constitute a quorum. Every citizen is eligible who has not been convicted of crime by a jury or been declared a bankrupt or insolvent, who has attained the age of twenty-five years, and who possesses fixed (*i.e.* real) unmortgaged property of the value of £500 at least.

The Volksraad is to meet annually in May, and may be summoned to an extra session by its chairman, as also by the President (§ 34), or by the President and the Executive Council (§ 45).

The Volksraad has power to depose the President if insolvent or convicted of crime, and may also itself try him on a charge of treason, bribery, or other grave offence; but the whole Volksraad must be present or have been duly summoned, and a majority of three to one is required for conviction. The sentence shall in these cases extend only to deposition from office and disqualification for public service in future, a President so deposed being liable to further criminal proceedings before the regular courts.

The votes of members of the Volksraad shall be recorded on a demand by one-fifth of those present. The sittings are to be public, save where a special cause for a secret sitting exists.

The Volksraad shall make no law restricting the right of public meeting and petition.

It shall concern itself with the promotion of religion and education.

It shall promote and support the Dutch Reformed Church.

It may alter the constitution, but only by a majority of three-fifths of the votes in two consecutive annual sessions.

It has power to regulate the administration and finances, levy taxes, borrow money, and provide for the public defence.

Articles 28 to 41 deal with the choice and functions of the President of the state.

He is to be elected by the whole body of citizens, the Volksraad, however, recommending one or more persons to the citizens<sup>1</sup>.

He is chosen for five years and is re-eligible.

He is the head of the executive, charged with the supervision and regulation of the administrative departments and public service generally, and is responsible to the Volksraad, his acts being subject to an appeal to that body. He is to report annually to the Volksraad, to assist its deliberations by his advice, but without the right of voting, and, if necessary, to propose bills. He makes appointments to public offices, and may fill vacancies that occur when the Volksraad is not sitting, but his appointments require its confirmation. (Such confirmation has been hardly ever, if ever, refused.) He may also suspend public functionaries, but dismissal appears to require the consent of the Volksraad.

Articles 42 to 46 deal with the Executive Council. It consists of five members, besides the State President, who is *ex-officio* chairman, with a deciding or overriding vote (*bestissende stem*). Of these five, one is the landrost (magistrate) of Bloemfontein, another the State Secretary, both these officials being appointed by the President and confirmed by the Volksraad; the remaining three are elected by the Volksraad. This Council advises the President, but does not control his action in matters which the Constitution entrusts to him, reports its proceedings annually to the Volksraad, and has the rights, in conjunction with the President, of pardoning offenders and of declaring martial law.

Regarding the judicial power only two provisions require mention. Article 48 declares this power to be exclusively exercisable by the courts of law established by law. Article 49 secures trial by jury in all criminal causes in the superior courts.

Local government and military organization, subjects

<sup>1</sup> In practice, the recommendation of the majority of the Volksraad is looked upon as likely to ensure the election of the person so recommended.

intimately connected in Dutch South Africa, occupy articles 50 to 56 inclusive.

A field cornet is elected by the citizens of each ward, a field commandant by those of each district, in both cases from among themselves<sup>1</sup>. In case of war, all the commandants and cornets taken together elect a Commandant-General, who thereupon receives his instructions from the President. Those who elected him may, with the consent of the President, dismiss him and choose another. Every field cornet and commandant must have landed property, the latter to the value of £200 at least.

Article 57 declares Roman Dutch law to be the common law of the state<sup>2</sup>.

Articles 58 and 59 declare that the law shall be administered without respect of persons and that every resident shall be held bound to obey it, while articles 60, 61, and 62 guarantee the rights of property, of personal liberty, and of press freedom.

It will be convenient to defer general criticisms upon the frame of government established by this Constitution till we have examined that of the sister republic of the Transvaal, which agrees with it in many respects. But we may here briefly note, before passing further, a few remarkable features of the present instrument.

1. It is a Rigid constitution, *i.e.* one which cannot be changed in the same way and by the same authority as that whereby the ordinary law is changed, but which must be changed in some specially prescribed form—in this case, by a three-fourths majority of the Volksraad in two successive sessions<sup>3</sup>.

2. The body of the people do not come in as a vot-

<sup>1</sup> In the earlier days of Rome the army elected its subordinate officers.

<sup>2</sup> Roman Dutch law is the common law all over South Africa, even in the almost purely English colony of Natal (though of course not in Portuguese or German territory). It has been largely affected, especially in the British colonies, by recent legislation.

<sup>3</sup> As to Rigid Constitutions, see Essay III.

ing power, save for the election of the President and Commandant-General. All other powers, even that of amending the constitution, belong to the Volksraad.

3. There is only one legislative chamber.

4. The President has no veto on the acts of the legislature.

5. The President has the right of sitting in and addressing the legislature.

6. The President's Council is not of his own choosing, but is given him by the legislature.

7. The heads of the executive departments sit neither in the Council nor in the legislature.

8. The legislature may apparently reverse any and every act of the President, save those (pardon of offences and declaration of martial law) specially given to him and the Executive Council.

American readers will have noted for themselves some few points in this Constitution which have been drawn from that of the United States. Others are said to have been suggested by the Constitution framed for the French Republic in 1848. Comparatively few controversies upon the construction of the Constitution have been debated with any warmth. One, which gave rise to a difference of opinion between the Volksraad and the Supreme Court of the state, arose upon the question whether the Volksraad has power to punish a citizen for contempt by committing him to prison for a long term, and to direct the State Attorney to prosecute him. The judges disapproved what they deemed an unconstitutional stretching of authority by the legislature. Using the opportunities of influencing public opinion which the delivery of charges to juries gave them, they ultimately so affected the mind of the people that the Volksraad tacitly retired from its position, leaving the question of right undetermined.

## III. CONSTITUTION OF THE SOUTH AFRICAN REPUBLIC.

The South African Republic, or Transvaal State as it is popularly called, is ruled by a much longer, much less clear, and much less systematically arranged document than that established by its sister commonwealth<sup>1</sup>. A considerable part of the contents of this constitution is indeed unfit, as too minute, for a fundamental instrument of government; and, whatever the intention of its framers may have been, it has not in fact been treated as a fundamental instrument. Whether it is really such, in strict contemplation of law, is a question often discussed in professional circles in Pretoria and Johannesburg. I shall summarize the more important of its provisions—they occupy two hundred and thirty-two articles—and endeavour therewith to present an outline of the frame of government which they establish.

The Grondwet (Ground-law) or Constitution was drafted by a committee of an assembly of delegates and approved by the assembly itself in February, 1858. It is in Dutch, but has been translated into English more than once.

Article 6 declares the territory of the republic open to every stranger who submits himself to the laws—a provision noteworthy in view of recent events—and declares all persons within the territory equally entitled to the protection of person and property.

Article 8 states, *inter alia*, that the people 'permit the spread of the Gospel among the heathen, subject to prescribed provisions against the practice of fraud and deception'; a provision upon whose intention light is thrown by the suspicions felt by the Boers of the English missionaries.

Article 9 declares that 'the people will not tolerate

<sup>1</sup> I have to thank my friend Mr. J. G. Kotzé, late Chief Justice of the South African Republic, for information kindly supplied to me regarding certain points in this Constitution.

equality between coloured and white inhabitants either in church or in state <sup>1</sup>.

Article 10 forbids slavery or dealing in slaves.

Article 19 grants the liberty of the press.

Articles 20 to 23 formerly declared that the people would maintain the principles of the doctrine of the Dutch Reformed Church, as fixed by the Synod of Dort in 1618 and 1619, that the Dutch Reformed Church shall be the Church of the State, that no persons shall be elected to the Volksraad who are not members of that Church, that no ecclesiastical authority shall be acknowledged save that of the consistories of that Church, and that no Roman Catholic Churches, nor any Protestant Churches save those which teach the doctrine of the Heidelberg Catechism, shall be permitted within the republic. But these archaic provisions were in the revised Grondwet of 1889 reduced to a declaration that only members of a Protestant Church should be elected to the Volksraad <sup>2</sup>.

After these general provisions we come to the frame of government. Legislation is committed to a Volksraad, 'the highest authority of the state.' It is to consist of at least twelve members (the number is at present twenty-four) who must be over thirty years of age and possess landed property. Each district returns an equal number of members. Residence within the district is not required of a candidate. The members were formerly elected for two years, and one-half retired annually. Their term was afterwards extended to four years. Every citizen who has reached the age of twenty-one enjoys the suffrage <sup>3</sup> (persons of colour are of course

<sup>1</sup> The Boers are a genuinely religious people, and read their Bibles. But they have shown little regard to 1 Corinthians xii. 13; Galatians iii. 28; and Colossians iii. 11. The same may be said of the people of the Southern States of America; and is indeed also true of the less religious English both in South Africa and in the West Indies.

<sup>2</sup> I am informed that even this restriction was abolished subsequently to 1895.

<sup>3</sup> The suffrage was by subsequent enactments restricted as respects immigrants and the sons of immigrants; and in 1895 a person coming into the country could not obtain full electoral rights till after a period of twelve years. In July 1899, three

incapable of voting or of being elected). The unworkable provision of the old Grondwet that 'any matter discussed shall be decided by three-fourths of the votes' was subsequently repealed.

Three months are to be given to the people for intimating to the Volksraad their opinion on any proposed law, 'except laws which admit of no delay' (§ 12), but laws may be discussed whether published three months before their introduction or introduced during the session of the Volksraad (§ 43). The sittings are to open and close with prayer, and are to be public, unless the chairman or the President of the Executive Council deems secrecy necessary.

If the high court of justice declares the President, or any member of the Executive Council, or the Commandant-General, unfit to fill his office, the Volksraad shall remove from office the person so declared unfit and shall provide for filling the vacant office.

The administration, as well as the proposal, of laws was by the old Grondwet given to an Executive Council (§ 13). The revised instrument vests it in the State President. The President is elected for five years by the citizens voting all over the country. He must have attained the age of thirty and be a member of a Protestant (formerly of the Dutch Reformed) Church (§ 56). He is the highest officer of the state, and appoints all officials. All public servants, except those who administer justice, are subordinate to him and under his supervision. In case of his death, dismissal, or inability to act, his functions devolve on the oldest member of the Executive Council till a new appointment is made. The Volksraad shall dismiss him on conviction of any serious offence. He is to propose laws to the Volksraad—'whether emanating from himself or sent in to him by the people'—and support them in that body either personally or through a member of the Executive Council. He has,

months before the war which broke out in that year, the period was shortened to seven years owing to pressure by the British Government.

however, no right to vote in the Volksraad. He recommends to the Volksraad persons for appointment to public posts; and may suspend public servants, saving his responsibility to the Volksraad. He submits an estimate of revenue and expenditure, reports on his own action during the past year and on the condition of the republic, visits annually all towns and villages where any public office exists to give due opportunity to the inhabitants of stating their wishes.

The Executive Council consists of four official members besides the President, namely, the State Secretary, the Commandant-General, the Superintendent of Native Affairs, and the Keeper of Minutes (*Notulenhouder*), and of two other members. All except the Commandant-General are elected by the Volksraad; the Secretary for four years, the two other members for three years. The Commandant-General is elected by the burghers of the whole republic for ten years. All, including the President, are entitled to sit, but not to vote, in the Volksraad. The President and Council carry on correspondence with foreign powers, and may commute or remit a penal sentence. A sentence of death requires the unanimous confirmation of the Council. The President may, with the unanimous consent of the Council, proclaim war and publish a war ordinance summoning all persons to serve (§§ 23, 66, 84).

The provisions relating to the military organization (§§ 93-114) are interesting chiefly as indicating the highly militant character of the republic. Express provision is made not only for foreign war and for the maintenance of order at home, but also for the cases of native insurrection and of disaffection or civil war among the whites. The officers are all elected by the burghers, the Commandant-General by the whole body of burghers for ten years, the commandants in each district for five years, the field cornets and assistant field cornets in the wards for three years.

The judiciary (§§ 115-135) consists of landrosts (magis-

trates who also discharge administrative duties), heemraden (local councillors or assessors), and jurors. The provisions regarding the exercise of judicial power are minute and curious in their way, but have no great interest for constitutional purposes. Two landrosts are proposed to the people of the judicial district by the Executive Council, and the people vote between these two. Minute provisions regarding the oaths to be taken by these officials and by jurymen, and regarding the penalties they may inflict, fill the remaining articles. A guarantee for the independence of the courts is to be found in the general statement in article 15 that 'the judicial power is vested in landrosts, heemraden, and jurors,' and in the declaration (§ 57) that the judicial officers are 'left altogether free and independent in the exercise of their judicial power.' A High Court and a Circuit Court, not provided for in the old Grondwet, appear in that of 1889, and are appointed for life. The High Court consists of a chief justice and four puisne judges.

The old Grondwet also contained some curious details relating to civil administration (which was primarily entrusted to the judicial officers, supported by the commandants and field cornets), and the revenue of the State, which was intended to be drawn chiefly from fees and licences, the people having little disposition to be directly taxed. The farm tax was not to exceed forty dollars, and the poll-tax, payable by persons without or with only one farm, was fixed at five dollars annually. Five dollars was the payment allowed to each member of the Volksraad for each day's attendance. Most of these provisions have disappeared from the instrument of 1889. The salary of the President of the Council, which had been fixed at 5,333 dollars, 2 schellings, and 4 stuivers, to be increased as the revenue increased, now amounts to £7,000 sterling (\$35,000) per annum, besides allowances.

The most considerable change made since 1889 was

the establishment, in 1890, of a chamber called the Second Volksraad, which is elected on a more liberal basis than the First Volksraad, persons who have resided in the country for two years, have taken an oath of allegiance and have complied with divers other requirements, being admissible as voters. This assembly, however, enjoys little real power, for its competency is confined to some specified matters, and to such others as the First Volksraad may refer to it; and its acts may be overruled by the First Raad, whereas the Second Raad has no power of passing upon the resolutions or laws enacted by the First Raad. The Second Volksraad is, therefore, not a second chamber in the ordinary sense of the term, such as the Senate in American States or the House of Lords in England, but an appendage to the old popular House. It was never intended to exercise much power, and was, in fact, nothing more than a concession, more apparent than real, to the demands of the Uitlanders, or recent immigrants excluded from citizenship.

A few general observations may be made on this Constitution before we proceed to examine its legal character and effect.

It was in its older form a crude, untechnical document, showing little trace on the part of those who drafted it either of legal skill or of a knowledge of other constitutions. The language was often vague, and many of the provisions went into details ill-fitted for a fundamental law.

Although enacted by and for a pure democracy, it was based on inequality—inequality of whites and blacks, inequality of religious creeds. Not only was the Dutch Reformed Church declared to be established and endowed by the State, but Roman Catholic churches were forbidden to exist, and no Roman Catholic nor Jew nor Protestant of any other than the Dutch Reformed Church was eligible to the presidency, or to membership of the legislature or executive council. In its improved

shape (1889) some of these faults have been corrected, and in particular the religious restrictions were reduced to a requirement that the President, the Secretary of State, the Landrosts and the members of the Volksraad should belong to a Protestant Church. The door, however, remained barred against persons of colour.

It contained and still contains little in the nature of a Bill of Rights, partly perhaps from an oversight on the part of its draftsmen, but partly also owing to the assumption—which the early history of the republic amply verified—that the government would be a weak one, unable to encroach upon the rights of private citizens.

The first legal question which arises upon an examination of this Constitution relates to its stability and permanence. Is it a Rigid or a Flexible Constitution? That is to say, can it, like the constitution of the Orange Free State and that of the United States, be altered only in some specially prescribed fashion? Or may it be altered by the ordinary legislature in the ordinary way, like any other part of the law?

In favour of the former alternative, that the constitution is a Rigid one, appeal has been made not only to the name *Grondwet* (Ground-law), but, which is of more consequence, to some of its language. The general declarations of the power of the people, the form in which they entrust power to the legislature, to the Executive Council, and to the judiciary respectively (as well as to the military authority), look as if meant to constitute a triad of authorities, similar to that created by the constitutions of American States, no one of which authorities may trespass on the province of the others. Some things seem intended to be secured against any alteration by the legislature, e. g., article 9 declares that 'the people will not allow of any equality between coloured and white inhabitants'; article 11 declares that 'the people reserve to themselves the exclusive right of protecting and defending the independence and

inviolability of Church and State, according to the laws.'

On the other hand, it is argued that the constitution must be deemed to be a Flexible one, because it did not in its original form, and does not now, contain any provision whereby it may be altered, otherwise than by the regular legislature of the country acting according to its ordinary legislative methods. One cannot suppose that no change was intended ever to be made in the Grondwet. That supposition would be absurd in view of the very minute provisions on some trivial subjects which it contains. No distinction is drawn, by the terms of the instrument, between these minutiae and the provisions of a more general and apparently permanent nature. *Ergo*, all must be alterable, and alterable by the only legislative authority, that is to say, the Volksraad. This view, moreover, is the view which the legislature has in fact taken, and in which the people have certainly acquiesced. Some changes have been made—such as the admission to the electoral franchise of persons not belonging to the Dutch Reformed Church, the creation of a new supreme court, and the establishment of a Second Volksraad—which are not consistent with the Grondwet, but whose validity has not been contested.

The difficulty which arises from the fact that, whereas the framers of the Grondwet appear to have desired to make parts of their work fundamental and unchangeable, they have nevertheless drawn no distinction between those parts and the rest, and have provided no specific security against the heedless change of the weightiest parts, may be explained by noting that they were not skilled jurists or politicians, alive to the delicacy of the task they had undertaken. They expected that the Volksraad would continue to be of the same mind as they were then, and would respect what they considered fundamental; they relied on the general opinion of the nation. They had, moreover, provided a method whereby the nation should always have an opportunity

of expressing its opinion upon legislation, namely, the provision (§ 12) that the people should have a period of three months within which to 'intimate to the Volksraad their views on any proposed law,' it being assumed that the Volksraad would obey any such intimation, although no means is provided for securing that it will do so.

This provision has given rise to a curious question. It excepts 'those laws which admit of no delay.' Now the Volksraad has in fact neglected the general provision, and, instead of allowing the three months' period, has frequently hastily passed enactments upon which the people have had no opportunity of expressing their opinion. Such enactments, which have in some instances purported to alter parts of the Grondwet itself, are called 'resolutions' (*besluite*) as opposed to laws; and when objection has been taken to this mode of legislation, these resolutions seem to have been usually justified on the ground of urgency, although in fact many of them, if important, could hardly be called urgent. They have been treated as equally binding with laws passed in accordance with the provisions of the Grondwet (for up to 1895 article 12 seems not to have been formally altered); and it is only recently that their validity has been seriously questioned in the courts. Those who support their validity argue that in passing such resolutions as laws, the Volksraad must be taken to have implicitly, but decisively, repealed the provision of article 12; or that, if this be not so, still the Volksraad is under article 12 the sole judge of urgency, and can legally treat things as urgent which are, in fact, not so; a view affirmed by the Chief Justice in a case (*State v. Hess*) which arose in 1895. They add that even apart from both these arguments the unbroken usage of the Volksraad during a number of years, tacitly approved by the people, must be deemed to have established the true construction of the Constitution, especially as according to Roman Dutch law, usage, whether affirmative or negative, can alter written enactments and could thus annul the direc-

tions of article 12. So it is written in the Digest of Justinian (I. 3. 32): 'Inveterata consuetudo pro lege custoditur . . . nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissime etiam illud receptum est ut leges non solum suffragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.' To this, however, it is answered that the principle of obsolescence by contrary practice cannot fitly be applied where a statute is recent and express.

Until 1897, the High Court of the Transvaal had held that the resolutions as well as the laws passed by the Volksraad were fully valid, whether or no they had been submitted to the people for the period of three months, nor had the question of their being really urgent been raised. It had thus declared the Grondwet to be alterable by the Legislature, and so not a Rigid Constitution. In that year, however, in the case of *Brown v. Leyds*, the Court held, by a majority, that a law which had been passed without having been submitted to the people during the period prescribed by the Grondwet was unconstitutional and therefore void, thus appearing to assert (for the language of the judgement is not very clear) the view that the Grondwet was a Rigid Constitution, not alterable by the Legislature. This action was warmly resented by the Executive and Legislature: and the latter passed a resolution directing the President to require from every judge on pain of dismissal a declaration that he would in future recognize as valid every law passed by the Volksraad, and not again assert the so-called 'testing power' of inquiring whether a law conformed to the provisions of the Grondwet. The Chief Justice refused to make this declaration, and was accordingly dismissed, much to the regret of those who remembered his past services to the State.

On a review of the whole matter, apart from the political passion which has been brought into it, the true view would appear to be the following, though I state

it with the diffidence becoming a stranger who is also imperfectly informed as to the constitutional history of the republic.

The Grondwet of the South African Republic, though possibly intended by its framers to be treated, in respect of its most important provisions, as a fundamental law not to be altered by the Volksraad in the exercise of its ordinary powers, is not really a Rigid constitution but a Flexible one. We have to look not so much at what the framers may have wished as at what the language employed actually conveys and imports; and the absence of any provision, such as that contained in the Constitution of the Orange Free State, for a special and peculiar method of change, is decisive upon this point. An American lawyer, accustomed to construe strictly documents which contain or modify powers, might be inclined to argue that the validity of laws (not dealing with matters which 'admit of no delay') which had been passed as mere resolutions, ignoring article 12, may have been doubtful until the Volksraad modified that article by legislation. But the Transvaal High Court had held that the question of urgency was a question for the discretion of the Volksraad; and it must be added that persons accustomed to other legal systems do not necessarily proceed upon American principles. The Swiss, for instance, make their legislature the interpreter of the Constitution for the purpose of determining the extent of legislative power<sup>1</sup>. Allowing for this, and remembering that both the law courts and the whole people had until 1897 treated the Volksraad as an absolutely sovereign body, the action it took in asserting its sovereignty need excite no surprise. It was claiming nothing more than the powers actually enjoyed by the British Parliament. However, although the Volksraad was merely enforcing the rights which it reasonably (and I think correctly) conceived itself to possess, and could not have permitted the majority of the High Court to assert a power pre-

<sup>1</sup> See Essay III, p. 195.

viously unknown, a wiser course would have been to amend the Constitution in some way which would have given to the judiciary a more assured position than that which had been secured to them by a confessedly crude and imperfect instrument. It was through the confused language of the Grondwet that the whole difficulty arose, and while formally declaring that the Grondwet was not—as it certainly was not—a Rigid Constitution, the Volksraad ought to have endeavoured to render it more suited to the needs of a society which had grown to be different from that for which it had been originally enacted.

#### IV. OBSERVATIONS ON THE CHARACTER AND WORKING OF BOTH CONSTITUTIONS.

The principles of these Constitutions are highly democratic. They were intended so to be. Among the whites settled in these wide territories there prevailed a perfect social equality, a passionate love of independence, and a strong sense of personal dignity. They were as little influenced by political theories as it was possible for any civilized men in this century to be. Their wish for a government purely popular, and indeed for very little of any government at all, was due to their personal experience and to the conditions under which they found themselves in the wilderness; and one may doubt whether they would have established a regular government but for the dangers which threatened them from the warlike native tribes. Such sentiments as I have described would have disposed them, had they lived in a city, or in a small area like the cantons of Uri or Appenzell in Switzerland, to have kept legislation and the determination of all grave affairs in the hands of a general meeting of the citizens. But they lived scattered over a vast wilderness, with no means of communication save ox-wagons which travel only some twelve miles a day. In the Orange River Territory when

it became a state there were probably less than three thousand citizens, though its area was nearly that of England. Hence primary assemblies were impossible, and power had to be entrusted to a representative body.

The predominance of the legislature is the most conspicuous feature of both these constitutions. The Transvaal Volksraad originally made all the appointments to the civil service, for the President had only the right of proposing, and even in the revised Grondwet of 1889 the Raad retains the right of approving or disapproving the President's appointments. In both republics the Volksraad appoints a majority of the Executive Council which surrounds the President, to advise, but also to watch and check him. It has complete control of revenue and expenditure. It may change the constitution, though, in the Orange Free State, only by a prescribed majority. The President has no veto on its acts; nor is it, as in most modern free countries, divided into two chambers likely to differ from and embarrass one another. Its vote, which may, if it pleases, be a single vote, given under no restrictions but those of its own making, is decisive.

The comparative feebleness of the other branches of government corresponds to the overwhelming strength of the legislature. The authority of the judiciary received from the first a somewhat vague recognition, and its independence was at one time, in the South African Republic, seriously threatened by the executive and legislature, and saved only by the exertions of the bench and bar, which aroused public opinion on its behalf. The later controversy between the Volksraad and the Chief Justice has been already discussed. In the Free State the Court's claim to be the proper and authoritative interpreter of the constitution, which would be clear upon English or American principles, was never formally admitted. And though the judges are in both republics appointed for life, their salaries are at the mercy of the legislature.

The executive head of the government has no doubt the advantage, as in an American State, of being directly chosen by the people, and not, as in France, by the legislature. But he has no veto on acts of the legislature, while his acts can be overruled by it, at least in the Orange Free State, for in the Transvaal this may be more doubtful. Its approval is required to any appointments he may suggest. He is hampered by an Executive Council which he has not himself selected, resembling in this respect an American State governor rather than the President of the Union. It may, in the Free State, try him and depose him if convicted. He has no military authority, such as that enjoyed by the British Crown and its ministers, or by the American President, for that belongs to the Commandant-General (though in the Orange Free State the Commandant 'receives instructions' from the President).

Against all these sources of weakness there are only two things to set. The President can speak in the Volksraad, and he is re-eligible any number of times.

The Executive Council, as already observed, seems intended to restrain the President, while purporting to aid and advise him. It may be compared to the Privy Council of mediaeval England, with the important difference that it is appointed, not by the executive, but partly by the legislature, partly by the people. As we shall see presently, it has proved to be an unimportant part of the machinery of government.

In all these points the two constitutions present a close likeness. They are also similar in the recognition which they originally gave, and have not wholly ceased to give, to a state church—an institution opposed to democratic ideas in America and in the British Colonies—as well as in their exclusion of persons of colour from every kind of political right. It would appear that upon this point there has never been any substantial difference of opinion in the two republics. Neither indeed is there

much difference of opinion in the British parts of South Africa, for although the influence of English ideas has been so far felt that in Cape Colony persons of colour are permitted to vote, still the combination of a property qualification with an educational qualification greatly restricts their number. A republican form of government, therefore, does not necessarily appear to make for 'human rights' in the American sense of that term, any more than it did in the United States in 1788.

Speaking generally, these two Constitutions carry the principle of the omnipotence of the representative chamber to a maximum. This will be more clearly seen if we compare the system they create, first with the cabinet system of Britain and her self-governing colonies, and secondly with the presidential system of the United States.

The main differences between the South African scheme of government and the British may be briefly summarized.

The head of the executive is, in the South African republics, chosen directly by the people, whereas in Britain and her colonies the executive ministry is virtually chosen by the legislature<sup>1</sup>, though nominally by the Crown or its local representative.

In these republics the executive cannot, as can ministers under the British system, be dismissed by a vote of the legislature, nor on the other hand has the executive the power of dissolving the legislature.

In these republics the nominal is also the real and acting executive head, whereas in the British system a responsible ministry is interposed between the nominal head and the legislature.

In all the above-mentioned points the South African system bears a close resemblance to the American.

<sup>1</sup> Using the expression which Bagehot has made familiar, though of course Parliament is far from determining the entire composition of a ministry, which may occasionally contain persons it would not have selected.

In these republics the President's Council need not consist of persons in agreement with his views of policy. It may even be hostile to him, as part of Warren Hastings's council at Calcutta was in permanent opposition to that governor. Nor does the Executive Council consist, like the (normal) British cabinet and United States Federal cabinet, of the heads of the great administrative departments, though several officials sit in it.

On the other hand, the South African system agrees with the British in permitting the head of the working executive to speak in the legislature, a permission which has proved to be of the highest importance, and which in America is given by usage neither to the Federal President<sup>1</sup> nor to a State governor.

The chief differences between the South African and the American system are the following:—

The President has, in the South African republics, far less independence than belongs in the United States to either a Federal President or to the Governor of a State. He has no veto on acts of the legislature, and less indirect power through the patronage at his disposal. Moreover, the one-chambered legislature is much stronger as against him than are the two-chambered legislatures of America, which may, and frequently do, differ in opinion, so that the President or Governor can play off one against the other. Further, as already observed, an American Federal President has a cabinet of advisers whom he has himself selected, and an American State governor has usually officials around him who, being elected by a party vote at the same election, are probably his political allies; whereas a South African President might possibly have an Executive Council of opponents forced on him by the Volksraad. And even in negotiations with foreign states, he cannot act apart from this Executive Council.

The distinctive note of both these South African Con-

<sup>1</sup> Although there is nothing in the federal constitution to prevent a President from addressing either House of Congress.

stitutions is the kind of relation they create between the Executive and the Legislature. These powers are not disjoined, as in the United States, because a South African President habitually addresses and may even lead the Volksraad. Neither are they united, as in Britain and her colonies, where the Executive is at the same time dependent on the legislature, and also the leader of the legislature, for the South African President is elected by the people for a fixed term, and cannot be displaced by the Volksraad. He combines the independence of an American President with the opportunities of influencing the legislature enjoyed by a British, or British colonial, Ministry. For nearly all practical purposes he is at the mercy of the legislature, because he has neither a veto, like the American President, nor a power of dissolution, like the British Ministry. The Volksraad could take all real power from him, should it be so minded. But he is strong by the possession of the two advantages just mentioned. He can persuade his Volksraad, which has not, by forming itself into organized parties, become inaccessible to persuasion. He can influence the opinion of his people, because he is their choice, and a single man in a high place fixes the attention and leads the minds of a people more than does an assembly.

It must, however, be remembered that the features—perhaps one may say the merits—which I have noted as shown in the working of the South African system, belong rather to small than to large communities. The Free State had in 1895 only some seventeen thousand voting citizens, the Transvaal not many more. Athens in the days of Themistocles had about thirty thousand. In large countries, with large Legislatures, whose size would engender political parties, things would work out differently. Furthermore, in a large State, the administrative departments would be numerous and their work heavy. The President could not discuss departmental affairs with the Raad, and could not easily be made personally responsible for all that his administrative officers

did. And the less knowledge he had of affairs and of persons, the less influence he exerted over the Raad, the more would his Executive Council tend to check him. Its members would probably intrigue with the leaders of parties in the Volksraad, and make themselves a more important factor in the government than they have been while overshadowed by his personality.

Any one who, knowing little or nothing about the social conditions and the history of these two republics, should try to predict the working of their governments from a perusal of their constitutions, would expect to find them producing a supremacy, perhaps a tyranny, of the representative assembly; for few checks upon its power are to be found within the four corners of either instrument. He would be prepared to see party government develop itself in a pronounced form. Power would be concentrated in the party majority and its leaders. The Executive would become the humble instrument of their will. The courts of law, especially in the Transvaal with its Flexible constitution, would be unable to stem the tide of legislative violence. The President might perhaps attempt to resist by producing a deadlock over appointments; and he would have a certain moral advantage in being the direct choice of the people. But the one-chambered Legislature would in all probability prevail against him.

Is this what has in fact happened? Far from it. Party government, in the English and American sense, has not made its appearance. The Legislature has not become the predominant power, subjecting all others to itself. It has, in general, followed the lead of the Executive. The Courts of law, though (in the Transvaal) at one moment menaced, have administered justice with fairness and independence. But in order to describe what has happened, I must, in a very few sentences, deal separately with the Orange Free State and the South African Republic, for though their constitutions are similar and the origin of their respective popu-

lations nearly identical<sup>1</sup>, their history has been very different.

The Orange Free State had, for many years prior to 1899, a comparatively tranquil and uneventful career. One native war inflicted some injury upon it, but the result of that war was to give it a strip of valuable territory. It had joined the British colonies in a South African Customs Union, had placed its railroads under the management of the Cape Government, had maintained friendly relations with the two British self-governing colonies, had extended the franchise to immigrants on easy terms, and was at all times recognized as absolutely independent by the British Government. Internally its development, if not rapid, was both steady and healthful. There was no poverty among the people, and hardly any wealth. No exciting questions arose to divide the citizens, and no political parties grew up. The Legislature, although too large, has been a sensible, business-like body, which wasted no more time than debate necessarily implies. From 1863 to 1888 it was guided by the counsels of President Brand, whom the people elected for five successive terms, and whose power of sitting in it and addressing it proved of the utmost value, for his judgement and patriotism inspired perfect confidence. His successor Mr. Reitz, who was obliged by ill-health to retire from office in 1895, enjoyed equal respect and almost equal influence, when he chose to exert it, with the Volksraad, and things went smoothly under him, as they promised to do under President Steyn, who was elected in 1896, for the latter also was believed—so I heard when visiting the Free State in 1895—to possess the qualities which had endeared his predecessors to the community. The Executive Council has not proved to be a very valuable part of the scheme of government; and some judicious observers thought the constitution ought to be amended by strengthening

<sup>1</sup> The British element is larger among the citizens of the Orange Free State than it is in the burgher population of the Transvaal.

the position of the courts and introducing provisions for a popular vote on constitutional amendments, similar to those which exist in American States and in Switzerland. But, on the whole, the system of government worked smoothly, purely and efficiently; the Legislature was above suspicion, and the people were content with their institutions.

Very different had been the annals of the South African Republic. Soon after the Grondwet was adopted in 1858, a civil war broke out; and from that time onward factions and troubles of all kinds were seldom wanting. In 1877 the country, then threatened by native enemies, was annexed to the British dominions against the will of the people: in 1881 its autonomy was restored, subject to British suzerainty<sup>1</sup>. Its government, however, continued to be pressed by financial and other difficulties, till the discovery of rich gold-fields in 1884-6, while suddenly increasing the revenue, drew in a stream of immigrants which has steadily continued to flow, and therewith raised that new crop of political troubles of which all the world has heard<sup>2</sup>. The result has been that the Constitution has never had any period of comparative peace in which its working could be fairly tested. If it has not worked as smoothly as that of the Free State, this may be due not merely to inherent defects but to the strain which civil and foreign wars have placed upon it. The Legislature, however, has not played the leading part. President Burgers, who held

<sup>1</sup> A further convention was made in 1884, whose articles, omitting all reference to 'suzerainty' conceded an independence qualified only in respect of the veto retained by Britain over treaties with foreign powers.

<sup>2</sup> When these immigrants from all parts of the world swarmed into the country, admission to the franchise was made more difficult, because the conservative section of the citizens naturally feared that the newcomers, many of whom did not intend to make the country their home, might, if they forthwith acquired voting power, soon secure a majority and overturn the existing system of the republic, including the official use of the Dutch language and the relations of Church and State. These non-burgher immigrants have been absurdly described as 'helots.' A closer parallel to them is to be found not in the semi-serfs of Sparta but in the class of resident aliens known at Athens as metics (μέτοικοι). But they were indeed far better off than that class, since they enjoyed full civic rights in all matters of private law, wanting only the right of sharing in the government.

office from 1872 till 1877, was, like President M. W. Pretorius before him, practically more powerful than the Volksraad; and since 1881 President Kruger, who has been thrice re-elected, has been the ruling force in the politics of the country. By his influence over the people, by his constant presence and speeches in the Volksraad, he threw its leaders entirely into the shade, and probably exerted more actual power than the chief magistrate of any other republic, though there was scarcely any other chief magistrate whose legal authority was confined within such narrow limits. So much may foreign troubles or economic and social facts, and so much do the qualities of individual men, affect and modify and prevail over the formal rules and constitutional machinery of government. The Legislature therefore has not had in the Transvaal that career of encroachment upon and triumph over the other authorities in the State which might have been predicted for it. Its turn might have come when external relations were tranquil and domestic controversies arose. When foreign affairs occupy men's minds and call for rapid decision as well as for continuity of policy, the Legislature is apt to be, in all countries, dwarfed by the Executive.

#### POSTSCRIPT.

Since the foregoing sketch of these remarkable experiments in the construction of Frames of Government was written (in 1896), both the Dutch republics have become involved in a deplorable war with England, which has lasted for many months, and still continues at the time of this writing. It has brought misery and desolation upon South Africa, and not least upon that singularly happy, prosperous, peaceful and well-governed community, the Orange Free State. While the flames are still raging, no one can conjecture in what form these two constitutions will emerge from the furnace, or whether indeed they will survive at all. In the midst

of so terrible a catastrophe, a catastrophe unredeemed by any prospect of benefit to any of the combatants, and one whose results must be fateful in many ways for the future of South Africa, and possibly also of Britain, the destruction or transformation of constitutions seems but a small matter. But had these two republics been suffered to continue the normal course of their constitutional development, that development would have been full of interest. It might even have conveyed valuable instruction or suggested useful examples to other small commonwealths, for in the scheme of these Constitutions, and especially in that of the Free State, there are some merits not to be found either in the American or in the British system. These simple Free State farmers were wiser in their simplicity than some of the philosophers who have at divers times planned frames of government for nascent communities. But though Wisdom is justified of all her children, she cannot secure that her children shall survive the shock of arms.

## VIII

# THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA

### I. INTRODUCTORY.

AUSTRALIA is the first instance in history of a whole continent whose inhabitants are all (if we exclude the vanishing aborigines) of one race and all owe one allegiance. Thus it has supplied the only instance in which a political constitution has been, or could have been, framed for a whole continent. It is moreover one of the very few cases in history in which a number of communities politically unconnected (save by their common allegiance to a distant Crown) who had felt themselves to be practically a nation have suddenly transformed themselves into a National State, formally recognizing their unity and expressing it in the national institutions which they proceeded to create. There could hardly be a more striking illustration of the speed with which events have been moving during the last and the present age than the fact that Australia, or New Holland as it was then called, was, except as to part of its coasts, marked as a *Terra Incognita* upon our maps so late as the beginning of the eighteenth century, that the first British settlement was not planted in it at Sydney (not far from Captain Cook's Botany Bay) till 1788, that responsible government was not conferred upon the oldest

colony, New South Wales, until 1855, nor upon West Australia till 1890.

Besides the interest with which every one must see the birth of a new nation, occupying a vast and rich territory, the student of political science finds further matter for inquiry and reflection in the enactment of an elaborate constitution for the Commonwealth of Australia. Every creation of a new scheme of government is a precious addition to the political resources of mankind. It represents a survey and scrutiny of the constitutional experience of the past. It embodies an experiment full of instruction for the future. The statesmen of the Convention which framed this latest addition to the world's stock of Instruments of Government had passed in review all previous experiments, had found in them examples to follow and other examples to shun, had drawn from them the best essence of the teachings they were fitted to impart. When the Convention prepared its highly finished scheme of polity, it delivered its judgement upon the work of all who had gone before, while contributing to the materials which will be available for all who come hereafter to the work of building up a State.

Nearly all the precedents which the Australian Convention had at its disposal belong to very recent times, in fact to the last century and a half. Though federal governments are ancient—the oldest apparently is that formed by the cities of Lycia in the fourth century B.C.—the ancient federations scarcely got beyond the form of leagues of small republics for the purpose of common military defence. Such leagues never quite grew into Federal States, properly so called, *i.e.* States in which the central government exercises direct power over the citizens of the component communities. The same remark applies to the confederacies of the Middle Ages, such as that of the Hanse Towns and that of the old Swiss Cantons, as well as to the United Provinces of the Netherlands. The first true Federal State founded

on a complete and scientific basis was the United States, which dates from 1788, when its present Constitution was substituted for the Articles of Confederation of 1776. Next came the Constitution of the Swiss Confederation, enacted in 1848, and replacing a much looser form of union which had previously joined the Cantons of Switzerland. Its present amended form dates from 1874. The third was the Constitution of Canada, established by the British North America Act of 1867. Still later came the Constitution of the North German Confederation (1866) enlarged into that of the new Germanic Empire (1871), a remarkable Federal State with a monarch for its head, and including as its members both large kingdoms, such as Bavaria and Würtemberg, and the city republics of Lübeck, Bremen, and Hamburg<sup>1</sup>. But this last-named Federation, instructive as it is, deals with conditions too dissimilar from those of Australia to furnish many precedents in point. It was the Constitutions of the United States and of Canada which the Australians studied most carefully, and whence they drew as well inspiration as many useful suggestions. And the student who examines the Australian scheme will find it interesting to note many points that recall, by way either of likeness or of contrast, the systems of the United States, of Switzerland, and of Canada. It is only with these three that I propose to compare the Australian Constitution in the pages that follow. As I am writing not for lawyers but for students of history and of constitutions, who desire to understand the nature of this new Government sufficiently to follow with intelligence the course of political life under it, I shall pass lightly over its more technical and more purely legal aspects, and dwell rather upon those general features which will give to the future Australian polity its character and spirit.

<sup>1</sup> One might add the Constitution of the Austro-Hungarian Monarchy, which is a sort of double federation. But it is too peculiar to serve as an example to other peoples proposing to federalize.

## II. THE MOVEMENT FOR FEDERATION.

Like the settlements of Britain in North America, the Australian settlements were organized as Colonies at different dates, and several of them independently of the others<sup>1</sup>. So, again like those of North America, each remained legally unconnected with the others, except through the allegiance they all owed to the British Crown, which sent out Governors to administer them. These officers were at first practically despotic; but when self-government was conferred upon a Colony, they became the nominal heads of an executive which in fact consisted of ministers responsible to the elective legislature of that Colony.

Little as there was in the way of official connexion between the scattered settlements, their inhabitants always deemed themselves Australians, giving their sentimental attachment rather to the country as a whole than to their respective colonies. They were all English; they all lived under similar conditions: their local life had not lasted long enough to form local traditions with which sentiment could entwine itself. The very names of some of the colonies did not favour individualization, for who would call himself a Newsouthwalesian? And the idea that the colonies ought to be united into one political body emerged very early. As far back as 1849 a Committee in England had recommended that there should be a Governor-General for all Australia, with power to convene a General Assembly to legislate on matters of common colonial interest, and a bill introduced into Parliament in that year contained clauses for establishing such a legislature. These provisions were dropped, for the time was not ripe, yet the idea continued to occupy the minds of Australian statesmen from that

<sup>1</sup> New South Wales in 1788, Tasmania in 1825, Western Australia in 1829, South Australia in 1836, Victoria in 1851, Queensland in 1859. Victoria and Queensland had however been originally settled (1836 and 1826), and for some time administered, from New South Wales, while Tasmania had been made a penal settlement as early as 1804.

year onwards; and it received a certain impulse from the creation of the Canadian Confederation in 1867. What it wanted was motive power, that is to say, a sense of actual evils or dangers to be averted, of actual benefits to be secured, by the union of the Colonies into one National State. Democratic communities, occupied by their own party controversies, are little disposed to deal with questions which are not urgent, and which hold out no definite promise either of benefit to the masses or of political gain to the leaders. However, in 1883 events occurred which evoked a new Pan-Australian feeling, and indicated objects fit to be secured by a united Australian government. The late Lord Derby, then Secretary of State for the Colonies, was the most cautious and unsentimental of mankind. He belonged to the old school of English statesmen who deprecated—and in some cases wisely deprecated—further additions to the territories and responsibilities of Britain. Disregarding the representations of the Governments of several among the Colonies, he neglected to occupy the northern part of the great neighbouring island of New Guinea which Australian opinion desired to see British, and permitted it, to their great vexation, to be taken by Germany. About the same time the escape of convicts into Australia from the French penal settlement in New Caledonia had caused annoyance, and movements were soon afterwards made by France which seemed to indicate an intention to appropriate the New Hebrides group of islands. These occurrences roused the Australians to desire an authority which might deliver their common wishes to the Home Government and take any other steps necessary for guarding their common interests. Accordingly a conference of delegates from all the Colonies, including New Zealand and Fiji, met in 1884, and prepared a scheme which was transmitted to England, and was there forthwith enacted by the Imperial Parliament under the name of The Federal Council of Australasia Act, 1885. This scheme was, how-

ever, (as I observed when it was under discussion in the House of Commons) a very scanty, fragmentary and imperfect sketch of a Federal Constitution. It had no executive power and no command of money. No colony need join unless it pleased, and each might withdraw when it pleased. Thus it befell that the plan excited little popular interest, and gave such faint promise of energetic action that only four colonies, Victoria, Queensland, Tasmania, and South Australia, entered into it; and of these South Australia presently withdrew. Meanwhile the need for some general military organization for all the Colonies began to be felt; and further objects attainable by union floated before men's minds. With the increase of trade and industry, the vexation of tariff barriers between the colonies grew daily less tolerable. Subjects emerged on which uniformity of legislation was felt to be needful. The irrigation question, one of great importance for so arid a country, brings New South Wales, where some of the large rivers have their source, into close relation with Victoria and South Australia, and requires to be treated on common lines. These and other grounds led to an Inter-Colonial Conference of Ministers at Melbourne in 1890, and then to the summoning of a Convention of Delegates from the Parliaments of all the Colonies, including Tasmania. This latter body, which included many leading men, met at Sydney in 1891, debated the matter with great ability, and produced a Draft Bill, which became the basis of all subsequent discussions. The movement, hitherto confined to a group of political leaders, now began to be taken up by the people, and became, especially when the financial troubles of 1893 had begun to pass away, the principal subject in men's minds. That crisis had shown all the Colonies how closely their interests were bound together, and had made them desire to remove every hindrance to an industrial and financial recovery. A Conference of Prime Ministers at Hobart in 1895 led to the passing by the several Co-

lonial Parliaments of enabling Acts under which delegates were chosen, this time (following recent American precedents) by popular vote, to a new Convention which met at Adelaide (in South Australia) in 1897. It produced a second draft constitution, based on that of 1891, and laid it before the legislatures of the Colonies for criticism. About seventy-five amendments were proposed, and were considered by the Convention at its further sittings, which closed in March, 1898. The draft Constitution was then submitted to a popular vote, a new expedient in the British dominions, but one amply justified by the need for associating the people with the work. New South Wales alone failed to adopt it by the prescribed majority, because a large section of her inhabitants thought that her interests had not been duly regarded, but after a few amendments had been inserted at a conference of the Colonial Prime Ministers, her people ratified it upon a second vote. On this vote enormous majorities were secured in Victoria, South Australia and Tasmania, smaller ones in New South Wales and Queensland. The Constitution was then sent to England and passed into law by the Parliament of the United Kingdom under the title of The Commonwealth of Australia Constitution Act (63 & 64 Vict. cap. 12). Action by the Imperial Parliament was not only a convenient way of overriding all the colonial constitutions by one comprehensive Act, but was legally necessary, inasmuch as some provisions of the Constitution transcended the powers of all the colonial legislatures taken together. Since it had from the first been understood that the wish of the mother country was not to impose her own views but simply to carry out the wishes of the Colonies, only one slight alteration, an alteration rather of form than substance, was made in the draft as transmitted from Australia, the ill-considered notion of introducing a larger change having been eventually dropped by the British Ministry.

I have mentioned these details in order to emphasize

the time, care and pains bestowed by the Australians—for the work was entirely their own—upon this latest effort of constructive statesmanship. The Constitution of the United States was framed by a Convention which sat at Philadelphia, with closed doors, for nearly five months, and was accepted by Conventions in all the thirteen States without change, though ten amendments were immediately thereafter passed by general consent, their adoption having been the price paid for the ratification of the main instrument by some doubtful States.

The Constitution of Canada took a little more than two years to settle. The Resolutions on which it was based were first of all drafted by a conference of delegates at Quebec. These were approved after full debate by the legislatures of the Provinces, and were, after some modifications, embodied in a Bill prepared by a small conference of Canadian statesmen who met in London. The Bill was then passed by the Imperial Parliament, never having been submitted to any popular vote. But this Australian instrument is the fruit of debates in two Conventions, of a minute examination by legislatures, of a subsequent revision by the second Convention, of further modifications in a few details by a conference of Prime Ministers, and has after all this preparation been sealed by the approval of the peoples of the Colonies concerned. The process of incubation lasted for nearly nine years, being all the while conducted in the full blaze of newspaper reporting and under the constant oversight of public opinion.

### III. THE CAUSES WHICH BROUGHT ABOUT FEDERATION.

The reasons and grounds assigned by the advocates of Federation were more numerous than those urged in the United States in 1787-9, or in Canada in 1864-6; but none of them were so imperative, for the Australian Colonies were far less seriously menaced by actually insistent evils, due to the want of a common national

Government, than was the welfare either of the American States in 1787, or of Switzerland in 1848, or of Canada in 1867. In North America, it was the growing and indeed hopeless weakness and poverty of the existing Confederation, coupled with the barriers to commercial intercourse, the confusion and depreciation of currency, and the financial demoralization of some of the States, all of which had just emerged from an exhausting war, that drew the wisest minds of the nation to Philadelphia, induced them to persist in efforts to devise a better union, and enabled them to force its acceptance upon a people largely reluctant. In Switzerland it was the War of Secession (the so-called Sonderbund war) of 1847 that compelled the victorious party to substitute a new and truly federal constitution for the league which had proved too weak. In Canada the relations of the French-speaking and English-speaking Provinces (Lower and Upper Canada) had become so awkward that constitutional government was being practically brought to a standstill, and nothing remained but that the leaders of the two parties should devise some new system. Australia was in no such straits. Her colonies might have continued to go on and prosper, as six unconnected self-governing communities. It is therefore all the more to the credit of her people that they forwent the pleasures of local independence which are so dear to vivacious democracies, perceiving that although necessity might not dictate a federal union, reason recommended it.

The grounds which were used in argument to urge the adoption of the Federal Constitution may be summed up as follows:—

The gain to trade and the general convenience to be expected from abolishing the tariffs established on the frontiers of each colony.

The need for a common system of military defence.

The advantages of a common legislation for the regulation of railways and the fixing of railway rates.

The advantages of a common control of the larger rivers for the purposes both of navigation and of irrigation.

The need for uniform legislation on a number of commercial and industrial topics.

The importance of finding an authority competent to provide for old-age pensions and for the settlement of labour disputes all over the country.

The need for uniform provisions against the entrance of coloured races (especially Chinese, Malays, and Indian coolies).

The gain to suitors from the establishment of a High Court to entertain appeals and avoid the expense and delay involved in carrying cases to the Privy Council in England.

The probability that money could be borrowed more easily on the credit of an Australian Federation than by each colony for itself.

The stimulus to be given to industry and trade by substituting one great community for six smaller ones.

The possibility of making better arrangements for the disposal of the unappropriated lands belonging to some of the colonies than could be made by those colonies for themselves.

There was in these arguments something to move every class in the community. To the commercial classes, the prospect of getting rid of custom-houses and of finding a large free market close at hand for all products was attractive; as was also that of sweeping away the vexation of railway rates planned in the interests of each colony rather than for the common benefit of trade. Large-minded men, thinkers as well as statesmen, hoped that a wider field would bring a loftier spirit into public life. The working-classes might expect, not only advantages in the way of brisker employment, but the establishment of that provision for old age and sickness which a Government covering the whole country and commanding ample resources could make more effi-

ciently and on more uniform lines than even the richest colony could do. Some of these grounds for union measure the distance which the world has travelled since 1788. Railways are far older than was self-government in the oldest Australian colony, far younger than the youngest of the original thirteen American States. Even so late as 1867, when Canada was confederated, no one thought of suggesting that the State should provide old-age pensions.

The opponents of Australian Federation, although they came more and more to feel their cause hopeless, were an active party, including many influential men. Besides denying that the benefits just enumerated would be attained, they dwelt upon the additional cost which a new Government, superadded to the existing ones, must entail. They fanned the jealousies which naturally exist between small and large communities, telling the former that they would be overborne in voting, and the latter that they would suffer in purse; and they wound up with the usual and often legitimate appeals to local sentiment.

The arguments drawn from considerations of expense and from local jealousies were met by a series of ingenious compromises and financial devices to which both the larger and smaller colonies were persuaded to agree, while the love of each community for its own political independence was overborne by the rising tide of national sentiment. An ambition which aspired to make Australia take its place in the world as a great nation, mistress of the Southern hemisphere, had been growing for some time with the growth of a new generation born in the new home, and was powerfully roused by the vision of a Federal Government which should resemble that of the United States and warn off intruders in the Western Pacific, as the American Republic had announced by the pen of President Monroe that she would do on the North-American Continent. The same nationally self-assertive spirit and desire for expansion which has recently spurred four great European Powers

into a rivalry for new colonial possessions, and which in 1899 made the United States forswear its old-established principles of policy, has been astir in the mind of the Australians. It had been stimulated by the example of a similar spirit in the mother country, and by the compliments which the English had now begun to lavish upon their colonies. It had gained strength with the growth to manhood of a generation born in Australia, and nurtured in Australian patriotism. Such a patriotism, finding no fit scope in devotion to the particular colonies, longed for a larger ideal. It supplied the motive force needed to create a national union. Without it, all the sober reasonings which counselled confederation might have failed to prevail. No equally strenuous or forward-reaching spirit moved the Canadians in 1867, nor are the traces of such a spirit conspicuous in the American debates of 1787-9. Some men were then solicitous for liberty, others for order and good government, but of imperial greatness in the present sense of the term little was said. Liberty and peace at home, not military strength and domination abroad, were the national ideals of those days.

The history of the Federation movement illustrates the truth that a great change is seldom effected in politics save by the coincidence of two moving forces—the prospect of material advantage and the power of sentiment. In every community there are many who can be moved only by one or other of these two forces, and nearly every man responds better to the first if he can be warmed by the second. In the American debates of 1788-9 feeling was mostly arrayed against the proposed federation, though reason was almost entirely for it. Reason prevailed, but prevailed with far more difficulty than the cause of Federalism, with less cogent economic grounds behind it, prevailed in Australia.

Like America in 1787, Australia was fortunate in having a group of able statesmen, most of whom were also lawyers, and so doubly qualified for the task of prepar-

ing a constitution. Their learning, their acuteness, and their mastery of constitutional principles can best be appreciated by any one who will peruse the interesting debates in the two Conventions. They used the experience of the mother country and of their predecessors in the work of federation-making, but they did so in no slavish spirit, choosing from the doctrines of England and from the rules of America, Switzerland, and Canada those which seemed best fitted to the special conditions of their own country. And like the founders of the American and Canadian Unions, they were not only guided by a clear practical sense, but were animated by a spirit of reasonable compromise, a spirit which promises well for the conduct of government under the instrument which they have framed.

#### IV. THE CONDITIONS FOR A FEDERAL COMMONWEALTH.

Before examining the provisions of the Constitution which is bringing the hitherto independent colonies into one political body, it is well to consider for a moment the territory and the inhabitants that are to be thus united.

The total area of Australia is nearly 3,000,000 square miles, not much less than that of Europe. Of this a comparatively small part is peopled by white men, for the interior, as well as vast tracts stretching inland from the south-western and north-western coasts, is almost rainless, and supplies, even in its better districts, nothing more than a scanty growth of shrubs. Much of it is lower than the regions towards the coast, and parts are but little above sea-level. It has been hitherto deemed incapable of supporting human settlement, and unfit even for such ranching as is practised on arid tracts in western North America and in South Africa. Modern science has brought so many unexpected things to pass, that this conclusion may prove to have been

too hasty. Still no growth of population in the interior can be looked for corresponding to that which marked the development of the United States west of the Alleghanias in the beginning of the nineteenth century.

Of the six Australian colonies, one, Tasmania, occupies an island of its own, fertile and beautiful, but rather smaller (26,000 square miles) than Scotland or South Carolina. It lies 150 miles from the coast of Victoria. Western Australia covers an enormous area (nearly 1,000,000 square miles, between three and four times the size of Texas), and South Australia, which stretches right across the Continent to the Gulf of Carpentaria, is almost as large (a little over 900,000 square miles). Queensland is smaller, with 668,000 square miles; New South Wales, on the other hand, has only 310,000 square miles (*i.e.* is rather larger than Sweden and Norway and about the size of California, Oregon and Washington put together); Victoria only 87,000 (*i.e.* is as large as Great Britain and a little larger than Idaho). The country (including Tasmania) stretches from north to south over  $32^{\circ}$  of latitude ( $11^{\circ}$  S. to  $43^{\circ}$  S.), a wider range than that of the United States (lat.  $49^{\circ}$  N. to  $26^{\circ}$  N.). There are thus even greater contrasts of climate than in the last-named country, for though the Tasmanian winters are less cold than those of Montana, the tropical heats of North Queensland and the shores of the Gulf of Carpentaria exceed any temperature reached in Louisiana and Texas. Fortunately, Northern Australia is, for its latitude, comparatively free from malarial fevers. But it is too hot for the out-door labour of white men. In these marked physical differences between the extremities of the Continent there lie sources whence may spring divergences not only of material interests but ultimately even of character, divergences comparable to those which made the Gulf States of the American Union find themselves drawn apart from the States of the North Atlantic and Great Lakes.

It must also be noted that the great central wilderness

cuts off not only the tropical north and north-west, but also the more temperate parts of the west from the thickly peopled regions of the south-west. Western Australia communicates with her Eastern sisters only by a long sea voyage<sup>1</sup>. She is almost in the position held by California when, before the making of the first transcontinental railway, people went from New York to San Francisco via Panama. Nor is there much prospect that settlements will arise here and there in the intervening desert.

The population of the Continent, which has now reached nearly 4,000,000, is very unequally distributed. The three colonies of widest area, Western Australia, South Australia, and Queensland, have none of them 500,000 inhabitants. Tasmania has about 170,000. Two others, New South Wales and Victoria, have each more than 1,000,000<sup>2</sup>. This disparity ranges them for political purposes into two groups, the large ones with 2,500,000 people in two colonies, and the small ones with 1,500,000 in four colonies.

Against these two sets of differences, physical and social, which might be expected to induce an opposition of economic and political interests, there is to be placed the fact that the Australian colonies are singularly homogeneous in population. British North America is peopled by a French as well as by an English race, British South Africa by a Dutch race as well as an English. But Australia is purely British. Even the Irish and the Scotch, though both races are specially prone to emigrate, seem less conspicuous than they are in Canada<sup>3</sup>. Australia is to-day almost as purely English as Massachusetts, Connecticut, and Virginia were in 1776,

<sup>1</sup> It is four days' voyage from Adelaide, the capital of S. Australia, to Perth, the capital of W. Australia.

<sup>2</sup> Two-fifths of the population of Victoria live in Melbourne, one-fourth of the population of New South Wales in Sydney.

<sup>3</sup> In 1891, out of that part of the total population of Australia which had been born in the United Kingdom, about one-fourth had been born in Ireland and one-sixth in Scotland. Of the whole population of Australia, 95 per cent. are of British stock.

and probably more English than were the thirteen original States taken as a whole. In this fact the colonies found not only an inducement to a closer union, but a security against the occurrence of one of the dangers which most frequently threatens the internal concord of a federation. Race antagonisms have troubled not only Canada and South Africa but the United Kingdom itself, and they now constitute the gravest of the perils that surround the Austro-Hungarian monarchy.

Among the other favouring conditions may be enumerated the use of one language only (whereas in Canada and in South Africa two are spoken), the existence of one system of law, the experience of the same form of political institutions, a form modelled on that which the venerable traditions of the mother country have endeared to Englishmen in all parts of the world. It has also been a piece of good fortune that religion has not interposed any grounds for jealousy or division. The population of Australia is divided among various Christian denominations very much as the population of England is, and the chief difference between the old and the new country lies in the greater friendliness to one another of various communions which exists in the new country, a happy result due partly to the absence of any State Establishment of religion, and partly to that sense of social equality which is strong enough to condemn any attempt on the part of one religious body to claim social superiority over the others.

Finally, there is the unique position which Australia occupies. She has a perfect natural frontier, because she is surrounded by the sea, an island continent, so far removed from all other civilized nations that she is not likely to be either threatened by their attacks or entangled in their alliances. The United States had, when its career began, British possessions on the north, French and Spanish on the south. But the tropical islands which Holland, Germany and France claim as theirs to the north and east of the Australian coasts are

cut off by a wide stretch of ocean<sup>1</sup>. They are not now, and are not likely at any time we can foresee, to contain a white population capable of disturbing the repose of Australia. Such a country seems made for one nation, though the fact that its settled regions lie scattered round a vast central wilderness suggests that it is better fitted for a federation than for a government of the unified type. But, on the other hand, this very remoteness might, in removing the force of external pressure, have weakened the sense of need for a federal union had there not existed that homogeneity of race and that aspiring national sentiment to which I have adverted.

Compare these conditions with those of the three other Federations. The thirteen colonies which have grown into the present forty-five States of the American Union lay, continuous with one another, along the coast of the Atlantic. England held Canada to the north of them, France held the Mississippi Valley to the west of them, and, still further to the west, Spain held the coasts of the Pacific. They had at that time no natural boundaries on land; and the forces that drew them together were local contiguity, race unity, and above all, the sense that they must combine to protect themselves against powerful neighbours as well as against the evils which had become so painfully evident in the governments of the several States. Nature prescribed union, though few dreamt that Nature meant that union to cover the whole central belt of a Continent. In the case of Canada, Nature spoke with a more doubtful voice. She might rather have appeared to suggest that this long and narrow strip of habitable but only partially inhabited land, stretching from the Gulf of St. Lawrence to Puget Sound, should either all of it unite with its mighty neighbour to the south, or should form three or four separate groups, separated by intervening wildernesses. Political feelings however, compounded of attachment to Britain and a proud resolve not to be merged in a rival

<sup>1</sup> The nearest point of Dutch New Guinea is about 150 miles from Australia.

power which had done nothing to conciliate them, led the Canadians to form a confederation of their own, which Nature has blessed in this point at least, that its territories are so similar in climate and in conditions for industrial growth that few economic antagonisms seem likely to arise among them. Switzerland, however, is the most remarkable case of a Federation formed by historical causes in the very teeth, as it might seem, of ethnological obstacles. Three races, speaking three languages, have been so squeezed together by formidable neighbours as to have grown into one. The help of Nature has however been given in providing them with mountain fastnesses from which the armies of those neighbours could be resisted; and the physical character of the country has joined with the traditions of a splendid warlike heroism in creating a patriotism perhaps more intense than any other in the modern world.

#### V. THE CONSTITUTION AS A FEDERAL INSTRUMENT.

In examining any Federal Constitution, it is convenient to consider the system it creates first as a Federation, *i.e.* a contrivance for holding minor communities together in a greater one; and then as a Frame of Government, composed of organs for discharging the various functions of administration. Although the former of these influences the latter, because the federal character of a State prescribes to some extent the character of that State's governmental machinery, it conduces to clearness to deal with these two aspects separately. Accordingly I begin with the federal aspect of the Constitution.

Federations are of two kinds. In some, the supreme power of the Central Government acts upon the communities which make it up only as communities. In others this power acts directly, not only upon the component communities, but also upon the individual citi-

zens as being citizens of the Nation no less than of the several communities. The former kind of Federation may be described as really a mere League of States; the latter kind is a National as well as a Federal State.

The Australian Federation is of this latter type. So are the United States, the Swiss Confederation, and the Canadian Federation. It was however to the former type that both the United States before 1788 and Switzerland before 1848 belonged. So Germany was a mere League of States before 1866, but has been a National as well as Federal State since 1866 and 1871.

The essential feature of this latter type, with which alone we are here henceforth concerned, consists in the existence above every individual citizen of two authorities, that of the State, or Canton (as in Switzerland) or Province (as in Canada), to which he belongs, and that of the Nation, which includes all the States, and operates with equal force upon all their citizens alike. Thus each citizen has an allegiance which is double, being due both to his own particular State and to the Nation. He lives under two sets of laws, the laws of his State and the laws of the Nation. He obeys two sets of officials, those of his State and those of the Nation, and pays two sets of taxes, besides whatever local taxes or rates his city or county may impose.

Accordingly the character of each and every Federation depends upon the distribution of powers between the Nation and the several States, since some powers must be allotted to the larger, some to the smaller entity. With regard to certain powers there can be no doubt. The navy, for instance, the post-office, the control of all foreign relations, must obviously be assigned to the National Government, together with the levying of customs duties at the frontiers and the raising of revenue for the purposes above mentioned. On the other hand, matters of an evidently local nature, such as police, prisons and asylums, the system of municipal or county administration, with the power of taxing for these pur-

poses, will be allotted to the State Governments. But between these two sets there lies a large field of legislation and administration which may, according to the circumstances of each particular country and the wishes of the people who enact their constitution, be granted either to the Nation or to the States. The law of marriage and divorce, for instance <sup>1</sup>, criminal law <sup>1</sup>, bankruptcy, the traffic in intoxicating liquors <sup>2</sup>, the regulation of railways <sup>2</sup>, the provision of schools or universities <sup>3</sup>, are all matters which have both a national and a local significance, and may be entrusted either to the National legislature or to the State legislatures according as one or other aspect of them predominates in the mind of the people.

#### VI. DISTRIBUTION OF POWERS BETWEEN NATION AND STATES.

Now the fundamental question in the distribution of powers between the Nation and the States is this—To which authority does the unallotted residue of powers belong? It has been found that no distribution, however careful, can exhaust beforehand all the powers that a legislature or an executive may possibly have to exercise, and it therefore becomes essential to provide, whenever a power not specifically mentioned needs to be exercised, whether it should be deemed to be rightfully exerciseable by the National or by the State authority. In other words, which of these authorities is to be deemed general legatee of any undistributed residue?

This question has been answered differently by different Federations. The United States and Switzerland leave to the States (to which they had belonged pre-

<sup>1</sup> In the U. S. A. a State, in Canada a Federal matter.

<sup>2</sup> In Switzerland a Federal matter, in the U. S. A. partly a Federal, partly a State matter.

<sup>3</sup> In the U. S. A. and Germany a State matter, in Switzerland and Canada partly a Federal matter.

viously) the undistributed powers. Canada (whose Provinces were in a different position) bestows them upon the National (Dominion) Government<sup>1</sup>. The question is the more important, because it creates in all sorts of doubtful matters a presumption in favour of the National Government or the State Governments, as the case may be. And it is specially important at the moment of creating a new Federation, because one of the difficulties always then experienced is to induce the States to resign powers they have hitherto enjoyed. Hence it reassures and comforts them to have the residue of powers not specifically distributed left still in their hands.

The Australians have followed the example of the United States and Switzerland rather than that of Canada; and they have done so for the sake of appeasing the local sentiment of the several colonies, and especially of the smaller colonies, who naturally feared that, as they would have less weight than their larger neighbours in the national legislature, they would be in more danger of being subjected to laws which their local opinion did not approve. Section 107 provides that—

‘Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State<sup>2</sup>, as the case may be.’

Comparatively few powers of legislation are ‘exclusively vested’ in the Commonwealth Parliament; so that upon subjects other than these the State Parliaments retain for the present their previous power to legislate.

<sup>1</sup> See U. S. A. Constitution, Amendment X: Constitution of Swiss Confederation, Art. 3: British North American Act (1867), sect. 91.

<sup>2</sup> These words are used to cover the case of the creation and admission of future States.

The name ‘State,’ which the Australians have substituted for ‘Colonies,’ is significant. It imports a slightly greater independence and has a more imposing sound than the Canadian term ‘Province.’

But as it is also provided that all Acts of the Commonwealth Parliament, within the range of the powers granted, shall override laws of any State Parliament, such laws as the latter may pass upon subjects open to both legislatures are left at the mercy of the Commonwealth Parliament, which may, as and when it finds time or occasion, pass Acts extinguishing, or modifying the effect of, those enacted by the States.

Now the range of powers granted to the National or Commonwealth Parliament is very wide, wider than that of Congress or of the Swiss National Assembly, or even of the Dominion Parliament in Canada. I need not enumerate the powers granted, forty-two in number, for they will be found in sects. 52 and 53 of the Australian Constitution. Among them are the following, which are not specifically given to, and nearly all of which are not even claimed by, the United States Congress:—Powers to take over State railways, and to construct and extend railways (with the consent of the State in which the railway lies), to control telegraphs and telephones and also trading and financial corporations, to take over State debts<sup>1</sup>, to legislate on marriage and divorce, on bills of exchange and promissory notes, on invalid and old-age pensions, on arbitration and conciliation in trade disputes (where these extend beyond one State), on bounties on the production or export of goods, on the service and execution throughout the Commonwealth of the civil and criminal process and judgements of the State Courts. If these powers come to be all put in force they may leave for State action a narrower and less interesting field than it enjoys in the United States, where nevertheless the State legislatures are bodies of no great account, seldom enlisting the services of men of first-rate capacity.

<sup>1</sup> Canada directs the Dominion to take over the Provincial debts existing at the time of the Union. In the U. S. A. the war debts of the States were taken over by the first Congress of the Union.

## VII. CONSTITUTIONAL POSITION OF THE AUSTRALIAN STATES.

The Australian Constitution, like that of the United States, assumes the States to be already organized communities, and contains nothing regarding their constitutions. The case of Canada was different, because there the previous government of the Upper and Lower Provinces, which had been one, had to be cut in two, and arrangements made for duly constituting the two halves. But in the case of Australia, the pre-existing constitutions of the Colonies, granted by the Imperial Government at various times, go on unchanged, subject only to the supersession of some of their functions by the Commonwealth, and to one or two specifically mentioned restrictions. That these restrictions are comparatively few may be partly ascribed to that aversion which the English everywhere show to this kind of safeguard against the misuse of legislature power. The omnipotence of the British Parliament seems to have fostered the notion that all Parliaments ought to be free to do wrong as well as to do right. The only things from which a State is disabled are the keeping of a naval or military force (except with the consent of the Commonwealth Parliament), coining money, and making anything but gold and silver coin legal tender<sup>1</sup>. A State is not, as are the American States, forbidden to grant titles of nobility, or to pass any *ex post facto* law or law 'impairing the obligation of contracts.' That no such prohibitions exist in Canada may be ascribed to the fact that in Canada the National or Dominion Government has the right of vetoing laws passed by provincial legislatures, so that improper legislation can be in this way checked. The power is not often exercised in Canada, but when exercised has sometimes led to friction. This plan, however, is neither so respectful to the Pro-

<sup>1</sup> See sections 114 and 115 of Constitution, and compare Art. I. sect. 10 of Constitution of U. S. A.

vinces nor so conformable to general principles as is the American plan, which leaves the States subject only to the restrictions imposed by the Constitution, restrictions which *ipso iure* annul a law attempting to transgress them. And the Australians have wisely followed the American rather than the Canadian precedent. The Australians have, to be sure, in reserve a power to which nothing similar exists in America, viz. the right of the British Crown at home to veto legislation. Rarely as this right is put in force, it might conceivably be used at the instance of the National Government to avert an undesirable conflict between State statutes and National statutes. Note further that each Australian State is left as free to amend its own constitution as it was before, subject of course to the veto of the British Crown, but to no interference by the Commonwealth, whereas in Canada acts of the Provincial legislatures amending their constitutions are subject to the veto of the Dominion Government as representing the Crown.

The omission of any provision similar to the famous and much litigated clause which debars an American State legislature from passing any law impairing the obligation of contracts is especially noteworthy. That clause, introduced by the Philadelphia Convention in order to check the tendency of some reckless States to get rid of their debts, produced in course of time unexpectedly far-reaching results, from some of which American legislatures and courts have made ingenious attempts to escape. It has indeed been thought that several subsequent decisions of the Supreme Court are not easily reconcilable with the famous judgement in the Dartmouth College Case (A.D. 1818), in which the full effect of this clause was for the first time displayed. That effect has been to fetter legislation in ways which are found so inconvenient in practice that they are acquiesced in only because many State legislatures are in the United States objects of popular distrust. No

corresponding distrust seems to be felt in the British colonies, and therefore the Australians have not deemed any such prohibition needful, following the example of the British House of Commons, which in 1893 rejected a similar clause when moved as an amendment to the Irish Home Rule Bill of that year.

In another point the Australian States have been treated with respect. In each of them the nominal executive head has hitherto been a Governor appointed by the British Crown. This was the case in Canada prior to 1867: but when the Canadian Federation was formed, the appointment of the Governors of the several provinces was entrusted to the Governor-General of the Dominion, that is to say, to the Dominion Cabinet by whose advice the Governor-General, being a sort of constitutional monarch, is guided. In practice, therefore, these governorships have become rewards bestowed upon leading party politicians. The Australians wisely (as most Englishmen will think) avoided this plan. Neither did they adopt the American method of letting the people of each State elect the Governor, a method unsuited to government on the Cabinet system, because, as the State Governor is under that system only a nominal head of the Executive (the Cabinet being the real Executive), there was no good reason for setting the people to choose him, and good reasons against doing so, inasmuch as popular elections are invariably fought on party lines. Accordingly the Australians have preferred to let him continue to be appointed by the Home Government, and to allow him to communicate directly with the Colonial Office in London. His Ministers are indeed described in the Constitution (sect. 44) as being 'the Queen's Ministers.'

VIII. DIFFERENCES FROM THE UNITED STATES  
AND CANADIAN FEDERATIONS.

Four other remarkable divergences, from both the American and the Canadian Federal systems, remain to be mentioned.

One relates to the judiciary. In the United States there is a complete system of Federal Courts ramifying all over the Union and exercising exclusive jurisdiction in all cases arising under Federal statutes, as well as in a number of other matters specified in Art. III. sect. 2 of the Constitution. But the State Courts remain quite independent in all State matters, and determine the interpretation of the State Constitutions and of all State statutes, nor does any appeal lie from them to the Federal Courts. In Canada this was not thought necessary, so there the same set of Courts deals with questions arising under Federal statutes and with those arising under Provincial Statutes, and the Supreme Court of Canada receives appeals from all other Courts. This is less conformable to theory than the United States plan, but does not seem to have worked ill. The danger that Courts sitting in the Provinces would, under the influence of local feeling, pervert Federal law was not serious in Canada (though a similar danger was feared in the United States in 1787), and indeed all the Canadian judges are appointed by the Dominion Government, a further illustration of the preponderance which the Nation has over the Provinces. The Australians have taken a middle course. They have established a Federal Supreme Court, to be called 'The High Court of Australia,' and have taken power for their Parliament to create other Federal Courts. So far, they follow the United States precedent. But they have given power to the Commonwealth Parliament to invest State Courts with federal jurisdiction, thereby allowing those Courts to be, as in Canada, both State and Federal. And they have also allowed an appeal from all State

Courts to the Federal High Court. By this plan the States are more directly connected with and subordinate to the National Government than they are in the United States. The Australian scheme has one great incidental advantage. In the United States the law of different States may and does differ, not only in respect of the difference between the statutes of one and the statutes of another, but also in respect of questions of common law untouched by statutes. The Supreme Court of Massachusetts may, for instance, take a different view of what constitutes fraud at common law from that taken by the Supreme Court of Pennsylvania, and there is no Court of Appeal above both these Courts to bring their views into accord. This has not happened to any great extent in Australia, because the British Privy Council has entertained appeals from all its Courts, and it will happen still less in future, because the Federal High Court will be close at hand to settle questions on which the Courts of different States may have been in disaccord.

A second point shows how much less powerful the sentiment of State sovereignty has been in Australia than it was in the United States. By an amendment (xi) to the American Constitution made in 1798 it is expressly declared that no State can be sued by a private plaintiff. But Australia expressly grants jurisdiction in such cases to its Federal High Court (sect. 75).

A third point is the curious and novel power given to a State of referring matters to the Commonwealth Parliament, and to that Parliament of thereupon legislating on such matters (sect. 51 (xxxvii)). Under this provision (which is not to be found in the Canadian Constitution<sup>1</sup>) there is no department of State law where-with the National legislature may not be rendered competent to deal. It may be usefully employed to secure uniformity of legislation over all Australia on a number

<sup>1</sup> But see section 94 of the Canadian Constitution.

of subjects not within the specifically allotted field of the Commonwealth Parliament.

Finally, the Commonwealth Parliament may grant financial assistance to any State, and may take over the whole or a part of its debts as existing at the establishment of the Commonwealth<sup>1</sup>. Provisions such as these imply, or will involve if put in practice, a relation between the National Government and the States closer than that which exists in America.

To complete this account of the relation of the Nation to the States, let it be noted that a State may surrender any part of its territory to the Commonwealth, and that the Commonwealth is bound to protect each State against invasion or, on the application of the Executive of the State, against domestic violence<sup>2</sup>. This latter provision is drawn from the United States constitution<sup>3</sup>, though in America it is from the State legislature, if then in session, that the application for protection ought to come. Australia is right in her variation, because in her States the Legislature acts through the Executive. Neither provision occurs in the Constitution of Canada, which assigns military and naval defence exclusively to the Dominion Government, and makes itself responsible for the maintenance of order everywhere. In Switzerland the management of the army, in which all citizens are bound to serve, is divided between Cantons and Confederation, the supreme control remaining with the latter (Artt. 18-22). The Confederation is bound to protect a Canton against invasion and disorders, and may even itself intervene if the Executive of the Canton cannot ask it on its own motion (Artt. 16 and 17). Australia, as we have seen, allows the States to maintain a force with the consent of the Commonwealth; and this is permitted by the American Constitution also.

<sup>1</sup> Sect. 105.

<sup>2</sup> Sect. 119.

<sup>3</sup> Art. II. sect. 3, and Art. IV. sect. 4.

## IX. THE CONSTITUTION AS A FRAME OF NATIONAL GOVERNMENT.

We may now pass on to consider the National Government, the construction whereof occupies by far the greater part of the Constitution, which, while it left the States pretty much as they were, had here to build up a new system from the ground.

The first point to be examined relates to the limitations imposed on the National Government as against the citizens generally, since I have already dealt with the limitations on its powers as against the States. Here a remarkable divergence from the American Constitution is disclosed. When that instrument was enacted, the keenest suspicion and jealousy was felt of the action of the Government to be established under it. It was feared that Congress might become an illiberal oligarchy and the President a new George the Third. Accordingly great pains were taken to debar Congress from doing anything which could infringe the primordial human rights of the citizen. Some restrictions are contained in the original Constitution: others fill the first nine amendments which were passed two or three years later, as a part of the arrangements by which the acceptance of the Constitution was secured. And down till our own time every State Constitution in America has continued to contain a similar 'Bill of Rights' for the protection of the citizens against abuse of legislative power. The English, however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature. So when Englishmen in Canada or Australia enact new Constitutions, they take no heed of such matters, and make their legislature as like the omnipotent Parliament of Britain as they can. The Canadian Constitution leaves the Dominion Parliament unfettered save by the direction (sect. 54) that money shall not be appropriated to any purpose

that has not been recommended to the House of Commons by the Executive, a direction embodying English practice, and now adopted by Australia also. And the Australian Constitution contains but one provision which recalls the old-fashioned Bill of Rights, viz. that which forbids the Commonwealth to 'make any law for establishing any religion or for imposing any religious observance or for prohibiting the free exercise of any religion.' The Swiss Constitution, influenced by French and American models, is in this respect more archaic, for it imposes a series of disabilities on its Legislature in the interest of individual freedom (sectt. 39, 49, 54-59). This diversity of attitude between the English on the one hand and both the Americans and the Swiss on the other is a curious instance of the way in which usage and tradition mould a nation's mind. Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against the abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.

The point just examined is one which arises in all Rigid Constitutions, whether Federal or Unitary. But the next point is one with which only Federations are concerned; and it is one in which all the great Federations agree. All have adopted the same method of providing both for the predominance of the majority of the people considered as one Nation, and for the maintenance of the rights of the States considered as distinct communities. The Americans invented this method: the Swiss, the Canadians, the Germans, and now the Australians, have imitated them. This method is to divide the Legislature into two Houses, using one to represent the whole people on the basis of numbers, and using the other to represent the several States on the basis (except in Germany) of their equality as auto-

mous communities. It was this device that made Federation possible in the United States, for the smaller States would not have foregone their independence in reliance upon any weaker guarantee.

#### X. THE LEGISLATURE.

The Australian scheme provides (sectt. 7-23) for an Upper House or Senate of thirty-six members, six from each State, and a House of Representatives (sectt. 24-40) of seventy-five members, elected on a basis of population, so that forty-nine members will come from the two large States, New South Wales and Victoria, and twenty-six from the four small States. No Original State is ever to have less than five.

The equal representation of the six Original States is always to be maintained, but the number of Senators may be increased, and when new States come to be formed, the Parliament may allot to them such number of Senators as it thinks fit. Senators sit for six years, and do not all retire at the same time. These features are taken from the Constitution of the United States, which, as already observed, has been a model for subsequent Federal Upper Houses. But there are remarkable variations in the Australian scheme.

1. In the United States each newly-created State receives as a matter of right its two Senators. In Australia the Commonwealth may allot such number as it thinks fit.

2. In the United States one-third of the Senate retires every two years. In Australia one-half retires every three years.

3. In the United States the President of the Senate is the Vice-President of the United States, chosen by the people<sup>1</sup>. In Australia, the Senate is to choose its own President.

<sup>1</sup> *I.e.* practically by the people, though formally by a body of electors elected for that purpose.

4. In the United States the quorum is one more than a half of the total number ; in Australia one-third of the total number.

5. In the United States the Legislatures of the several States elect the Senators. In Australia the Senators are elected by the people of the State.

This last point is one of great interest. Tocqueville, writing in 1832, attributed (erroneously, as the sequel has shown) the excellence of the American Senate to the method of election by the State Legislatures<sup>1</sup>. Since his days the American Senate has declined ; and so far from this mode of election having tended to sustain its character, the general, though not unanimous, opinion of the wise in America deems the Senate to be injured by it, and desires a change to the method of election by direct popular vote. It was partly because the Australian Convention had become aware of this tendency of American opinion that they rejected the existing American plan ; nor is it impossible that the Americans themselves may alter their system, which gives greater opportunities for intrigue and the use of money than popular election would be likely to afford. In Australia, the Senators are in the first instance to be elected by the people, each State voting as one electorate, but this may be altered (*e.g.* to a system of district elections) by the Parliament of the Commonwealth, or failing its action, by the Parliament of a State. It will be interesting to see what experiments are tried and how they work. District voting may give different results from a general State vote, and a party for the moment dominant may choose the plan that best suits it.

6. In the United States the Senate is an undying body, perpetually renewed by fresh elections, never losing more than one-third of its members at any one time. In Australia the Senate may be dissolved in case a deadlock should arise between it and the House of Representatives.

<sup>1</sup> See as to this, Essay VI, p. 336 and p. 352.

The Senate is the sheet-anchor of the four small States. Commanding a majority in it, they have consented to acquiesce in the great preponderance which their two larger neighbours possess in the House of Representatives. The numbers of the latter House are to be always as nearly as practicable double those of the Senate, a point whose importance will presently appear.

The House is to continue for three years (subject of course to dissolution), a term intermediate, though inclining in the democratic direction, between the two years of the American Congress and the seven (practically six) years of the British House of Commons. The Canadian term is five years. Until the Commonwealth Parliament otherwise provides, the electoral suffrage is to be (as in the United States) the suffrage prescribed by State law for the election of members of the more numerous State House, and it is expressly provided, doubtless with a view to the fact that women's suffrage already exists in two colonies, that no law shall prevent a State voter from voting at Commonwealth elections. So far from securing, as does the United States Constitution, that no person shall be excluded on the ground of race from the suffrage<sup>1</sup>, Australia has expressly provided that persons belonging to a particular race may be excluded, for she declares (sect. 25) that in such case the excluded race is not to be reckoned among the population of the State for the purposes of an allotment of representatives. Plural voting is forbidden. The quorum of members is a mean between the inconveniently large quorum (one-half) of the American, and the very small one (forty) of the British House. The seat of any Senator or member of the House becomes *ipso facto* vacant if he fails (without permission) to attend any session for two continuous months. No person having any pecuniary interest in any agreement with the public service (except as member of an incorporated company of at least twenty-five persons), or holding any office of

<sup>1</sup> See Amendment XV to the Constitution.

profit under the Crown, can sit in either House, unless he be a Minister either of the Commonwealth or of a State. The exception is noteworthy, not only because it is framed with a view to the establishment of Cabinet Government, but also because it implies that a man may, contrary to American and Canadian usage, be at the same time both an executive official of a State and also a member of the Federal Legislature. It would appear that women are eligible to membership of either House. Every Senator and Representative is to receive a salary, fixed for the present at £400 (\$2,000) a year.

#### XI. THE EXECUTIVE.

The Executive is to consist of the Governor-General and the Ministers. To the great convenience of the Australian people, the head of the Executive does not need to be elected either by popular vote (as in the United States) or by the Chambers, as in France and Switzerland. He is nominated by the British Crown, and holds office so long as the Crown pleases, receiving a salary fixed, for the present, at £10,000 (\$50,000) a year (exactly the salary of the American President). He has an Executive Council, modelled on the British Privy Council (though the name Privy Council is not used as it is in the Canadian Constitution), and from it he chooses a number of Ministers (fixed for the present at seven) who are to administer the several departments of the public service. They must be members of one or other House of Parliament—a remarkable provision, for though this is a British practice, that practice has never been embodied in any positive rule. As the Governor-General is only a constitutional figure-head, these Ministers will in fact constitute the ruling executive of the Commonwealth.

## XII. THE JUDICIARY.

The Judiciary is to consist in the first instance of a Federal High Court (containing a Chief Justice and at least two other judges) capable of exercising both original jurisdiction in certain sets of cases, and also appellate jurisdiction not only from single Federal Judges and inferior Federal Courts, but also from the Supreme Courts of the States. Power is taken both to establish lower Federal Courts and to invest State Courts with federal jurisdiction. But besides this Judiciary proper, there is created a second Court for dealing with cases relating to trade and commerce, under the name of the Inter-State Commission (sect. 101). This remarkable and very important institution has doubtless been suggested by the United States Inter-State Commerce Commission created by Congress some eighteen years ago in order to deal with railway and water traffic between the States. Its functions will be half-administrative, half-judicial, and in questions of pure law an appeal will lie from it to the High Court, while a guarantee for its independence is found in the clause which declares that its members shall not be removed during their seven years' term of office. All Federal Judges are to be appointed by the Governor-General, that is to say, by the Executive Ministry. All trials (on indictment) for any offence against the laws of the Commonwealth shall be by jury, and held in the State where the alleged offence was committed. The judicial establishments of the States remain unaffected, and the judges thereof will continue to be appointed by the State Executives.

In determining the functions of the High Court there arose an important question which seemed for a moment to threaten the whole scheme of Federation. The draft Constitution which the Convention had prepared and which the people had approved by their vote provided that questions arising on the interpretation of the Con-

stitution as to the respective limits of the powers of the Commonwealth and of the States, or as to the respective limits of the constitutional powers of any two or more States, should be adjudicated upon by the High Court of the Commonwealth, and that no appeal should lie from its decision to the Queen in Council (*i.e.* to the Judicial Committee of the Privy Council in England, which is the Supreme Court of Appeal from the British Colonies and India), 'unless the public interest of some part of Her Majesty's dominions, other than the Commonwealth or a State, are involved.' When the draft reached England to be embodied in a Bill, the British Government took exception to this provision as tending to weaken the tie between the mother country and the colonies. There were many in England who thought that it was not in the interest of Australia herself that she should lose, in questions which might involve political feeling and be complicated with party issues, the benefit of having a determination of such questions by an authority absolutely impartial and unconnected with her domestic interests and passions. How much better (they argued) would it have been for the United States at some critical moments could they have had constitutional disputes adjudicated on by a tribunal above all suspicion of sectional or party bias, since it would have represented the pure essence of legal wisdom, an unimpeachable devotion to legal truth!

To this the Australians replied that the experience of the United States had shown that in constitutional questions it was sometimes right and necessary to have regard to the actual conditions and needs of the nation; that constitutional questions were in so far political that where legal considerations were nearly balanced, the view ought to be preferred which an enlightened regard for the welfare of the nation suggested; that a Court sitting in England and knowing little of Australia would be unable to appreciate all the bearings of a constitutional question, and might, in taking a purely technical

and possibly too literal a view of the Constitution, give to the Constitution a rigidity which would check its legitimate expansion and aggravate internal strife. Australia must—so they pursued—be mistress of her own destinies, and as it is she that had framed and procured the enactment of this Constitution, so by her ought the responsibility to be borne of working it on its judicial as well as its executive and legislative side. Not only was this better for Australia herself, but it would be more conducive to the maintenance of the connexion between the Commonwealth and the mother country.

After some wavering, the British Government, perceiving the risk of offending Australian sentiment, gave way. They dropped in Committee of the House of Commons the alteration which they had introduced into the Australian draft, substituting for it an amendment which, while slightly varying the original terms of the draft, practically conceded the point for which the Australian Delegates, sent to England to assist in passing the measure, had contended. The Act as passed provides that no appeal shall lie to the Crown in Council upon the constitutional questions above-mentioned unless the High Court itself shall, being satisfied that the question is one which ought to be determined by the Privy Council, certify to that effect. In all other such cases its judgement will be final.

Appeals to the Privy Council in questions other than constitutional will continue to lie from the Supreme Courts of the States (with the alternative of an appeal to the High Court) and from the High Court itself, when special leave is given by the Privy Council. The Commonwealth Parliament may limit the matters in which such leave may be asked, but the laws imposing such limitations are to be reserved for the pleasure of the Crown.

The scheme of judicature above outlined follows in the main the model contained in the American Consti-

tution. It does not draw the line between State and Federal matters and courts so sharply, for appeals are to lie from State Courts in all matters alike, and State Courts may receive jurisdiction in Federal matters. On the other hand, it is more conformable to principle than either the Canadian plan, which provides no Federal Courts save the Supreme Court and gives the appointment of all judges alike to the Dominion Government, or the Swiss plan, which refers questions of conflict between the Nation and the Cantons, or as to the constitutionality of Federal laws, not to the Judiciary at all, but to the Federal Legislature. Broadly speaking, the Australian High Court will have to fill such a place and discharge such functions as have been filled and discharged in America by that exalted tribunal which Chief Justice John Marshall and other great legal luminaries have made illustrious. In working out the provisions of the Constitution by an expansive interpretation, cautious but large-minded, it may render to Australia services not unworthy to be compared with those which America has gratefully recognized.

### XIII. WORKING OF THE FRAME OF GOVERNMENT. THE CABINET.

Now let us see how this Frame of Government, which I have briefly outlined in its salient features, is intended to work.

Its essence lies in a matter which is not indicated by any express provision, the dependence of the Executive upon the Legislature. Herein it differs fundamentally from the American and Swiss systems. It reproduces the English system of what is called Cabinet or Responsible Government; that is to say, a Government in which the Executive instead of being, as in America, an independent authority, directly created by the people and amenable to the people only, is created by and responsible to the Legislature. As and when the British colo-

nies respectively obtained self-governing institutions, each of them adopted this scheme, since it was the one familiar to them at home: and to it they seem all determined to adhere.

Its distinctive features are these.

The nominal head of the Executive, in Britain the Crown, in Australia the Governor-General as representing the Crown, is permanent, and is not responsible to the Legislature, because he acts not on his own views, but upon the advice of his Ministers.

The Ministers are responsible to the Legislature which virtually chooses them, and they depend upon its confidence for their continuance in office.

The Ministers are however not wholly at the mercy of the Legislature, because they may dissolve it, that is to say, may appeal to the people, in the hope that the people will elect a new Legislature which will support them. This kind of government accordingly rests on a balance of three authorities, the Executive, the Legislature, and the People, the people being a sort of arbiter between Ministry and Parliament. As the Ministry can at any moment appeal to the people, the threat of appealing puts pressure upon the Parliament, and keeps a majority cohesive. In the existence of this power of sudden dissolution there lies a marked difference from the American scheme, which some one has called *Astronomical*, because the four years' term of office of the Executive and the two years' term of the Legislature are both fixed by the earth's course round the sun.

I have spoken of the Legislature as the authority to which the Ministry is responsible. But what is the Legislature? In England, although Parliament consists of two Houses, the Minister-making power resides solely in the House of Commons. Being elective, the House of Commons has behind it the moral weight of the people and the prestige of many victories. Being the holder of the purse, it has the legal machinery for

giving effect to its will, since without supplies administration cannot be carried on. Accordingly, though the existence of two often discordant Houses may arrest or modify legislation in Britain, it does not affect the executive conduct of affairs, save on the rare occasions when immediate legislation is deemed indispensable by the Executive. The same remark applies to Canada. There also one finds two Houses, but the Senate, being a nominated and not a representative body, holds an entirely secondary place. The Ministry may disregard a vote of want of confidence passed by it, just as in England they disregard an adverse vote of the House of Lords. In Australia, however, things will be quite different. There the Senate has been constituted as a representative body, elected by the peoples of the States; and as the protector of the rights and interests of the States it holds functions of the highest importance. Its powers (save in one point to be presently mentioned) are the same as those of the House. In whom then does the power of making and unmaking ministries reside? Wherever one finds two assemblies, one finds them naturally tending to differ; and this will be particularly likely to occur where, as in Australia, they are constructed by different modes of election. Suppose a vote of no confidence in a particular Ministry is carried in one House and followed by a vote of confidence passed in the other? Is the Ministry to resign because one House will not support it? It retains the confidence of the other; and if it does resign, and a new Ministry comes in, the House which supported it may pass a vote of no confidence in those who have succeeded it.

The problem is one which cannot arise either under the English or under the American system. Not under the English, because the two Houses are not co-ordinate, the House of Commons being much the stronger. Not under the American, because, although the Houses are co-ordinate, neither House has the power of displacing the President or his Ministers. It is therefore a new

problem, and one which directly results from the attempt to combine features of both schemes, the Cabinet system of England and the co-ordinate Senate, strong because it represents the States, which a Federal system prescribes.

#### XIV. PROVISIONS AGAINST DEADLOCKS.

This, however, is only one, though perhaps the most acute, of the difficulties that arise from the existence of two co-ordinate Houses. Their differences upon questions of legislation are always liable to produce deadlocks. These annoying phenomena occur in England, though there the House of Lords, except upon Irish questions, usually gives way (even without a dissolution of Parliament), because it is afraid of incensing the people and thereby bringing about its own destruction if it continues to resist the national will. In Irish questions the Upper House has been apt to assume that the people of England and Scotland are not sufficiently interested to resent very keenly its difference from the Commons. In the United States there is no remedy for such deadlocks. They have to be endured, at whatever cost. The resistance of the Senate to various plans suggested by the House for dealing with the slavery question may be reckoned among the causes which brought on the War of Secession. The Australian colonies themselves have had frequent experience of deadlocks in matters of legislation between the two Houses, for in every colony there have been two Houses, though in every colony it is the more popular House which has controlled the Executive.

The difficulties I have indicated were fully before the minds of the statesmen who sat in the two Conventions. An ingenious device has been contrived for dealing with them (sect. 57). When the House passes a law and the Senate disagrees, the House may pass it again after three months, and if the Senate still disagrees, the Gov-

ernor-General may thereupon dissolve both House and Senate together, unless the Parliament is within six months of its natural end by effluxion of time. If after such dissolution the new House again passes the measure, and the Senate once more disagrees, the Governor may convene a joint sitting of both Houses. If the proposed law is then passed by an absolute majority of the whole Parliament so convened in joint sitting, it shall be taken to have been duly passed by both Houses.

This method involves the expenditure of a good deal of time and the worry of a double general election, one for the House and one for the Senate. But it may prove to be the best method of solving a problem which neither Britain nor the United States has yet attempted to solve, and which certainly needs solution. The reader who remembers that the numbers of the House have been fixed to be always double those of the Senate, will now see how necessary such a provision was in order to secure that in this final trial of strength between Senate and House the principle of State rights and the principle of population shall each have its due recognition. Should these two principles come into collision, should, for instance, all the members from the four small States be of one mind and all the members from the two large States of another mind, the principle of population will prevail, for in the two Houses sitting together, the large States will have sixty-one votes (twelve senators and forty-nine representatives), whereas the small States will have only fifty (twenty-four senators and twenty-six representatives). Such a conjuncture may however never arise.

#### XV. RELATIONS OF THE TWO HOUSES.

The question remains which of the two Houses will hold the place of the British House of Commons as determining the tenure of office by Ministries. Upon this question light may be cast by the provisions with regard to money bills. The Constitution enacts (sect. 53) that

all bills appropriating revenue or imposing taxation must originate in the House, and that the Senate may not amend taxing bills, or those 'appropriating money for the ordinary annual services of the Government,' though it may return such bills to the House suggesting certain amendments in them. The Senate may however reject such bills. As this scheme, which somewhat resembles that of the American Constitution<sup>1</sup>, itself suggested by the practice of England, seems to throw upon the House the primary function of providing money for the public service, and thus the primary control of the national exchequer, it would seem that Ministers, unable without money to carry on that service, must stand or fall by a vote of the House and not by a vote of the Senate. Yet the Senate, though it cannot take the first steps for granting money, can withhold money; and if it does so in order to get rid of a Ministry it dislikes, nothing short of the deadlock provision above described can be invoked. Nor can the expedient of mixing up a number of different taxing provisions in one Bill, or inserting other matter in appropriation Bills ('tacking'), be resorted to, for these are expressly prohibited by the Constitution (sectt. 54, 55). Possibly in practice the Houses will frequently agree to let the accustomed services of the year be provided for without much controversy, and will reserve their serious conflicts for new proposals regarding taxation or appropriation.

Australians evidently expect that the usage hitherto prevailing in all the Colonies of letting the Ministry be installed or ejected by the larger House will be followed. Nevertheless the relations of the Commonwealth Houses are so novel and peculiar, that the experience of the new Government in working them out will deserve to be watched with the closest attention by all students of politics. Englishmen in particular have good reason

<sup>1</sup> In the U. S. A., however, the Senate may and does amend both revenue-raising and appropriation bills, and indeed frequently prevails against the House in the quarrels which arise over these matters.

for doing so, because England, when she has substituted a representative Second Chamber for her present theoretically indefensible House of Lords, will have to devise some means for avoiding or solving deadlocks between such a Chamber and the House of Commons.

Some high Australian authorities have appeared to doubt whether two co-ordinate Houses can be made to work along with Cabinet Government. They observe that although there may be sometimes a willingness to make compromises for the sake of the public service, there is also in all governments, and certainly not least in those of the United States and the British Colonies, a tendency to press every legal right to its furthest limit, even if the machine should be stopped thereby. Were such stoppages to become frequent, Australia might, they think, be driven to amend her Constitution by so far disjoining the Executive from the Legislature as to give it something of the permanence it enjoys in America and Switzerland<sup>1</sup>.

The relations of the Senate to the House may largely depend on factors still undetermined. One of these is the growth of population. Should the small Colonies grow rapidly, their representation in the House would before long be fairly proportionate to that which they enjoy in the Senate, so that the balance of parties might, so far as the size of States is concerned, tend to be nearly the same in both Houses. Another is the character of the controversies which will arise. These may not be such as to set the small States against the large ones, and the three party organizations, which are already strong, though they possess no such Machine System as America enjoys, may find their support pretty equally in all or most of the States, so that the balance of parties

<sup>1</sup> It was suggested in the Convention by Mr. Playford (then Prime Minister of South Australia) that the two Houses sitting together might appoint the Executive Ministry, but this plan deviated too far from British Colonial practice to find acceptance. A similar suggestion was made by Sir John Cockburn in the Sydney Convention in 1891. See his speech in an interesting volume published by him entitled *Australian Federation* (p. 139).

may in practice be found to differ but little in the Senate from what it is in the House. Thus these particular wheels or shafts of the constitutional machine, which are deemed less able than others to bear a severe strain, may not for a long while to come have any severe strain thrown upon them.

Another thing which may affect the relations of the two Houses is the comparative attractions which each will have for high political capacity. In the United States the Senate became, within thirty years from the establishment of the Constitution, an assembly much stronger, through the eminence of its members, than was the House of Representatives. As its term of membership was longer (six years against two years), and as it had certain quasi-executive functions in connexion with foreign relations and appointments, men of ability preferred it to the House, and the House constantly saw its best talent drawn off to its rival. The Senate has to-day no such intellectual ascendancy as it had then, but capable men still migrate to it when they can from the House of Representatives. If the House establishes in Australia, as it will apparently do, its sole right to make and unmake Ministries, it will be the more tempting field for ambition: yet something will depend upon the amount of genius and character which the Senate attracts, for the presence of these in abundant measure will give it weight with the nation.

It has been suggested in Australia that the Senate with its thirty-six members is too small. The Senate of the United States however began with twenty-six; and it has been a great advantage to that body that its original numbers were small, for traditions more dignified than those of the tumultuous House were formed, and a somewhat stronger sense of personal responsibility was developed just because the individual was not lost in a crowd.

## XVI. MISCELLANEOUS PROVISIONS.

Questions of trade and finance fill a chapter of the Constitution (sectt. 81-105); and it was indeed these questions, next to the issue between the large and the small States, that gave most trouble to those who framed the instrument. It is provided that the collection and control of all duties of customs and excise shall pass to the Commonwealth, but that not more than one-fourth thereof shall, for ten years at least, be retained by the Commonwealth, the other three-fourths being paid over to the several States, or applied to payment of the interest on their respective debts, should these debts be assumed by the Commonwealth. This arrangement was deemed needful to supply the States with funds for defraying their administrative expenses and the interest on their debts, seeing that the chief part of their revenue arose from customs and excise, the five which prepared the Constitution, except New South Wales, having adopted a protective policy. Bounties may be given either by the Commonwealth, or by the States with its consent. There are provisions regarding the collection of the customs, the control of railways and settlement of railway rates, the use of rivers for irrigation and water storage, and the State debts, but as these are largely temporary, and have little special interest for the student of constitutions, important as they are to Australian industries, I mention them only to show how elaborately the scheme of union has been worked out, and on how many perplexing topics, settled provisionally by the Constitution, the Commonwealth Parliament will have to legislate.

The question of the spot where the capital should be placed gave rise, as had happened in the United States and in Canada, to some controversy. It was adjusted by providing that the seat of Federal government should be in the colony of New South Wales, but at least 100 miles from Sydney. Here an area is to be set apart

of not less than 100 square miles, which shall be under the jurisdiction of the Commonwealth, as the District of Columbia is under the authority of the National Government in the United States : and here a stately city will doubtless in time spring up.

Power is taken to admit new States, whether formed out of existing States or not, upon any terms and conditions (*e.g.* as to number of Senators) which the Parliament may fix, but if the new State is formed out of an old one, only with the latter's consent. The Parliament has also full power to accept and provide for the administration of any territory transferred to it by the Crown, so that no constitutional questions can arise resembling that which has occupied American lawyers since the annexation of Puerto Rico.

#### XVII. AMENDMENT OF THE CONSTITUTION.

Last of all we come to the mode of amending the Constitution, a mode easier to apply than that prescribed for the United States, but showing the influence to some extent of the American though more largely of the Swiss model in its reference to the popular vote.

Every law proposing to alter the Constitution must be passed by an absolute majority of each House, and thereupon (after two but before six months) be submitted to the voters of every State. If in a majority of States a majority of the electors voting approve the proposal, and if these State majorities constitute a majority of all the electors voting over the whole Commonwealth, the amendment is passed, and is then to be presented to the Crown for assent. Should the two Houses differ, one passing the proposed law and the other rejecting it (or passing it with an amendment which the first-mentioned House rejects), the House which approves the proposal may again pass it, and if the dissenting House again dissents, the amendment may be submitted to the people as if both Houses had passed it. The de-

cision of the people is final. To meet the fact that the suffrage is not in all the States confined to men, it is further provided that, in any State wherein all adults are entitled to vote, only one half of the vote shall be counted<sup>1</sup>.

Thus the requirements for the passing of an Amendment are:—

1. Absolute majority in each House of Parliament, or else absolute majority in one House given twice, the second time after three months' interval, *plus* submission on both occasions to the other House.

2. Approval of the people in a majority of States (*i.e.* at present in four States at least).

3. Approval of a majority of the people voting over the whole Commonwealth.

The American Federal Constitution requires a two-thirds' majority in each House of Congress and a three-fourths' majority of States, or else the proposal of a Convention by two-thirds of the States and a three-fourths' majority of States approving what the Convention has settled, conditions extremely difficult to secure. The Swiss system permits the Constitution to be amended by the same process as is applied to the passing of laws, *plus* a popular vote which results in a majority of Cantons and in a majority of the people voting over the whole Confederation.

#### XVIII. RELATIONS OF THE AUSTRALIAN COMMONWEALTH TO THE CROWN.

It has not seemed necessary to set forth the relations of the Commonwealth to the British Crown, because these relations are substantially those which have heretofore existed between the Crown and each of the self-

<sup>1</sup> But 'no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing or otherwise altering the limits of the State, shall become law unless the majority of the electors voting in that State approve the proposed law' (sect. 128).

governing colonies now united in the Federal Commonwealth. The chief difference is that the Commonwealth Parliament receives certain powers (as to extra-territorial fisheries and relations with the islands of the Pacific) which were previously exerciseable only by the (now extinct) Federal Council of Australasia (mentioned above), that it has a general power to legislate on 'external affairs' (a somewhat vague term, sect. 51, xxix), and that it may 'exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, any power which can now be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia' (sect. 51, xxxviii). Apart from these provisions, which may give rise to some delicate questions, the principles and practice which have guided the action of the Home Government and of the Colonial Governors will apparently be preserved. Though the Imperial Parliament has an unquestioned right to legislate for every part of the British dominions so as to override all local legislation, it does not now exercise this power except for a few purposes of utility common to all, or many, British possessions, such as for the regulation of merchant-shipping or copyright, and when it does so, it secures the assent of the self-governing Colonies. So again, though the Crown has the legal right to withhold consent from Colonial Statutes, this right is rarely exerted, and then only in respect of some general imperial interest which it is supposed that the statute in question may prejudicially affect, *i.e.* the Crown's right is not exerted in the interest of any class of persons in the Colony or in pursuance of any particular view entertained either by the Governor there or by the Ministry at home. The new Australian Constitution provides (sectt. 58-60) that when a measure passed by the Parliament is presented to the Governor-General, he may either assent to it in the Queen's name (but subject to a power to the Queen to disallow the same within one year) or he may withhold

assent; or he may reserve it for the Queen's pleasure, in which last case it shall not take effect unless he announces within two years that the Queen has assented to it. This right of veto, though it looks on paper larger than that which belongs to the President of the United States, seeing that the President's veto can be overridden by a two-thirds' majority in each House of Congress, is in reality far more limited, and will constitute no check (except where imperial interests may be affected) upon the practically sovereign power of the Commonwealth Parliament.

#### XIX. COMPARISON WITH THE CONSTITUTIONS OF THE UNITED STATES AND CANADA.

Before I make some general reflections on the character of this Australian Constitution, it is worth while to note summarily the principal points in which it differs from the two other Federal Constitutions which it most resembles.

The provisions which it has borrowed from the American Constitution have been already adverted to. It differs from that Constitution in the following (among other) respects:—

1. It is a longer instrument, going into much fuller detail on many topics.

2. It leaves less power to the States and gives more power to the Commonwealth; and it enables the Commonwealth Parliament to legislate for a State upon the State's request, a thing which lies quite outside the functions of Congress.

3. It does not establish a complete system of Federal Courts covering the whole area of the Commonwealth, but allows State Courts to be invested with Federal jurisdiction.

4. It makes the Federal High Court a Court of appeal from State Courts, whereas in the United States each State Supreme Court is final in its proper sphere.

5. It contains hardly any restrictions, in the nature of a 'Bill of Rights,' upon the power of the Federal Legislature over the individual citizen.

6. Instead of disjoining Legislature and Executive, it unites them closely by the system of Responsible or Cabinet Government, and so far from excluding every official from Congress, it makes a seat in Parliament a condition of Ministerial office.

7. It vests the choice of the Head of the Executive, not in the people, but in an external authority, the British Crown. To be sure, this Head is nominal and not responsible either to the people or to the legislature.

8. It vests the election of Senators in the people, not in State Legislatures, gives the Senate no power of amending but only of suggesting amendments in money bills, makes the Senate dissoluble in case of a deadlock between it and the House, and contemplates the possibility that new States may have a smaller representation in the Senate than original States.

9. It gives to the Executive no such veto on legislation as the President has in the United States. I have already explained that the veto of the Governor-General and the Crown is a different thing, and rarely employed.

10. It makes the amendment of the Constitution a much less tedious and difficult process.

Thus it may be said that, as compared with the American Constitution, it vests more power in the National Government as against the State Governments, and that, as between the various departments of the National Government itself, it concentrates power more fully in the hands of the Legislature and imposes fewer restrictions upon its action.

The Constitution of Canada seems at first sight nearer to that of Australia than does the American. It has a Monarch, represented by a Governor-General, for the head of its Executive. It contemplates a number of States small when compared with the forty-five of the

American Union. It has adopted the British system of Cabinet or responsible Government.

But the differences are really so considerable as to place Australia's scheme as far from that of her colonial sister as from the American. Among them are the following:—

1. The Canadian Constitution prescribes the Constitutions of the several Provinces, though it permits the Provincial legislatures to alter them (subject to a Federal veto). The Australian assumes its State Constitutions as existing, and makes no change in them, except so far as the Federation controls or supersedes them. Hence the antecedent power of changing them remains, so far as they are not affected by the Federal Constitution.

2. Australia leaves to the States all residuary powers (*i.e.* powers not expressly granted). Canada withholds them from the Provinces and vests them in the Dominion.

3. Australia leaves the State Governors to be appointed, as now, by the Home Government, apart from Federal interference. Canada gives the appointment of them to the Federal Ministry. And whereas in Canada a Provincial Governor cannot communicate directly with home but only with the Governor-General, in Australia the State Governor and his Ministers are in direct touch with the British Government in London.

4. Australia gives to the Federal Government no right whatever to interfere with State Statutes. Canada invests the Dominion Government with a veto on Provincial legislation by placing the Governor-General as regards such legislation in the place which the Queen holds as regards Dominion legislation.

5. Australia distinguishes Federal from State jurisdiction, taking power to establish Federal Courts other than her High Court, and to invest State Courts with Federal jurisdiction. Canada has no special Federal Courts other than the Supreme Court of the Dominion.

6. Australia makes her Senate an elective assembly. In Canada the Senate is nominated by the Dominion Government, and is therefore a weak body, quite unfit to try conclusions with the House which has the people behind it.

7. Australia provides a method whereby the Commonwealth may amend its Constitution. Canada has no such method, and thereby leaves amendment to the Imperial Parliament of the United Kingdom.

This comparison shows that the Australian scheme of Federal Government stands intermediate between that of the United States and that of Canada. In the United States, the Federal Government has less power as against the States than in Australia. In Canada, the Federal Government has more power, or at least a wider range of action. In other words, the Australian system approaches nearer, in point of form, to a Unitary Government than does the United States, but not so near as does Canada. I am speaking merely of form, that is, of the institutions as they stand on paper, for it does not necessarily follow that the spirit in which institutions are worked will precisely correspond to their form. The old Romano-Germanic Empire, for instance (1638-1806), was less unitary in practice than would have been collected from its form; the new German Empire (since 1871) is more unitary in spirit and working than its form would necessarily convey.

## XX. GENERAL OBSERVATIONS ON THE CONSTITUTION.

Technically regarded, the Constitution is an excellent piece of work. Its arrangement is logical. Its language is for the most part clear and precise. The occasional, and perhaps regrettable, vagueness of some expressions appears due, not to any carelessness of the draftsmen, but to the nature of the subject-matter. The cumbrousness of the provisions regarding customs, duties, and the control of railways is the almost inevitable result of

an effort to meet the claims and appease the apprehensions of neighbouring communities with interests that have been deemed opposed. Although it is much longer, as well as less terse, than the Constitution of the United States, going into fuller detail, and with more of the flavour of an English statute about it, it nevertheless, like that Constitution, leaves much to be subsequently filled up by the action of the legislature. A very large field of legislation remains common to the States and the Commonwealth Parliament; and though statutes passed by the latter will of course override or supersede those which may have been passed by the former, it may be many years before the higher Parliament finds leisure to cultivate all the ground which lies open before it. A further range of activity for that Parliament may disclose itself if the State legislatures should exert the power they possess of asking the Commonwealth to take over part of their work. And apart from both these lines of legislative action, the Parliament will find a very large number of matters which the Constitution has expressly directed it to settle by statutes. Till such statutes have been enacted, many points material to the working of the system will remain undetermined.

In two points the experience of the United States has been, consciously or unconsciously, turned to account. The complaint has often been made in America that the Constitution contains no recognition of the Supreme Being. The Australians have introduced such a recognition in the preamble of the Imperial Act establishing the Constitution, which runs as follows: 'Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom,' &c. And they have also solemnly enounced in the same preamble that indissolubility of their union which the Americans did not enounce in 1788, and the absence of which from the instrument gave

rise to endless argumentation on the part of those who maintained the right of a State to retire from the Federation.

The perfection of any Federal system may be tested by the degree of thoroughness with which the Federal principle is worked out in its application, not only to the legislative, but also to the executive and judicial branches of government. In this respect the Australian scheme is less perfect than the American; for the Commonwealth has received power to legislate, no doubt at the request of the State, on purely State matters, to return to the States part of the revenue it collects, and to assume the pecuniary liabilities of the States. There is also, as already noted, no such effort as in America to secure that questions of State law shall be determined solely by State Courts, for such cases may be appealed from State Courts to the Federal High Court. Thus the Nation looms large over the whole instrument, overshadowing the States. There are indeed many provisions for safeguarding the interests of the States, yet these are not so much recognitions of States' rights as stipulations made to secure material advantages, industrial or commercial or financial. An explanation of this remarkable feature of the scheme may be found in the phenomena of Australian as compared with those of American history. The thirteen States which united in 1788-9 had each of them a long history. The two oldest dated back to the beginning of the seventeenth century. The youngest had nearly sixty years of political life behind it. All were animated by a strong sentiment of local independence, and by a passion for liberty which had become associated with local independence. Their notions of a Unitary Government were formed from England, whose monarch they had latterly learned to hate as their oppressor. Hence their love for their States was largely sentimental. Their minds were filled, not by the mere sense of what they gained from their States as business men, but by the loyalty they bore to

their States as protectors of their civic rights and emblems of their historical traditions.

Very different were the feelings of the Australians. The oldest colony dated back scarcely more than a hundred years, and had enjoyed responsible government for less than fifty. Proud as each colony was of its progress, there had not been time for those political traditions to be formed in which the love of local independence roots itself. Neither were there between the several colonies such differences of origin or of usages and ways of life as separated the New Englanders from the men of Virginia and the Carolinas, for the Australians had emigrated so recently from Britain that no local types had yet been formed. Still less was there that aversion to a Unitary system of government which the strife with England had evoked among the Americans. The only political model which the Australians knew at first hand was the government of Britain by its Parliament, a government which had ceased in 1832 to be oligarchic, and had since 1867 begun to be democratic. Accordingly, among the Australians, State feeling had a thoroughly practical and business character. It took in each man the form of a resolve to secure the agricultural and trading interests of his own part of the country. It was in fact the wish to make a good bargain for his community and himself. Sentiment there was and is. But the sentiment gathered round the Commonwealth of the future rather than the Colony of the past. The same kind of feeling which attached the sons of the Cavaliers to Virginia and the Puritans of Massachusetts to the old 'Bay State' made the Australians desire to found a great nation which should be the mistress of the Southern seas. Hence the absence of any jealousy of the central power beyond that which is suggested by the fear that local industrial or commercial interests might be unfairly dealt with.

This attitude of Australian feeling will therefore (if the view here presented be correct) work towards the development of those centralizing tendencies in the Con-

stitution for which its terms give ample scope. In all forms of polity the influences which draw the members of a composite political community together and those which thrust them asunder are partly material, partly sentimental<sup>1</sup>. How the influences of material interest will work in Australia I will not attempt to predict. Some of them may prove centrifugal; others, such as those of trade, are clearly centripetal. The Constitution frankly recognizes that economic conditions prescribe a federal rather than a unitary government. But it is a significant fact that the influences of sentiment were arrayed on the side of the Nation rather than on that of the States. One can read this between the lines of the Constitution; and it explains why the Frame of Government is less consistently Federal than is that of the United States.

#### XXI. MODERN AND DEMOCRATIC CHARACTER OF THE AUSTRALIAN CONSTITUTION.

The Australian instrument is the true child of its era, the latest birth of Time. Compared with it, the American Constitution seems old-fashioned, and parts of the Swiss Constitution positively archaic. Cabinet Government, whose fully developed form is scarcely a century old, is taken for its basis. Ideas and enterprises, problems and proposals, so new that they are only just beginning to be seriously discussed, figure in it. As slavery, an institution almost coeval with the human race, but essentially barbarous, survived to be mentioned (under a transparent euphemism) in the Constitution of the United States, so a new industrial question—viz. the struggle between white labour and free coloured labour—makes its appearance in this Australian document. Here too are the new products and new methods of science, telegraphs and telephones and the keeping of meteorological observations; here is the extension of

<sup>1</sup> See Essay IV.

the suffrage to women; here are the new troubles which spring from contests between employers and workmen; here the new proposals for throwing on the State the function of providing for its members in sickness and old age; here an express recognition of the right of a State to control the traffic in intoxicating liquors. And above all these one perceives through the whole instrument that dominant factor of our age, the ever-present and all-pervading influence of economic forces, of industrial production, of commerce, of finance. The increased and increasing importance of these influences in the life of the modern world, stimulated as they have been by the amazing progress of scientific discovery, finds a fuller expression in this Constitution than in any other yet framed.

As in these points this Constitution is at least abreast of European and American theory, and ahead of European or American practice, so also it represents the high-water mark of popular government. It is penetrated by the spirit of democracy. The actual everyday working of government in the Australian Colonies is more democratic than in Britain, because Britain has retained certain oligarchical habits, political as well as social. It is more democratic than in the United States, because there both the States and the Union are fettered by many constitutional restrictions, and because wealth has there (as indeed in Britain also) been able to exert a control none the less potent because half-concealed. But the Constitution of this Federal Commonwealth is more democratic than are the Constitutions of the several Australian colonies, in some of which property qualifications and nominated second chambers have survived till now. It prescribes no qualification for a Senator or Representative beyond his having attained the age of twenty-one and being himself qualified to become an elector. He need not even be a resident in the State where he seeks election. The Senate as well as the House is elective; both are chosen directly by the peo-

ple, and on the basis of the suffrage which each State prescribes for the election of its more popular House. The duration of the House is only three years. The direct popular vote, an institution specially characteristic of advanced democracy, which has been developed independently in the United States and in Switzerland (where it has taken the double form of a Referendum to the people and an Initiative proceeding from the people), is here applied to the enactment of amendments to the Constitution, and, in the form of a general election of both Houses simultaneously, to the settlement of deadlocks between the Houses. There is no veto on the acts of the Legislature, for that vested in the Governor-General and in the Crown is not intended to be used except in the rare cases where imperial interests may be touched. In fact all those checks and balances in the English and American Constitutions by which the censors of democracy used to set such store, have here dwindled down to one only, viz. the existence of two Chambers. These two will be elected on the same franchise and composed of similar men, but the tendency to dissension so natural to rival bodies may sometimes interpose delays and ought certainly to make the criticism of proposals more searching. If the principle of popular sovereignty is expressed with equal clearness in the Constitutions of America and Switzerland, it assumes in this Australian Constitution a more direct and effective form, because many of the restrictions which the two former constitutions (and especially that of America) impose on the legislature in the supposed interests of the people are absent from the Australian instrument. In Australia the people, through their legislature with its short term, are not only supreme, but can, by the legislature's control of the Executive, give effect to their wishes with incomparable promptitude. For this purpose, the expression 'people' practically means the leader who for the time being commands the popular majority. Holding in his hand both the Executive

power of the Cabinet and the legislative power of Parliament, he has opportunities of effecting more than any one man can effect under the constitutions either of America or of Switzerland.

The solitary restraint which Australia provides is the co-ordinate authority of the Senate, a hostile majority in which may check or at least delay his legislative projects. Yet if his party in the country be well organized and his programme alluring to the masses he may control the Senate as well as the House, for it does not follow that because the smaller States have prudently placed their interests under the protection of the Senate, they will on the great issues of politics be usually found opposed to their larger neighbours <sup>1</sup>.

This highly democratic character of their Constitution has been fully appreciated by Australian statesmen. The effusiveness with which they dwell upon it is probably more sincere than even that which is displayed by politicians in England, America, or France, when they chant the praises of the multitude. Australians are as sanguine in their temper now as Americans were in the days before the clouds of Slavery and Secession had begun to darken their sky.

## XXII. POLITICAL PARTY IN AUSTRALIA.

Although the Constitution says no word about political parties, the fact that it contemplates a party system is written over it in bold characters. The sages of the Philadelphia Convention of 1787 neither intended nor expected that the scheme they devised would fall into the hands of parties. Indeed they had a touching faith, dispelled as soon as Washington retired from the scene, that the electors who were to be chosen to elect the President would select the best man in the nation irre-

<sup>1</sup> In the first election of members of the two Houses, which took place while these pages were passing through the press, every State was divided upon the issue of Free Trade *versus* Protection, though the Protectionist (or high-tariff) party secured more seats, in proportion, in the House than it did in the Senate.

spective of his political ties. The Swiss, strange as it may seem to men of English or Anglo-American race, have succeeded in keeping their Executive, elected though it is by the Chambers, out of party politics altogether, nor do parties dominate the legislature and colour the public life of the nation as in America and England. But Government of the English 'Cabinet type' is essentially party Government, that is to say, it has been so hitherto both in England and wherever else it has been tried, and no one has yet shown how it can be made to work otherwise.

In America the great parties are younger than the Constitution, which may be said to have created them. In England they are older than Cabinet Government proper, being practically contemporaneous in their rise with that very rudimentary form of the Cabinet which began to emerge in the time of King Charles II. In Australia every colony has had such active and skilfully-organized parties that no one doubts but what the Federal Legislature will find its first Ministry forthwith provided with a competent Opposition. It is generally believed that the tariff will furnish the first, and for some time the main, ground of party division, for the new Government must begin by providing itself with an adequate revenue; the chief part of that revenue must be raised by indirect taxation, and the issue of Free Trade *versus* Protection has for years past been a burning one in the largest Colonies.

I have observed that the Australian scheme contemplates a party system to work it. But what sort of a party system? Obviously one in which there are two parties only, each cohesive, each prepared to replace its antagonist in the Executive. Such was the party system of England till the present generation. Such has been the party system of the United States. Exceptions indeed there have been, such as the Know-Nothing party in 1852, the Greenback party in 1876, the Populist party which arose in 1889, and is not quite extinct now (Febru-

ary 1901). In the United States the power of the two great organizations is so vast, and the cost of creating a new party so deterrent, that a third organization seldom appears, and if it appears, presently disappears. But in France there have been and are several parliamentary groups, which frequently change their attitude towards one another, sometimes combining to support a Ministry, sometimes falling asunder and leaving it to perish, because one group alone was not sufficient to sustain it. Hence the lives of Cabinets have been short, and would have been still shorter but for the fact that an imminent peril to republican government itself has sometimes compelled the various republican groups to hold together. In Britain the same difficulty became acute from 1880 onwards, as the Irish Nationalists consolidated themselves in a distinct Third Party; and it may at any moment create serious embarrassment. It exists in Germany also, and in the Reichsrath of the Austrian half of the Austro-Hungarian Monarchy. Now in several of the Australian Colonial Parliaments a Labour party has recently arisen, which, keeping itself independent of the two older parties, can throw its weight on one or the other side and endanger the stability of Cabinets. Should this phenomenon reappear in the Parliament of the Commonwealth, it will complicate still further a position which the co-ordinate powers of Senate and House make complicated enough already<sup>1</sup>.

### XXIII. POLITICAL ISSUES LIKELY TO ARISE IN AUSTRALIA.

The mention of parties suggests another question, the last I shall attempt to discuss, viz. the lines on which the political life of Australia is likely to move under her new Constitution. It is a topic on which little will be

<sup>1</sup> Since these lines were written, the phenomenon has reappeared, for at the first elections, held in the spring of 1901, of the Senate and House, the Labour party obtained more than one-fifth of the seats in each House.

said by any one who remembers how seldom great constitutional changes have been followed by the results prophesied at the time. The Reform Bill of 1832 in Britain, the Civil War in the United States, the union of Italy under the dynasty of Savoy, not to speak of the French Revolutions of 1789 and 1848, all brought forth fruits very different from those predicted by some of the most judicious and unbiassed contemporary observers. Even the extension of the suffrage and redistribution of seats effected in Britain in 1884-5 were followed by a shifting of the balance of party strength exactly the opposite of that which the shrewdest party politicians had expected. But without attempting forecasts, one may try to indicate certain conditions likely to affect the development of Australian national and political life under the new form which this Constitution gives it.

First let us ask what are the controversies likely to occupy the nation and to supply a basis for national parties?

Taking one country with another, it will be found that the questions on which men have grouped themselves into parties may be classed under five heads, viz.:—

1. Questions of Race, such as those which have contributed to distract Ireland, which to-day trouble the Austrian Monarchy and (as respects the Poles) the Prussian Monarchy, which exist, though at present not acute, in Canada, and which are painfully acute in South Africa.

2. Questions of religion, now generally less formidable than they once were, yet embittering disputes regarding education in many modern countries.

3. Questions relating to foreign policy, whether as to the general lines on which it should be conducted, or as to the attitude to be held towards particular States at any given moment.

4. Questions regarding the distribution of political power within the nation itself.

5. Questions of an economic or economico-social

kind, *e. g.* regarding the disposal of land in public hands or its tenure in private hands, regarding the conditions of labour, regarding taxation and finance, the policy of Protection or Free Trade, the policy of progressive imposts, the propriety of assisting particular industries or particular classes out of public funds, whether national or local. Some of these may seem to be rather social than economic, but it will be found upon scrutiny that it is their economic aspect, *i. e.* their tendency to take money from or give money to some class in the community, that makes them bases for party combination. A purely social question seldom assumes great political significance.

(1, 2) Applying this classification to Australia we shall find that the first two sets of questions are absent. All the people are of practically the same race. None are animated by any religious passion, although controversies have sometimes arisen over theological teaching in State schools.

(3) Questions of foreign policy do not, strictly speaking, come within the scope of the Commonwealth Parliament, because they belong to the mother country. Nevertheless, it cannot be doubted that the Parliament will from time to time interest itself in them, especially as regards the isles of the Pacific and of the Eastern Archipelago, and will give forcible expression to its views should any crisis arrive. One can well imagine that the question of the attitude which the Commonwealth should assume, or urge the mother country to assume, towards Germany or France, or Holland, or even towards China or Japan or the United States, when any of these Powers may be taking action in the Western Pacific, might give rise to political contention.

(4) As respects the distribution of political power and the structure of the Federal Government, Australia is so democratic already that it cannot go much further. It will doubtless, however, be proposed to extend to women in all the States that right of voting at Common-

wealth elections which they already enjoy in South Australia and Western Australia, under the local law, or to apply more widely the institution of the direct popular vote; or to amend the Constitution in some point which will raise an issue between the more radical and the more conservative sections of opinion. That questions of constitutional amendment have played so small a part in American politics may be attributed to the extreme difficulty of securing the majorities required for altering the Constitution. In Australia the process will be far easier. The history of the United States during the first seventy years of the Constitution suggests that the question of the respective rights of the Federation and of the States may furnish a prominent and persistent issue. This is quite possible, for in Federations there is a tendency for many controversies of various kinds to connect themselves with, or to raise afresh, controversies regarding the true construction of the Federal instrument as respects the powers which it assigns to the Nation and to the component communities.

(5) It is however questions of the economic order that are likely to occupy, more than any others, the minds and energies of Australian statesmen. The tariff is a practically inexhaustible topic, because apart from the general issue between a Protective and Free Trade policy, the particular imports to be taxed and the particular duties to be imposed will furnish matter for debates that can hardly have finality, seeing that circumstances change, and that the financial needs of the Government will increase. It need hardly be said that in a new country like Australia direct taxation is difficult to collect and highly unpopular, so that larger recourse will be had to customs and excise than orthodox economists could justify in Europe. The financial relations between the Commonwealth and the States will be another fertile source of controversy. So may the regulation of the railways, which the Commonwealth seems likely to take over. So will the arrangements for secur-

ing the respective rights of different States as regards both irrigation and the navigation of the rivers, practically the only rivers of the Continent, which intersect the three south-eastern colonies. Among the labour questions likely to arise, one problem, much before the minds of Australians, may be found to cause difficulties in its details if not in its general principle; viz. the exclusion of immigrants of coloured race, Chinese, Japanese, Malays, and Indian coolies. The white labourers of the temperate colonies have been strongly opposed to the admission of such strangers, but the planters of the tropical north, who have used the labour of Pacific islanders on their sugar estates, take a different view of the case.

Some may think that the obvious line of party division will be found to be that which ranges the four smaller and the two larger States into opposite camps. If this should happen, which may well be doubted, it will be owing to a coincidence of economic interests, and not to the mere fact that the strength of one set of States lies in the House, that of the other in the Senate. The two largest States, New South Wales and Victoria, have hitherto been conspicuously divergent in their financial policy. In America, though the small States fought hard against the large ones in the Convention of 1787, the distinction has never since that date possessed any permanent political significance.

If parties form themselves on any geographical lines, the line will more probably be one between the tropical and the temperate regions. These tropical regions are at present much less populous and wealthy than is the temperate south-east corner of the Continent. They will doubtless increase both in wealth and in population, but as the strong sun forbids out-door labour to white men, the population enjoying political rights cannot, for generations to come, be a large one.

## XXIV. POSSIBLE ENTRANCE OF NEW STATES.

The existing situation may be so materially affected by the entrance of new States that one naturally asks what are the prospects that new States will be admitted. As the whole Continent is already divided among the five existing States, new ones can come into being only by carving up the three larger of these. There has already been talk of dividing Queensland into two or perhaps three States. Others might be formed out of the now sparsely peopled regions of the north and north-west, when they have become more thickly inhabited. How fast the process of colonization will advance in these regions will depend upon what engineering science may be found able to do for the more arid tracts in the way of storing rain-water and raising it from deep wells, while something will depend on the disposition of the Federal Government to spend money for that purpose. Nor is another element to be overlooked. Vast as is the mineral wealth already known to exist in the explored parts of Australia, it may be equalled by that which exists in regions which have received no thorough geological examination. Should mines begin to be worked in the arid tracts, an additional motive would be given for the provision of water supplies there, for the existence of a population furnishing markets would stimulate men to develop the capacities of the soil for ranching and even for tillage. These possibilities show how many factors hitherto undetermined may go to moulding the political future of the country. The increase of population in regions now thinly peopled would either make the four smaller States, or some of them, the equals of the larger, or would, more probably, lead to the creation of new States, some of them with a character different from that of the two which now command a decisive majority in the House of Representatives. As the settlement of the Mississippi Valley changed American politics, so a filling up of large parts

of the interior and north of Australia, unlikely as this now appears, might affect her constitutional growth in ways at which we can now only guess.

At present not only these tropical regions, but also the settled parts of Western Australia are separated by vast uninhabited spaces from the populous south-east corner of the continent. Hence just as in Canada an Intercolonial Railway to connect Nova Scotia and New Brunswick with Quebec and Ontario was provided for in the Constitution of 1867, and just as the construction of the great transcontinental Canadian Pacific line enabled Manitoba and British Columbia to become effective members of the Federation, so a line of railway from east to west across Australia, as well as the completion of the line, already partly constructed, from the south to the north, are among the political needs of the Commonwealth, and might do much to weld its people into an even more united nation.

One community remains to be mentioned whose geographical position towards Australia recalls the saying of Grattan that while the Ocean forbade Ireland to be politically severed from Britain, the Sea forbade an incorporating union. It has been hoped that New Zealand would enter the Federation, and she has herself seriously considered whether she ought to do so. With a healthy climate, a soil generally well watered, and an area not much less than that of the British Isles, New Zealand has evidently a great future before her. The population, now between 700,000 and 800,000, has tripled within the last thirty years; and the level of personal comfort and well-being is as high as anywhere in the world. Her accession would give further strength to the Federal Commonwealth. But New Zealand, as one of her statesmen observed, has twelve hundred reasons against union with Australia, for she is separated from the nearest part of Australia by twelve hundred miles of stormy sea, a distance more than half of that which divides Ireland from Newfoundland. She may therefore

think that some sort of permanent league with Australia, for the purposes of combined naval defence and joint action in external questions of common concern, would conform better to her outlying position than would participation in a Legislature which must be mainly occupied with the affairs of Australia. Of the subjects assigned by the Constitution to the Commonwealth Parliament, there are several in which, because purely Australian, New Zealand would have no interest, some also with regard to which she could legislate better for herself than the Commonwealth could legislate for her, inasmuch as her economic and social conditions are not the same as those of Australia. An illustration is furnished by the difference between the native races in the two countries. The Australian aborigines, one of the most backward branches of the human family, are obviously unfit for the exercise of any political functions. They are not permitted to vote in any colony, and the Constitution provides that in determining the number of representatives to be allotted to a State they shall not be reckoned among its population. But the Maoris of New Zealand are an intelligent folk, to whom New Zealand has given the suffrage, and who are now on excellent terms with their white neighbours. It would no doubt be possible for the Commonwealth Parliament to legislate differently for them and for the 'black fellows' of Australia; but their dissimilar character shows the difference of the problems which arise in the two countries. New Zealand has however an interest in obtaining free access to the Australian markets, and her final decision as to entering the Federation may be influenced by the commercial policy which the larger country pursues<sup>1</sup>.

In this changeful world, no form of government ever remains the same during a long series of years, and no Federation, however strictly the rights of its members

<sup>1</sup> While these pages were passing through the press, a Commission appointed in New Zealand to consider the question has reported strongly against her entrance into the Australian Federation.

may be secured by a Rigid Constitution, can continue to maintain exactly the same balance of powers between the Nation and the States. I have already expressed the opinion that the tendency is in Australia likely to be rather towards consolidation than towards a relaxation of the Federal bond, because not only national sentiment but economic influences also will work in that direction. Much however may depend on a factor still unpredictable, the relations between Australia, together with the British Empire generally, and the other Powers which are interested in the Western Pacific. Nothing does so much to draw together a people already homogeneous as the emergence of issues which threaten, or result in, a struggle against foreign States. The sentiment of internal unity is accentuated. Public attention is diverted from domestic controversies. Powers are willingly yielded to the Executive which would in days of peace be refused. The consequences may be good or evil—they have sometimes been in the long run evil—but either way they alter the character of the government. They may even give a new direction to its policy, as the United States has recently, and quite unexpectedly, discovered.

#### XXV. FUTURE RELATIONS OF THE AUSTRALIAN COMMONWEALTH TO BRITAIN.

Australia however is not a State standing alone in the world, but a member of the British Empire, so we cannot close an examination of her Constitution without asking whether the union of her Colonies will affect her relations to the mother country.

When the first Convention to frame a Federal Constitution assembled in 1891, most Englishmen supposed that a Federated Australia would soon aspire to complete independence. Australian statesmen saw deeper, and predicted that the formation from the several Colonies of an Australian Nation would tend not to loosen,

but rather to draw closer the ties that unite the people to Great Britain. So far as can be judged from the course of Australian opinion during the past ten years, this has been the result. There were at first some who advocated Federation as a means to independence. But they soon desisted, overborne by a different current. The same National feeling through which Federalism triumphed seems to have deepened the sense of unity with other members of the British race. And possibly that suspicion which colonies are apt to feel of a sort of patronage on the part of the mother country, and which sometimes disposes them to be self-assertive, may have vanished as they came to realize that the old country was proud of them and wished to treat them not only as a daughter but as an equal. Neither do they, democrats as they are, harbour distrust of a monarchy, or deem their freedom in any way hampered by it. The love for republicanism in the abstract, though far stronger in Continental Europe than in England, was everywhere a force in the first half of the nineteenth century. It has faded away in the second half throughout the British world, because the solid substance of freedom has been secured, because the old mischiefs of monarchical government have reappeared in republics, because men's minds have begun to be occupied with economic and social rather than with purely political questions. The fact that the British Crown is titular head of the Australian Commonwealth will not render the working of the Constitution less truly popular, any more than has befallen in Canada, a somewhat less democratic country. So far as the internal politics of Australia are concerned, she will take her own course, scarcely affected by her connexion with England. But the fact that she is, and seems likely to remain, a part of the British Empire, sharing in the enterprises and conflicts and responsibilities of that vast body, is a fact of the highest moment for her future and for the future of the world. Still more momentous might her relation to the Empire become

should any scheme be devised for giving the self-governing Colonies of Britain a share in the financial liability for common defence, together with a voice in the determination of a common foreign policy. The difficulties of constructing any constitutional machinery for this purpose are obvious, yet perhaps not insurmountable. Should any such arrangement be ever reached, it will probably be reached through some crisis in the history of the Empire itself.

Sixty years ago it was generally believed that as soon as each British self-governing colony had become conscious of its strength, it would naturally desire, and could not be refused, its independence. But the last sixty years have brought with them many favouring conditions; and among these, one of which no one then thought, the long reign of a sovereign whose personal character, by its purity, simplicity and kindness, won such reverence and affection, not only for herself, but also for the ancient institutions at the head of which she stood, that the prolongation of her life may be reckoned among the causes which have kept these far-off lands a part of the British realm and have given its actual form to the Commonwealth of Australia.

## IX

# OBEDIENCE

THE question which meets on the threshold of their inquiries all who have speculated on the nature of political society and the foundations of law is this: What is the force that brings and keeps men under governments? or, in other words, What is the ground of Obedience?

### I. THEORIES REGARDING POLITICAL OBEDIENCE.

The answers given by philosophers to this question, while varying in form, group themselves under two main heads. Some assign Fear as the ground, some Reason. One school discovers the power that binds men together as members of a State in Physical Force, acting upon them through the dread of death or other physical evil. The other conceives it to lie in a rational view of the common advantage, which induces men to consent of their own free-will to forgo some measure of their (supposed) original personal independence in order to obtain certain common benefits. Thus, while the former school finds the origin of law in Compulsion, the latter finds it in Agreement.

Both schools are of high antiquity, and have been represented by many eminent names. One gathers from Plato that divers sophists maintained the former thesis. It is in substance not far from that assigned to Thrasy-

machus in the *Republic*, where the Sophist says that Justice is nothing but the advantage of the stronger; and in later times Hobbes and Bentham are eminent among those who embrace it. The other view is most familiar to moderns from the writings of Rousseau; but it has a long and interesting history, intertwined with that of the notions of the State of Nature and the Law of Nature, and also with the history of the conception of Sovereignty—topics which are discussed elsewhere in this volume. Rousseau grounds obedience on the original ‘social contract,’ whereby each and every person agrees with every other to forgo his natural freedom by constituting a State which is to act for all, and in which the citizen recovers his freedom because he is himself a part of that ‘general will’ to which he renders a reasonable service. The Aristotelian doctrine that men are by their very constitution sociable creatures, naturally drawn to create and to live in communities, comes nearer to the second view, while escaping by its generality of expression the errors into which those who set political society upon the foundation of contract have frequently been betrayed. And it need not be added that many other philosophers in comparatively modern times, basing the State, some of them on the nature of man, some on eternal reason or the will of God, have held that it thereby acquires an absolute right to obedience from its members. These speculations, however, seldom touch the particular point I propose to discuss here, viz. the grounds which actually dispose men to obedience.

Of the two chief older theories, that which represents men as led by reason to enter into a Contract has of late fallen into discredit, being indeed so evidently opposed to what we know of the early state of mankind that it may be doubted whether most of those who propounded or have adopted it did not mean it to be taken rather as an apologue or mythical presentment of moral facts than as a piece of history. The theory of Force and Fear, on the other hand, has retained much of its vogue, having

connected itself with a system of jurisprudential terminology which is, or lately was, influential in England and not unknown in America. According to Bentham and his followers, there is in every State a Sovereign who enjoys unlimited physical, and therefore also unlimited legal, power. His might makes his right. He rests on Force and rules by Fear. He has the sole right of issuing Commands. His Commands are Laws. They are enforced by Threats, and are obeyed in respect of the apprehension of physical harm to follow on disobedience. Whether those who adhere to this body of doctrine think it historically true as an account of the origin of law, or merely adopt it as a concise explanation and summary view of the principles on which modern law and highly developed forms of political society are based, is not always clear from the language they use. But the importance they attach to Force appears not only from the contempt they pour on the contractual theory of government, but also from their omission to refer to any facts in the character and habits of mankind except those which are connected with Force and Fear as factors in the development of the social organism.

A little reflection will, however, convince any one who comes to the question with an open mind that both these theories, that of compulsion as well as that of contract, are alike incomplete, and, because incomplete, are misleading. They err, as all systems are apt to err, not by pointing to a wholly false cause, but by extending the efficiency of a true cause far beyond its real scope. Rousseau is right in thinking that political society needs a moral justification, and that the principle of individual freedom is best satisfied where every one obtains a share in the government to which he submits. The Contractualists generally may find a solid basis for authority in the fact that organized society does actually render to each of its members some return for the so-called 'natural liberty' which he has surrendered. Even a bad government gives him at least a measure of protection,

however imperfect, for his person and property against the attacks of any one but the government itself. Here there is, if not what we can call an implied contract, at least a consideration, a sort of mutuality of service in the political relation, for which each member gives something, and from which each gains something. To go further, and either to explain the growth of government by a conscious bargain at some past moment, or to conceive the idea of such a bargain as present to the bulk of those who live in any actual society now, or to regard the individual members of society as entitled to act upon contractual principles towards their government and one another, is to plunge at once into what are not more palpably historical errors than unworkable principles. So also the school of Thrasymachus and that which claims Hobbes as its founder are right in feeling that some test must be found of the solidity of a community and the actual working strength of its machinery; and they discover this in the fact that physical force is the *ultima ratio* wherewith to coerce the disturbers of the community and the transgressors of the law. Without force in the background, the law might be defied. It is when the men of this school, or some of them, go on to represent physical compulsion as the means by which communities have been in fact formed—though, to be sure, Hobbes himself alleges a contract as the very first step<sup>1</sup>—and Fear as the motive which in fact secures respect to the law from the majority of the citizens, that they depart alike from history and from common sense. The problem of political cohesion and obedience is not so simple as either school of theorists would represent it.

To show that both schools are historically wrong would not be difficult. This has been often done as against such of the Contractualists as have held that conscious reason brought men out of the State of Na-

<sup>1</sup> See as to the doctrine of Hobbes, the Essay on Sovereignty which follows this Essay.

ture by a compact; and if the historians who deal with the earlier stages of human progress have not cared to demolish the Physical Force doctrine, this may have happened because none has thought it worth while to refute a theory whose flimsiness they have perceived, but which they have deemed to lie outside the sphere of history. As it is the historian who best understands how much Force has done to build up States, so he most fully sees that Force is only one among many factors, and not the most important, in creating, moulding, expanding and knitting together political communities. It is not, however, necessary to institute any historical inquiry in order to reach this conclusion. An easier course is to interrogate one's own consciousness, and to observe one's fellow men. The problem of obedience to government and law is part of the larger and even more obvious problem of the grounds of Obedience in general. Why do we all forgo the gratification of many of our personal desires, desires in themselves harmless, merely because they are not shared by others? Why do we go on echoing opinions whose soundness we more than doubt? Why do we pursue pleasures which give us no amusement, but rather weariness? Why do we adhere to a party, political or ecclesiastical, of whose conduct we often disapprove? Why in fact is so large a part of our daily conduct determined, not by our own natural preferences, but by compliance with the opinion of others or submission to the social conditions that surround us?

## II. THE GROUNDS OF OBEDIENCE IN GENERAL.

Political obedience is not a thing by itself, but a form of what may be called Compliance in general.

The grounds or motives of Compliance can be summed up under five heads. Putting them in the order of what seems to be their relative importance, they may be described as the following—Indolence, Deference, Sympathy, Fear, Reason. Let us consider each separately.

By Indolence I mean the disposition of a man to let some one else do for him what it would give him trouble to do for himself. There are of course certain persons to whom exertion, mental as well as physical, is pleasurable, and who delight in the effort of thinking out a problem and making a decision for themselves. There are also moments in the lives of most of us when under the influence of some temporary excitement we feel equal to a long succession of such efforts. But these are exceptional persons and rare moments. To the vast majority of mankind nothing is more agreeable than to escape the need for mental exertion, or, speaking more precisely, to choose only those forms of exertion which are directly accompanied by conscious pleasure and involve little fatigue. In a great many exertions of thought resulting in determinations of the will there is no pleasure, or at any rate no conscious pleasure, or at any rate no pleasure which is not outweighed by an accompanying annoyance. Such exertions may relate to things in which we have slight personal interest, and therefore no desires to gratify, or to things in which our personal interest is so doubtful that we shrink from the trouble of ascertaining which way it lies, and are glad to shift the responsibility from ourselves to whoever will undertake it for us. The ascendancy of one of a married couple, for instance, or of one member of a group of persons living together, is usually acquired in some such way. It is not necessarily the will really strongest that in these cases prevails, but the will which is most active, most ready to take a little trouble, to exert itself on trivial occasions and undertake small responsibilities. Persons of a resolute and tenacious character are sometimes also hesitating and undecided, because they cannot be at the trouble of setting to work, for the little questions of daily life, their whole machinery of deliberation and volition. In five persons out of six the instinct to say Yes is stronger than the instinct to say No—were it not so,

there would be fewer marriages—and this is specially so when the person who claims consent possesses exceptional force and self-confidence. In other words, most of us hate trouble and like to choose the line of least resistance. In tropical Africa the country is covered by a network of narrow footpaths, made by the natives. These paths seldom run straight, and their flexuosities witness to small obstacles, here a stone and there a shrub, which the feet of those who first marked them avoided. To-day one may perceive no obstacle. The prairie which the path crosses may be smooth and open, yet every traveller follows the windings, because it is less trouble to keep one's feet in the path already marked than it is to take a more direct route for one's self. The latter process requires thought and attention; the former does not.

Nor is the compliance of indolence less evident in thought than in action. To most people, nothing is more troublesome than the effort of thinking. They are pleased to be saved the effort. They willingly accept what is given them because they have nothing to do further than to receive it. They take opinions presented to them, and assume rules or institutions which they are told to admire to be right and necessary, because it is easier to do this than to form an independent judgement. The man who delivers opinions to others may be inferior to us in physical strength, or in age, or in knowledge, or in rank. We may think ourselves quite as wise as he is. But he is clear and positive, we are lazy or wavering; and therefore we follow him.

Under the name of Deference it is convenient to include the various cases in which some emotion, drawing one person to another, disposes the former to comply with the will of the latter. Whether the emotion be love, or reverence, or esteem, or admiration, a persuasion of superior goodness or of superior wisdom, there is a feeling on the part of the person attracted which makes him ready to sacrifice his own impulses, if they

be not of unusual strength, to the will of the person loved or revered or admired. Wisdom and goodness give their possessor a legitimate authority, wisdom in making him appear as a fit person to follow where the question is of choosing means, goodness where it is a question of the choice of ends; and the belief that these qualities exist in the person revered or esteemed is just as effective as the reality, such belief being obviously the result of many causes besides a rational scrutiny. The force of the feeling of deference in securing compliance or adhesion varies in different nations and in different states of society. The advantages, for instance, which rank, wealth and learning give to a candidate for any public post in a modern country like France or England, only faintly represent the authority which belonged to birth, learning and sanctity, whether real or supposed, in simpler times. A so-called holy man in the Musulman or Hindu East, a Fakir or a Guru, exerts to-day enormous power in his own neighbourhood, in respect far less of any fear of the harm he can do than simply of the veneration he inspires. Even if he does not claim a direct supernatural mission, his words carry great weight. And there is abundant evidence in the careers of famous Europeans in the East to show how readily in primitive times a remarkable character and career would permanently attach a halo, not only of admiration but of submissive deference, to the descendants of such a person or to the occupant of the office he had filled.

By Sympathy as a ground of obedience I mean not merely the emotion evoked by the sight of a corresponding emotion in another, but the various forms of what may be called the associative tendency of mankind, the disposition to join in doing what one sees others doing, or in feeling as others feel. The root of this instinct lies very near Indolence; for no way of saving effort is so obvious as to do what others have done or are doing; but it is not quite the same thing as Indolence, for it is a tendency strong among some of the less

indolent races of mankind, and each of us must have noted from his own personal experience that its action depends as much upon the susceptibility of the imagination as upon the slowness or slackness of the will. There is hardly a more potent factor than this in the formation of communities, whether social or political, because it unites with, if it be not almost identical with, what we call party and civic spirit, substituting a sense of and a pleasure in the exercise of the collective will for the pleasure of exerting the individual will, and thus tending to subordinate the latter, and to make it rejoice in following, perhaps blindly, the will which directs the common action. The shock to individual pride is avoided, because each man acts spontaneously, at the bidding of his own emotion, and each feels that what he may lose as an individual he recovers as a member of the body, and that with a better chance of indulging his passions at the expense of his antagonists. The spirit of the body seems to live in and inspire him, increasing indefinitely the force of his own personality. Obedience to the directing authority is here a first necessity, and becomes the more implicit the greater the dangers of whatever enterprise the body may undertake. As fighting covers great part of the life of primitive communities, the disposition to obey becomes early strong among them, because in nothing is obedience so essential as in war.

Perhaps these three sources of the tendency to comply are really only forms of, as they are certainly all closely connected with, the disposition to imitate which is so strong, not only in man, but throughout the animal kingdom, so far as we can observe it. When ninety-nine sheep one after another jump over a fence at precisely the point where the first of the flock has jumped it, they reveal a propensity similar to that which makes a file of savages travelling over a wilderness each tread in the footsteps of his predecessor, or that which soon stamps the local accent upon the tongue of a child brought from some other part of the country, where the

mode of speech was different. There is evidently a psychological, doubtless indeed a physiological, cause for this general and powerful tendency to reproduce the acts and ways of other creatures, even where, as in the case of a local accent, there is no motive whatever for doing so. Conscious imitation is of course frequently explainable by the desire to please, or by a perception of the advantage of doing as others do. But there are many facts to show that its roots lie deeper and that it is due largely to a sympathy between the organs of perception and those of volition, which goes on in unconscious or subconscious states of the mind, and which makes the following of others, the reproduction of their acts, or the adoption of their ideas, to be the path of least resistance, which is therefore usually followed by weaker natures, and frequently even by strong ones.

Of Fear and of Reason nothing need be said, because the school of Hobbes and Bentham for the one, and the apostles of democratic theory for the other, have said more than all that is needed to show the part they respectively play in political society. Fear is no doubt the promptest and most effective means of restraining the turbulent or criminal elements in society; and is of course the last and necessary expedient when authority either legally established or actually dominant is threatened by insurrection. Reason operates, and operates with increasing force as civilization advances, upon the superior minds, leading them to forgo the assertion of their own wills even where such assertion would be in itself innocent or beneficial, merely because the authority which rules in the community has otherwise directed. Reason teaches the value of order, reminding us that without order there can be little progress, and preaches patience, holding out a prospect that evils will be amended by the general tendency for truth to prevail. Reason suggests that it is often better that the law should be certain than that it should be just, that an existing authority should be supported rather than that

strife should be caused by the attempt to set up a better one. So also Reason disposes minorities to acquiesce even where a majority is tyrannical, in the faith that tyranny will provoke a reaction and be overthrown by peaceable discussion. J

Allowing for the efficacy of Fear as a motive acting powerfully upon the ruder and more brutish natures, and for that of Reason as guiding the more thoughtful and gentle ones, and admitting that neither can be dispensed with in any community, their respective parts would nevertheless seem to be less important than are the parts played by the three first-mentioned motives. If it were possible either in the affairs of the State, or in the private relations of life, to enumerate the number of instances in which one man obeys another, we should find the cases in which either the motive of Fear or the motive of Reason was directly and consciously present to be comparatively few, and their whole collective product in the aggregate of human compliance comparatively small. If one may so express it, in the sum total of obedience the percentage due to Fear and to Reason respectively is much less than that due to Indolence, and less also than that due to Deference or to Sympathy.

In a large proportion of the cases arising in private life the motive of Fear cannot be invoked at all, because there is no power of inflicting harm; and Reason just as little, because the persons who habitually apply ratiocinative processes to their actions are after all few. It may be said that conscious thought is not ordinarily applied to action because Habit supplies its place, and Habit, enabling and disposing us to do without consideration the acts which otherwise would need to be considered, is in fact fossil reason. That is largely so, but Habit is still more often the permanent and unchanging expression of Indolence. Nothing becomes a habit so quickly as does the acquiescence due to Indolence, nor does any tendency strike its roots so deep. And though it is true as regards public or civic matters that

physical force is always at hand in the background, we must also recognize that the background is not in fact usually visible to the majority of those who act according to the laws which they obey. They do not necessarily, nor even generally, think of the penalties of the law. They defer to it from respect and because other people defer; they are glad that it is there to save them and other people from trouble. This attitude is not confined to civilized States, but has existed always, even in unsettled societies, where the law might not be able to prevail but for the aid of private citizens.

Of the three springs of Obedience which have been represented as on the whole the stronger, Indolence disguises itself under Deference and Deference is intensified by Sympathy; that is to say, the tendency of men to let others take decisions for them which they might take for themselves becomes much stronger and more constant when they have any ground for believing others to possess some sort of superiority, while the disposition to admit superiority is incomparably more active where a number of other persons are perceived to be also admitting it. A society like that in which modern men live in England or America is apt to suppose that the admission of superiority mortifies a man's pride, but this is so far from being generally true that the attitude of submission is to most men rather pleasurable than the reverse. So Protestants have been apt to assume that the natural and normal attitude of man in religious matters is independence—a wish to seek out truth for himself, a sense of the duty of consulting his own conscience; whereas the opposite is the fact, and those religious systems take the greatest hold upon man which leave least to individual choice and inculcate, not merely humility towards the Unseen Powers, but the duty of implicitly accepting definite traditions or of revering and following visible ecclesiastical guides.

Some philosophers have talked of Will as the distinctive note of Man—and in so far as the exercise of Will

implies a conscious exertion of rational choice it may be admitted to be characteristic of him alone. But in mere tenacity of purpose and persistence in a particular course other animals run him hard. A rogue elephant or a bucking mustang can show as much persistence, sometimes mingled with a craft which seeks to throw the opponent off his guard, and bides its time till the most favourable moment for resistance arrives. In most men the want of individual Will—that is to say, the proneness to comply with or follow the will of another—is the specially conspicuous phenomenon. It is for this reason that a single strenuous and unwearying will sometimes becomes so tremendous a power. There are in the world comparatively few such wills, and when one appears, united to high intellectual gifts, it prevails whichever way it turns, because the weaker bow to it and gather round it for shelter, and, in rallying to it, increase its propulsive or destructive power. It becomes almost a hypnotizing force. One perceives this most strikingly among the weaker races of the world. They are not necessarily the less intelligent races. In India, for instance, an average European finds many Hindus fully his equals in intelligence, in subtlety, and in power of speech; but he feels his own volitions and his whole personality to be so much stronger than that of the great bulk of the native population (excluding a very few races) that men seem to him no more than stalks of corn whom he can break through and tread down in his onward march. This is how India was conquered and is now held by the English. Superior arms, superior discipline, stronger physique, are all secondary causes. There are other races far less cultivated, far less subtle and ingenious, than the Hindus, with whom Europeans have found it harder to deal, because the tenacity of purpose and the pride of the individual were greater. This is the case with the North-American Indians, who fought so fiercely for their lands that it has been estimated that in the long conflict they maintained they have

probably killed more white men than they have lost at the hands of the whites. Yet they were far inferior in weapons and in military skill; and they had no religious motives to stimulate their valour.

No one can read the history of the East without being struck by the extraordinary triumphs which a single energetic will has frequently achieved there. A military adventurer, or the chief of a petty tribe, suddenly rises to greatness, becomes the head of an army which attacks all its neighbours, and pursues a career of unbroken conquest till he has founded a mighty empire. Perhaps he raises vast revenues, constructs magnificent works, establishes justice, creates a system of administration which secures order and peace during his lifetime. Men like Thothmes III, Cyrus, and Darius son of Hystaspes. Khosroes Anushirwan, Saladin, Tamerlane, Baber, Akbar the Great, Hyder Ali are in their several ways only the most striking instances of the tremendous effect which a man of exceptional force and activity produces among Oriental peoples<sup>1</sup>. One asks why this happens chiefly in the East. Is there a greater difference in Asiatic than in European peoples between the few most highly-gifted men and the great mass of humanity, so that where the ordinary characters are weak one strong character prevails swiftly and easily? Or is the cause rather to be sought in the fact that in the East there are no permanent institutions of government to be overthrown? That which is strong and permanent there—viz. the customs, religious and legal, of the people—a ruler does not (except in a fit of insanity) venture to touch, while the thrones of neighbouring potentates go down at a stroke before him. In mediæval and modern Europe, the weakness of the ordinary man was and is entrenched behind a fabric of government and law, which the strongest individual will cannot overthrow; and it is

<sup>1</sup> Some of these succeeded to thrones already established, but their careers illustrate none the less the results effected by brilliant gifts appearing in the midst of a comparatively inert people.

only when this fabric has been shattered by a revolution, as happened in France at the end of the eighteenth century, that the adventurer of genius and volition has a chance of rivalling the heroes of the East.

Thus the comparative stability of governments in mediaeval and modern Europe does not disprove the view which finds in the force of individual will, and the tendency of average men to yield to it, a potent factor in compelling obedience. For in the European countries the resistance offered to the ambition of such a will is effective, not so much because ordinary men are themselves more independent and more capable of opposition as because their superior intelligence has built up well-compacted systems of polity to which obedience has by long habit become attached. Traditions of deference and loyalty have grown up around these systems, so that they enable individuals to stand firmly together, and constitute a solid bulwark against any personality less forceful than that of a Julius Caesar or a Buonaparte.

To this explanation one may perhaps add another. In the East the monarch is as a rule raised so far above his subjects that they are all practically on a level, as compared with him; and those who are for the moment powerful are powerful in virtue of his favour, which has elevated and may at any moment abase them. This has long been the case in Musulman States, and was to a large extent true even in the Byzantine Empire. It is in some degree true in Russia now. Where there is no land-holding or clan-leading aristocracy, nor any richly endowed hierarchy, there may be nothing to diminish the impression of overwhelming power which the sovereign's position produces. Hence there may be no order of men to set the example of an independence of feeling and attitude which springs from their position as the leaders of their dependents and as entitled to be consulted by the Crown. Such an order of men existed in the feudal aristocracy of the Middle Ages, ~~who~~ have done much to create a type of character in the States of

modern Europe. To them has now succeeded, in some modern countries, a so-called aristocracy of wealth, which, vain as it may be of its opportunities for influencing others, is much less stable than was the landholding class of old days, and much less high-spirited. Meanwhile the general levelling down and up which has created what we call modern democracy has, in reducing the number of those whom rank and tradition had made 'natural leaders,' increased the opportunities of strong-willed and unscrupulous men, restless and reckless, versed in popular arts, and adroitly using that most powerful of all agents for propagating uniformity of opinion which we call the newspaper press, powerful because it drives the individual to believe that if he differs from the mass he must be wrong. Such a man may have a career in a huge democracy which he could not have had a century ago, because the forces that resist are fewer and feebler to-day than they were then, and the multitude is more easily fascinated by audacity or force of will, apart from moral excellence, apart from intellectual distinction, than is an aristocratic society.

It may help to explain the theory I am trying to present if we pause for a moment to examine the influences under which the habit of obedience is first formed in the individual man and in the nascent community. For the individual, it begins in the Family; and it grows up there only to a small extent by the action of Force and Fear. The average child, even in the days of a discipline harsher than that which now obtains, did not as a rule act under coercion, but began from the dawn of consciousness to comply with the wish of the parent or the nurse, partly from the sense of dependence, partly from affection, partly because it saw that other children did the like. Force might sometimes be resorted to; but force was in most cases a secondary and subsidiary agency. Nor did force succeed so well as softer methods. Everybody knows that the children who have been most often punished are not the most obedient, nor is this

merely because, being naturally self-willed, they have needed more correction. After those little squalls of aimless passion which belong to a certain period in the child's life have passed away, the boy usually moves as a matter of course at his parents' bidding until the age is reached when circumstances oblige him to act for himself, or when the sense of independence is stimulated by perceiving that others of his own age will despise him if he remains too submissive. The child whose constant impulse is to disobey is as likely to turn out ineffective as the child who obeys too readily; for perversity is as frequently due to want of affection, sympathy and common sense as to exceptional force of will.

Thus most people enter adult life having already formed the habit of obeying in many things where Force and Fear do not come in at all, but in which the most obvious motive is the readiness to be relieved of trouble and responsibility by following the directions of some one else, presumably superior. They have also formed during boyhood the habit of adopting the opinions of those around them. An acute observer has said that the chief fault of the English public school is that it makes this habit far too strong. Custom—that is to say, whatever is established and obeyed—has great power over them. No conservatism surpasses that of the schoolboy.

It would not be safe to try to find a general explanation of the growth of political communities in the phenomena of domestic life, though it was a favourite doctrine of a past generation that the germ or the type of the State was to be found in the Family. There are some races among whom the Family and its organization seem to have played no great part. But it is clear that in primitive societies three forces, other than Fear, have been extremely powerful—the reverence for ancient lineage, the instinctive deference to any person of marked gifts (with a disposition to deem those gifts supernatural), and the associative tendency which unites the members of a group or tribe so closely together that the

practice of joint action supersedes individual choice. These forces have imprinted the habit of obedience so deeply upon early communities that it became a tradition, moulding the minds of succeeding generations. Physical force had plenty of scope in the strife of clans or cities, or (somewhat later) of factions, with one another; but in building up the clan or the city it was hardly needed, for motives more uniform and steady in their efficiency were at work. To pursue this topic would lead us into a field too wide for this occasion; yet it is well to note two facts which stand out in the early history of those communities in which Force and Fear might seem to have had most to do with the formation of governments, and of the habit of obedience to authority. One is the passionate and persistent attachment to a particular reigning family, apart from their personal gifts, apart from their power to serve the community or to terrify it. The Franks in Gaul during the seventh and eighth centuries were as fierce and turbulent a race as the world has ever seen. Their history is a long record of incessant and ferocious strife. From the beginning of the seventh century the Merwing kings, descendants of Clovis, became, with scarcely an exception, feeble and helpless. Their power passed to their vizirs, the Mayors of the Palace, who from about A.D. 638 onwards were kings *de facto*. But the Franks continued to revere the blood of Clovis, and when, in 656, a rash Mayor of the Palace had deposed a Merwing and placed his own son on the throne, they rose at once against the insult offered to the ancient line; and its scions were revered as titular heads of the nation for a century longer, till Pippin the Short, having induced the Pope to pronounce the deposition of the last Merwing and to sanction the transfer of the crown to himself, sent that prince into a monastery. This instance is the more remarkable because the Franks, being Christians in doctrine if not in practice, can hardly have continued to hold the divine origin of their dynasty.

The other fact to be dwelt upon is this, that where religion comes into the matter we discover an associative tendency of immense strength, which binds men into a community, and wins obedience for those who, whether as priests or as kings, embody the unity of the community, who represent its collective relation to the Unseen Powers, who approach them with its collective service of prayers or sacrifice. Altars have probably done even more than hearths to stimulate patriotism, especially among those who, like the Romans, had a sort of domestic altar for every hearth, and kept up a worship of family and clan spirits beside the worship of the national gods. It may be said that the power of religion in welding men together and inducing them to obey kings or magistrates or laws is due to the element of Fear in religion. Such an element has no doubt been at work, but its influence is more seen in the requirement of sacrifices to the deities themselves than in enforcing obedience to the authorities and institutions of the State. What commends these latter to reverence is rather the belief that their divine appointment gives them a claim on the affection of the citizens, and makes it a part of piety as well as of patriotism to support them. In the Old Testament, for instance, the love of Jehovah, and the sense of gratitude to Him for His favours to His people, are motives invoked as no less potent than the dread of His wrath. There has always been a tendency, since Christianity lost its first freshness and power, to insist upon the more material motives, upon those which appear palpable and ponderable, such as the fear of future punishment, rather than on those of a more refined and ethereal quality. But it was not by appealing to these lower motives that Christianity originally made its way in the Roman Empire. The element of Fear, though not wholly absent from the New Testament, plays a very subordinate part there, and became larger in mediæval and modern times. Yet it may be doubted whether, in growing stronger, it increased the efficiency

of Christianity as an engine of moral reform. 'Perfect love casteth out fear.' It was the gospel of love, and not the fear of hell, that conquered the world, and made men and women willing to suffer death for their faith. The martyrs in the persecutions under Decius and Diocletian, and the Armenian martyrs of 1895, who were counted by thousands, overcame the terror of impending torture and death, not from any thought of penalties in a world to come, but from the sense of honour and devotion which forbade them to deny the God whom they and their parents or forefathers had worshipped.

Returning to the general question of the disposition of the average man to follow rather than to make a path for himself, it may be remarked that the abstract love of liberty, the desire to secure self-government for its own sake, apart from the benefits to be reaped from it, has been a comparatively feeble passion, even in nations far advanced in political development. It is not easy to establish this proposition by instances, because wherever arbitrary power is exercised, there are pretty certain to be tangible grievances as well as a denial of liberty, and where a monarch, or an oligarchy, attempts to deprive a people of the freedom they have enjoyed, they conclude, and with good reason, that oppression is sure to follow. But when the sources of insurrections are examined, it will be almost always found that the great bulk of the insurgents were moved either by the hatred of foreign domination, or by religious passion, or by actual wrongs suffered. Those who in drawing the sword appeal to the love of liberty and liberty only are usually a group of persons who, like the last republicans of Rome, are either exceptional in their sense of dignity and their attachment to tradition, or deem the predominance of a despot injurious to their own position in the State. So we may safely say that rebellions and revolutions are primarily made, not for the sake of freedom, but in order to get rid of some evil which touches men in a more tender place than their pride. They rise

against oppression when it reaches a certain point, such as the spoiling of their goods by the tax-gatherer, the invasion of their homes by the minions of tyranny, the enforcement of an odious form of worship, or perhaps some shocking deed of cruelty or lust. Once they have risen, the more ardent spirits involve the sacred name of liberty and fight under its banner. But so long as the government is fairly easy and tolerant, the mere denial of a share in the control of public affairs is not acutely resented, and a great deal of paternally regulative despotism is acquiesced in.

In A.D. 1863, when Bismarck was flouting the Prussian Parliament, Englishmen were surprised at the coolness with which the Prussian people bore the violations of their not too liberal constitution. The explanation was that the country was well governed, and the struggle for political power did not move peasants and tradesmen otherwise contented with their lot. The English were a people singularly attached to their ancient political and civil rights, yet Charles the First might probably have destroyed the liberties of England, and would almost certainly have destroyed those of Scotland, if he had left religion alone. One of the few cases that can be cited where a great movement sprang from the pure love of independence is the migration of the chieftains of Western Norway to Iceland in the ninth century, rather than admit the overlordship of King Harold the Fair-haired. But even here it is to be remembered that Harold sought to levy tribute: and the Norsemen were of all the races we know those in whom the pride of personality and the spirit of independence glowed with the hottest flame.

There are even times when peoples that have enjoyed a disordered freedom tire of it, and are ready to welcome, for the sake of order, any saviour of society who appears, an Octavianus Augustus or even a Louis Napoleon. The greatest peril to self-government is at all times to be found in the want of zeal and energy among

the citizens. This is a peril which exists in democracies as well as in despotisms. Submission is less frequently due to overwhelming force than to the apathy of those who find acquiescence easier than resistance.

Two questions arising out of the view that has been here presented regarding the main sources of Obedience remain to be considered.

One of these, that which bears upon the theory of jurisprudence as a science, being somewhat technical, had better not be suffered to interrupt the course of the general argument. I have therefore relegated it to a note at the end of this essay.

### III. THE FUTURE OF POLITICAL OBEDIENCE.

The other question which deserves to be examined is a much wider one. We have inquired what have been the grounds of Obedience in the past, and how it has worked in consolidating political society. We have seen that political society has depended upon the natural inequality in the strength of individual wills and in the activity of individual intellects, so that the weaker have tended to follow and shelter themselves behind the stronger, not so much because the stronger have compelled them to do so as because they have themselves wished to do so. But the conditions of human life and society have of late years greatly changed, and are still continuing to change, in the direction of securing wider scope for independence of thought and action. Society has become orderly, and physical violence plays a smaller and a steadily decreasing part. The multitude, in most of the civilized and progressive countries, can, if and when it pleases, exercise political supremacy through its voting power. There is very much less distinction of ranks than formerly, so that even those who dislike social equality are obliged to profess their love for it. And the opportunities of obtaining knowledge have become infinitely more accessible than they were even a

century ago. Changes so great as these must surely—though of course they cannot alter the fundamental facts of human nature—modify the working of the tendencies and habits which man shows in political society. How far, then, are they likely to modify the tendency to Obedience, and in what way? In other words, What will be the relation of Obedience to democracy and to social equality?

It used to be believed, perhaps it is still generally believed, that with the advance of knowledge, the development of intelligence, and the accumulation of human experience, Obedience must necessarily decline, and that therewith governmental control will decay or be deemed superfluous, the good sense of mankind coming in to do for themselves what authority has hitherto done for them. The familiar phrase 'Anarchy *plus* a street constable' was employed to describe the ideal of a government restricted to the fewest possible functions, as that ideal was cherished by the lovers of liberty and the apostles of *laissez-faire*. There is even a school counting among its members, besides a few assassins, many peaceful and tender-hearted theorists, men of high personal excellence, which maintains that all the troubles of the world spring from the effort of one man, or a group of men, or the general mass of a people, to regulate the relations and guide the conduct of individuals. To this school all forms of government are pretty nearly equally bad, and a Czar, though a more conspicuous mark for denunciation, is scarcely worse than is a Parliament.

The answer to this view, which is attractive, not merely because it is paradoxical, but because it is a protest against some really bad tendencies of human society, and whose ideal, however unattainable, offers larger prospects of pleasure than does that of the ultra-regulators, seems to be that Obedience is an instinct of human nature too strong and permanent to be got rid of, and that the extinction of the State machinery which

rules by this instinct, and when necessary enforces its own authority by the strong arm, would not really secure freedom to the weak though it might facilitate oppression by the strong. To assume that human nature will change as soon as provisions for State compulsion have been withdrawn is to misread human nature as we have hitherto known it. Organizations there will be and must be, even if existing governments come to an end: and every organization implies obedience, not only because large enterprises cannot otherwise be worked, but also because the direction, necessarily committed to a few, forms in those few the habit of ruling and disposes others to accept their control. The decline of respect for the State, or even the growth of a habit of disobedience to State authorities, so far from implying a decline in the motives and forces which produce obedience generally, may indicate nothing more than that people have begun to obey some other authorities, and so illustrate our proposition that the obedience rendered to authorities commanding physical force is not always nor necessarily the promptest and the heartiest. New forms of social grouping and organization are always springing up, and in these, if they are to strive for and attain their aims, discipline is essential, because it is only thus that success in a struggle can be won. To keep men tightly knit together power must be lodged in few hands, and the rank and file must take their orders from their officers. Such submission, due at starting partly no doubt to reason, which suggests motives of interest, but largely also to deference and to sympathy, with fear presently added, soon crystallizes into a habit. Any one who will watch any considerable modern movement or series of movements outside the State sphere will perceive how naturally and inevitably guidance falls into a few hands, and how largely success depends on the discipline which those who guide maintain among those who follow; that is to say, on the uniformity and readiness of obedience, and on the strength of the asso-

ciative habit which makes them all act heartily together. Whether it be a political party, or an ecclesiastical movement, or a combination of employers or of workmen, the same tendencies appear, and victory is achieved by the same methods.

I will name in passing three very recent instances, drawn from the country in which it might be supposed that subordination was least likely to be found, because the principles of democracy and equality have had in it the longest and the fullest vogue. One is to be found in the Boss system in American politics. Such party chieftains as Mr. Croker in New York City, Mr. Cox in Cincinnati, and the well-known masters of the Republican party in the great States of Pennsylvania and New York, wield a power far more absolute, far more unquestioned, than the laws of the United States permit to any official. One must go to Russia to find anything comparable to the despotic control they exert over fellow citizens who are supposed to enjoy the widest freedom the world has known. A second is supplied by the American trade unions, in which a few leaders are permitted by the mass of their fellow workmen to organize combinations and to direct strikes as practical dictators. A trade union is a militant body, and the conditions of war make the leader all-powerful. The third is to be found in the American Trusts or great commercial corporations, aggregations of capital which embrace vast industries and departments of trade employing many thousands of work-people, and which are controlled by a very small number of capable men. Modern commerce, like war, suggests the concentration of virtually irresponsible power in a few hands.

Whether we examine the moral constitution of man or the phenomena of society in its various stages, we shall be led to conclude that the theoretic democratic ideal of men as each of them possessing and exerting an independent reason, conscience, and will, is an ideal too remote from human nature as we know it, and from

communities as they now exist, to be within the horizon of the next few centuries, perhaps of all the centuries that may elapse before we are covered by the ice-fields again descending from the Pole or are ultimately engulfed in the sun.

✓What, then, is the most that a reasonable optimist may venture to hope for? He will hope that 'the masses' of democratic countries in the future, since they, like ourselves, must follow a small number of leaders, will ultimately reach a level of intelligence, public spirit and probity which will enable them to select the right leaders, will make the demagogue repulsive, will secure their deference for those whose characters and careers they can approve, and will so far control the associative instinct as to cause their adhesion to party to be governed by a moral judgement on the conduct of the party. The masses cannot have either the leisure or the capacity for investigating the underlying principles of policy or for mastering the details of legislation. Yet they may—so our optimist must hope—attain to a sound perception of the main and broad issues of national and international policy, especially in their moral aspects, a perception sufficient to enable them to keep the nation's action upon right lines. For the average man to do more than this seems scarcely more possible than that he should examine religious truth for himself, scrutinizing the Christian evidences and reaching independent conclusions upon the Christian dogmas. This is what the extreme Protestant theory, which exalted human reason in the religious sphere no less than democratic theory did in the political sphere, has demanded, and indeed must demand, from the average man. But how many Protestants seek to rise to it? Many of those who grew up under the influence of that inspiring theory can recall the disappointment with which, between twenty and thirty years of age, they came to perceive that the ideal was unattainable for themselves, and that they must be content to form and live by such

views of the meaning of the Bible and of the dogmas held to be deducible therefrom as a reliance on the opinions of the highest critical authorities and of their own wisest friends, coupled with their own limited knowledge of history and with the canons of evidence which they had unconsciously adopted, enabled them to form. Even this, however, has seemed to most of those who have passed through such an experience to be better than a despairing surrender to ecclesiastical authority.

So the optimist aforesaid may argue that the future for which he hopes will represent, not indeed the ideal which democracy sets up, yet nevertheless an advance upon any government the world has yet seen, except perhaps in very small communities or for a brief space of time.

The doctrine that the natural instinct and passion of men was for liberty, because every human being was a centre of independent force, striving to assert itself; the doctrine that political freedom would bring mental independence and a sense of responsibility; that education would teach men, not only to prize their political rights, but also to use them wisely—this doctrine was first promulgated by persons of exceptional vigour, exceptional independence, exceptional hopefulness. These were the qualities that made such men idealists and reformers: and they attributed their own merits to the general body of mankind. It was an admirable ideal. Let us hold to it as long as we can. The world is still young.

Having heard the optimist, we must let the pessimist also state his case. If he is a reasonable pessimist, he will admit that Obedience may be expected to become more and more a product of reason rather than of mere indolence or timidity, because every advance in popular enlightenment or in the participation of the masses in government ought, after the first excitement of unchastened hopes or destructive impulses has passed away, to engender a stronger feeling of the common interest

in public order, and of the need for subordinating the demands of a class to the general good. He will also admit that the progress of social equality may tend to increase each man's sense of individual dignity. But if he is asked to admit further that governments will become purer and better because there will come along with that habit of rational obedience (a habit necessary to enable any government to be efficient) a stronger interest in self-government, a more active public spirit, a constant sense of the duty which each citizen owes to the community to secure an honest and wise administration, he will observe that as we have seen that Obedience rests primarily upon certain instincts and habits woven into the texture of human nature, these instincts and habits will be permanent factors, not necessarily less potent in the future than they have been in the past. He will then ask whether the events of the last seventy years, during which power has, at least in form and semblance, passed from the few to the many, encourage the belief that the spirit of independence, the standard of public duty, and the sense of responsibility in each individual for the conduct of government are really advancing.

Are the omens in this quarter of the heavens so favourable as we are apt to assume?

There is less love of liberty—so our pessimist pursues—than there used to be, perhaps less value set upon the right of a man to express unpopular opinions. There is less sympathy in each country for the struggles which are maintained for freedom in other countries. National antagonisms are as strong as ever they were, and nations seem quite as willing as in the old days of tyranny to forgo domestic progress for the sake of strengthening their militant force against their rivals. There is less faith in, less regard for, that which used to be called the principle of nationality. Peoples which have achieved their own national freedom show no more disposition than did the tyrants of old time to respect the struggles

of other peoples to maintain theirs. The sympathy which Germans and Frenchmen used to feel for the oppressed races of the East has disappeared. France has ceased to care about the Cretans or the Poles. England, whose heart went out forty years ago to all who strove for freedom and independence, feels no compunction in blotting out two little republics whose citizens have fought with a valour and constancy never surpassed. The United States ignore the principles of their Declaration of Independence when they proceed to subjugate by force the Philippine Islanders. The modern ideal is no longer liberty, but military strength and commercial development.

If freedom is less prized, it is perhaps because free governments have failed to bear the fruit that was expected from them fifty years ago. The Republic in France seems, after thirty years, to have made the country not much happier or more contentedly tranquil than it was under Louis Napoleon or Louis Philippe. It maintains, to the eyes of foreign observers, a precarious life from year to year, now and then threatened by plots military, political, or ecclesiastical. A free and united Italy has not realized the hopes of the great men to whom she owes her unity and her freedom. The United States have at least as much corruption in their legislatures, and worse government in their great cities, with fewer men of commanding ability in their public life, than before the Civil War, when it was believed that all evils would disappear with the extinction of slavery. In particular, representative government, in which the hopes of the apostles of progress were centred half a century ago, has fallen into discredit. In some countries the representative is more timid, more willing to be turned into a mere delegate, more at the mercy of a party organization, than he was formerly. In others the popular assembly is so much distrusted that men seek to override it by introducing a so-called plebiscite or referendum to review its decisions.

No result was more confidently expected from the enlightenment of the bulk of the people than the triumph, a speedy and complete triumph, of sound economic doctrines, such as those which prescribe the adoption of Free Trade in commercial legislation and reliance upon self-help rather than State-help in poor law matters and generally in social improvements. But the United Kingdom is the only country in which Free Trade holds the field, and in the United Kingdom the true and wholesome principles of poor law administration, as set forth by Chalmers and by the famous Commissioners of 1834, have rather lost than gained ground.

The doctrines of *Laissez-Faire* and Individualism have suffered an eclipse. The State interferes more and more with the power of the individual to do as he pleases. Its motives are usually excellent, but the result is to subject his life to a closer and more repressive supervision. This means more obedience, less exercise of personal discretion, less of that virtue which guides the self-determining will to choose the good and reject the evil. 'If every action,' says John Milton, 'which is good or evil in man at ripe years were to be under pittance, prescription and compulsion, what were virtue but a name—what praise could be then due to well-doing, what grammarcy to be sober, just or continent?'

Nor is it only the State (whether through central or through local authorities) that threatens individual freedom. Masses of working men surrender themselves to the control of the few chiefs of their trade organization, who are hardly the less despotic in fact because they are elected and because they are nominally subject to a control which those who have elected them cannot, from the nature of the case, effectively exert<sup>1</sup>. Thus there is,

<sup>1</sup> This pessimist omits to notice that interference by the State or by such quasi-despotic combinations of workmen may have been deemed the only means of escaping from submission to organizations of capitalists capable of exercising a tyranny through the forms of the law. He would however reply that this fact did not tell against his thesis that, one way or another, people are not becoming more fully masters of their own lives and fates.

instead of more independence, always more and more obedience.

To one who believes the principles of Free Trade and Self-Help to be irrefragably true this means that the bulk of the people are not, as was formerly expected, thinking for themselves, perhaps are not capable of thinking for themselves, while those persons who are capable fear to contend for doctrines which happen to be unpopular because opposed to ignorant or superficial views of what is the interest of a nation or of the most numerous class in the nation.

In the enlightenment of the people, which was to increase their independence of spirit and their zeal for good government, the chief part was to be played by the public press. Its influence has increased beyond the most sanguine anticipations of the last generation of reformers whether in Great Britain or in Continental Europe. It employs an enormous amount of literary talent. Nothing escapes its notice. But in some countries it has become a powerful agent for blackmailing; in others it is largely the tool of financial speculators; in others, again, it degrades politics by vulgarizing them, or seeks to increase its circulation by stimulating the passion of the moment. Pecuniary considerations cannot but affect it, because a newspaper is a commercial concern, whose primary aim is to make a profit. Almost everywhere it tends to embitter racial animosities and make more difficult the preservation of international peace. When it tells each man that the views it expresses are those of everybody else, except a few contemptible opponents, it increases the tendency of each man to fall in with the views of the mass, and confirms that habit of passive acquiescence which the progress of enlightenment was once expected to dispel.

The growth in population of the great industrial nations, such as Germany, England, and the United States, may tend to dwarf the sense in each man of his own significance to the whole body politic, and dispose him

to make less strenuous efforts than he would have put forth had he thought his own exertions more likely to tell upon the community. The vaster the people the more trivial must the individual appear to himself, and the more readily will he fall in with what the majority think or determine.

The rise of wages among the poorer classes and the bettering of material conditions in all classes were expected to give the bulk of the people more leisure, and it was assumed that this would induce them to bestow more attention upon public affairs and so stimulate them in the discharge of civic duties. Wages have risen everywhere, notably in England and the United States, and material conditions have improved. But new interests have therewith been awakened, and pleasures formerly unattainable have been brought within the reach of every class except the very poorest. Whatever other benefits this change brings, it has not tended to make civic duty more prominent in the mind of the average man. With some, material enjoyments, with others physical exercise, or what is called sport (including the gambling that accompanies many kinds of sport), with others the more refined pleasures of art or literature, have come in to occupy the greatest part of such time and thought as can be spared from daily work; and public affairs receive no more, perhaps even less, of their attention than was formerly given.

May it not even be that material comfort and the surrender of one's self to enjoyment, whether directed towards the coarser or towards the worthier pleasures, tend in softening the character, to relax its tension, or at least to indispose it to rough work? To a fine taste things in which taste cannot be indulged become distasteful. Thus high civilization may end by increasing the sum of human indolence, at least so far as politics are concerned, and indolence is, after all, the prime source of Obedience. Some things no doubt men will continue to value and (if need be) to defend, because

they will have come to deem them essential. Freedom of Thought and Speech is probably one of these things, though the multitude occasionally shows how intolerant it can be when excited. Civil Equality is another; the respect for private civil rights, with a tolerably fair administration of justice for enforcing those rights, is a third. These have rooted themselves in Germany and England, for instance, and (with some few local exceptions) in the United States, as necessities to existence. But can the same thing be said of political freedom, that is, of the right to control, by constitutional machinery, the government of the State? Is it not possible that the disposition to acquiesce and submit without the application of compulsive force may be as strong under these new conditions as it ever was before? possible that an educated and intelligent people might, if material comfort and scope for intellectual development were secured, grow weary of political contention, and submit to the despotism, perhaps of a regular monarch, perhaps of a succession of adventurers, which, tempered in some degree by public opinion, should secure peace, order and commercial prosperity? The thing has happened before. For five centuries the people who had been the most politically active and who remained the most intelligent and most civilized in the world made no effort to recover the political freedom they had lost, having, indeed, within a generation or two, ceased even to think of it.

So far our pessimist. He has obviously omitted, not only some facts which make against the gloom of his picture, but also other facts incidental to the phenomena on which he dwells, which qualify their import or indicate that they may be merely transient. The most serious part of the case which he endeavours to make against the old theory that democratic government fosters the attachment to freedom, stimulates civic zeal, and intensifies the independent spirit of the citizen, is the suggestion that the vast size of modern nations, and the insignifi-

cance of the individual man as compared to the multitude around him, tend to dwarf his personal sense of responsibility and to depress his hopes of withstanding whatever sentiment or opinion may be for the time predominant. The rule of the majority, if it induces the belief that the majority must be right, or at any rate that the majority is irresistible<sup>1</sup>, brings back the old dangers of submission. So the familiar tendency to follow and obey, rather than to think and act for one's self, may be even stronger in a democracy than it was under the monarchies of earlier days.

If, now that both sides have been heard, we are to attempt to answer the question propounded some pages back, our answer must be that despite the changes which have passed upon the modern world, the tendencies of human nature which make for obedience have not become, and are not likely to become, less powerful than they were. That they should disappear is not to be desired, for they are useful tendencies, without which society would not hold together. But they have not been reduced even so far as the reasonable friends of progress might wish. In the sphere of religion the compulsion once exercised, not merely by force, but also by public opinion, has doubtless in most countries declined. There is also a larger and freer play of thought and taste in all matters not appertaining to collective action, that is to say, in matters involving no collision of wills. But where this collision arises, as in the spheres of politics and industry, the disposition of the average man to defer and fall into line, the tendency of the stronger will to prevail because it is the stronger, are as great as ever they were before. Physical force plays a smaller part than it did in the ruder ages. But Indolence, Deference, and Sympathy, rather than Reason and the pride of personal independence, have filled the void which the less frequent appeal to physical force has left.

<sup>1</sup> Some remarks upon this feature of the United States may be found in the author's *American Commonwealth*, vol. ii, chap. lxxxv, 'The Fatalism of the Multitude.'

So far as the question touches England, it may be that the friends of progress and freedom of the last generation, the generation of Mazzini and Garrison and Cobden and Gladstone, assume too hastily that the reforming ardour and other civic virtues which had been evoked by the long battle of Englishmen against monarchy and oligarchy and class legislation would remain unabated, after the battle had been won, in days which see popular self-government an ordinary part of daily life. When the grosser abuses in administration have been removed, when everybody's rights have been recognized, when new questions, far more intricate and difficult, but less exciting, have arisen, when it is not destruction—a thing everybody can clamour for—but constructive legislation that is needed, public interest may flag and politics cease to stir emotion as they formerly did. Just as in Italy the struggle for national unity and freedom called to the front in the first half of the nineteenth century a brilliant and lofty group of men, who have left few successors, so it may be that the normal attitude of a people towards its public life, and the normal attraction which public life has for fine characters and high talents, will fall short of that which has marked the periods of conflict over great principles. The standard will not therefore, even should it now be sinking, rest at a point lower than that at which average humanity has stood through past ages, though it will be lower than that to which exceptional needs, rousing strong emotions and inspiring golden hopes, had uplifted men during the days of conflict.

There is, however, a further reply to be made to our pessimist before we part from him. Even supposing that the ideals which democratic theory sets up have not advanced towards realization, that the love of freedom and justice has declined, and that the tendency to indifference, to acquiescence in a dominant opinion, or to unthinking adherence to some organization, is stronger than was expected some forty years ago, these may be

only transitory phenomena. In a striking passage of his *Constitutional History of England* (vol. ii, chapter 17), Bishop Stubbs comments on the moral and political decline of the men of the fourteenth century from the level of the thirteenth, but observes that unseen causes were already at work which after no long interval restored the tone and spirit of England. It has often been so in history, though no generation can foretell how long a period of intellectual or moral depression will endure.

## NOTE TO THE ABOVE ESSAY

### ON THE APPLICATION OF THE THEORY OF OBEDIENCE TO THE FUNDAMENTAL DEFINITIONS OF JURISPRU- DENCE.

THE school of jurisprudence which follows Bentham defines a Law as a Command of the State, represents every law as resting solely upon the physical force of the State, through the threat of punishment to those who transgress the law, and finds in the fear of punishment the sole motive of the obedience rendered by the citizens.

There are three objections to this doctrine and definition. The first is that if it is meant, as the generality of language used by its propounders implies, to apply to all political communities, it is untrue as matter of history, because it suggests a false view of the origin of law, and is inapplicable to the laws of many communities. There have been peoples among whom there was a law but no State capable of enforcing obedience. In all communities there have been laws which were in fact obeyed, but which were not deemed by the people to have emanated from the State. The great bulk of the rules which determine the relations of individuals or groups to one another have in most countries, until comparatively recent times, rested upon Custom—that is to say, upon long-settled practice which everybody understands and in which everybody acquiesces. In such countries customs were or are laws, and do not need to be formally enounced in order to secure their observance by the people. Custom is simply the result

of the disposition to do again what has been done before. What Habit is to the individual, Custom is to the community.

The second objection is that, even in mature States where there exist public authorities regularly exercising legislative functions, most laws do not belong in their form or their meaning to the category of commands. In order to make them seem commands a forced and unnatural sense must be put upon them, by representing the State as directly ordering everything to which it is prepared to give effect. Statute law takes the form of a command more often than does any other kind of law. Yet even in English statute law administrative statutes, which now constitute a large part of that law, are usually couched in the form, not of an order to a public body or an official to do such and such a thing, but of an authorization which makes action legal which might otherwise have been illegal. This distinction, though somewhat technical, nevertheless indicates the unsuitability of the definition. As for that part of the law of a country which determines the private rights of the citizens towards one another, as for instance the conditions attaching to commercial and other contracts, their interpretation, the liability they create, or, again, the rights of succession to property, and the modes of dealing with heirship or bequests—this largest and most important part of the law does not consist of commands. The rules of which it consists are declarations of the doctrines which the Courts have applied and will apply; or they are, if you like, assurances given by the State that it will, with physical force at its disposal, take a certain course in certain events, and thus they become instructions helpful to the citizens, showing them how they may get the law, and physical force, on their side in civil disputes. But they are not, in any natural sense of the word, Commands. This is obvious enough in English law, where most of such rules are to be gathered from the reports of decided cases: but the same thing

is substantially true of those countries which have embodied in statutory form their rules upon these matters. The point is not merely one of form or phrase, though it may at first sight seem to be so. It goes deeper; it carries one back to the origin of these laws, and bears upon their inherent nature. In fact the only branch of law which is properly covered by the definition I am examining is Penal or Criminal (with certain parts of administrative) law, for this branch does consist of express orders or prohibitions accompanied by threats of punishment. It may be conjectured that the Benthamites took their notion of law in general from this particular department of it, or perhaps from the Ten Commandments in the Book of Exodus, which, though no doubt good examples of the categorical imperative, are anything but typical of law in general.

If the Benthamites had been content to distinguish rules which the State enforces from courses of conduct which opinion supports, the distinction, though an older and more obvious one than they supposed, would have its worth. The definition of a law as that which the State is prepared to enforce fits a modern State, though not universally applicable to early communities. But the Benthamite definition goes further, and may be misleading even as regards modern laws generally.

The third objection to this definition is that it is not primarily or chiefly Fear which is the source of Obedience. It is not Physical Force that has created the State whence (according to this doctrine) laws issue and by which they are applied. It is not through Force that kings reign and princes decree justice. According to the Hebrew Scriptures it is by God that they reign. According to Homer it is Zeus who has given to the king the sceptre and the dooms, that therewith he may rule. Both expressions convey the same truth, that it is by the natural or providential order of things, and in virtue of the constitution of man as a social being, that men are grouped into communities under leaders who

judge among them. The tendency to aggregation, to imitation, to compliance and submission, is the basis on which the State is built. It is of course not only true but obvious that the State must have physical strength at its disposal in order to make the law obeyed. The capacity for applying compulsion holds the State together. But why is it that the State is able to apply force? Because, in the ordered and normal State, the same influences which have drawn men together keep them together, and make them willingly yield to the State the physical strength, and the money which purchases physical strength, needful for its purposes. Where a ruler rules by pure force (apart from the consent of the community), he is what the Greeks called a Tyrant, or the Italians in the fourteenth century a Signore, a Usurper reigning in defiance of law by means of armed men, an Adventurer who has risen by a revolution, is supported by the soldiery, and will fall when they turn against him. Such Tyrants are represented in our own day by the Presidents in some of the Spanish Republics of Central and South America. Pure Force is really the most unstable foundation on which either the State or Law can rest.

Thus the same conclusion to which history leads is also enjoined on us by a consideration of the psychological or sociological grounds which induce obedience, and the Benthamic definition is perceived to be unsound. These curt and often sweeping definitions usually are unsound. They are not simple, although they are summary. They are arbitrary and artificial, concealing under few words many fallacies. Human nature and human society are too complex to be thus dealt with.

## X

# THE NATURE OF SOVEREIGNTY

### I. PRELIMINARY.

As the borderland between two kingdoms used in unsettled states of society to be the region where disorder and confusion most prevailed, and in which turbulent men found a refuge from justice, so fallacies and confusions of thought and language have most frequently survived and longest escaped detection in those territories where the limits of conterminous sciences or branches of learning have not been exactly drawn. The frontier districts, if one may call them so, of Ethics, of Law, and of Political Science have been thus infested by a number of vague or ambiguous terms which have provoked many barren discussions and caused much needless trouble to students. The words which serve as technical expressions in adjacent departments of knowledge are sometimes employed in slightly different senses in those different departments; and neither in Ethics nor in Politics has a well-defined terminology become accepted. It is only of late years, when philosophy in becoming less creative has become more critical, that there has been established on the confines of these three sciences a comparatively vigilant police, which is competent, at least in the realm of law, to arrest suspicious phrases and propositions, and subject them to a rigorous examination.

No offender of this kind has given more trouble than

the so-called 'Doctrine of Sovereignty.' The controversies which it has provoked have been so numerous and so tedious that a reader—even the most patient reader—may feel alarmed at being invited to enter once again that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples. Let me therefore hasten to say that my aim is to avoid that desert altogether, and approach the question from the concrete side. Instead of attempting to set forth and analyse the doctrines of the great publicists of the sixteenth and seventeenth centuries—Bodin, Althaus, Grotius, Hobbes, and the rest—or the dogmas delivered by Bentham and Austin, who represent the school that has had most influence during the last seventy years in England, I will assume the views of these and similar writers to be sufficiently known, and will reserve criticisms upon them till we have seen whether there may not be found a conception and definition of the thing more plain, simple, and conformable to the facts, than could well have been reached by those who, living in the midst of acute political controversies, were really occupied in solving problems which belonged to their own time, and which now, under changed conditions, seem capable of receiving an easier solution. If we succeed in finding such a conception, we may return to inquire why the modern successors of Hobbes, who had not the same need for a theory as he had, worried themselves over what was really a question rather of words than of substance.

It is well to begin by distinguishing the senses in which the word Sovereignty is used. In the ordinary popular sense it means Supremacy, the right to demand obedience. Although the idea of actual power is not absent, the prominent idea is that of some sort of title to exercise control. An ordinary layman would call that person (or body of persons) Sovereign in a State who is obeyed because he is acknowledged to stand at

the top, whose will must be expected to prevail, who can get his own way, and make others go his, because such is the practice of the country. Etymologically the word of course means merely superiority<sup>1</sup>, and familiar usage applies it in monarchies to the monarch, because he stands first in the State, be his real power great or small.

## II. LEGAL SOVEREIGNTY (*De Jure*).

For the purposes of the lawyer a more definite conception is required. The sovereign authority is to him the person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power either of laying down general rules or of issuing isolated rules or commands, whose authority is that of the law itself. It is in this sense, and in this sense only, that the jurist is concerned with the question who is sovereign in a given community. In every normal modern State there exist many rules purporting to bind the citizen, and many public officers who are entitled, each in his proper sphere, to do certain acts or issue certain directions. Who has the right to make the rules? Who has the right to appoint and assign functions to the officers? The person or body to whom in the last resort the law attributes this right is the legally supreme power, or Sovereign, in the State. There may be intermediate authorities exercising delegated powers. Legal sovereignty evidently cannot reside in them; the search for it must be continued till the highest and ultimate source of law has been reached.

A householder in a municipality is asked to pay a paving rate. He inquires why he should pay it, and is referred to the resolution of the Town Council imposing it. He then asks what authority the Council has

<sup>1</sup> The heads of monasteries seem to have been sometimes familiarly described as Sovereigns in the Middle Ages. The name Sovereign was down till very recent times used to describe the head of a municipality in several Irish boroughs. Probably other similar instances might be collected.

to levy the rate, and is referred to a section of the Act of Parliament whence the Council derives its powers. If he pushes curiosity further, and inquires what right Parliament has to confer these powers, the rate collector can only answer that everybody knows that in England Parliament makes the law, and that by the law no other authority can override or in any wise interfere with any expression of the will of Parliament. Parliament is supreme above all other authorities, or in other words, Parliament is Sovereign.

The process of discovering the Sovereign is in all normal modern States essentially the same. In an autocracy like that of Russia it is generally very short and simple, since all laws (except customs having legal force) and executive orders emanate directly or indirectly from the Czar, and by the law the Czar is the sole legislative authority. Both these cases are simple and easy, because we speedily reach one Person, as in Russia, or one body of persons, as in Britain, to whom the law attributes Sovereignty. But there are cases which present more difficulty, though the principles to be applied are the same.

In a country governed by a Rigid Constitution which limits the power of the legislature to certain subjects, or forbids it to transgress certain fundamental doctrines, the Sovereignty of the legislature is to that extent restricted. Within the sphere left open to it, it is supreme, while matters lying outside its sphere can be dealt with only by the authority (whether a Person or a Body) which made and can amend the Constitution. So far as regards those matters, therefore, ultimate Sovereignty remains with the authority aforesaid, and we may therefore say that in such a country legal Sovereignty is divided between two authorities, one (the Legislature) in constant, the other only in occasional action.

Another class of cases arises in a Federal State, where the powers of government are divided between the Central and the Local Legislatures, each having a sphere of

its own determined by the constitution of the federation. In such a State the power of making laws belongs for some purposes to the Central, for some to the Local Legislatures. Thus in the United States, while Congress is everywhere the supreme legislative power for some subjects, the tariff, for instance, or copyright, or interstate commerce, the legislature of each State is within that State supreme for other subjects, the law of marriage, for instance, or of sale, or of police administration. Each legislature therefore (Congress and the State Legislature) has only a part of the sum total of supreme legislative power; and each is moreover further limited by the fact that the Constitution of the United States restricts the general powers of Congress by forbidding it to do certain things, while the powers of each State Legislature are restricted not only by the Constitution of the particular State but by the Constitution of the United States also. These complications, however, do not affect the general principle. In every country the legal Sovereign is to be found in the authority, be it a Person or a Body, whose expressed will binds others, and whose will is not liable to be overruled by the expressed will of any one placed above him or it. The law may, in giving this supremacy, limit it to certain departments, and may divide the whole field of legislative or executive command between two or more authorities. † The Sovereignty of each of these authorities will then be, to the lawyer's mind, a partial Sovereignty. But it will none the less be a true Sovereignty, sufficient for the purposes of the lawyer. He may sometimes find it troublesome to determine in any particular instance the range of action allotted to each of the several Sovereign authorities. But so also is it sometimes troublesome to decide how far a confessedly inferior authority has kept within the limits of the power conferred upon it by the supreme authority. The question is in both sets of cases a question of interpreting the law, which defines in the one case the sphere of power, in the

other case the extent of delegation actually made; and this difficulty nowise affects the truth that legal Sovereignty is capable of being divided between co-ordinate authorities, or of being from time to time interrupted, or rather overridden, by the action of a power not regularly at work. It will be understood that I am now dealing with Legal Sovereignty only, and not at this stage touching the question of whether, from the point of view of philosophic theory, Sovereignty is capable of division.

( Finally, let it be noted that where Sovereignty is divided between two or more authorities, one of those (or possibly even more than one) may have executive functions only. Where there is but one Sovereign Person or Body, that Person or Body will evidently have both legislative and executive powers, *i.e.* will be entitled to issue special commands as well as to prescribe general rules. But a division of Sovereignty may assign legislative functions to one authority, executive to another. In the United States, for instance, the President is, by the Constitution, Sovereign for certain executive purposes (*e.g.* the command of the army), and the legislature cannot deprive him of that Sovereignty. If Congress were to pass an Act taking the command of the army from him, that Act would be void. / So in England four centuries ago, although Parliament was already beginning to be recognized as sovereign for legislative purposes, the king had, in some departments, an executive sovereignty which the two Houses of Parliament did not dispute; and he laid claim in the time of the first two Stuarts to a sort of concurrent legislative sovereignty, which it required first a civil war and then a revolution finally to negate and extinguish.

So also it has been argued that Legal Sovereignty may be temporary, yet complete while it lasts, as was that of a Roman dictator. The phenomenon is so rare that we need not spend time on discussing it; but there seems to be in principle nothing to prevent absolute

legal control from being duly vested in a person or body of persons for a term which he, or they, cannot extend.

The kind of Sovereignty we have been considering is created by and concerned with law, and law only. It has nothing to do with the actual forces that exist in a State, nor with the question to whom obedience is in fact rendered by the citizens in the last resort. It represents merely the theory of the law, which may or may not coincide with the actual facts of the case, just as the validity of the demonstration of the fifth proposition in the first book of Euclid has nothing to do with the accuracy with which the lines of any actual figure of that proposition are drawn. The triangle in the figure which appears in a particular copy of the book may not have equal sides, nor the angles at the base be equal; this does not affect the soundness of the proof, which assumes the correctness of the figure. So law assumes, and must assume all through, that the machinery required for its enforcement is working *in vacuo*, steadily, equably, and in a manner capable of overcoming resistance. The actual receiving of obedience is therefore not (as some have argued) the characteristic mark of a Sovereign authority, but is a postulate of the law with regard to each and every of the authorities it recognizes. Penal laws no doubt contemplate transgression, but they assume the power of overcoming it. With the fact that obedience is in any given community rendered imperfectly or not rendered at all, Law as such has nothing to do. In other words, the question of where Legal Supremacy resides is a pure question of Right as defined by law. The Sovereign who exists as of right (*de iure*) has not necessarily anything to do with the Sovereign who prevails in fact (*de facto*), though, as we shall see presently, the two conceptions, however distinct scientifically, exercise a significant influence each on the other.

Further: the question, Who is Legal Sovereign? stands quite apart from the questions, Why is he Sove-

reign? and, Who made him Sovereign? The historical facts which have vested power in any given Sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the questions with which Law is concerned, and belong to history, or to political philosophy, or to ethics; and nothing but confusion is caused by intruding them into the purely legal questions of the determination of the Sovereign and the definition of his powers. Even the manner in which, or the determination of the persons by whom, the Legal Sovereign is chosen is a matter distinct from the nature and scope of his authority. He is not the less a Sovereign in the contemplation of law because he reigns not by his own right but by the choice of others, as an elective monarch (like the Romano-Germanic emperor) did, or as an elective assembly does to-day. The appointing body, even if it can in a stated way and at a stated time recall its appointment, is not sovereign over him while his powers last. The fact that the House of Commons, a part of the Legal Sovereign of England, is chosen by the people, and that many members of the House of Lords, another part of the Legal Sovereign, have been appointed by the Crown, does not affect the Sovereignty of Parliament, because neither the people nor the Crown have the right of issuing directions, legally binding, to the persons they have selected.

We have already seen that Legal Sovereignty may be limited or divided. But it is further to be noted that the totality of possible legal sovereignty may, in a given State, not be vested either in one sovereign or in all the sovereign bodies and persons taken together. In other words, there may be some things which by the constitution of the State no authority is competent to do, because those things have been placed altogether out of the reach of legislation. We have already remarked that all the American constitutions, for instance, both State and Federal, forbid the legislature to interfere with the so-called 'primordial rights' of the citizen. There is thus

in the United States no authority invested with legal power, in time of peace, to prohibit public meetings not threatening public order, or to suppress a newspaper. It is true that the people of each State (or of the Union) retain the power to alter their Constitution, but until or unless they do alter it the acting legal Sovereign remains debarred from an important part of the power of Sovereignty. And we may imagine a case in which a Constitution has been enacted with no provision for any legal method of amending it<sup>1</sup>. In fact, a somewhat similar condition of things exists in all Musulman countries. In Turkey, the Sultan, though Sovereign, is subject to the Sheriat or Sacred Law, which he cannot alter; and which no power exists capable of altering. A good deal may be done in the way of interpretation; and the desired Fetwa or solemnly rendered opinion of the Chief Mufti or Sheik-ul-Islam can generally be obtained by adequate extra-legal pressure on the Sultan's part. But no Sultan would venture to extort, and probably no Mufti to render, a fetwa in the teeth of some sentence of the Koran itself, which, with the Traditions, is the ultimate source of the Sacred Law, binding all Muslims always and everywhere.

### III. PRACTICAL SOVEREIGNTY (*De Facto*).

We may now turn back to the more popular meaning in which the term Sovereignty is used by others than lawyers<sup>2</sup>. Even to the ordinary layman it generally seems to convey some sort of notion of legal right, yet it may be, and sometimes has been, used to denote simply the strongest force in the State, whether that force has or has not any recognized legal supremacy.

<sup>1</sup> This seems to be the case in Spain. Some of the republics of antiquity professed to have unchangeable laws, but few, if any, of these fully answered to the conception of a Rigid Constitution as we understand it. See Essay III, p. 124.

<sup>2</sup> I pass by the sense in which it is applied to the person of a monarch, whether limited or absolute, as the king is in any country called the Sovereign, because that sense is not liable to be confused with the purely legal sense. A Nominal Sovereign need not be, and often is not, either a Legal or a Practical Sovereign.

This strongest force may be a king, or an assembly, or an oligarchic group controlling a king or an assembly, or an army, or the chief or chiefs of an army. It may be and ought to be the legal sovereign; or it may be quite distinct from the legal sovereign and possess no admitted status in the Constitution. The expression is perhaps most frequent in the phrase 'Sovereign Power,' which carries with it the idea of its being, whether legal or not, at any rate irresistible. We may define this dominant force, whom we may call the Practical Sovereign, as the person (or body of persons) who can make his (or their) will prevail whether with the law or against the law. He (or they) is the *de facto* ruler, the person to whom obedience is actually paid.

It is better not to say 'the person who compels obedience' or 'the person who commands physical force,' because it may not be under positive compulsion, but in virtue of other sources of power than the command of physical force, that obedience is in fact rendered. Religious influence or moral influence or habit may dispose men not only themselves to obey, but to place their service in making others obey at the disposal of the person to whom such influence belongs. A priest or a prophet may be stronger than the king.

The best instances of the Practical or Actual Sovereign are to be found in communities where legal sovereignty is in dispute or has disappeared. Cromwell when he dissolved the Long Parliament, Napoleon when he overthrew the Directory, the Convention when it offered the Crown of England to William and Mary, the Constituent Assembly in France in 1871 when it made peace with Germany before any regular republican constitution had been adopted for France, were actually Sovereign. Even where a Legal Sovereign exists, there are sometimes particular persons or groups who stand out as able to control the State. However, although Thucydides speaks of Pericles as exercising practical control in Athens, it would be going too far to apply to him or

to any person in his position such a description as that of *de facto* sovereign. In most of the South American republics the Practical Sovereign is the army, or a general (or combination of generals) whom the army, whether or no this general be in fact President, will follow. In Egypt, though the Legal Sovereign is the Khe-dive—for little regard need be had to the theoretical suzerainty of the Turk, which is put in force only when the European Powers choose to use it for their own purposes—the Practical Sovereign has for some years past been the British Government. In Rome, after the revolution which overthrew the republic, the Practical Sovereign was Octavianus Augustus, though the Legal Sovereignty remained vested in the People, subject to the claim of the Senate to exercise certain powers. In Syracuse under Dionysius the Elder, in Florence under Lorenzo dei Medici, each of those tyrants was Practical Sovereign, though neither enjoyed legal supremacy. In England people are accustomed to call the House of Commons the 'sovereign power,' though the law makes the consent of the other House and that of the Crown just as necessary to the validity of a statute as is that of the representatives of the people. In Denmark within our own time the Practical Sovereign was for some years the King, because the Constitution, which gives legal sovereignty to the Legislature and King together, was for a while virtually in abeyance, there having been a struggle and deadlock during which the Crown retained its ministers and raised taxes without the concurrence of the popular house. One might refer, by way of illustration, to cases in which some private organization exerts a power which interferes with that of the *de iure* government. Such was the Vehmgericht in Westphalia in the fifteenth century, such, on a much smaller scale and in a less effective way, were the Molly Maguires of Pennsylvania and the Mafia of Sicily. But these cases lie quite outside our definition: as do those of monarchies in which a strong minister or a father confessor or even

a court favourite has held the position of Practical Sovereign, that is to say, has been the person who would and could have his way, wielding the powers of the State at his sole pleasure through his influence upon the will of the titular sovereign<sup>1</sup>.

The Musulman world furnishes two instances which deserve a passing word. The Mogul Emperors after Aurungzebe continued to be sovereigns *de iure* for a long time in Northern and Central India, though it was hard to say, till the East India Company extended its conquests far inland, who was sovereign *de facto*. Since the time of Sultan Selim the First (A.D. 1516) the Turkish Sultans have been (in large measure) Khalifs *de facto*. They claim to be Khalifs *de iure*, but the better opinion among Muslim sages is that the Khalif must be, as were the Ommiyads and the Abbasides, of the tribe of the Khoreish, to which Muhamad belonged, and in matters of such high sanctity long possession *de facto* makes no difference. Possibly therefore the Shereef of Mecca may be better entitled to call himself the Khalif *de iure*, entitled to the obedience of all the Faithful.

Where the Legal is not also the Practical Sovereign, it is obviously a far more difficult task to discover the latter than the former. As respects legal power there are the fixed rules of law, which in communities that have reached a certain stage of development indicate clearly the person (or body) to whom the ultimate right of legislation, or of issuing executive orders, belongs. But the political philosopher or historian who wishes to ascertain the actually strongest force in a State lacks the guidance of such rules as the lawyer possesses. He has to do with facts which are uncertain, with forces which are imponderable. In no two countries, moreover, are the phenomena of Practical Sovereignty quite the same. Nevertheless it is true that there is in every State a Strongest Force, a power to which other powers

<sup>1</sup> During part of Lewis the Fifteenth's reign Madame Du Barry might almost have been, and probably was, described as sovereign *de facto* of France.

bow, and of which it may be, more or less positively, predicted that in case of conflict it will overcome all resistance. Here, however, we come upon one of the many difficulties that beset an inquiry into practical supremacy. Are we to take a condition of peace, and ask whose will actually prevails while peace lasts, or are we to suppose a condition of war, and ask who would prevail if the strife between contending authorities were to be fought out by physical force? In the before-mentioned case of Denmark, for instance, though the Crown practically carried on the government, it was by no means clear that, if an insurrection broke out, the Crown would prove to be stronger than the popular chamber or those who supported it. In such inquiries the precision with which Legal Sovereignty can be determined is unattainable, for the political student finds that the terms suited to the phenomena of one country are unsuited to those of another, and that his general propositions regarding the actually Sovereign Powers must be subject to so many qualifications that they virtually cease to be general.

We have, however, found in every political community two kinds of Sovereign, belonging to two different spheres of thought, the Sovereign *de iure* and the Sovereign *de facto*. Let us see what are the relations of the two conceptions, or the two concrete persons, each to the other.

#### IV. THE RELATIONS OF LEGAL TO PRACTICAL SOVEREIGNTY.

The Sovereign *de iure* may also be the sovereign *de facto*. He ought to be so; that is to say, the plan of a well-regulated State requires that Legal Right and Actual Power should be united in the same person or body. Right ought to have on its side, available for its enforcement, physical force and the habit of obedience. Where Sovereignty *de facto* is disjoined from Sove-

reignty *de iure*, there will not necessarily be a collision, because the former power may act through the latter. But there is always a danger that the laws will be overridden by the Practical Sovereign and disobeyed by the citizens.

Sovereignty *de iure* and sovereignty *de facto* have a double tendency to coalesce; and it is this tendency which has made them so often confounded.

Sovereignty *de facto*, when it has lasted for a certain time and shown itself stable, ripens into Sovereignty *de iure*. Sometimes it violently and illegally changes the pre-existing constitution, and creates a new legal system which, being supported by force, ultimately supersedes the old system. Sometimes the old constitution becomes quietly obsolete, and the customs formed under the new *de facto* ruler become ultimately valid laws, and make him a *de iure* ruler. In any case, just as Possession in all or nearly all modern legal systems turns itself sooner or later through Prescription into Ownership—and conversely possession as a fact is aided by title or reputed title—so *de facto* power, if it can maintain itself long enough, will end by being *de iure*. Mankind, partly from the instinct of submission, partly because their moral sense is disquieted by the notion of power resting simply on force, are prone to find some reason for treating a *de facto* ruler as legitimate. They take any pretext for giving him a *de iure* title if they can, for it makes their subjection more agreeable and may impose some restraint upon him.

Sovereignty *de iure* in its turn tends to attract to itself sovereignty *de facto*, or, in other words, the possession of legal right tends to make the legal sovereign actually powerful. Hence a ruler *de facto* is always anxious to get some sort of *de iure* title, and Louis Napoleon, who had seized power by violence in 1851, thought himself, and doubtless was, more secure after he had got two (so-called) plebiscites in his favour in 1852, recognizing him first as President for ten years and then Emperor.

This is not merely because the Legal Sovereign has presumably a moral claim to obedience—I say presumably, because he may have forfeited this claim by tyranny—but also because most men are governed and all are influenced by Habit, and therefore tend to go on obeying the person they have theretofore obeyed. It is moreover easier, in case of conflict, to know who is *de iure* sovereign than to foretell who will prove to be sovereign *de facto*; and whereas the *de iure* sovereign is certain, if victorious, to punish as rebels those who have opposed him, the *de facto* sovereign, having been himself a rebel, may possibly be more indulgent. Under King Henry the Seventh in England express provision was made by statute for the protection of persons obeying a *de facto* king<sup>1</sup>. Accordingly, when strife arises between two persons or bodies of nearly equal physical resources, each claiming authority, the person who has the better legal claim will usually have the better prospect of success, and the ordinary citizen will be safer in siding with him. This is one of the reasons why conspiracies and insurrections, even against the worst *de iure* sovereigns, so often fail.

Similarly it happens that where sovereignty *de iure* is in dispute and uncertain, strife is likely to trouble the practical sphere in the hands of the claimant who for the moment holds the government *de facto*; and this not merely because some of the people are zealous to support rights which they think infringed upon, but also because the sense of stability which supports a government has been impaired, and the usual check on a resort to physical force thereby removed.

When a sovereign has been long and quietly established *de iure*, the distinction between law and fact is forgotten, and people assume that whoever has the legal right will also as a matter of course have the physical force to support it. This tends to make the distinction forgotten. Conversely, when *de facto* sovereignty is

<sup>1</sup> 11 Henry VII, cap. 1.

frequently in dispute, as happened in the Roman Empire during part of the third century A.D., and happens now in some of the so-called republics of Central and South America, the *de iure* sovereign virtually disappears, and nothing but the actual strength of each *de facto* sovereign, or pretender to sovereignty, is regarded. Some of these republics are so much accustomed to the suspension of *de iure* government by *de facto* disturbance, that they provide that when a rebellion is over the previously enacted constitution shall be deemed not to have lost its force<sup>1</sup>. It might be expected that when such a state of things has continued and become familiar, the conception of a legal sovereign would itself fade away and be extinguished. But political necessities and the example of other countries forbid this in the more civilized communities. It is so convenient to all parties to maintain the fabric of ordinary private law with the judicial and executive machinery required to support that fabric, that even when the person (or set of persons) who exercises Practical Sovereignty is frequently changed by revolutions, the substitution of one head for another is not deemed to affect the general machinery. Administration is held to go on *de iure*, and the new occupant of the supreme power steps at once into the legal position of his predecessor. In the Roman Empire of the first four centuries of our era, the office of Emperor remained with its recognized functions and powers, though the holder of the office was frequently changed by violent means, and seldom possessed what lawyers would call a good title. The individual man was a pure *de facto* sovereign, often with no legal right to the obedience of the subject, but Caesar Augustus remained unchanged, and probably five-sixths of the population of the Empire did not know the personal name or the previous history of him whom they revered as Caesar Augustus. So the

<sup>1</sup> Thus the Constitution of Guatemala directs: 'Esta Constitucion no perderá su fuerza y vigor aun cuando por alguna rebelion se interrumpa su observancia.' I take this instance from the book of M. Ch. Borgeaud, *Établissement et Révision des Constitutions*, p. 236.

changes in the constitution of France between January, 1848, and February, 1871, in which there were three total and absolute ruptures of legal continuity by revolution, with two interregna under provisional governments, had little effect on the laws or the courts or the civil administration of France. The same thing happened during the dynastic wars of the fifteenth century in England. Thus even in disorderly times the idea of rule *de iure* is not lost among peoples that have once imbibed it. All through the English Civil War and Protectorate of the seventeenth century strenuous efforts were made by the Long Parliament and by Oliver Cromwell to make their government appear to be *de iure*, though the Restoration Parliament treated it as having been (on the whole) *de facto*. In most Central or South American republics, on the other hand, as among the Italian republics of the fourteenth century, the interferences of the *de facto* sovereign with the course of law and administration are so numerous that the very notion of *de iure* government loses its practical efficacy, and people simply submit to force, praising the ruler who least abuses his despotic power.

The action and reaction of power *de iure* and *de facto* upon one another might be illustrated by a diagram—a sort of political seismographic record—showing how the disturbance of either disturbs the other, and how the steadiness of the *de iure* needle or the frequent quiverings of the *de facto* needle indicate the stability or instability of the institutions of a country. One may express the relations of the two somewhat as follows:—

When Sovereignty *de iure* attains its maximum of quiescence, Sovereignty *de facto* is usually also steady, and is, so to speak, hidden behind it.

When Sovereignty *de iure* is uncertain, Sovereignty *de facto* tends to be disturbed.

When Sovereignty *de facto* is stable, Sovereignty *de iure*, though it may have been lost for a time, reappears, and ultimately becomes stable.

When Sovereignty *de facto* is disturbed, Sovereignty *de iure* is threatened.

Or, more shortly, the slighter are the oscillations of each needle, the more do they tend to come together in that coincidental quiescence which is an index to the perfect order, though not otherwise to the excellence, of a government.

Let us try to sum up the propositions to which the foregoing inquiry has led us:—

The term Sovereignty is used in two senses, Legal Supremacy and Practical Mastery.

Legal Sovereignty exists in the sphere of Law: it belongs to him who can demand obedience as of Right.

Practical Sovereignty exists in the sphere of Fact: it is the power which receives and can by the strong arm enforce obedience.

The Legal Sovereign in any State is ascertained by determining the Person (or Body) to whom the law assigns in the last resort the right of issuing general rules or special orders, or of doing acts without incurring liability therefor.

The Practical Sovereign is ascertained by determining who is the Person (or Body) whose will in the last resort prevails (or in case of conflict, will be likely to prevail) against all other wills.

Legal Sovereignty does not depend upon the obedience actually rendered; for the law assumes obedience to be always enforceable. Obedience paid is not a note characterizing the Legal Sovereign, but a Postulate of his existence. That the Legal Sovereign does in fact exercise his rights under the influence of another person (or body) makes no difference. He is none the less a Legal Sovereign. A Mikado is Legal Sovereign though the Shogun may rule in his name. Thus Legal Sovereignty is Formal, not Material.

Legal Sovereignty is Divisible: *i.e.* different

branches of it may be concurrently vested in different Persons (or Bodies), co-ordinate altogether (Pope and Emperor), or co-ordinate partially only (President and Congress), though acting in different spheres.

Practical Sovereignty seems indivisible, for by its definition it can belong to one Person (or Body) only, viz. that which is actually the strongest (though perhaps not known to be the strongest) in the State. But it may be so far divided that men obey one ruler in one sphere of action and another in another sphere. In the fourteenth century, for instance, all Christians obeyed the Pope in spiritual matters, their secular government in temporal, and this whether the latter was only *de facto* or also *de iure*. There might of course be much dispute as to what were spiritual matters, but no one denied that in matters which were really spiritual the Church alone should be obeyed.

Legal Sovereignty may be Limited, *i.e.* the law of any given State may not have allotted to any one Person (or Body), or to all the Persons (or Bodies) taken together, who enjoys (or enjoy) supreme legislative (or executive) power, the right to legislate, or to issue special orders, on every subject whatever. That is to say, some subjects may be reserved to the whole People, or may be declared unsusceptible of being legislated on at all, even by the whole people. If there be a reservation to the people of an ultimate decision on all subjects, as for instance by way of constant Referendum, the people and not the legislature may be the true Legal Sovereign. But a right reserved to the people of qualified interference, or of altering the powers of the Legislature from time to time, does not of itself deprive the legislature of legal sovereignty.

Practical Sovereignty is, by definition, incapable of being limited (for Law has nothing to do with it), though the exercise of it by its possessor may be restrained by the fear of consequences.

Although Legal and Practical Sovereignty are distinct conceptions, belonging to different spheres, they are in so far related that—

Legal Authority is a potent factor in creating Practical Mastery.

Practical Mastery usually ripens, after a certain time, into Legal Authority.

Thus—

In an orderly State, the respect for Legal Sovereignty keeps questions of Practical Sovereignty in abeyance.

In a disorderly State, conflicts regarding Practical Sovereignty weaken and ultimately destroy the respect for Legal Sovereignty.

To which we may add, with a view to questions to be discussed presently—

Questions of the Moral Rights conferred and the Moral Duties imposed by Sovereignty, whether Legal or Practical, belong to a different province from that in which the determination of the nature of either kind of Sovereignty lies. Such questions are however in so far related to these two that—

Legal Sovereignty carries with it a *prima facie* moral claim to the obedience of all citizens;

Practical Sovereignty carries with it no further moral claim to obedience than such as arises from the fact that a useless resistance to superior physical force tends to breaches of the peace and to suffering which might be spared.

In both cases it may be the duty of the citizen, where some higher moral interest than that of avoiding breaches of the peace is involved, to resist either the Legal or the Practical Sovereign.

Let it be further noted that though one is obliged to

speak of the Practical Sovereign as exerting a limitless power, and as some of those who have written on Sovereignty describe the Sovereign as being subject to no restraint whatever, his sole will being absolutely dominant over all his subjects, there has never really existed in the world any person, or even any body of persons, enjoying this utterly uncontrolled power, with no external force to fear and nothing to regard except the gratification of mere volition. The most despotic monarch is bound to respect, and often to bow to, the general sentiment of his subjects. From some acts even a Sultan Hakim in Egypt or a Gian Galeazzo Visconti in Milan recoils, because he feels they might provoke an insurrection or bring about his own assassination. A popular majority (although also to some extent limited) is less sensitive, because individuals, nearly all of them obscure, have less to fear. In this sense a democracy, that is to say, the majority in a democracy, may be a more absolute sovereign than a monarch. But the majority in a democracy has fewer personal temptations to abuse power. It is moreover checked by the feeling that if it does so it may alienate its own more moderate section. Hence it becomes tyrannical only when it is swayed by violent passion, or when it is sharply divided into two sections between whom no moderate party is left.

#### V. ROMAN AND MEDIAEVAL VIEWS OF SOVEREIGNTY.

Let us now turn to consider the theory of Sovereignty which, started by Hobbes, reiterated by Jeremy Bentham, and set forth with dreary prolixity by John Austin, found much acceptance in England during the first three quarters of the present century, though it has latterly lost its former prestige. The modern form of Hobbes' doctrine (whose original form will be presently stated and examined) is recommended by its apparent simplicity and completeness. But we shall find it to have the defects (1) of confounding two things essentially distinct,

the sphere of law and the sphere of fact; (2) of ignoring history; and (3) of being inapplicable to the great majority of actual States, past or present. It can be brought into conformity with the facts only by an elaborate process, either of rejecting a large part of the facts, or else of torturing and twisting the conception itself. A rule which consists chiefly of exceptions is not a helpful rule. In the human sciences, such as sociology, economics, and politics, just as much as in chemistry or biology, a theory ought to arise out of the facts and be suggested by them, not to be imposed upon the facts as the product of some *a priori* views. If it needs endless explanations and qualifications in order to adapt it to the facts, it stands self-condemned, and darkens instead of illumining the student's mind.

Obviously however no such theory would have emerged or for so long commanded respect but for causes of considerable weight and permanence. Its origin therefore, and the sources of its influence, deserve to be carefully examined by the light which history supplies. And to explain its origin, one must digress a little from our proper theme, and go back to the fountain of modern legal ideas in the Roman law.

The Roman jurists themselves fell into no confusion between the rights of a legal sovereign and the powers of the actual or (so-called) 'political' sovereign, for they dealt with legal sovereignty only, and dealt with it, not as political philosophers, but simply as lawyers. Under the Republic, legislative supremacy belonged to the people meeting in their *comitia*, while a certain control of the executive magistrates, springing from the right to advise, was practically allowed to the Senate. It may be argued that the people could have legally deprived the Senate of its executive powers, and those who hold this view may if they like hold that the Senate had not in technical strictness any sort of sovereignty even in executive matters<sup>1</sup>.

<sup>1</sup> As to the Senate's right of legislation, see Essay XIV, p. 716.

For our present purpose the important point is the period of Justinian, because it was in the form into which he condensed it that Roman law affected political speculation after the twelfth century. Now Justinian's *Institutes* and *Digest* still talk of the Roman people as possessing of right supreme legislative authority, though in point of fact they had not exercised it for more than five centuries. And in recognizing the Emperor as the person who actually possesses legislative power, they deduce his rights from a delegation by the people of their rights, and perhaps, if we are to take their words strictly, a delegation not in perpetuity to the imperial office, but to each individual Emperor in succession. Like the English of the seventeenth century, the Romans were determined worshippers of legality, and sought carefully to obliterate the traces of revolution, so they continued for a long time to treat the arrangement by which supreme authority was vested in a person as the holder of certain magistracies as a provisional and temporary arrangement<sup>1</sup>.

It need hardly be said that centuries before Justinian's day this doctrine of delegation, for a time formally expressed in the so-called *lex de imperio* passed at the accession of each new Emperor, had become a mere antiquarian curiosity, no more representing the actual facts than the language of the Anglican liturgy regarding the Crown represents the actual condition to-day of the royal prerogative in England. Justinian and his successors had in the fullest sense of the word complete, unlimited, and exclusive legal sovereignty; and the people of old Rome, who are talked of in the *Digest*, by the lawyers of the second and third centuries, as the source of the Emperor's powers, were not in A. D. 533, except in a vague *de iure* sense, actual subjects of Justinian, being in fact ruled by the Ostrogothic king

<sup>1</sup> At one moment, after the death of Caligula, it was proposed in the Senate to set to work anew the republican constitution, which had never been formally superseded.

Athalarich (grandson of the great Theodorich). But it is noteworthy that the lawyers also assigned to the people as a whole, entirely apart from any political organization in any assembly, the right of making law by creating and following a custom, together with that of repealing a customary law by ceasing to observe it, *i.e.* by desuetude, and that they justify the existence of such a right by comparing it with that which the people exercise by voting in an assembly. 'What difference,' says Julian, writing under Hadrian, 'does it make whether the people declares its will by voting or by its practice and acts, seeing that the laws themselves bind us only because they have been approved by the people<sup>1</sup>?'

It need hardly be observed that if Tribonian and the other commissioners employed by Justinian to condense and arrange the old law had, instead of inserting in their compilation sentences written three or four centuries before their own time<sup>2</sup>, taken it upon themselves to state the doctrine of legislative sovereignty as it existed in their own time, they would not have used the language of the old jurists, language which even in the time of those jurists represented theory rather than fact, just as Blackstone's language about the right of the Crown to 'veto' legislation in England represents the practice of a period that had ended sixty years before. But those who in the Middle Ages studied the texts of the Roman law cared little and knew less about Roman history, so that the republican doctrine of popular sovereignty which they found in the *Digest* may have had far more authority in their eyes than it had in those of the contemporaries of Tribonian, to whom it was merely a pretty antiquarian fiction.

These were the legal notions of Sovereignty with

<sup>1</sup> *Dig.* I. 3, 32, § 1 (cf. *Inst.* i. 2, 11). In the *Institutes* of Justinian the Emperor's legislative power, though complete, is still grounded on a delegation formerly made by the people.

<sup>2</sup> They frequently altered the language of the old jurists to make it suit their own time, so it is the more noteworthy that the ancient terms have in this instance not been altered.

which the modern world started—the sharply outlined Sovereignty of an autocratic Emperor, and the shadowy, suspended, yet in a sense concurrent or at least resumable, Sovereignty of the People, expressed partly in the recognition of their right to delegate legislation to the monarch, partly in their continued exercise of legislation by Custom.

But there was also another influence, born while the autocracy of the early Emperors was passing from the stage of power *de facto* into that of sovereignty *de iure*, which told with no less force upon the minds of men during the Middle Ages, and also in the later days when a freer philosophy began to attack the problems of political science. While to the educated classes in old Rome the Emperor's legal Sovereignty bore the guise of a devolution from that of the People, his provincial subjects, who knew little or nothing of these legal theories, regarded it as the direct and natural consequence of Conquest. By the general, probably the universal, law of antiquity, capture in war made the captured person a slave *de iure*. Much more then does conquest carry the right of legal command. Conquest is the most direct and emphatic assertion of *de facto* supremacy, and as the *de facto* power of the Romans covered nearly the whole of the civilized world, maintained itself without difficulty, and acted on fixed principles in a regular way, it speedily passed into Legal Right, a right not unwillingly recognized by those to whom Roman power meant Roman peace. This idea is happily expressed by Virgil in the line applied to Augustus—

‘Victorque volentes  
Per populos dat iura,’

while the suggestion of a divine power encircling the irresistible conqueror, an idea always familiar to the East, appears in the words

‘viamque adfectat Olympo,’

which complete the passage.

The feeling that the power actually supreme has received divine sanction by being permitted to prevail, that it has thereby become rightful, and that it has, because it is rightful, a claim to obedience, is clearly put in writings which were destined, more than any others, to rule the minds of men for many centuries to come.

‘ Let every soul be subject unto the higher powers. For there is no power but of (= from) God : the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God : and they that resist shall receive to themselves damnation (*lit.* judgement). For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same; for he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil’ (Rom. xiii. 1-5).

‘ Submit yourselves to every ordinance of man for the Lord’s sake; whether it be to the Emperor, as supreme, or unto Governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well. For so is the will of God, that with well-doing ye may put to silence (*lit.* bridle) the ignorance of foolish men ’ (1 Pet. ii. 13-15).

Here the authority of the Emperor is not only recognized as being *de iure* because it exists and is irresistible, but is deemed, because it exists, to have divine sanction, and thus a religious claim on the obedience of the Christian, while at the same time, in the reference to the fact that the power of the magistrate is exercised, and is given by God that it be exercised, for good, there is contained the germ of the doctrine that the Power may be disobeyed (? resisted) when he acts for evil; as St. Peter himself is related to have said, ‘ We ought to obey God rather than men ’ (Acts v. 29).

These and other similar dicta in the New Testament are not only evidence of the sentiments of Roman provincials under the earlier Empire, but are also the doctrines, delivered under the highest authority, from which

mediaeval thought starts. How they are worked out may be seen by examining the reasonings of Dante in his *De Monarchia*, or, still better, the political theories of St. Thomas Aquinas. From the fifth to the sixteenth century whoever asked what was the source of legal Sovereignty, and what the moral claim of the Sovereign to the obedience of subjects, would have been answered that God had appointed certain powers to govern the world, and that it would be a sin to resist His ordinance. From the eleventh century onwards it was admitted in Western Christendom, though less cordially in France, Spain, or England than in Italy and Germany, that there were two Legal Sovereigns, and according to the view more generally held, each was *de iure* absolute, the Pope in spiritual, the Emperor in temporal matters. Both Pope and Emperor were above all positive secular Law, but subject to the Law of Nature and the Law of God, these being virtually the same<sup>1</sup>. The power of the Pope came immediately from God, through the institution of Peter as chief bishop. The Emperor's power, almost equally incontestable, had a double origin. According to the New Testament, that power came from God; according to the Roman law, it had been delegated by the people, the ultimate source of civil authority. St. Thomas Aquinas recognizes sovereignty as originally and primarily vested in the people, hardly less explicitly than does the Declaration of Independence. These two views were capable of being combined, and the theory of delegation did not really reduce the Emperor's authority, for there was no actual people capable of recalling the rights delegated<sup>2</sup>. But there was also another doctrine, according to which the Emperor drew his rights from the Pope, who crowned him, and who as

<sup>1</sup> See as to the distinction between that part of the Law of God which is also the Law of Nature and other parts thereof, Essay XI, p. 594.

<sup>2</sup> Nevertheless the followers of Arnold of Brescia in Rome attempted to claim for the Roman people the right of choosing the Emperor; while there were others who argued that the true representatives of the old Roman people were to be found in the whole Christian community of the Empire.

spiritual Sovereign exercised a higher jurisdiction, being responsible for the welfare of the Emperor's soul. After the days of Pope Gregory the Ninth and the Emperor Frederick the Second, the doctrine held by nearly all churchmen of the inferiority of imperial to papal authority damaged the Emperor's position. It suffered still more because after those days the Emperor did not rule *de facto* outside Germany, and not always even within it. Most jurists, however, continued to hold that the rights of the successor of Augustus still existed everywhere *de iure*, though it was admitted that they consisted only in a sort of over-lordship, which, always ineffective in practice, became constantly more evanescent in theory. Controversy continued to rage over the limits to be drawn between them and the parallel sovereignty of the successor of Peter; and this controversy produced in the fourteenth century an anti-ecclesiastical movement represented in literature by such men as Marsilius of Padua and the English Franciscan William Occam. In those writers one finds the germs of the doctrine, afterwards famous, which refers the origin of the State to the free consent of individual men.

In these mediaeval controversies it was assumed throughout and on all sides that power *de facto* must follow Sovereignty *de iure*. But this Sovereignty, although above positive law, being indeed the source of such law, was deemed to be held subject to the Law of Nature, since it is a trust from God. However, as it became more and more clear that the Emperor was ceasing to be an effective ruler, the temporal sovereignty of local kings was fully admitted, and their rights were based partly on the providence of God, which had allowed them *de facto* power, partly on the feudal relations of lord and vassal, formed by reciprocal promises of protection on one side, of loyal support on the other.

## VI. MODERN THEORIES OF SOVEREIGNTY.

The sixteenth century brought with it four momentous changes, any one of which would have alone been sufficient to shake the existing fabric of thought and belief:—

The Emperor died out as universal Sovereign, and became thenceforth little more than a German monarch, with a titular precedence over other princes.

The Pope was gravely wounded by a revolt which ended by withdrawing half Europe from his sway.

The feudal structure of society began to crumble away, and therewith the power of the Crown in each country grew.

A new spirit of inquiry, sceptical in its tendencies and no longer deferential to authority, sprang up in Western and Southern Europe.

Thus that traditional doctrine regarding the basis of authority which had been sufficient for the Middle Ages faded into dimness. Morals began to be separated from theology, and the outlines of political science to emerge from feudal law. Men asked what was the basis of a king's claim to be obeyed. Did Might give Right? or did Right give Might? What was Right itself? Were there any, and if so, what, moral or religious limitations on the powers of a monarch? and if so, did his transgression of these limitations justify rebellion against him? These were not purely speculative questions, because the wars of religion, which brought bodies of subjects into collision with monarchs of a faith opposed to their own, and the Pope into collision with Protestant monarchs, raised issues of principle that were momentous, not merely because they troubled conscientious minds, but also because men felt the need of guidance and sought for it in some belief which could stimulate and inspire their action. Kings were everywhere extending their functions and assuming, more than ever before, the work of legislators, while at the same time subjects found that new reasons had arisen for resisting kings. The

old theory which deduced the rights of kings from the grant of authority divinely made to Peter and to Caesar was outworn. A new explanation of the nature of political society was needed; and from that time onward new theories of State power began at intervals to appear.

The particular form taken by the problems which these theories attempted to solve was determined by the conditions of a time in which the coherence of nations and states was threatened on the one hand by religious discord, and on the other by the claims of local magnates as against the Crown. Hence the aim of thinkers was to discover something which would secure the unity of the State. They asked, What is it that holds the State together? Must there not be some supreme Force to overcome the various forces that in each State make for division? Where is that Force to be found? Whence comes its title to rule? In what persons should it be vested? Can it be, or ought it to be, checked? These thinkers did not approach such questions by an induction from the facts of actual states, as we should do, but were guided partly by the dogmas of law and theology which the Middle Ages had bequeathed to them, partly by abstract theories which their advocacy of kingly authority, or papal claims, or popular rights, suggested. And this explains why the Roman Catholic writers, who might have been expected to maintain the absolute sovereignty of kings for the purpose of crushing out heresy, are often found defending the rights of the people, and arguing for the right to revolt against and depose a heretical monarch, such as Henry the Eighth, or Elizabeth, who had fallen away from obedience to that ecclesiastical authority whose rights came from the grant to St. Peter.

The first theory, or at least the first which exerted wide influence, was that of Bodin, a French jurist, whose book, in its earliest form, was published in 1576. In his view Sovereignty or *Maiestas* is the highest power in a

State, which is subject to no laws, but is itself the maker and master of them. It may reside either in one person, which is the best and normal form, or in a number of persons. But in either case it is above all law, incapable of limitation or division, and having an absolute claim to the obedience of all its subjects, irrespective of the justice or policy of its acts. Hence Bodin rejects all so-called limited monarchies and restricted governments; and while he calls the Romano-Germanic Empire of his day not a monarchy but an aristocracy, he finds in the French monarchy a pure autocracy of the proper type. Nevertheless even Bodin admits that, in some sort of vague way, the Sovereign is subject to the Law of God and the Law of Nature, and conceives that he is therefore bound to perform any contracts he may make, and to respect the rights of property and of personal freedom.

The boldest and most logically complete counter theory to that of Bodin came from a younger contemporary of his, the Calvinist Iohannes Althusius (John Althus or Althaus), who was born in 1557, and died in 1638. Calvin himself, and most theologians of his school, had returned to the ancient theocratic view that civil power is derived from God, dwelling especially on Romans viii. 1. Althusius, however, bases the government of the State on a contract between the people and the ruler, and proceeds to assert the rights of the former, as the ultimate source of all power and the only true and permanent depositary of sovereignty, to depose the ruler and resume the delegated power when he has violated his duties and transgressed the measure of authority granted to him<sup>1</sup>.

Nearly a century later than Bodin a scheme similar to his, but more thorough-going was propounded by Thomas Hobbes of Malmesbury. This scheme, con-

<sup>1</sup> A full and instructive account of this writer's theories is contained in the admirable book of Professor Otto Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, which is a repertory of information regarding mediæval and post-mediæval doctrines of the State.

tained in the book entitled *Leviathan* (and in the treatise *De Cive*), cannot be appreciated without remembering the time when the book was written, and the circumstances to which it was addressed. So directly does it contemplate them that it may almost be called a political pamphlet—gigantic, but a pamphlet. The Civil War was raging. The supreme power in England was disputed between the King and the House of Commons. Ecclesiastics, both Episcopalian and Presbyterian, had been prominent in claiming authority for their religious views, and the nation was splitting up partly on political, partly on ecclesiastical lines. Hobbes was equally hostile to all ecclesiastics—to the Anglican theory of divine right, and to the Presbyterian theory of a covenant of the people with God. Yet he did not like to base society upon mere force, because in that he could find no foundation for justice or moral obligation. Hence he clung to the notion of a contract. But it was a new kind of contract, which, not being made with the Sovereign, and being itself irrevocable, can give no ground for insurrection. Seeing disunion and confusion all around him, and men divided by the pretensions of jarring authorities, Hobbes conceived that the three things needful were (1) to find a basis for power which should be permanent and inexpugnable, (2) to make power one and indivisible, and (3) to make it absolute and limitless. Perceiving the flaws in the theory, as old (in a rude form) as the thirteenth century, which founded government on a compact between Sovereign and People, he bases his Sovereignty on a covenant of each member of the community with every other member to surrender all their several rights and powers into the hands of one Person (or Body), who thereby becomes Sovereign, but as against whom, seeing that he is not himself a party to the compact, it cannot be annulled by those who made it, because they made it not with him but with one another. His authority is therefore permanent and unlimited; nor is he, like Bodin's Sovereign, bound by any pre-

existing institutions. As the people have, by anticipation, ratified all his acts, everything that he does, however harsh, is just, and gives them no ground for complaint. Indeed his power is justified by the Law of Nature, because the three fundamental Laws of Nature are (1) that all men should endeavour to secure peace, (2) that an individual man should renounce his original rights when the majority will to do so, (3) that every man should observe the covenants which have been made by him, including of course this supreme covenant.

Though Hobbes is chiefly concerned with establishing his Sovereign *de iure*, and making his *de iure* autocracy complete, he does also conceive him as enjoying complete *de facto* power. He could indeed do no otherwise, for the Sovereign he describes is not an actual Sovereign. Hobbes does not profess to be analysing existing States, or explaining existing institutions. He is presenting an ideal State, and arguing that mankind (and in particular England) will never be rid of their present troubles until this Absolute Sovereign of his has been installed with a *de iure* title so fully recognized that *de facto* power will follow. The Civil War had raised grave questions in the *de iure* sphere, and it was natural to believe that, were those questions out of the way, Practical Mastery would accompany Legal Sovereignty. Nor was it so strange as some may fancy to-day, that a philosopher should doubt the possibility of securing peace and order under a monarch limited by law, or indeed under any government consisting of elements so antagonistic as Crown, Lords, and Commons, were then showing themselves to be. Hobbes is a thinker of singular clearness and precision. He is cogent in argument, and adheres to his main propositions with a consistency greater than Bodin had shown. He sometimes seems more disputatious than philosophical. But the reader who would judge him fairly must bear in mind that he is writing with a view to the circumstances of his own time, delivering his blows now at the Solemn League

and Covenant, now at the Levellers, now at the parliamentary legalists<sup>1</sup>.

Towards the end of the following century Bentham revived Hobbes's doctrine of Sovereignty, taking it over, however, not so much as either an ideal conception, or a suggestion pointing a way out of civil war, but rather as embodying the characteristic features of a normal State. Bentham was a man of extraordinary ingenuity, fertility, and boldness, but he was sometimes heedless; he lived before the days of what we call the historical method, and he had a hearty contempt, if not for history, yet for the legal institutions it had produced, which indeed he thought mostly wrong. Accordingly, neither the absolutistic proclivities of Hobbes, nor the inapplicability of the Hobbesian theory to the majority of existing governments, deterred him from adopting a doctrine which pleased him by its subjection of vague morality to precise legality, and by its vigorous assertion of the legal omnipotence of an authority which a reformer of his drastic type needed for the accomplishment of his purposes. Bentham therefore had practical reasons for his adhesion to the scheme of Hobbes, far removed as he was from Hobbes's notions of the anarchic State of Nature and the original covenant. But John Austin, Bentham's disciple, had less excuse for the use he made of Hobbes's speculations. It has been doubted whether he understood Hobbes. However this may be, he would seem to have misconceived the position in which Hobbes stood, and to have taken the latter's argument for an absolute Sovereign as the best way of constituting authority in a State, as a philosophical analysis of the nature and essence of authority in a normal State. Hobbes was the advocate of a scheme intended to cure actual political evils. Bentham was a practical reformer of the law, which certainly needed reform. Austin, how-

<sup>1</sup> Hobbes goes so far as to wish to extinguish the right of private judgement, and deems it part of the duty of the Sovereign to prescribe opinions to his subjects, and in particular to inculcate the true doctrine of Sovereignty.

ever, wrote as a jurist, professing to describe the normal and typical State. He was therefore bound to have some regard to facts, and to present a theory of the State which would have explained and correlated the facts, putting them in their natural and true connexion. Instead of this he has given us a theory, which is so far from being that of the normal modern State, that it is applicable to only two kinds of States, those with an omnipotent legislature, of which the United Kingdom and the late South African Republic are almost the only examples, and those with an omnipotent monarch, of which Russia and Montenegro are perhaps the only instances among civilized countries. In nearly all free countries, except the United Kingdom, legislatures are now restrained by Rigid constitutions, so that there is no Sovereign answering the Austinian definition. In all Muhamadan countries the monarch is legally, as well as practically, restrained by his inability to change the Sacred Law; so that, even in those countries where despotism seems at first sight enthroned, the definition will not work. Even in the application of his own theory to the United Kingdom, Austin falls into an error which betrays its radical unsoundness. Though he defines a Sovereign as 'the determinate superior who receives habitual obedience from the bulk of a given society'—a definition which belongs to the *de facto* sphere and suits a *de facto* sovereign, but does not touch the *de iure* sovereign, who may have no means of enforcing obedience—still it is plain that his eye is chiefly fixed on law and legal right, and that he assumes that to the person who enjoys legal right obedience will in fact be rendered. A Greek tyrant, such as Agathocles at Syracuse, received habitual obedience from the bulk of the Syracusans; but he was clearly not Sovereign *de iure*<sup>1</sup>. But Austin, when he comes to the United Kingdom, finds

<sup>1</sup> Austin so far feels the difficulty of fitting his theory to the case of tyrannies as to imply that it is to be applied in settled States only. But this is to admit *pro tanto* the inadequacy of the theory.

his Sovereign not in Parliament, that is to say, in the Great Council of the Nation consisting of the Crown, the House of Lords, and the House of Commons, but in the two former parts of Parliament, along with—not the House of Commons, but—the qualified electors of the nation! This view is opposed not only to law, but also to history, which shows that the Great Council of the Nation has never been deemed to consist of or include ‘trustees’ (as Austin calls them) for the Nation, but to be the Nation itself, assembled for national purposes, its members being either in their own right or, as representatives, plenipotentiary, and enjoying, in contemplation of Law—just as much as did the primitive Folk Mot from which Parliament has gradually developed—the plenitude of the nation’s powers. It is moreover opposed to the facts of the case, because the electors of the country do not legislate, and have no legal means of legislating. Their consent is not required to the validity of the most revolutionary Act of Parliament, as the consent of a majority of the Swiss electors and Cantons is required to a change in the Constitution of the Helvetic Confederation. A statute might conceivably be passed, of which five-sixths of the electors notoriously disapproved, and yet it would be just as good a statute as one against which no voice had been raised. Parliament may even give itself a competence which the electors never contemplated, as it did when it passed the Septennial Act.

Some of those who have admitted that Bentham’s and Austin’s theory is historically indefensible, have sought to excuse its faults on the ground that we must test theories, not by the facts of nascent communities, but by those which the fully-grown modern State presents. But it is in truth quite as inapplicable to most of these modern States as it is to ruder societies. Take, for instance, the Austro-Hungarian monarchy. Where, on Austin’s principles, does Sovereignty reside in this dual State? The ultimate legislative authority, that is to say,

the authority which receives commands from no other authority, but gives them to others, is to be found in the so-called Delegations, each composed of thirty members of the Hungarian Parliament, and as many of the Austrian Reichsrath. But these are themselves chosen by the two subordinate Parliaments, and must therefore be subordinate to them, if the British House of Commons is subordinate to the British Electorate. Moreover, the Delegations can legislate on a few prescribed subjects only, all other subjects belonging either to the two Parliaments respectively, or, in the case of Austria, to the legislatures of the several provinces (*Kronländer*) which make up the Austrian federation, and the Delegations derive their authority from laws passed by the Austrian Reichsrath and by the Hungarian Parliament. Where then does Sovereignty reside? Is it in the authorities which made the Constitution? The Austrian half of the Monarchy received its Constitution from five Statutes passed in 1867, which can be changed only by a two-thirds majority in both Houses of the Reichsrath; the Hungarian half from the laws of 1848, which the Emperor King agreed to bring into force in 1867, and which apparently the Parliament, with the consent of the Monarch, can amend. There is evidently no hope of finding any one Sovereign, in the sense of the Austinian definition, for this great and powerful State<sup>1</sup>. Or take the United States, whose Constitution has become a sort of model for many more recent confederations. Austin places Sovereignty in the ultimate power which can alter the Constitution, viz. the people (or peoples)—I use both phrases to avoid controversy—of the States. But in the first place, the people (or peoples) of the States are not a body habitually acting. They did not act at all from 1810 till 1867. They have

<sup>1</sup> An Austinian might perhaps say that the Austro-Hungarian monarchy consists of two separate States, with no single Sovereign. But it is unquestionably one State in the eye of international law, and the Delegations have some powers incompatible with the existence of an Austinian sovereign in either half of the monarchy.

not acted since 1870. It was because it was impossible to get them to act that the question of slavery proved insoluble by constitutional means. Is there not something unreal and artificial in ascribing Sovereignty to a body which is almost always in abeyance? Moreover, the majorities by which the Constitution can legally be amended are very rarely attainable; and when they are not attainable, there would therefore seem to be no Sovereign at all. And as regards one point—the equal representation of the States in the Senate, even a three-fourths majority of States can do nothing against the will of the State or States proposed to be affected, a further absurd result of the doctrine. One might pursue the argument by examining the case of other federations, such as the Germanic Empire, both the old one and the new one, and show to what strange results these Austinian principles would lead. But the above illustrations may suffice to indicate the extreme artificiality of the doctrine that Sovereignty cannot be divided, as earlier illustrations have shown the inconveniences of confounding purely legal supremacy with actual mastery.

Austin denies that there is any difference between a government *de iure* and one *de facto*, because Sovereignty *de iure* must itself issue from the Sovereign himself, and the same person cannot be both creature and creator. If this means that the British Parliament and the Czar, being legally omnipotent cannot be legally controlled, it is an obvious, but infertile remark, and it conceals the really material fact that both authorities are obeyed because the long-settled custom or law of the country has formed the habit of obeying and the notion that it is a duty to obey. If it means that every Sovereign *de facto* is also Sovereign *de iure*, or the converse, it is untrue. Hobbes had a reason for bringing in obedience as the test of the Sovereign. Bentham and Austin have not this reason, for they are in the sphere of law, and law is not concerned with obedience as a fact. The right of a Sovereign to be obeyed does not

to the lawyer rest on Force, for he assumes that wherever law exists it will make itself prevail.

## VII. QUESTIONS REGARDING SOVEREIGNTY LIABLE TO BE CONFOUNDED.

In most of the speculations of the school which traces its origin to Hobbes, and indeed in some of Hobbes' critics also, there would seem to be a confusion of two or more of six different things, viz. :—

1. The conception and definition of legal supremacy.
2. The conception of practical mastery.
3. The historical question as to the origin of the notion of Legal Right.
4. The historical question as to the origin of organized political communities in general, and of the habit of obedience therein.
5. The moral obligation on the members of a State to render obedience to the authorities within it, whether those authorities rule by law or by force.
6. The moral obligations which bind the holder of power, whether *de iure* or *de facto*.

In the hands of Bentham, whom Austin follows, the two last-mentioned confusions, which exercised men's minds in the days of Hobbes and Locke, have disappeared. Bentham has seen, and has stated with admirable clearness, the line which divides the province of morality from that of legal obligation.

But he has mixed up the other four, and especially the first two—for it is rather by implication than by express words that his writings cover the questions of the historical origin of Right and of the State—in a way that has clouded the mind of many a student since his time, and has in particular produced two capital errors, that of regarding Law as primarily and normally a command, which it certainly was not at first and is only partially now, and that of denying the legal quality of

Customary Law, which has been in all countries the most fertile, and is still in some practically the only source of law. This confusion seems to have been due mainly to two causes. One is the omission of the followers of Hobbes to pay any regard to the history of States and Governments, and to perceive that in many stages of their growth the definitions which may suit a normal modern State are quite inapplicable. The other is the attempt to find concise and summary definitions and descriptions which will suit all modern States generally, whatever their diversities from one another, or (to put the same thing in a different form) the habit of arbitrarily assuming one kind of modern State to be the normal State, even though the trend of recent tendency may be away from that type. The remark of Bacon, that men are prone to assume a greater uniformity in Nature than in fact exists, and to conceal real distinctions under identical nomenclature, finds an application in the moral and political sciences as well as in the sciences we call physical. This besetting sin of those who frame logical classifications upon the basis of abstract notions has led the so-called Analytic School of jurists sometimes to ignore the most material facts, sometimes to twist their definitions into a sense far removed from the natural meaning of the words they use.

The truth seems to be that the difficulties which have been supposed to surround the subject of Sovereignty are largely factitious difficulties, and spring from the attempts made to answer questions essentially different by the same terms. Had the qualifying terms *de iure* or *de facto* been added every time the word 'Sovereignty' was used, most of these difficulties would have disappeared. If we take the six questions just stated, and examine each by itself, there will be nowadays no great conflict of opinion as to the answer which each ought to receive.

Questions 1 and 2 have been already dealt with.

When the qualification *de iure* or *de facto*, as the case may be, is in each case added, there need be no more mystery about either of them.

As regards 3 and 4, *i.e.* the origin of political power, whether *de facto* or *de iure*, the reply of history is unequivocal. There never was and never could have been any social contract in the sense either of Hobbes or of Rousseau or of any of the other philosophers who have discovered in such a fact the foundation of organized society. Political communities, as every one will now admit, grew up of themselves under the influence of the needs of common defence, of religious belief, of habit, of the aggregative and imitative instincts of mankind. Law grew out of custom, and showed itself first, in most races, in the form of rules for the settlement of disputes, whether regarding property or regarding the compensation to be made for murder or other personal injury. It cannot be said that (as a general rule) authority based on physical force, the form in which Sovereignty *de facto* is commonly supposed to have begun, preceded authority *de iure*, for the two have usually grown up together, custom having in it an element of fear and an element of moral deference; and in this growth physical force has played no such predominant part as the school of Hobbes and Austin assign to it. Just as in the case of each individual man the most important, if not the largest part of his knowledge is that which he acquired in the semi-conscious years of childhood, so the chief part of the work of forming political societies was done by tribes and small city communities before they began to be conscious that they were forming institutions under which to live: and the leading conceptions of law and procedure were definite and potent before the beginnings of that direct legislation by a Sovereign which is now represented as the normal action of an organized political body. Nor is the power of the community as a whole, apart from its titular Sovereign or its representative organs, extinct to-day. It survives in the vague

but irresistible force of public opinion which controls all those organs.

When we come to the two last of the above questions (5 and 6) we find that a sharp distinction between Legal Sovereignty and Practical Mastery makes it easier to solve the problems they raise. Obedience to a ruler who is Sovereign only *de facto* and not also *de iure* is not now deemed a duty, unless the ruler *de iure* be powerless, or cannot be ascertained, in which cases it may be for the general good that the actual holder of power, even unlawfully obtained, should be supported as against anarchy or the prospect of civil war. But to our minds power *de facto*, apart from legal sanction, carries no title to respect. When it is abused, the good citizen not only may but ought to resist it.

With the Sovereign *de iure* the case is different. He has a *prima facie* claim to obedience, which can be rebutted or disregarded only in one of three events, (a) if he has lost *de facto* power, and is therefore unable to perform a Sovereign's duties, (b) if he has, in a State where his powers are limited, himself so gravely transgressed the constitution or laws as either legally or morally to forfeit his Sovereignty, (c) if in a State where his powers are not limited by the Constitution he has so abused his legal power as to become in fact a Tyrant, a foe to the objects of peace, security, and justice, for which government exists. In each of these cases it would be now generally held that the citizen is absolved from his allegiance, and that the sacred right of insurrection which the French of the Revolution and their friend Jefferson so highly prized must come into play. In case (b) the proper course would seem to be to resist the *de iure* Sovereign by constitutional means, so far as they will go, and only in the last resort by force. If his transgressions have gone so far as to work forfeiture of his legal rights, he is of course no longer Sovereign *de iure*. In case (c), where no constitutional remedy exists, the formerly *de iure* ruler, since he has made

himself a mere Tyrant or ruler against law, has created a state of war between himself and the citizens, and opposition to him becomes (as in the case of the mere *de facto* tyrant) a duty which is of stronger or weaker obligation according to the greater or less enormity of his offences, and the greater or less prospect of success in such opposition.

As respects the moral restraints by which the Sovereign, whether *de facto* or *de iure*, ought to hold himself bound, few will now dispute that they are substantially the same as those which bind an individual man in the ordinary relations of human life. Each must use his power in accordance with the general principles of justice and honour, regarding actual power as a trust from Divine Providence, and legal power as a trust from the community also. Only in a single point would it seem that there may be a difference, though one whose limits are difficult to fix in practice, between the moral duty of a Sovereign and that of an individual good citizen. Both are equally bound to strict justice, strict good faith, strict avoidance of cruelty, or even unnecessary harshness. But while the individual ought often to be not merely just but also generous, since it is only his own resources which generosity will impair, it is suggested that the Sovereign has no right to be generous out of the resources of the community for which he is only a trustee. Similarly, while the good man may risk his own life to save the lives of others, the ruler must not risk the life of the community, because he has not been entrusted with any such power. To this it has been answered that the Sovereign is entitled to assume that the community ought to desire and will desire that its powers should be exercised in the best and highest spirit for the good of its members and of the world, and that he may upon this assumption do everything which a high-minded community would do were it consulted. The question, though seldom a practical one, is both interesting and difficult, for even if the analogy of trustee-

ship be admitted, there is room for much controversy as to the application of the principle in each particular case.

Some few publicists have argued that the Sovereign Power in a State is entirely discharged from all moral obligations when it is a question of preserving the existence of the State itself, and that violence, injustice, and bad faith then become legitimate expedients. In reply to such a detestable doctrine, it is enough to observe (first) that as the Sovereign would be himself the judge of what does involve the life of the State, he would be sure to abuse his freedom from moral ties in cases where the supposed justification did not really arise, and that thus all confidence of one nation in the good faith of another would be destroyed, and (secondly) that the argument must go so far as to put the claim of a State to preserve its collective existence higher than that of the individual to preserve himself from death, for no one will contend that an individual is justified in killing another man (except of course in self-defence) or bringing a false charge against him, for the sake of saving his own life.

This question need not be pursued, because it lies rather outside the particular subject with which we are here concerned. But a few words may fitly be said regarding the bearing of the distinction between that which exists *de iure* and that which exists *de facto* on the questions that have arisen regarding Sovereignty in the international sphere.

#### VIII. SOVEREIGNTY IN INTERNATIONAL RELATIONS.

In that sphere there is no Law, in the strict modern sense, because no superior authority capable of adjudicating on disputes and enforcing rules, and therefore we cannot speak of the Sovereignty of one State over another State in the same sense in which a Person or Body within a State may be called Legally Supreme over the subjects. Nevertheless, where some legal tie has been created be-

tween two or more States, placing one in a lower position, we may say that inferiority exists *de iure*, while if there is merely an actual and continuing disposition of the weaker one to comply with the wishes of the stronger, there is inferiority *de facto*. Where the laws made by the legislative authority of one State directly bind the subjects of another State, the latter State cannot be called in any sense Sovereign. But between this case and that of absolute independence there are several grades of what may be called semi-Sovereignty, or (perhaps more correctly) imperfect Sovereignty. The dependent State, though not amenable to the laws or courts of the superior one, may have no right to hold diplomatic relations with other States, or may, though entitled to send and receive envoys, have bound itself by a treaty with the superior State to submit for the approval of the latter any treaty it may conclude. Or again, it may have formally accepted the protection of the superior State, or have undertaken to receive its executive head from the latter, or to pay tribute to the latter. In all such cases the tie duly formed between the superior and inferior State, and notified to other States, is a fact of high diplomatic moment in determining the international status of the inferior State. Other States are bound by international usage to take note of the fact, and for one of them to attempt to send an ambassador to, or make a treaty with, an inferior State which had bound itself to a superior State in the way above indicated, would constitute a grave breach of comity—would be treated as what diplomatists call ‘an unfriendly act.’ Although, therefore, there is no Law, in the strict sense of the word, binding these inferior States, but only a Contract, still they may appropriately be said to be *de iure* dependent, or imperfectly sovereign. The world is full of them. There are a great many in India, bound to the British Crown by engagements which make them more or less subject to British control. Rumania and Servia were formerly in this position. There is one left

in South-Eastern Europe, Bulgaria, although the tie binding it to the Turkish Sultan is wearing very thin<sup>1</sup>. Bulgaria is not precluded from sending envoys and making treaties. There is one in North Africa—Tunis—which is now, in all but name and legal intendment, a province of France. Another African case, that of the late South African Republic, which, though it could accredit and receive envoys, was liable to have any treaty made by it (except with its neighbour republic) disapproved by Great Britain, has given rise to much controversy. Probably it should not have been called either an internationally Sovereign State, or a Dependent State, but rather a State dependent for one particular purpose and independent for others. The position of Egypt—which is *de iure* part of the Ottoman Empire for some purposes, is also *de iure* (for certain other purposes) under the control of six European Powers, and is *de facto* under the control of one of those six—is a very peculiar one. The varieties of relation in which one State may legally stand to another are indeed endless, and elude any broad classification.

Quite different from these cases are those in which a State, though practically dependent on another State, has contracted no public engagement which affects her theoretical independence. In such cases, third parties (*i.e.* States) are not *prima facie* bound (by international usage and comity) to pay any regard to the fact that the inferior State is *de facto* dependent. They may properly treat it as being completely Sovereign. But just as there are some cases in which a *de facto* Sovereign becomes morally entitled to obedience from the citizens of a community, so there are some extreme cases in which a State, while technically independent, is notoriously so much *de facto* under the protection and control of a stronger State that it would be improper for third parties

<sup>1</sup> The position of Bosnia, occupied by Austria but not yet formally severed from the Ottoman Empire, is somewhat different. It may be compared with that of Lothian in the hands of the king of Scots about the end of the tenth century, though in that case there may have been a quasi-feudal relation.

to ignore the actual relation. England (strictly speaking) has no legal control over Afghanistan or Nepal, and had none over independent Burma down to 1885, but Burma was annexed because it toyed with France, and any negotiations by a third power with Afghanistan or Nepal would be resented by England. Persia may possibly sink into a similar position as regards Russia.

#### IX. SOVEREIGNTY IN A FEDERATION.

One peculiar case remains to be mentioned in which theoretical views of the nature of Sovereignty, and a certain tendency to confuse the spheres of *de iure* and *de facto*, produce difficulties. It is the case of communities uniting themselves in a Federation, and resigning to it a part of their self-government, and either a part or the whole of their Sovereignty. There have been several such instances, but it will be sufficient to examine one.

When the thirteen semi-independent States—semi-independent because they had parted with some of their powers by the instrument of confederation of 1776—that lay along the Atlantic coast of North America adopted (between 1787 and 1791) the newly drafted Constitution of the Union, they neither expressly reserved nor expressly disclaimed the right to withdraw from it and resume their previous condition. Questions presently arose as to the right of a State to treat as null any act of the Federal legislature which she deemed to go beyond the powers conferred upon it by the Constitution, and ultimately as to her right to withdraw altogether from the Union. In the discussions of these points much stress was laid on the sovereignty which the several States had (so it was urged) originally possessed, which they had never in terms renounced, and which the Eleventh Amendment to the Federal Constitution had, when it declared that no State could be sued by a private person, virtually admitted.

The earlier statesmen, such as Hamilton and Madison, held that Sovereignty was by the Constitution divided between the Nation, acting through Congress and the President, and the States. This was all the more natural, because both the National and the State organs of government were agents of the people, from whom it was admitted that all powers had come, and in whom, therefore, ultimate Sovereignty must lie, though whether in the people as one whole, or in the several peoples of the several States, was another question. But the publicists of the next generation, who on each side led the contest over slavery, refused to acquiesce in any doctrine of division. Like Bodin, Hobbes, Bentham, and other Europeans, they proclaimed Sovereignty indivisible; but while the Northern men found it in the Nation as a whole, the Southerners, led by Calhoun, insisted that it remained in the several States, suspended or temporarily qualified, but capable of resuming its former proportions in each State whenever that State should quit the Union.

On these questions, which were treated as questions of pure law, there was immense debate—acute, learned, passionate, and such debate might have gone on for ever; for each side had a perfectly arguable case, the point being one which the Constitution had (perhaps intentionally) evaded. The term Sovereignty acquired to the disputants a sort of mystic meaning, and many forgot that while the respective rights of the nation and the States were *de iure* the same in 1860 as they had been in 1791, a new state of things had in fact grown up, which the old *de iure* conception did not suit. Controversy there would in any case have been, but the controversy was greatly darkened by the metaphysical character which the use of the abstract term Sovereignty imparted to it; and which helped to conceal the momentous change which the political conditions of the country had undergone.

The moral of a concrete case like this is the same as

that suggested by a study of the errors of the modern followers of Hobbes. Hobbes seems to assume that his Sovereign *de iure* will be also Sovereign *de facto*. Austin cannot admit any one to be a Sovereign who is not so both *de iure* and *de facto*. The lawyers on both sides in America grew so hot over their legal controversy as to forget the incompetence of law to deal with certain classes of questions. They ignored history, and got too far away from facts. In the sphere of pure law political facts need not be regarded, for Law assumes that while it remains law its decisions will be accepted. But when it is attempted to transfer the principles and conclusions of law to the sphere of controversies in which not only vast interests, but also violent passions are engaged, there is danger that the law may turn out not to have been made for the new facts and not to be capable of dealing with them, so that efforts to apply it to them will not carry the full moral weight which law ought to exert. That each party should have a plausible legal case makes the risk of conflict greater, because men think themselves justified in resorting to force to defend their legal case, whereas if they left law out of the matter, they might be more willing to consider their chances of practical success, and therefore more ready to accept a compromise. What is deemed a good case *de iure* has sometimes proved a temptation to a weak State to resist when it had better have agreed with its adversary, or a temptation to a strong State to abuse its strength, whether by resorting to force when it ought to have accepted arbitration, or by expending on the annihilation of its opponent an amount of blood and wealth out of all proportion to the issues involved.

Knots which the law cannot untie may have to be cut by the sword. So it happened in the case of the United States. The Supreme Court tried its hand and failed. The only legislative authority which could have been invoked to settle the dispute by constitutional

means was one consisting of a two-thirds majority of each House and a three-fourths majority of the States (acting either through Conventions or through their legislatures), such being the only authority capable of amending the Constitution. It was practically impossible to obtain a majority of three-fourths of the States for an amendment dealing with slavery or with State sovereignty. The resources of law being exhausted, the question of Sovereignty was tried *de facto* by a war which lasted nearly four years, and in which about a million of men are supposed to have perished.

#### X. CONCLUSION.

Upon a review of the long and, on the whole, unprofitable controversies that have been waged regarding the abstract nature of Sovereignty, one is struck by the fact that with the possible exception of the German philosophers from Kant to Hegel, these controversies have been at bottom political rather than philosophical, each theory having been prompted by the wish to get a speculative basis for a practical propaganda. It was so when the Pope and the Emperor were at war in the days after Gregory the Ninth and Boniface the Eighth. It was so in the days of Bodin, of Althaus, of Hobbes, of Locke, of Rousseau, of De Maistre and Haller. The Romans and the English have contributed less to these controversies than most other nations, not only because both have been eminently practical as well as eminently legal-minded peoples, but because both had the good fortune to obtain a clear *de iure* Sovereign, who was for some centuries in Rome, and has been for some centuries in England (with short transitional periods, in both cases, of uncertainty), the undisputed possessor not only of *de iure*, but also of *de facto* power. Save during a few intervals of conflict, all that we English have needed to know about Sovereignty is where the

law places it<sup>1</sup>. We were beginning to know this as far back as the thirteenth century; and just at the time when Bodin's book opens the long disputations of post-mediaeval theorists, Sir Thomas Smith set forth the legal supremacy of Parliament in words to whose clearness and amplitude nothing can be added to-day<sup>2</sup>. In the seventeenth century a struggle which arose over the respective rights of the component parts of this composite Sovereign was settled *de facto* by a civil war and by a revolution, which negated any right of separate legislation claimed for the Crown and placed the judiciary in a position of independence. Yet the change then made *de facto* was so far from being fully expressed *de iure* that whoever should to-day study legal texts only, might conclude that the Crown and the House of Lords are just as important members of the composite Sovereign as is the House of Commons. Since 1689 *de iure* Sovereignty has coincided with *de facto* obedience. The idea that power *de facto* naturally goes along with authority *de iure* has grown to be almost a part of an Englishman's mental constitution, a happy result whereof let us all say—*Esto perpetua*. France and Germany have been less fortunate in their history, and consequently more prolific in their theories. Yet with the exception of a few belated defenders of the old doctrine of 'divine right,' Frenchmen are now agreed as to the source of all political power, and the Germans, equally agreed upon this point, are chiefly occupied in debating where, according to the Constitution of their Em-

<sup>1</sup> Indeed the recognition of the Great Council of the nation as the chief power in the State is still older: though its exclusive supremacy, *i.e.* its right to interfere with certain branches of the prerogative of one part of it, the Crown, remained long contested.

<sup>2</sup> In his *Commonwealth of England* (published in 1583): 'All that ever the people of Rome might do, either *Centuriatis comitiis* or *Tributis*, the same may be done by the Parliament of England, which representeth and hath the whole power of the realm, both the head and body. For every Englishman is intended to be there present, either in person or by procurator and attorney, of what pre-eminence, state, dignity, or quality soever he be, from the prince (be he King or Queen) to the lowest person of England, and the consent of the Parliament is taken to be every man's consent.' See an article by Sir F. Pollock in *Harvard Law Review* for January, 1895, and his *First Book of Jurisprudence*, p. 247.

pire, sovereign power is to be deemed in point of theory to reside.

After long wanderings through many fields of speculation, as well as many a hard-fought fight, all civilized nations have come back to the point from which the Romans started twenty centuries ago. All hold, as did the Romans, that sovereign power comes in the last resort from the people, and that whoever exercises it in a State, exercises it by delegation from the people. All also hold that in the internal affairs of a State, power legally sovereign—even if the Constitution subjects it to no limitation—ought to be exercised under those moral restraints which are expected from the enlightened opinion of the best citizens, and which earlier thinkers recognized under the name of Natural Law. The sphere in which no Sovereignty *de iure* exists, that of international relations, where all power is *de facto* only, is also the sphere in which morality has made least progress, and in which justice and honour are least regarded.

#### NOTE.

The above article was written, now a good many years ago (though it has been revised subsequently), when I had not before me some writings on the subject of Sovereignty, to which a brief reference ought to be made. First among them comes Sir H. Maine. Two lectures (in the volume entitled the *Early History of Institutions*) contain an ingenious criticism of the system of Bentham and Austin. This criticism would now command general assent, yet Maine suddenly stops short of the conclusions one would naturally expect. He points out so clearly that most of the propositions of Austin are either unreal or self-evident, that one is inclined to fancy that the praise he nevertheless bestows is due more to respect for the destructive work which he holds Bentham and Austin to have done than to a belief in the substantial value of their doctrines. Mr. F. Harri-

son, in an article published in the *Fortnightly Review* some time afterwards, has a very interesting discussion of these two lectures, and of the Austinian theory, which he also condemns in substance, while handling it tenderly, and holding it to be serviceable as bracing to the reader's mind. Mr. D. G. Ritchie (now professor at the University of St. Andrew's), in an article on 'The Conception of Sovereignty,' in the *Annals of the American Academy of Political and Social Science* for January, 1891, criticizes the Austinian view more stringently, and makes many acute remarks, with most of which I find myself in agreement. Mr. Henry Sidgwick devotes a chapter in his *Science of Politics* to the topic, and subjects the notion that Sovereign Power is absolute and irresponsible to a penetrating and suggestive analysis. Sir F. Pollock discusses the question in his *Introduction to the Science of Politics*, and shows very clearly the unsoundness of the Austinian view. Finally, Mr. C. E. Merriam, junior, in his *History of the Theory of Sovereignty since Rousseau*, has presented a full and useful account of the chief doctrines put forward on the subject, not stating a theory of his own, but adding pertinent criticisms on the views which he summarizes.

## XI

# THE LAW OF NATURE

### I. THE IDEA OF NATURE AS A RULING FORCE.

IT would not be possible, within the compass of anything less than a substantial volume, either to present a philosophical analysis of the ideas comprised or implied in the term Law of Nature, or to set forth and explain the various senses in which that term has been in fact employed, and the influence which, in those various senses, it has exerted as well upon political theory as upon positive law. What I propose to do here is something less ambitious and more closely connected with the study of the Roman law. It is to sketch in outline the process by which the notion of Nature as the source of law grew up and passed into philosophy, and from philosophy into legal thought; to show how the notion took a comparatively definite shape in the minds of the Roman jurists; to describe the practical use to which they put it, and finally to indicate (in the briefest way) some of the consequences in modern times due to the prominence which the Romans assigned to it. The subject has been treated by so many writers, some of them well known to all students, that much of it may be passed over as familiar. My chief aim will be to show that there is far less of a vague and merely abstract character in the conception than has sometimes been attributed to it; that it had a pretty definite meaning to the

Roman jurists; and that they used it in a thoroughly practical spirit.

When man, having attained some mastery over nature, begins to turn his thoughts to an explanation or classification of the phenomena among which he finds himself and of which he is a part, two general observations present themselves to his mind. The first of these is that beneath all the differences which mark off from one another the living creatures, both animals and plants, wherewith the world is filled, there exist certain noticeable similarities in respect of which they may be distributed into groups. Individual animals differ from one another, but all those of a certain kind or species have certain points in common, which constitute their character as a kind. So also different kinds have still many things in common. All sorts of dogs have certain common characteristics; and though dogs differ from wolves, dogs and wolves have many points of resemblance. Now the most general and most remarkable of these phenomena in which living creatures are alike to one another are the processes of growth through which they pass. They are born in a similar way; they enter on life small and weak; they become larger and stronger; they gain teeth at certain periods; they shed their hair or plumage at certain periods; they at last become weaker and die. So plants spring out of the earth from seed, shoot up and give off leaves, bloom into flowers, form seed, wither down again into the earth and die.

From the habit of noting these phenomena four conceptions seem to arise. The first is this, that of the various characteristics of each creature, those which it has in common with other creatures of the same kind are the most deeply rooted and permanent. The second is that these characteristics exist from the origin of the creature, and are its Birth-gift. The third is that one group of the common characteristics, and the most important of them all, is the group which includes the

phenomena of growth and decay. And the fourth is that in these phenomena of growth there is evidence of some sort of force working upon and through the creatures, something wholly irrespective of, and no-wise referable to, their volitions, something stronger than they are, and which determines the course of their life-processes.

The second observation is that among human beings there is a similar identity of dominant characteristics combined with an endless diversity of individuals, a diversity greater than that between different individuals of each lower species. In all men, however otherwise unlike, there may be noted the same general tendencies, the same appetites, passions, emotions. It is these passions and emotions that move men's actions, and move them upon principles and in ways which are always essentially the same, despite the contrasts which one man presents to another, despite the jars and conflicts in each man which spring from the fact that passion may urge him in one direction, and interest in another, while fear <sup>may</sup> arrest action altogether. Thus there is formed the conception of a general constitution of man as man, over and above all the peculiarities of each individual, a constitution which is not of his own making, but is given to him in germ at the outset of his life, and is developed with the expansion of his physical and mental powers. The most notable marks of this constitution of man as man are therefore its Origin at his birth, and its unfolding in the process of his Growth. So here also the phenomena of Birth and Growth stand out as the notes of that sort of unity which includes all mankind and makes Man what he is.

The language in which I am seeking to present these conceptions, though untechnical, is inevitably tinged by our modern habits of thought. But we may well believe that in substance such conceptions were present to persons of a reflective turn long before a set of abstract terms in which to express them had been invented.

They had worked themselves into the texture of educated minds, and had been conveyed in figurative language by poets before metaphysicians laid hold of the matter.

When metaphysicians appear, that is to say, when thought, consciously speculative, begins to attempt systematic and comprehensive solutions of the problems of the universe which it has begun to realize as problems, a new period opens. Looking round upon the animated (and now also with a clearer eye upon the inanimate) world, philosophers feel the need of finding a Cause for the regularity they observe in the working of physical forces and in the growth of living creatures upon settled and uniform lines. They conclude that there must exist a power, either personal—a Deity or Deities—or impersonal, a sort of immanent and irresistible force in things themselves, which has stamped its will or tendency upon the movements and processes of the material universe. They discover analogies between the action of such a Power in the inanimate and in the animated world, and between its action on other animals and its action on man. Thus they figure it to themselves as governing both on somewhat similar principles, and aiming at somewhat similar ends. The name they give it is drawn from Birth. It is *Φύσις*, *Natura*, Nature.

When they apply this method of inquiry or way of considering phenomena to Man regarded, not as a mere animal, but as a rational being, they find in him complex faculties and impulses working towards certain ends, ends which, despite infinite differences of detail, are substantially the same for all men. They note certain characteristics and tendencies which they call Normal, as being those prescribed by the general rules of his moral and physical constitution, and they deem every thing varying therefrom to be either a morbid aberration, or a fact of quite secondary consequence. And as in the wider sphere of animated being, so in that

of man taken by himself, they conceive his constitution as being the result of a Power which has framed it with an intelligent purpose, so harmonizing its various activities as to fit them to attain a main and central end. Just as in the animal organism all the forces and processes of the body are so united as best to subserve its development, so in man regarded as a thinking being all the capacities, intellectual and emotional, seem to be correlated and guided by a presiding influence, that of the Rational Will, in obedience to which all the parts and all the impulses find their proper line of action. Thus that central and supreme power which in the material universe has been called Nature comes to be called in man Reason, and conversely, Nature is conceived of as necessarily Rational. For as in the universe at large the general tendency of things and that which makes their harmony is thought of, not merely as a fact, but also as a principle or pervading force, not merely as the sum of the phenomena, but also as a Power ruling the phenomena, so when a similar canon is applied by analogy to man, this power is found in Reason. And the recognition of reason as the harmonizing principle in man causes Nature, the force which gives to all things their shape and character, to be conceived of as an intelligent force moulding phenomena upon settled lines to definite ends.

✓ Thus the conception of Nature, when it is ready to be applied to human society, includes two elements. One is that of Uniformity or Normality—the idea that the essence and ruling principle in all kinds of objects and beings and processes resides in that which they have in common, *i.e.* in the Type which runs through them. The other element is that of Force and Control—the idea that types have been formed and that processes work under the guidance of an intelligent Power, a power which in the case of the material universe may or may not be what is called conscious and personal (since as to this philosophers differ), but whose analogue

in man is conscious and personal. [Thus Nature and Reason are brought very near: or at any rate, there is what may be called a rational quality in Nature.]

[This view of nature and her processes as characterized by uniformity of action, and this view of such uniformity as necessarily due to some directing Force, took shape, at a more advanced stage of thought than the stage we are now considering, in the much canvassed expression *Laws of Nature*<sup>1</sup>. This term, used to describe the uniformity of sequence in the phenomena of the material universe, opens up a line of reflection with which I am not here directly concerned. It is due to an imagined analogy between an ordered community, whose members obey rules made for them by a governing authority, and the ordered universe, every part of whose machinery works with a regularity which suggests rational direction by an irresistible Force. As laws are the framework of a State, so the sequences in the processes of Nature are deemed to be the framework of the external world. With the (moral) Law of Nature I am about to discuss these *Laws of Nature*—physical or external Nature—have of course nothing to do. In the latter, Nature, meaning the aggregate of natural phenomena, is passive, and obeys laws set to her; whereas the expression ‘Law of Nature’ represents her as the power which makes and prescribes laws. The ‘Laws of Nature’ are deemed to be imposed upon the world of nature by the Power which rules it, or, as the Greeks would say, they are laws given to the Kosmos by the Demiurgos; whereas our (moral) ‘Law of Nature’ is (as will presently appear) the law which Nature herself (or God ‘the author of Nature’) sets to mankind, her children. Nevertheless in the expression ‘Laws of Nature’ (in the physical sense) the word Nature is sometimes used to describe, not only the passive subject which

<sup>1</sup> The term has been extended from material phenomena to those dealt with by other sciences, such as economics and philology (*e.g.* laws of supply and demand, ‘Grimm’s law’).

obeys, but also the active ruler who commands: and this double usage has tended to induce confusion. It may be partly responsible for the phrase 'a violation of the Laws of Nature,' though obviously a Law of Nature cannot be violated. All that phrase can mean is that men may, ignorantly or knowingly, act in disregard of a certain sequence of physical phenomena, receiving the inevitable recompense<sup>1</sup>. By the ancients, the two notions were not confounded, and indeed the phrase 'Laws of Nature,' in the precise sense it bears to moderns, occurs very rarely among them, as one may indeed say that the idea in any such sense as ours was by them but faintly apprehended<sup>2</sup>. But, distinct as these conceptions are, they have in common the notion that Reason as a Power presides over and orders all things. And Wordsworth has in a noble passage boldly identified with the moral law the Force which directs the majestically uniform march of the celestial bodies, when he says of Duty—

'Thou dost preserve the stars from wrong,

And the most ancient heavens by Thee are fresh and strong.'

Now let us turn to the phenomena of political society and see how the conception works itself out in this field.

## II. ORIGIN OF THE CONCEPTION OF NATURAL LAW.

When the observer applies himself to social phenomena, he perceives again, as he has perceived in studying the whole animated creation, two facts equally patent

<sup>1</sup> He who steals, breaks the law and may or may not be discovered or punished: he who puts his finger in the fire finds in the pain he suffers the operation of the regular sequence of physical phenomena.

<sup>2</sup> There is a passage in a Constitution of the Emperors Theodosius, Arcadius, and Honorius (*Cod. Theod.* Bk. xvi, Tit. x. 12) in which the term 'laws of Nature' is used in a sense which seems to come near the modern one. Forbidding any one to sacrifice victims or consult the 'spirantia exta,' the Emperors, after threatening punishment as in the case of treason, proceed to say, 'Sufficit ad criminis molem naturae ipsius leges velle rescindere, illicita perscrutari, occulta recludere, interdicta temptare.' The expression may however mean nothing more than that it is impious to tamper with the principles which keep the secrets of nature from men's eyes. But in any case it is used in a sense different from that of the moral law which the ancients conceived to have been set by nature.

and equally general—Uniformity and Diversity. In human customs, civil and religious, in the rules and maxims and polities of tribes and nations, there are many things wherein one community differs from another<sup>1</sup>. But there are also many things wherein all agree. All deem some acts, and speaking generally, though with many variations, the same kinds of acts, to be laudable or pernicious, and award praise or penalties accordingly. All recognize somewhat similar relations between individuals, or families, or classes, as indispensable, and try to adjust and regulate these relations upon similar principles. The forms which such relations take are no doubt differentiated by the particular stage, be it higher or lower, of civilization which various peoples have respectively reached. The customs of a number of savage tribes, while bearing some resemblance *inter se*, bear a slighter resemblance to those of more advanced nations. Yet even between the savage tribe and the semi-civilized or civilized community there are marked similarities, and the customs of the former are perceived often to contain the germ of what has been fully developed among the latter.

[Now the customs and rules wherein tribes or nations agree are evidently the result of dispositions and tendencies which belong to man as man. In other words, they are the expression of what is permanent, essential, and characteristic of man, so that if a traveller were to come upon some hitherto undiscovered tribe, he might expect to find these phenomena present there, just as in each child as it grows up there appear the familiar qualities and tendencies which belong to the whole human species. Hence such phenomena of usage are deemed to be normal, and therefore Natural, that is, they are due to the Force which has made the human

<sup>1</sup> The famous dictum which Herodotus quotes from Pindar, 'Custom is the king of all mortals and immortals,' is quoted to show how usage makes a thing seem right to one people and wrong to another, but it was afterwards often taken in the sense of an assertion of the supremacy of Law over all things. Cf. Herod. iii. 38, and Chrysippus, *apud* Marcian in Justinian's *Digest*, i. 3. 2.

species what it is. So here in the sphere of human customs and institutions we perceive the same contrast between that which is variable as being due to circumstance or environment, or what we call chance, and that which is constant and uniform as being due to causes present, if not everywhere, yet at any rate in the enormous majority of cases. And the source of the constancy is to be found here in the political, no less than in the ethical and social sphere, in the constitution of man as a moral and intellectual being. Nature is therefore, on this view, a ruling power in social and political phenomena as well as in those of material growth and of moral development.

The customs and usages of mankind are the early forms of what come afterwards to be called Laws—seeing that all law begins in custom—as indeed the Greeks call both by the same name. Accordingly those who began to philosophize about human society gave shape to their speculation in theories about Laws.

Now Laws, the rules and binding customs which men observe and by which society is held together, fall into two classes. Some are essentially the same, in all, or at any rate in most communities, however they may superficially vary in their arrangement or in the technical terms they employ. They aim at the same objects, and they pursue those objects by methods generally similar. Other laws differ in each community. Perhaps they pursue objects which are peculiar to that community; perhaps they spring out of some historical accident; perhaps they are experimental; perhaps they are due to the caprice of a ruler. Those which prevail everywhere, or at any rate, generally, appear to issue out of the mental and moral constitution common to all men. They are the result of the principles uniting men as social beings, which Nature, personified as a guiding power, is deemed to have evolved and prescribed. Hence they are called Natural. Being the work of Nature, they are not only wider in their area, but also of

earlier origin than any other rules or customs. They are essentially anterior in thought as well as in date to the laws each community makes for itself, for they belong to the human race as a whole. Hence they are also deemed to be higher in moral authority than the laws which are peculiar to particular communities, for these may be enacted to-day and repealed to-morrow, and have force only within certain local limits.

This antithesis of the Customs and Laws which are Natural, Permanent, and Universal to those which are Artificial, Transitory, and Local, appears in some other fields as well as in that purely legal one which we are about to consider. In particular, it takes three forms, which may be called the Ethical, the Theological, and the Political.

The ethical appears early, and indeed before there is any proper science of Ethics. One of the first difficulties which men advancing in civilization encounter is the conflict between the Law of moral duty ruling in the heart and the laws enacted by public authority which may be inconsistent with that law. This conflict is the subject of the *Antigone* of Sophocles. We are all familiar with the famous lines in which the heroine replies to the king, who had accused her of breaking the laws of the city, by declaring that those laws were not proclaimed by Zeus or by Justice, who dwells with the deities of the nether world:—

οὐ γάρ τί μοι Ζεὺς ἦν ὁ κηρύξας τάδε  
οὐδ' ἡ ξύνουκος τῶν κάτω θεῶν Δίκη.

Antigone goes on to say that these laws of the gods, unwritten and steadfast, live not for to-day or yesterday, but for ever, and no one knows whence they spring:—

οὐ γάρ τι νῦν γε κάχθές, ἀλλ' αἰεὶ ποτε  
ζῆ ταῦτα, κοῦδεὶς οἶδεν ἐξ ὅτου φάνη.

The same poet enforces the same view in a lofty passage of another drama, where the moral laws are de-

scribed as the offspring of the gods, and not of man's mortal nature, and which no forgetfulness can ever lap in slumber<sup>1</sup>.

The idea frequently recurs in later literature, and is nowhere more impressively stated than in the *Apologia* of Socrates, where the sage speaks of himself as being bound to obey the divine will rather than the authorities of the State, treating this divine will as being directly, though internally, revealed to him by 'a divine sign,' and being recognized by his own conscience as supreme.

^ The theological view is vaguely present in early times, as for instance in Homer, where certain duties, such as that of extending protection and hospitality to suppliants, are associated with the pleasure and will of Zeus. It is most familiar to us from St. Paul, who compares and contrasts the Law of Nature, which prescribes right action to all men, being instilled into their minds by God, with the Positive revealed Law which God has given to one particular people only.

'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; which show the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the meanwhile accusing or else excusing one another<sup>2</sup>.'

A similar view, *mutatis mutandis*, is found in not a few of the Greek philosophers. Heraclitus speaks of one divine law whence all human laws draw nourishment. Socrates, as reported by Xenophon, contrasts the laws of the city with the unwritten laws which in every country are respected as substantially the same, and says that these latter laws were laid down by the Gods for

<sup>1</sup> Soph. *Antig.* 1. 450; *Oed. Tyr.* 1. 865.

<sup>2</sup> Rom. ii. 14, 15, where 'hearts' is probably to be taken in the ancient sense, which regards the heart and not the brain as the seat of the intellect. Cf. also Rom. i. 20, 'For the invisible things of God from the creation of the world are clearly seen, being understood by the things that are made, even his eternal power and Godhead, so that they are without excuse.'

mankind<sup>1</sup>, adding that the fact that their infraction carries its own penalty with it seems to suggest a divine source. Similar passages occur in Plato, who contrasts abstract justice and rightful laws with the actual laws and customs that prevail in political communities. The contrast becomes more definite in Aristotle, whose views are specially important, because they profoundly influenced the scholastic philosophers of the Middle Ages. He divides Justice as it appears in the State into that which is Natural and that which is Legal or Conventional, the former having everywhere the same force, while the latter consists of matters which were originally indifferent and might have been settled in one way or another, but which have become positively settled by enactment or custom. Some (he proceeds) think that there is no such thing as Natural Justice, because 'just things' are not the same everywhere, whereas physical phenomena are everywhere identical. This is true: nevertheless, even as the right hand is naturally stronger than the left, although there are left-handed men, so there is a real difference between rules which are and rules which are not natural<sup>2</sup>. Similarly, in a more popular treatise, Aristotle divides law into that which is Common, being in accordance with Nature and admitted among all men, and that which is Peculiar (*ἴδιος*), settled by each community for itself<sup>3</sup>. This he treats as a familiar conception, to which an advocate pleading a cause may appeal when he finds positive law against him. He quotes the passage already cited from Sophocles, and

<sup>1</sup> Xen. *Memor.* iv. 4, 15 sqq. θεοὺς οἶμαι τοὺς νόμους τούτους τοῖς ἀνθρώποις θεῖναι. These words are put into the mouth of Hippias, but are part of the argument which Socrates conducts.

<sup>2</sup> *Eth. Nicom.* v. 7.

<sup>3</sup> *Rhet.* i. 10 and 13: Λέγω δὲ νόμον τὸν μὲν ἴδιον τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἐκάστοις ὠρισμένον πρὸς αὐτούς, καὶ τοῦτον τὸν μὲν ἄγραφον τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν. Ἔστι γάρ, ὃ μαντεύονται τι πάντες, φύσει κοινὸν δίκαιον καὶ ἀδίκον, κἀν μηδεμίᾳ κοινωνίᾳ πρὸς ἀλλήλους ἢ μηδὲ συνθήκη.

The lines of Empedocles refer to what it seems strange to call a part of Universal Law, the abstention from killing a living thing—τὸ μὴ κτείνειν τὸ ἐμψυχον' τοῦτο γὰρ οὐ τισὶ μὲν δίκαιον τισὶ δ' οὐ δίκαιον,

ἀλλὰ τὸ μὲν πάντων νόμιμον διὰ τ' εὐρυμέδοντος

αἰθέρος ἠνεκῶς τέτοται διὰ τ' ἀπλέτου αὐγῆς. (*Rhet.* i. 13.)

two lines of Empedocles descanting on Universal Law. So Demosthenes refers to the 'common law of all mankind' which justifies a man in defending his property by force<sup>1</sup>.

The Stoics took up the idea and worked it out with great fullness and force, especially on its ethical side. They developed the Aristotelian conception of Nature as the guiding principle immanent in the universe. This principle is Reason, *i.e.* the Divine Reason; and Natural or Common (=Universal) Law is its expression. So also in Man, who is a part of universal nature, Reason is the ruling and guiding element, ordering all his faculties in such wise that when they are rightfully developed<sup>1</sup> in action he is obeying his true nature. Thus the formula 'to live according to nature' becomes the concise statement of what is at once his duty and his happiness.

Philosophers were however by no means unanimous on the subject. The Sceptics and the New Academics denied altogether that there was such a thing as the 'naturally just (*φύσει δίκαιον*),' pointing to the diversities in the positive law of all States, and also to the disagreements among speculative thinkers. But the Socratic or Aristotelian or Stoic view prevailed, having ethical or religious considerations to recommend it to those who greatly desired to find an ethical basis for life, and, if possible, create thereout a religion.

What I have called the Political form of the idea is to be found in the notion, as old as Epicurus, that there is a close connexion between the Law of Nature and the Common Good, a connexion sometimes represented by saying that Natural Justice prescribes what is useful for all, sometimes by holding that practical utility is the test of whether any law is to be deemed to have the authority of Nature behind it<sup>2</sup>. This notion comes right down through the ancient world to modern times,

<sup>1</sup> *Against Aristocrates*, 639.

<sup>2</sup> Epicurus described Natural Justice as an agreement made for the sake of common advantage: τὸ τῆς φύσεως δίκαιον ἔστι σύμβολον τοῦ συμφέροντος εἰς τὸ μὴ βλάπτειν ἀλλήλους μηδὲ βλάπτεσθαι (*Diog. Laert.* x. 150).

and is really implicit in nearly all that has been written on the subject.' No one would have repudiated the high metaphysical or theological view of the Law of Nature more vigorously than Bentham, yet there is an affinity between his method of applying utility as against positive laws and the methods of several of the ancient philosophers. And so a German critic is justified when he talks of Bentham and Austin as the 'propounders of theories of Natural Law.' With the political outcome of the idea, however, we are not at this moment concerned. It is enough to indicate how it has found expression in these various fields<sup>1</sup>.

What I have sought to do in this introductory statement is to show how the notion of Nature as a force governing social as well as physical phenomena grew up, and to indicate the wide influence it had attained at the time when Rome became mistress of the world. Let us now turn to the Romans, and inquire what they meant by Natural Law, how the conception shaped itself in their hands, and to what practical use they turned it.

The Roman conception has two sources, the one historical, the other theoretical. I begin with the historical, which is the earlier in date, and incomparably the more important<sup>2</sup>.

<sup>1</sup> Since this Essay was in type I have seen the article *On the History of the Law of Nature*, by Sir F. Pollock, published in the *Journal of the Society of Comparative Legislation* for Dec. 1900, and simultaneously in the *Columbia Law Review*, Jan. 1901; and am happy to find myself in substantial agreement with him upon all points of importance connected with the subject. Some branches of it, especially the Greek and mediæval parts of the history of the idea, are treated of more fully by him, and the whole article is full of interest. Judicious remarks and useful quotations will also be found in Prof. D. G. Ritchie's *Natural Rights* (published in 1895), Part i; and in Dr. Holland's *Elements of Jurisprudence*, pp. 30-38 of ninth edition.

<sup>2</sup> A very minute and careful collection of the authorities regarding *Ius Naturæ* and *Ius Gentium* may be found in the book of Dr. Moriz Voigt, *Die Lehre vom Jus Naturale, æquum et bonum und Jus Gentium der Römer*. I do not find myself always able to agree with his views, but they are stated with painstaking ability, and the citations have often aided me.

## III. THE ROMAN 'LAW OF THE NATIONS.'

Long before the time when the city on the Tiber had become the undisputed mistress of Italy, Rome began to be the resort of many strangers who did not possess even that qualified kind of citizenship (summed up in the words *connubium* and *commercium*) which included the capacity for forming family ties, and for entering into business relations according to Roman rules. These strangers or aliens (*peregrini*) had originally no civil rights, public or private, but they nevertheless dealt with Roman citizens, sold to them, bought from them, lent and borrowed money, entered into partnership, acted as factors or supercargoes, made wills, gave or received legacies. Similarly, some of them contracted marriages with Roman citizens, and became connected by various family bonds. It was necessary for the Roman courts to deal with the relations, and especially of course with the business relations, which were thus created. Yet the courts could not apply the rules of pure Roman law to them, because it was a precondition to the doing of certain formal acts under that law, to the holding certain legal relations, and (in some kinds of suits) to the use of the appropriate forms of procedure, that the doer or holder should be a full citizen. Accordingly the Roman courts, when they had to administer justice between these strangers, or between them and citizens, were obliged to find certain principles and rules which could guide their action in the same way as the principles and rules of the pure Roman law guided them when dealing with citizens.

The phenomenon of having a different law for strangers and for citizens is one which at first sight seems strange to us moderns, because in modern civilized countries ordinary private law is administered with little regard to the nationality or allegiance of the persons concerned, the law of the country being regularly applied, except when it can be shown that the domicile of a party

to a suit, or the fact that a contract was made with reference to another law than that of the court exercising jurisdiction, or the situation of the property dealt with, requires the application of some other (*i. e.* foreign) law<sup>1</sup>. But in the ancient world foreigners everywhere stood on a different level from citizens, as regards not only political, but also private civil rights; the sense of citizenship being much more intense in small communities, and there being no such bond of fellowship as the Christian Church subsequently formed for the Middle Ages and the modern world<sup>2</sup>. Indeed it was the Roman Empire and the Church taken together which first created the idea of a law common to all subjects and (later) to all Christians, a law embodying rights enforceable in the courts of every civilized country.

How then did the Roman magistrates find the law which they needed for the above-mentioned purpose? As they could not apply their own law, so neither could they select the law of any one of the States which surrounded Rome, because the persons between whom justice had to be done came from a great number of States and tribes, each of which had a law of its own. Being unable therefore to borrow, they were forced to create. They would appear to have created—I say ‘appear,’ because our knowledge of the matter is far from complete—by taking those general principles of justice, fair dealing, and common sense, which they found recognized by other peoples as well as their own, and by giving effect to those mercantile and other similar usages which they found prevailing among the strangers resident at Rome. Thus by degrees they built up a body of rules and a system of legal procedure which, while it resem-

<sup>1</sup> In the days after the fall of the Roman Empire, however, different laws were applied to different sets of persons in the extra-European dominions of European States, *e.g.* the Roman law to the clergy and the provincial subjects, the barbarian law to barbarians. And the same thing happens now in countries where Europeans and Musulmans or semi-civilized tribes dwell side by side.

<sup>2</sup> Among some of the Greek cities, however, before they were engulfed in the Roman dominion, there had grown up a practice by which friendly commonwealths reciprocally extended certain civil rights to one another's citizens.

bled their own system in many of its general features, was less technical and more consonant to the practical convenience and general understanding of mankind. They called it the Law of the Nations or of Mankind (*ius gentium*)<sup>1</sup>, not in the sense of law valid as between nations (what we should call International Law<sup>2</sup>), but as being the common or general law, just as the expression *nusquam gentium* means 'nowhere at all<sup>3</sup>.' It is the law which nations in general used and could comprehend. Each of these nations, or communities—Tuscans, Umbrians, Greek cities of Southern Italy, Carthaginians, and so forth—had a law of its own, with certain peculiarities which no other people could be expected to know or perhaps to relish. But the principles of good faith and equity underlay, and were recognized in, the laws of all, so that this Law of the Nations represented the common element which all shared, and by which all might be content to be judged. Thus it comes near to what the Greeks had called the 'common law of mankind.' Yet it is not to be identified with that law, for it is conceived of as something concrete, resting entirely on the fact that men observe it, and possibly not always in accordance with abstract justice.

We need not here examine the question, which indeed our data do not enable us to answer, by what practical methods or processes the Roman Courts proceeded to frame this Law of the Nations; whether, and if so how

<sup>1</sup> The word *gens*, though we commonly translate it 'nation,' was originally used to denote a clan or sept (e.g. Fabii, Julii), and always retained this as one of its meanings. Can this original sense have had anything to do with the earliest legal meaning of the term? One is tempted to conjecture that there might have been a sort of common law of the *gentes*, recognized in contradistinction to the law of each *gens*, but when we find the term in the time of Cicero, it has the sense mentioned in the text, and I do not know of any facts supporting such a conjecture. So far back as one can go *ius Quiritium* is the term applied to the law of the city as a whole.

<sup>2</sup> Though *ius gentium* is sometimes the term used to describe those usages which as being common to all men were in fact observed by States in their relation to one another; cf. Sallust, *Jug.* c. 35; Livy, i. 14; v. 36. Obviously the rules which all nations recognize would be those which they would apply in their dealings with one another.

<sup>3</sup> See the article *Ius Gentium* in Professor H. Nettleship's *Contributions to Latin Lexicography*. He thinks the term had become a popular one before the time of Cicero.

far, they actually did inquire into the customs and rules of the peoples with whom they came most in contact; or whether they were content to proceed upon the general principles of justice and utility; or whether they followed in the main their own law, stripping off its technicalities while preserving its substance. All three methods might be more or less used. But probably they were chiefly influenced by the customs which they found actually recognized by traders from various nationalities resident at Rome. Before the Courts stepped in to administer justice among the strangers, commercial practice had doubtless created a body of customs which were in fact observed, though no express and binding sanction had yet been given to them. One may illustrate this by recalling the fact that much of our own mercantile law is based upon customs of merchants which English Courts, seeing them recognized by honest traders as actually binding, and seeing that contracts were made with regard to them, and that they were in fact understood as being conditions implied in such contracts, proceeded to enforce, treating them as being really part of the contract. This process of turning custom into law went on actively so late as the time of Lord Mansfield, of whom it has been said that he and the juries at the Guildhall in the City of London created no small part of English commercial law. So the English officials, when they began to administer justice among traders in India, found a number of customs actually observed, and built up a body of law out of these rules, *plus* their own notions of what was fair and just, together with such recollections as they had of the principles of English law<sup>1</sup>.

What is certain is that the Romans did not formally enact any parts of this new Law of the Nations. It was built up solely by the practice of the courts and the action of the jurists; and it took definite shape only in

<sup>1</sup> See Essay II, pp. 97-101.

the edicts of the Praetors and Aediles<sup>1</sup>. By the end of the Republic it had grown to considerable dimensions, and long before that date had begun to exercise a potent influence upon the development of the law which belonged to citizens only, and which was therefore called *ius civile*. Such dicta of the professional jurists regarding *ius gentium* as we possess belong to a later time, and the earliest authority who mentions it is Cicero. He says that 'our ancestors distinguished the law of citizens from the law of the nations, that which is proper to citizens not being therewith part of the law of the nations, whereas that which belongs to the law of the nations ought to belong to the law of citizens also'<sup>2</sup>; and in several other passages he contrasts the two kinds of law, observing in one place that the *ius gentium*, like part of the *ius civile*, is unwritten, *i.e.* not included in statutory enactments<sup>3</sup>. He talks of it as a body of positive law resting on custom and agreement, but unfortunately does not tell us how that particular part of it which the Roman Courts administered had been formed. We may, however, safely conclude that the procedure of the magistrates in granting actions and allowing defences in certain cases had been the chief agency whereby it received a definite form, and that the materials were (as already observed) chiefly furnished by the habits of dealing which had arisen among the strangers resident at Rome in their intercourse with Romans and with one another, in their bargains and transfers of property, in the forms and conditions relating to loan and pledge and selling and hiring, such conditions being usually embodied in documents to which a specific legal

<sup>1</sup> See as to this Essay XIV, p. 707. Thus Praetor-made law, *ius honorarium*, very largely coincides with and covers the field of *ius gentium*, but the two are by no means identical. The *actio Publiciana*, for instance, belonged to the former, but not (except so far as natural equity suggested it) to the latter. So in *Digest* xvi. 3, 31 'merum ius gentium' is opposed to 'praecepta civilia et praetoria.'

<sup>2</sup> 'Itaque maiores aliud ius gentium, aliud ius civile esse voluerunt. Quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet' (*De Off.* iii. 17. 69).

<sup>3</sup> *Orat. Partit.* xxxvii. 130.

effect would be attached. Broadly speaking, the basis or source of the underlying principles of *ius gentium* would as respects commercial matters be found in good faith and common sense, and as respects family matters and inheritance in natural affection.

This sketch, slight as it is, may suffice to indicate how the Romans were brought to deal in a concrete and practical way with the phenomenon we were considering on its abstract side, viz. the distinction between customs and laws which are substantially common to all (more or less civilized) communities, and those which are peculiar to one or a few only. That which struck a Greek thinker who reflected on the state of the Mediterranean world in the fifth or fourth century B.C., viz. virtual uniformity in some customs and laws, endless diversity in others, struck every Roman magistrate who had to preside in urban or provincial courts during the third and second centuries B.C. The Greek formed a philosophic theory: the Roman, being a ruler, was forced to construct a working system. But the Greek had little occasion to apply his theory; and the Roman did not think of basing his system on any theory at all. His *ius gentium* grew up and spread out and bore fruit, and was already influencing both the old law of Rome herself and the administration of Roman courts in the provinces before (so far as we know) anybody had thought of connecting the Law of Nature with the Law of the Nations.

#### IV. CONNEXION OF THE LAW OF NATURE WITH THE LAW OF THE NATIONS.

This connexion belongs to the last days of the Roman Republic, and was probably due to that increased interest in philosophy and ethics which owed so much to the literary activity of Cicero, who was not only a statesman and an orator, but an ardent student of philosophy and a voluminous writer on philosophical, especially

ethical, topics. It is the fashion now to depreciate Marcus Tullius. He was probably also depreciated in his own time. The learned black-letter lawyers, who had been his fellow pupils under Q. Mucius the Augur, doubtless said of him, as Sugden is reported to have said of Lord Chancellor Brougham, that if only he knew a little about law he would know something about everything. And the Greek philosophers with whom he loved to discourse probably hinted to one another, when their eloquent patron was not by, that, after all, no Roman would ever be a thinker. We can admit a measure of truth in both criticisms. But Wisdom is justified of all her children, and Cicero has outlived both the lawyers and the philosophers of his own time. His eager and capacious intellect, playing round political and legal, as well as metaphysical and moral inquiries, and using a brilliant style to popularize and render attractive all that he touched, gave a currency to the ideas of Greek speculators which made them tell more widely than ever before upon the Roman mind, and all the more so when, in the generation that succeeded his own, the career of political distinction through forensic and senatorial and platform oratory began to be closed by the growth of an absolute monarchy. Indeed Cicero's own philosophical treatises were due to that retirement from active political life which the ascendancy of Julius Caesar caused; and his composition of them was prompted (as he tells us) by a wish to stimulate the flagging public spirit of his younger contemporaries.

(Now the theory of the Law of Nature, suggested by Heraclitus and Socrates, preached more actively by Zeno and Chrysippus, had been much discussed and widely diffused during the centuries between Aristotle and Cicero. Its acceptance and influence were aided by the changes which had been going on in the world, the Hellenization of Asia, the admixture of religions and mythologies, and that more easy and frequent intercourse between the Western and Eastern Mediter-

ranean countries which enabled the peoples to know more of one another. The doctrine, though not confined to the Stoics, received among them special prominence, and became a corner-stone of their ethical teaching. Moral duty was by them practically deduced from, and identified with, the Law of Nature. Cicero, though he would not have described himself as a Stoic, substantially adopts their language on this point, and lays great stress on Nature as the source of the highest law and morality, invoking the doctrine in his speeches as well as expounding it in treatises<sup>1</sup>. With him the Law of Nature springs from God, is inborn in men, is older than all the ages, is everywhere the same, cannot be in any wise altered or repealed. It is the basis of all morality. It ought to prescribe the provisions of positive law far more extensively than it in fact does, and to give that law a higher and more truly moral character. We might expect Cicero to go on, if not to identify it with the *ius gentium* which he contrasts with the peculiar law of Rome, at any rate to describe it as the source and parent of *ius gentium*. This, however, he does not actually do, though more than once he comes near it<sup>2</sup>. *Ius gentium* is to him a part of positive law, though much wider in its range than *ius civile*, whereas the Law of Nature is altogether an ethereal thing, eternal, unchangeable, needing no human authority to support it, in fact St. Paul's 'law written on the hearts of men.'

Although Cicero was the most copious and eloquent writer among those Romans who pursued the study of philosophy in his generation, he did not by any means

<sup>1</sup> See especially the fragment of his *De Republica* preserved by Lactantius, *Div. Inst.* vi. 8, 7.

<sup>2</sup> Many writers have, however, thought that Cicero did mean to identify *ius gentium* and *ius naturae*, basing themselves on *De Off.* iii. 17, 69, and iii. 5, 23. Cf. also the words 'lege . . . naturae, communi iure gentium' in *De Harusç. Respons.* 15, 32, and 'consensio omnium gentium lex naturae putanda est' in *Tusc. Disp.* i. 13. The point is argued, at great length, by Voigt (*op. cit.* vol. i. pp. 65-75, 213-219, and Appendix II). Nor does Cicero quite precisely define the relation of his Laws of Nature to positive law. He writes rather as a moralist than as a jurist.

stand alone. Most of the prominent statesmen, orators, and authors occupied themselves with ethical speculation; and this was no less true of the leading spirits of the following century. The great jurists of the Augustan and post-Augustan age, such as Antistius Labeo, Massurius Sabinus, and Cassius, refer to the Law of Nature as a source of law already familiar. Two influences were indeed at work, which gave to philosophy a greater prominence than it had perhaps ever enjoyed before or has ever enjoyed since. Faith in the old religions having practically vanished from the educated classes, some substitute was needed, and the more pure and earnest minds sought this in philosophy. The career of political life having been, in its old free form, closed by the vesting of all real power in the hands of one person, who presently became recognized as legally sovereign, men were more and more led to seek solace, or enjoyment, or at any rate occupation, in the study of metaphysics and ethics. Jurisprudence continued to be pursued by many of the most powerful and cultivated intellects; and philosophy was not only a main part of education which such men received, but claimed much of their time and thought. They were so permeated by it, that both its methods and its principles must needs influence their treatment of legal matters, whether as writers, or as magistrates, or as advisers of the monarch and framers of legislation. The idea of the Law of Nature as the source of morality and the true foundation of all civil laws, the idea of all mankind as forming one natural community of which all are citizens, and in which all are equal in the eyes of Nature—this idea had come to pervade the minds of thinking men, whether or no they were professed adherents of any school of philosophy. It was taken as a generally accepted truth, and was therefore assumed and referred to without adducing arguments on its behalf, far removed from the actual facts of the world as was the ideal to which it pointed.

The growth and acceptance of the doctrine may be compared with the process whereby certain notions, now pretty generally received in nearly all civilized countries, have made their way during the last two centuries. Such are the doctrines known in America as those of the Declaration of Independence, and in France as the principles of 1789. Such is the doctrine of the freedom of the individual conscience, and the consequent wrongfulness of religious persecution. These doctrines began to be asserted (especially in England) during the seventeenth century. They were diffused slowly, and constantly denied by the powers that be, but they have been now virtually accepted in principle by all thinking men. Few think it necessary to argue on their behalf; yet they are very far from having secured their full effect, for in some countries the rulers refuse to apply them, and in almost all countries they are admitted to be subject to exceptions which render their full application difficult. They represent rather an ideal towards which society is held to be moving, than a positive basis on which existing society is built.

Although, however, the Romans of the earlier imperial period saw that their conception of the Law of Nature was a long way from being realizable in such a world as was then present, they also discovered in the changes that had passed upon that world much which recommended the conception as true and sound. [The extension of Roman dominion was completing the process which the conquests of Alexander the Great had begun. Eastern religions invaded the West; Greek and Latin became world-languages; commerce brought all the Mediterranean peoples together; nations and nationalities were blent and ultimately fused in a common subjection to Rome. The provincial rose as the old Roman citizen sank, so that equality came nearer and nearer. The old mutually exclusive systems of citizenship and law seemed obsolete; and therewith the traditional reverence for the ancient legal institutions

of the Quirites passed away, even from the conservative minds of lawyers<sup>1</sup>. In particular the idea of a community of all mankind, as opposed to the small civic communities of earlier days, began to approach a realization in the great empire which had gathered all civilized men under its wings, had secured for them peace, order, and a just administration of the laws, and had admitted every one, whatever his race, tongue, or birth-place, to a career of honourable ambition in civil and military office, a career whose possibilities included even the imperial dignity itself.

For this all-embracing commonwealth, this *societas omnium hominum*, of which the Greek philosophers and Cicero had written, and which had taken concrete shape in the Roman Empire, there would seem to be needed some common law, since the ideas of law and state were correlative<sup>2</sup>, according to the dictum, *Quid est civitas nisi iuris societas*<sup>3</sup>? Now there was a law which could actually be applied to all Roman subjects, non-citizens and citizens alike, and which was supposed to be the law common to all men as being the law which all nations used, and which had therefore been applied by Roman Courts where persons outside the pale of Roman law proper were concerned. [Just as the law of Rome drew its authority from the will of the people, whether signified expressly by enactments or tacitly by usage and consent, so this general law rested on custom, on the understanding and will of collective mankind, evidenced by their practice; and its source was therefore one which met and satisfied the view that the community are the source of law.] Now this common law of mankind was

<sup>1</sup> There does not, however, seem to be any ground for the notion that the Roman lawyers ever despised *ius gentium* as only fit for inferior people; that they deemed it 'an ignoble appendage to their civil law,' as Sir H. Maine says. That this was ever their feeling is mere surmise. No traces of such a view appear in our authorities.

<sup>2</sup> Not, of course, in the Austinian sense that law is only what the State has expressly enacted, for the ancients always dwell upon custom (*mores maiorum, consuetudo inveterata, consensus utentium*) as a chief source of law.

<sup>3</sup> Cic. *De Rep.* i. 52. 49.

the *ius gentium*. Though in point of fact gathered and moulded by Roman Courts, it was deemed to represent the essence of the law which prevailed among various neighbour peoples, and of the usages which common sense and the needs of commerce had sanctioned among men in general, wherever dwelling. It was conceived of as being common to all mankind (*ius commune omnium hominum*<sup>1</sup>) (*omni humano generi commune*<sup>2</sup>), or as the law which exists among all peoples (*ius quod apud omnes populos peraeque custoditur*<sup>3</sup>) (*ius quo gentes humanae utuntur*<sup>4</sup>). It was applicable to persons who had no rights of citizens in any city (*ἀπόλιδες*)<sup>5</sup>. It was coeval with the human race itself (*cum ipso humano genere proditum*)<sup>6</sup>. It was in all these respects contrasted with *ius civile*, just as the Law of Nature (*ius naturale*) was similarly contrasted. Finally it was the law which natural reason had created (*ius quod naturalis ratio constituit*)<sup>7</sup>. When this point had been reached, it became practically identical with the Law of Nature, and the identity, implicitly suggested in Cicero's remark that the agreement of all nations must be deemed a law of nature<sup>8</sup> was formally enounced by jurists at least as early as the time of Hadrian. In Justinian's *Institutes* the identification is complete.

A third conception, to which reference has not yet been made, contributed to this fusion, viz. the conception of Equity (*aequum et bonum, aequitas*). Equity means to the Romans fairness, right feeling, the regard for substantial as opposed to formal and technical justice, the kind of conduct which would approve itself to a man of

<sup>1</sup> Gaius, *Inst.* i. 1; *Dig.* i. 1, 9.

<sup>2</sup> In *Inst.* *Inst.* i. 2, 2, taken from Marcian.

<sup>3</sup> Gaius, *Inst.* i. 2.

<sup>4</sup> Ulpian in *Dig.* i. 1, 1, 4.

<sup>5</sup> Marcian in *Dig.* xlviii. 19, 17.

<sup>6</sup> Gaius in *Dig.* xli, 1, 1, *pr.*

<sup>7</sup> Gaius, *Inst.* i. 1. The formal express and specific identification is to be found only in some jurists, and is most explicitly stated by Gaius. There does not, however, seem to be sufficient ground for thinking (as Voigt, *op. cit.*, argues) that there was any real difference of opinion among them. Their language on these points is seldom precise.

<sup>8</sup> See p. 577, note 2, *supra*.

honour and conscience. It completes the idea of the higher kind of law by adding a third element, or rather a third source, that which springs from the breast of man and represents his natural sense of justice, his sympathetic good feeling towards his fellow men. Thus we may say that seen from the point of view of theology or metaphysics, this universal or Natural law is prescribed by God or by Nature. Seen from that of history and political science, it issues from the will of mankind, who, organized as nations, have created it by custom and practice. Seen from the side of ethics and psychology, it represents the tendencies and habits of the typical good man, who desires to treat his neighbour as he would wish to be himself treated. The coincidence of these three streams of origin or lines of thought enlarges the conception, defines it, gives to it, taken as a whole, a harmonious symmetry. Thus it becomes complete on its theoretical as well as on its practical side.

In the Roman jurists of the best age we note three qualities not always united in lawyers—a love for theoretical perfection, an attachment to ancient usage, and a sense of practical convenience. The first delivered them from the tyranny of the second, the second moderated their devotion to the first, the third found a middle term between the other two and guided them in the adjustment of principle to fact. The blending of the notion of Natural Law, as the ethical standard of conduct and the ideal of good legislation, with the notion of the law formed by the usages and approved by the common sense of all nations as embodying what was practically useful and convenient, satisfied both the philosophical and the historical instincts of the jurist. Had there been a similar combination of ideas and habits in the English jurists of the seventeenth and eighteenth centuries, our legal progress would have been more rapid, and, if the phrase be permissible, more ordered and rhythmical.

## V. RELATION OF NATURAL LAW TO GENERAL CUSTOMARY LAW.

There are, however, misconceptions against which we must be on our guard in grasping and appraising this identification of Natural Law with the sum of that which is common in the customs of mankind.

In the first place it was not a complete identification. There were some points in which Natural Law and the Law of the Nations differed, and one of these was of profound importance. That point was Slavery. It was universal in the ancient world, and so must be deemed a part of *ius gentium*. But philosophers had pointed out (even before the time of Cicero) that it was contrary to nature<sup>1</sup>. Here, therefore, is a large department in which the sanction of Nature could not be claimed for this part of *ius gentium* any more than it could for much of *ius civile*. Slavery, says one jurist, is an institution of the Law of the Nations, whereby one man is subjected to the ownership of another against Nature<sup>2</sup>. And where we find the rigour of the old law of Slavery modified, this is always said to be in deference to nature and humanity, not to anything in *ius gentium*. And the Roman jurists indeed go so far as to hold that by Nature all men are equal<sup>3</sup>. So on the other side there were some provisions of statute law (for instance, in the rules regarding inheritance) which, though they had been suggested by principles ascribable to the Law of Nature, were, as resting on Roman statutes, referred to the category of *ius civile* rather than to that of *ius gentium*.

Secondly, the Romans did not, when they referred any particular institution to the *ius gentium*, necessarily intend to convey that it was universally prevalent. The origin of *hypotheca* for instance (mortgage of immova-

<sup>1</sup> Ulpian in *Dig.* l. 17, 32.

<sup>2</sup> *Dig.* l. 5, 4, § 1: cf. *Inst.* l. 5; Gaius, *Inst.* i. 52.

<sup>3</sup> The doctrine that slavery is against nature was older than Aristotle, who does not accept it. The orator Alcidas (a contemporary of Socrates) said *ἐλευθέριος ἀφῆκε πάντας θεός· οὐδένα δούλον ἢ φύσις πεποίηκεν*. See W. L. Newman's *Politics of Aristotle*, Introduction, p. 141.

bles) and of the *syngraphe* (written acknowledgement of a debt) was due to Greek usage, and by no means general over the world. These legal institutions, however, since they did not belong to Roman law proper, were held to be part of *ius gentium*.

Thirdly, there is no ground for thinking that when the Roman jurists said that Natural Reason was the source of *ius gentium*, they had altered their historical view of the origin and character of the latter body of law, or fancied that there ever had been an age, however remote, however simple and primitive, during which its precepts, in any concrete shape they knew or could imagine, had actually prevailed among mankind. The expression 'lost Code of Nature,' which a distinguished writer has used<sup>1</sup>, is therefore an unfortunate one, for it seems to imply that the Romans were under the belief that there had once been a so-called State of Nature, in which the *ius gentium* served as law. So far were they from such a delusion that they ascribe to *ius gentium* war, captivity, slavery, and all the consequences of these facts, while in the golden age, the *Saturnia regna* of the poets, all men were free<sup>2</sup> and war was unknown—

'Necdum etiam audierant inflari classica, necdum  
Impositos duris crepitare incudibus enses<sup>3</sup>.'

Their identification of the Law of Nature, which they accepted as a doctrine of philosophy, with the Law of Nations, which their courts had been administering and their text-writers expounding for two or three centuries at least, affected neither the essentially ideal character of the former nor the distinctly practical character of

<sup>1</sup> Sir H. Maine in *Ancient Law*. It will be seen that the view which he takes of *ius gentium* and *ius naturae* seems to me to be in several points at variance with the facts; but I need hardly say that no one feels more strongly than I do the value of the stimulus to English study and thought on these subjects which his fertile mind and brilliant treatment have given, and for which all subsequent writers must be grateful.

<sup>2</sup> Cf. Macrob. *Saturn.* i. 7; and Justin. *Hist.* xliii. 1, who says that not only slavery but also private property was unknown under the reign of Saturn, so great was his justice!

<sup>3</sup> Virg. *Georg.* ii. 539.

the latter. Had it done either of these things it might have worked for evil. But in point of fact it did not palpably quicken the pace of legal reform, nor did it induce any theoretic vagueness in their views of law, or suggest crochets or subtleties which could impede the manipulation of positive rules. The jurists use the two terms as practically synonymous, though generally employing *ius naturae* or *naturalis ratio* when they wish to lay stress on the motive or ground of a rule, *ius gentium* when they are thinking of it in its practical application. To borrow the language of logic, the connotation of the two terms is different, while their denotation (save as aforesaid, and especially save as regards slavery) is the same.

Thus happily united by a synthesis which satisfied at once the practical good sense and the philosophic temper of the Roman jurists, the two conceptions of the Law of Nature and the Common Law of Mankind went on their way rejoicing. But after a while an event befell which deprived the latter expression of its ancient concrete basis, and rendered it, except for historical purposes, and as a description of a body of rules of a particular historical origin, virtually obsolete. This was the extension of Roman citizenship to all the subjects of the Roman Empire by an edict of the Emperor Antoninus Caracalla between 212 and 217 A.D., an act which destroyed the distinction between *ius gentium* and *ius civile* so far as the persons governed by each were concerned, for there were thereafter comparatively few *peregrini* (non-citizen subjects), since *ius civile* was now enjoyed by all the dwellers in the Roman world<sup>1</sup>. This may be

<sup>1</sup> There remained as aliens (1) the class called *deditici*, the lowest species of freedmen, (2) persons deprived of citizenship as a punishment for crime, (3) foreigners, *i.e.* subjects of some other State temporarily resident in the Empire, and probably also persons imperfectly manumitted subsequently to the Edict, together (possibly) with the inhabitants of territories added to the Empire subsequently to the Edict. See Muirhead (*Historical Introduction to the Private Law of Rome*, 2nd edition, by Professor Goudy, p. 319), and, for a fuller discussion of the topic, Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, chap. vi.

one of the reasons why, in the constitutions of the Emperors collected in the Codes of Theodosius the Second (A.D. 438) and of Justinian (A.D. 534), constitutions the earliest of which date from Hadrian, the term *ius gentium* never occurs. It is frequent in the *Institutes* of Justinian (A.D. 533), but that book (based on the *Institutes* of Gaius) is, although a statute, yet primarily a manual for learners who were going to use the extracts from old jurists contained in the Digest, so that the term could not be omitted. When the later Emperors wish to assign a ground for some enactment which they are issuing, they commonly speak of Nature, or Natural Reason, or Humanity, or Equity, using these words almost indiscriminately to describe the same thing.

#### VI. MEANING ATTACHED BY THE ROMAN JURISTS TO NATURE.

Now let us inquire a little more closely what the Roman jurists and legislators meant to convey when they talk of Nature, or the Law of Nature, and what are the positive rules of law which they ascribe to this source, or established in obedience to this principle.

The following senses in which they use the word Nature may be enumerated, though these cannot be sharply distinguished, for some run into others.

1. The character and quality of an object, or of a living creature, or of a legal act or conception (e.g. *natura venenorum*, *natura hominum*, *natura apium* (*fera est*), *natura contractus*, *natura dotis*).

2. The physical system of the Universe (*rerum natura*), and the character which it bears. Thus it is said that Nature has taken some objects (e.g. the sea and air) out of the possibility of private ownership.

3. The physical ground of certain relations among men, as for instance of blood relationship (*cognitionem natura constituit*). So the rule that children born out of

wedlock follow the condition of the mother is ascribed to Nature (*liberi naturales*); so the rule that persons under puberty should have a guardian.

4. Reason, whether in the sense of logic and philosophical principle on the one hand, or as meaning what we should call 'common sense' on the other, is often denoted by the term Nature. Nature (it is said) prescribes that no one should profit by harm and injury to another, and that whoever bears the disadvantages of a thing should also reap the advantages of it; and Nature allows a buyer to make a profit on a re-sale. The expression Natural Reason (*naturalis ratio*) is commonly used when the former meaning is to be conveyed, and Paulus indeed says that Natural Reason is a sort of tacit law. To use the term Reason as equivalent to common sense and convenience comes very near the doctrine that Utility is the basis of law, and the word *utilitas* is frequently employed by the Romans.

5. Good feeling and the general moral sense of mankind. For instance, Nature directs that parents should be supported by their children, and that a freedman should render a certain respect and help to his patron. Nature prohibits theft, and makes certain offences (*e.g.* adultery) disgraceful, while other offences are not necessarily base (*turpia*). So—and this is an interesting illustration of Roman sentiment—it is against Nature to contemplate the probability that a freeman may become a slave—although this is an event which may sometimes happen. One may refer either to this or to the preceding category the ascription to Nature of the principle that faith must be kept by a debtor, even where he has not bound himself in a formal way. (*Is Natura debet quem iure gentium dare oportet, cuius fidem secuti sumus.*)

One jurist only, Ulpian, gives a yet further sense to the term Law of Nature, making it cover those instincts and physical relations which other animals have in common with man, and which may be called the raw mate-

rial upon which Custom acts<sup>1</sup>. But this fancy of his, which appears now and then in other ancient writers<sup>2</sup>, and received great attention in the Middle Ages because the passage was embodied in Justinian's *Institutes*, is devoid of practical importance even for Ulpian's own treatment of legal topics. It has been much ridiculed by the moderns, but has recently received a sort of reinforcement or illustration from an unexpected quarter. Mr. Darwin has suggested that the origin of our moral ideas is to be sought in the accumulated experience of animals, which in the course of long ages ripened, to some slight extent, in the higher species, and ultimately ripened far more completely in man, into the beliefs and usages which govern the life of primitive peoples, and out of which morality has been insensibly developed in comparatively recent times. Upon any such hypothesis the gap between man and other animals would become less wide, and a certain community might be ascribed to them with man in what may be called the rudimentary protoplasm of customary law.

In its practical applications, the idea of Nature or the Law of Nature, blent with the idea of Equity (for the two terms are in some departments, and in the mouths of many jurists, equivalent and interchangeable), extends itself over nearly the whole field of law. It supplements or modifies the relations of parents and children, of patrons and freedmen, and even of slaves, as these relations had been established by the ancient strict law of Rome. A slave is to *ius civile* merely a thing, but a regard for Nature causes him to be treated as being in

<sup>1</sup> 'Natural Law is that which Nature has taught all animals; for that kind of law is not peculiar to mankind, but is common to all animals. . . . Hence comes that union of the male and female which we call marriage; hence the procreation and bringing up of children.'

<sup>2</sup> As, for instance, in Pliny the Elder's ascription to the lower animals of moral sentiments (*Hist. Nat.* viii. 5; viii. 16, 19; x. 52). Michael Drayton's lines, of birds pairing in spring,—

'And but that Nature by her all-constraining law,  
Each bird to her own kind this season doth invite,'—

hover between Ulpian's 'Law of Nature' and the 'Laws of Nature' of modern science.

some respects a person. In the law of property, of inheritance, of obligations, and of procedure, a great many principles drawn from this source have been embodied in rules which qualify or supersede the rigour of the older law in most important points. It is only by examining these in detail that the skill, and tact, and sound judgement, which the Romans showed in working out the idea, can be duly appreciated. To enumerate them here would, however, be impossible: one might as well try to enumerate the numerous points in which Equity has affected and amended the common law of England.

Speaking broadly, the Law of Nature represented to the Romans that which is conformable to Reason, to the best side of Human Nature, to an elevated morality, to practical good sense, to general convenience. It is Simple and Rational, as opposed to that which is Artificial or Arbitrary. It is Universal, as opposed to that which is Local or National. It is superior to all other law because it belongs to mankind as mankind, and is the expression of the purpose of the Deity or of the highest reason of man. It is therefore Natural, not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened, through the teachings of Reason<sup>1</sup>. But if any disciple of Bentham, looking not at the sonorous language occasionally used to describe its origin, but at its practical applications, calls it the expression of good sense and good feeling, the law which springs from an enlightened view of Utility, he will not be far wrong, as indeed the idea of practical convenience is frequently associated with those of Nature and Reason in the Roman texts<sup>2</sup>.

<sup>1</sup> This is, broadly speaking, the view of the Classical jurists. But occasionally, especially in late times, phrases are used which point to primitive societies as governed by the natural law: e.g. *Novell. Inst.* lxxxix. c. 12, § 5.

<sup>2</sup> So in a fragment preserved by Dositheus, a jurist of classical times says of 'ius naturale vel gentium'—'omnes nationes similiter eo utuntur: quod enim bonum et aequum est omnium utilitati convenit.'

A modern precisian might say that the Romans ought to have called it not 'the Law of Nature,' but 'materials supplied by Nature for the creation of a law,' a basis for law rather than the law itself. To the Romans, however, such a criticism would probably have seemed trivial. They would, had the distinction been propounded to them, have replied that they knew what the critic meant, and had perceived it already; but that they were concerned with things, not words, and having a practical end in view, were not careful about logical or grammatical minutiae.

This conception, or at any rate the attempt to apply this conception to Positive Law, would seem to be exposed to two dangers. One is that of wasting time and pains in hunting for those institutions or rules which are most characteristic of man in the earlier stages of his progress, or which have been in fact most generally in vogue among men. This danger the Roman jurists completely avoided. Their Law of Nature had nothing to do with any so-called State of Nature, and they never troubled themselves about primitive man, leaving him to the poets and the philosophers. And though they talked of their *ius gentium* as roughly equivalent to their *ius naturae*, we do not find them endeavouring to support their view of what is reasonable and natural by instances drawn from such and such peoples who had adopted the rules they had themselves made part of their *ius gentium*<sup>1</sup>. They are content to ascribe to *ius gentium* that which is so obviously reasonable and convenient that the general usage of mankind approves it, such as the principle that the shores of the sea are open to the common use of all (a principle which, however, English and Scottish law have never fully admitted), the principle that a thing which has no owner becomes the

<sup>1</sup> Although they sometimes dwell on the fact that an institution is to be found among all nations. So Gaius observes of Guardianship, 'Impuberes in tutela esse omnium civitatum in re contingit, quia id naturali rationi conveniens est ut is, qui perfectae aetatis non sit, alterius tutela regatur; nec fere ulla civitas est in qua non licet parentibus liberis suis impuberibus testamento tutorem dare' (*Inst.* i. 189).

property of the finder, the principle that a debtor ought to pay his debts. *Redde quod debes aequissima vox est, et ius gentium prae se ferens.*

The other danger is that the idea of Nature, as the true guide to the making and interpreting of law, may lead to speculative vagueness, and that the identification of Nature with Morality may tempt the legislator or the judge into efforts to enforce by law duties best left to purely moral sanctions. This danger also the Romans escaped. They escaped it by virtue of their eminent good sense and their practical training. The lofty precepts of morality which they were fond of proclaiming, and which they sometimes declare it to be the duty of the lawyer to teach and of the magistrate to apply, had after all not much more to do with the way in which they built up the law than the flutings of the columns or the carvings on the windows have to do with the solid structure of an edifice. These decorations adorned the Temple of Justice, but were never suffered to interfere either with its stability or with its convenience for the use of men. In point of fact, the rules of Roman law, down to the age of Constantine, whose successors, wanting the sage advisers of an earlier day, tried some foolish experiments, furnish a model of the way in which moral principles should be applied to positive law. Though the Romans did not in theory draw any very clear line between the sphere of law and that of morals, they succeeded admirably in practice in keeping their moral zeal on the safe side of the line which divides the standard of conduct which the State may, and that which it had better not, try to enforce; while they certainly did impart to the law as it left their hands a spirit of honour, good faith, and equitable fairness which modern systems have never surpassed, and which is in some respects higher than that of our own English law.

The Roman jurists of the first three centuries of the Empire were a unique phenomenon in the history of

mankind, and they had a unique opportunity. They were at once the makers, the expounders, and the appliers of law. They worked for the whole civilized world. They were hampered by no meddlesome legislatures, for legislatures did not exist, and hardly at all by capricious monarchs, for the good Emperors encouraged them, while the voluptuaries, as well as the unlettered soldiers, left them alone. Their only restraint was that useful and necessary one which dwells in the deference of the wise for one another, and in the respect of the leaders of a great profession for the opinion of the profession as a whole. They were not indeed philosopher-kings in Plato's sense, but they were sufficiently imbued with the spirit of philosophy to value principle and to rise superior to prejudice. Accordingly they were able to do a work which has been of inestimable value for all time, since it has become, like the philosophical ideas of the Greeks and the religious ideas of the Semites, part of the common heritage of mankind. Rome is the only city to which it has been given to rule the whole of the civilized world, once as a temporal, once as a spiritual power. In both phases she welded the diverse and incongruous elements into a united body, whose elements, even when they had again been disjoined, retained traces of their former union. And on both occasions it was largely through law that she worked, the ecclesiastical law of her later period being an efflux of the civil law of her earlier.

We have now traced the origin and growth of the conception of a Law of Nature in the ancient world, and have perceived how, having taken shape and received an ethical colour among the Greeks, it was turned to practical account by the Romans. It was not to them, as it has often been deemed by recent English writers, a purely negative and barren conception, nor was it wholly a destructive, and, if the expression may be permitted, a ground-clearing conception. Doubtless a large part of its work was done in first undermining and finally

overcoming the traditional authority of the old peculiar and usually cumbrous Law of the City (*ius quiritorium*), which was often harsh and sometimes arbitrary. Another part was done in explaining old rules so as to amend their operation. But the conception of Nature as a source of Law was also a corrective and expansive force, not merely in sweeping away what had become obsolete, but also in establishing what was new and suited to the time. It found a solid basis for law in the reason and needs of mankind, and it softened the transition from the old to the new, first by developing the inner meaning of the old rules while rejecting their form, extracting the kernel of reason from the nut of tradition, and secondly by appealing to the common sense and general usage of mankind, embodied in the *ius gentium*, as evidence that Nature and Utility were really one, the first being the source of human reason, the latter supplying the grounds on which reason worked. Thus the idea of Nature, coupled with that of customs generally observed by mankind, which embodied their experience, became a fertile and creative idea, which turned the law of a city into the law of the world, and made it fit to be a model for succeeding ages.

## VII. THE LAW OF NATURE IN THE MIDDLE AGES.

When the succession of Roman jurists as a professional class came to an end, and the level of culture in the whole community declined in Western Europe after the destruction of imperial power in the Western provinces, the ecclesiastics, among some of whom a tincture of legal knowledge remained, naturally identified the law of Nature with the law of God. We have this clearly expressed in the passages from Isidore of Seville (who wrote early in the seventh century) which obtained immense circulation and influence by being incorporated (in the twelfth century) in the introductory paragraphs

of the *Decretum* of Gratian, the oldest part of the collected Canon Law. Isidore says<sup>1</sup>: 'All laws are either divine or human. The divine rest upon Nature, the human upon custom; and the latter accordingly differ among themselves, because different laws have pleased different nations.' Gratian himself, in the paragraph preceding, says: 'Mankind is ruled by two things, natural law and customs. Natural Law is that which is contained in the law and the gospel, whereby every one is commanded to do to another that which he would have done to himself.' This identification, already suggested by the Stoics and by some of the Roman jurists themselves<sup>2</sup>, was inevitable as soon as Christianity appeared on the scene. St. Paul, as we have seen, recognized a law written by God on men's hearts; St. Augustine speaks of the Eternal Law which governs the City of God. Nature—that is to say the Power that rules all things, the Force that is in all things—is, to a Christian, God; as St. Chrysostom says, 'when I speak of Nature I mean God, for it is He who has made the world<sup>3</sup>.' The idea receives its final expression in Dante's identification of the Divine Love with the Force that pervades the universe—

'L'Amor che muove il sol e le altre stelle.'

Accordingly the scholastic philosophers posit a Law of Nature as being the work of God. St. Thomas of Aquinum introduces a useful distinction which exer-

<sup>1</sup> 'Omnes leges aut divinae sunt aut humanae. Divinae natura, humanae moribus constant, ideoque hae discrepant, quoniam aliae aliis gentibus placent. Fas lex divina est: ius lex humana. Transire per agrum alienum fas est, ius non est.'—*Dist. Prima*, c. i. 'Humanum genus duobus regitur, naturali videlicet iure et moribus. Ius naturale est quod in lege et evangelio continetur, quo quisque iubetur alii facere quod sibi vult fieri et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in Evangelio "Omnia quaecunque vultis ut faciant vobis homines, et vos eadem facite illis. Haec est enim lex et prophetarum."' Here the Sermon on the Mount is taken as stating the Law of Nature.

<sup>2</sup> Cf. the citation by Marcian, in *Dig.* i. 3, 2, of the dictum of Demosthenes (*Adv. Aristog.* p. 774) νόμος εὐρημα καὶ δῶρον θεοῦ; and Justinian's *Institutes*, i. 2, § 11 'Naturalia iura, quae apud omnes gentes peraeque servantur, divina quadam providentia semper firma atque immutabilia permanent.'

<sup>3</sup> ὅταν εἶπω τὴν φύσιν, Θεὸν λέγω, ὃ γὰρ τὴν φύσιν δημιουργήσας αὐτὸς ἐστίν.

cised an enduring influence. The Eternal Law which governs all things is the expression of the Reason of God, the supreme Lawgiver. That part of it which is not revealed, but is made known to man by his own reason, may fitly be called Natural Law, as being the outcome of human reason, itself created and directed by the Divine Reason. Thus the sharing in the Eternal Law by a rational creature is Natural Law<sup>1</sup>. And so Suarez says that the Law of Nature is in God the Eternal Law, and in men is the light which carries this eternal law into their souls, being applied by conscience.

I cannot here pursue an inquiry into the treatment of these notions by the scholastic theologians and philosophers, nor by their successors who belong to the school of the Catholic Renaissance in the sixteenth century, for the subject is a vast one. Neither have I space to deal with the students and teachers of the Roman Law during the thirteenth, fourteenth, and fifteenth centuries, of whom however it may be said that Natural Law has in their pages a less definite character than it bore to the ancient jurists, and is more coloured by that ethical atmosphere which they found in the treatment of it by Cicero and Aristotle and by such ecclesiastical authorities as Gratian and St. Thomas. It was during these centuries less widely and effectively used in the sphere of pure law than in those of speculation and actual political controversy. In these latter spheres it played a great part, being appealed to by the advocates as well of imperial as of papal pretensions, the one side claiming its support for the temporal, the other side for the spiritual potentate. All admitted that it stood above both these powers, and some maintained that where either power transgressed it, he might be lawfully resisted by his subjects<sup>2</sup>. Now and then princes put it

<sup>1</sup> *Summa Theologiae*, prima secundae, Q. xciv. 2.

<sup>2</sup> On this subject see the authorities collected and luminously expounded by Professor Dr. Gierke in his *Johannes Althusius*, chap. vi.

forward as a ground for legislation. Philip the Fair of France, proposing to liberate serfs, says (A.D. 1311) that 'every human creature formed in the image of Our Lord ought by natural law to be free.' Now and then a jurist specifies matters in which it limits the legislator's power, as Baldus says, neither Emperor nor Pope could validly authorize the taking of usury<sup>1</sup>. But one can hardly say that the idea emerges as an independently formative power in the growth either of the Canon Law in Europe, or of the law of Islam in the East, for the obvious reason that ecclesiastical systems do not need it. The Bible in Christendom, the Koran where Islam ruled, supplied all the philosophical basis and all such indications of the Divine Will as were needed to give law a moral character. So, although the term is indeed frequently used by mediaeval writers of all types, it is generally used with a theological or ethical bearing. Nature, except in such a sense as was given to it by St. Paul, or in such expressions as were sanctioned by Aristotle or by the texts of the jurists, would have sounded strange, and might have savoured of heterodoxy. As the Chancellor says in the second part of Goethe's *Faust*—

'Natur und Geist! so spricht man nicht zu Christen:  
Deshalb verbrennt man Atheisten.'

Yet throughout this period the place which this conception holds and the function which it discharges in the world of thought, if not in that of practice, are of high import. It is an assertion of the supremacy of the eternal principles of morality, of the duty of princes to obey those principles, of the right of citizens to defend them, if need be even by rebellion or tyrannicide. It proclaims the responsibility to God of all power, whether spiritual or temporal, and the indestructible rights of the indi-

<sup>1</sup> Gierke, *ut supra*. Baldus and other jurists declare that the Emperor 'tenetur ratione naturali, cum ius naturae sit potentius principatu,' and one goes so far as to hold him to be also bound by *ius gentium*. See Arthur Duck, *De Usu et Autoritate Iuris Civilis*, bk. i. chap. iii. § 12.

vidual human being. Finding in the Divine Justice the ultimate source of all law, it imposes a restraint upon the force which positive law has at its command, and sets limits to the validity of positive laws themselves. Whether or no the individualistic spirit of the Teutonic races contributed to this remarkable change from the attitude of the Roman lawyers is a question I will not attempt to discuss. But it is clear that the influence of Christian teaching had, even under a dominant and persecuting ecclesiastical system, stimulated the vindication in the name of Natural Law of principles which are the foundation both of civil and of religious liberty.

#### VIII. THE LAW OF NATURE IN MODERN TIMES.

When the European mind, stimulated by Greek literature and by the ecclesiastical revolt of the sixteenth century, as well as by a group of coincident external causes, began to play freely round the great subjects of thought, a still wider career opened for this ancient conception. The history of that career, however, belongs to the domain of philosophy and of political science rather than to that of jurisprudence. Though it was chiefly from the Roman texts that the men of the Renaissance and Reformation eras drew their notions of Nature and natural law<sup>1</sup>, and though the term *ius gentium* reappears as indicating the recognition of Natural Law by mankind at large, the speculations which these notions inspired turned largely upon such questions as the origin of law in general, a point which, as already observed, had not much occupied the Romans, and (still more) upon the source of authority and political power, and on the right of any constituted authority to demand obedience. The systems of the Middle Ages,

<sup>1</sup> The Romans had been content to derive law (see Essay X, p. 525) from the will of the people, whether expressed directly by legislation or tacitly by customs, and this doctrine continued to be enounced under the autocracy of Justinian much as it had been in Republican times.

which deduced the powers of the Pope from Christ's words to St. Peter, and the powers of the Emperor either directly from God or mediately through the Pope, and which found the source of all other spiritual and temporal power in some sort of delegation from one or other of these potentates, had now vanished, and thinkers were much concerned to find a new and sounder foundation on which to plant the Monarch and the State. Thus Nature came to play a new part: and presently there appeared theories regarding an original State of Nature, a conception not necessarily connected with that of the Law of Nature, yet one which has historically been closely associated therewith. This newly-invented State of Nature was neither the Golden Age of Hesiod, nor the *Saturnia regna* of Virgil, nor the brutish savagery (*mutum et turpe pecus*) of Horace. The man of the State of Nature was highly intelligent, and he was also highly self-assertive. In Hobbes he appears as in perpetual war with his fellows<sup>1</sup>; and that ingenious and uncompromising philosopher finds in this fact the basis of his theory of the State, holding that men, in order to get rid of their distracting strife, agreed with one another to surrender all their natural rights to get what they can for themselves by force into the hands of a Monarch, who thereby acquired a perpetual title to the obedience of all; the contract, since not made with him, being nowise dissoluble in respect of any misfeasance on his part. Locke, on the other hand, argues for a Natural Law which issues from Reason, is prior to all governments, and being superior to them entitles men to vindicate their natural rights against tyranny. With him, therefore, as with most thinkers of the seventeenth and eighteenth (and indeed also of earlier) centuries, Natural Law, being the offspring of Reason and the foundation of Natural Rights, is the ally of freedom. It is invoked, under the name of Natural Right, by the

<sup>1</sup> With Hobbes compare the view of Spinoza, *Tractatus Theologico-Politicus*, cap. xvi.

framers of the Declaration of Independence in 1776, and therewith enters the field of modern politics as a conqueror. Contemporaneously the doctrine was being spread over the Old World by Rousseau in his theory of the State of Nature and the Social Contract (first published in 1762): and it presently became the basis of the Declaration of the Rights of Man made by the French Convention in 1789.

The old theory had now developed into a destructive political force. Any one can see to-day that this revolutionary quality was always latent in it: the singular thing is that, unlike most revolutionary ideas, it should have kept the explosive element so long dormant. That which had been for nearly two thousand years a harmless maxim, almost a commonplace of morality, became in the end of the eighteenth century a mass of dynamite, which shattered an ancient monarchy and shook the European Continent. Liberty, Equality, Fraternity, are virtually implied in the Law of Nature in its Greek no less than in its French dress. They are even imbedded in the Roman conception, but imbedded so deep, and overlaid by so great a weight of positive legal rules and monarchical institutions as to have given no hint of their tremendous possibilities.

Let us return from this glance at the political history of the conception to note three directions in which it has acted, in modern times, within the sphere of law proper.

The first of these is its action upon the law of England. Our system of Equity, built up by the Chancellors, the earlier among them ecclesiastics, takes not only its name but its guiding and formative principles, and many of its positive rules, from the Roman *aequitas*, which was in substance identical with the Law of Nature and the *ius gentium*. For obvious reasons the Chancellors and Masters of the Rolls did not talk much about Nature, and still less would they have talked about *ius gentium*. They referred rather to the law of God and to Reason. But

the ideas were Roman, drawn either from the Canon Law, or directly from the *Digest* and the *Institutes*, and they were applied to English facts in a manner not dissimilar from that of the Roman jurists. The very name, Courts of Conscience, though the conscience may in the immediate sense have been the King's, suggests that moral element on which the Romans insisted so strongly; and the wide, sometimes almost too wide, discretionary power which Equity judges exercised, finds its prototype in the passages in Roman texts which refer to natural equity as the consideration which guides the judge in qualifying, in special cases, the normal strictness of law. A passage in the remarkable little book called *Doctor and Student*, written by Christopher St. German early in the sixteenth century, observes that the term 'Law of Nature' is not much employed by English common lawyers, who generally prefer (it is remarked) to talk of the Law of Reason, and to say that such and such a rule is grounded in reason, or that reason points to such and such a conclusion. Nevertheless the author recognizes the Law of Nature or Reason as one of the three departments of the Law Eternal or Will of God, which is made known to man partly by Reason, partly by Divine revelation in the Scriptures, partly by the orders of princes or of the Church, having an authority derived from God. Some (it is added) say that all the law of England is part of the law of Reason; but St. German prudently doubts whether this can be proved. However, we have here another evidence of the influence of the old conception, and even, in the reference to a general Law of Nature shared in by unreasonable creatures ('for all unreasonable creatures live under a certain rule to them given by Nature, necessary for them to the consideration of their being'), a recurrence of the old notion countenanced by Ulpian, that the Law of Nature extends to the lower animals as well as to mankind. Nor are dicta of English judges referring to the Law of Nature wanting.

Yelverton, under Edward the Fourth, says that in the absence of authority the judges 'should resort to the Law of Nature which is the ground of all laws.' And the law merchant, *i.e.* the customs commonly observed by traders of divers countries, is referred to as part of the Law of Nature by Lord Chancellor Stillington in the same reign<sup>1</sup>. Here we have the old identification of *ius naturae* and *ius gentium* which was beginning in Cicero's days. Still later, the idea reappeared in the doctrine that as the Law of Nature is the foundation of all law, positive enactments plainly repugnant to it or to Common Right and Reason (an equivalent expression) ought to be held invalid. Dicta to this effect were delivered by Lord Coke and by Lord Hobart, and were approved by Lord Holt; though little (if any) effect has ever been given to them. Similar references to the 'eternal principles of justice' as capable of overruling the acts of State legislatures may occasionally be gleaned from the reports of cases decided by American State Courts. Blackstone, repeating Cicero, declares that 'the Law of Nature is binding over all the globe in all countries: no human laws are of any validity if contrary to this<sup>2</sup>'; and he ascribes to 'natural reason and the just construction of law<sup>3</sup>' the extension which his contemporary, Lord Mansfield, gave to the enforcement of implied contracts<sup>3</sup>. So we find the Indian Civil Procedure Code of 1882 laying down that a foreign judgement is not operative as a bar if it is, in the opinion of the Court which deals with the question, 'contrary to natural justice.' But the chief practical applications in recent times of the ancient conception have, very appropriately, arisen where European judicial administration has been brought into contact with foreign semi-civilized peoples on whom the law of their European conquerors could not properly be imposed. Thus in British

<sup>1</sup> I owe these references to Sir F. Pollock's Essay in *Columbia Law Review*, already mentioned.

<sup>2</sup> *Commentaries*, Introd. § 2.

<sup>3</sup> *Ibid.* bk. iii. chap. ix.

India the Courts have been directed to apply 'the principles of justice, equity, and good conscience'<sup>1</sup> in cases where no positive law or usage is found to be applicable.

The second line of action is the part which the terms *ius naturae* and *ius gentium* played in the creation of International Law. That branch of jurisprudence has a twofold origin. It is due partly to customs which grew up among maritime nations in the course of trade, together with the usages and understandings which formed themselves in the diplomatic intercourse of States, partly to the doctrines thought out and delivered by a succession of legal writers, of whom the most famous are Hugo Grotius, Albericus Gentilis, Leibnitz, and Puffendorf. These thinkers, finding that large parts of the field of international relations were not covered by pre-existing custom, or that the existing customs were often discrepant, were obliged to seek for some general and permanent basis whereon to build up a system of positive rules. This basis could not be looked for in the laws of any State or States, because no such laws could have force beyond the limits of those States, and that which was needed was something which all States were to observe. Neither could it be expressly deduced from the Imperial Roman law, because the Romano-Germanic Empire had become 'a mere shadow of its former self, and the old Roman law, being the law of a State (though a World-State), did not contain all the necessary materials, not to add that anything imperial was in the earlier part of the seventeenth century regarded with suspicion by Protestants. Accordingly, Grotius and his successors recurred to the Law of Nature as being, according to the theory of the ancient Roman jurists, a law grounded in reason and valid for all mankind. They used it copiously, and some of them called their writings 'Treatises on the Law of Nature

<sup>1</sup> See on this subject Sir C. P. Ilbert's *Government of India*, chap. vi. The expression 'equity and good conscience' in this connexion is as old as the Charter to the E. India Company of 1683; *ibid.* chap. i. p. 21.

and of Nations,' using the old phrase *ius gentium*<sup>1</sup> in what began to be taken as a new sense<sup>2</sup>. It was indeed their wish to represent this Law of Nature as being essentially a Law for the Nations, *i.e.* a law governing the intercourse of nations. There had in fact been always a close connexion between the two conceptions. For although the Roman jurists of imperial times had employed the term 'Law of the Nations' to denote, not the law applicable between nations, but a part of the law which was applied within the Roman dominions, still they had held their *ius gentium* to have been not only created by the customs of the nations of the world, but therewith also binding on nations generally, and to be indeed (save in some special points) a concrete embodiment of the law which Natural Reason gives to all mankind. Thus the name 'Law of Nature and Nations' became well settled; and it is only in our own days that the more precisely descriptive (if not quite satisfactory)

<sup>1</sup> When he uses the phrase *ius gentium*, Grotius dwells on the fact that its force springs from the Will of the Nations which use it, and he observes that when it is ascribed to the will of all nations it is practically *ius naturale*, but that there is much of it which rests on the will, not of all, but only of many nations, since sometimes we find a *ius gentium* holding good in one part of the world which does not exist in other parts.

<sup>2</sup> Grotius, who (differing but little from the old schoolmen) defines the eternal and immutable Law of Nature as 'dictatum rectae rationis, indicans actui alicui ex eius convenientia aut disconvenientia cum ipsa naturali ratione inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut praecipere,' distinguishes from it the more arbitrary laws of God (*ius voluntarium*) which God may change, whereas He cannot change His own Natural Law any more than He can make two and two anything but four. In another place he observes that Human Nature itself is the mother of natural law, and (through contract) great-grandmother of civil (= positive) law. 'Naturalis iuris mater est ipsa humana natura, quae nos, etiamsi re nulla indigeremus, ad societatem mutuam appetendam ferret' (here repeating Aristotle), 'civilis vero iuris mater est ipsa ex consensu obligatio, quae cum ex naturali iure vim suam habeat, potest natura huius quoque iuris quasi proavia dici' (*Proleg.* 9. 16). He had just before said, 'Cum iuris naturae sit stare pactis, necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest; ab hoc ipso fonte iura civilia fluxerunt. Nam qui se coetui alicui aggregaverant, aut homini hominibusque sublecerant, hi aut expresse promiserant, aut ex negotii natura tacite promississe intelligi, secuturos se id quod aut coetus pars maior, aut hi, quibus delata potestas erat, constituissent.' His *ius divinum voluntarium* is divided into that part which was delivered by God to all mankind at the Creation, after the Flood, and at Christ's coming, and that part which was delivered to Israel alone. It is therefore Revealed Law, and so different from the Law of Nature.

term 'International Law' has, in superseding the older name, acquired a general acceptance.

Thirdly, the expression Law of Nature has, within comparatively recent times, obtained in Germany, France, and Italy, the meaning of the Philosophy of Law, that is to say, the metaphysical basis of legal conceptions and of the most general legal doctrines. Some observations will be found elsewhere in this volume<sup>1</sup> upon this *Naturrecht* or *Droit Naturel*, to which much labour and thought have been devoted by Continental writers, though very little by those of England or of the United States. Whatever value the works of these writers may have for metaphysics or ethics, they shed comparatively little light upon law in its proper sense. The study of Law in general seems nowadays likely to be practically useful chiefly on its concrete side, as what the Romans call a *ius gentium*, that is to say, as a collection and examination, a criticism and appraisal of the rules adopted by civilized nations on topics with which the legislation of all or most of such nations has to deal. In other words, Comparative Jurisprudence promises more fruit than abstract speculation on the foundations of law.

## IX. CONCLUSION.

Except from the lips of the Continental theorists just referred to, we now seldom hear the term Law of Nature. It seems to have vanished from the sphere of politics as well as from positive law. A phrase which was, in the eighteenth century, a potent source of inspiration to some and a tocsin of alarm to others, is not now invoked by either of the two schools of thought which condemn, or seek to overthrow, existing institutions. The Social Democrats do not appeal to Nature, perhaps because they have realized that there never was a state of society in which all property was held in common by

<sup>1</sup> See Essay XII.

large organized communities, and perhaps also because they feel that so complex a system as they desire could not well be described as natural. Anarchists do not appeal to the Law of Nature, because their quarrel is with law altogether, and those among them who are educated enough to desire to find a philosophical basis for their doctrines are also educated enough to feel and honest enough to admit that history, which knows to-day far more about primitive man than she did a century ago, would afford no such basis in any state of nature she could possibly set before us.

Nevertheless the notion sometimes appears, and properly appears, in unexpected places. The British Order in Council for Southern Rhodesia, of October 20, 1898, directs the Courts of that territory to be 'guided in civil cases between natives (*i.e.* Kafirs) by native law, so far as that law is not repugnant to natural justice or morality, or to any Order made by Her Majesty in Council.'

Whether this time-honoured conception has or will hereafter have any practical value for the modern world is a further question, but one for conjecture rather than discussion. We have seen what good work it did for the ancient world in breaking down race prejudices, and in particular for the Roman jurists in giving them a philosophical ideal towards which they could work in expanding and refining the law of the Empire. Nor should we forget that in later times it has sometimes stimulated resistance to oppression, and has corrected the tendency, always present among lawyers and in a ruling class, to defer unduly to tradition and to defend institutions which have become incompatible with reason, and hurtful to the common interest. This kind of work may not seem to be needed from the old idea in our own times. There is not much risk, either in Europe or in North America, that tradition will check reform, or that institutions will be respected and maintained merely because they exist. But our planet may expect,

even according to the most pessimistic physicists, to last for millions of years. Who can say that an idea so ancient, in itself simple, yet capable of taking many aspects, an idea which has had so varied a history and so wide a range of influence, may not have a career reserved for it in the long future which still lies before the human race?

## XII

# THE METHODS OF LEGAL SCIENCE

WHOEVER, having heard the Roman law praised as a philosophical system, enters upon the study of it, and peruses either the *Corpus Iuris Civilis* or the writings of modern German civilians, will presently find himself asking, Where is the legal philosophy of the Romans to be found? By which of them is the subject treated in the abstract? Where are those general views on the nature and essence of law with which a philosophical treatment of it ought to begin? And where is that theory of the historical evolution and development of law which represents another method of treating jurisprudence in a scientific spirit?

There is scarcely anything answering to the student's expectations, either in the original Roman texts, or in those modern books wherein the scattered rules and maxims of the ancient jurists have been rearranged in systematic form. In the proem and introductory title of Justinian's *Institutes* and in the first few titles of his *Digest* may be found some few dicta, more sonorous than exact, about Justice and Nature and the origin of law. Nothing more in the *Corpus Iuris* nor in any other of the few old legal writings that have survived. There is no trace that any lawyer ever composed a treatise on that which we in England call General Jurisprudence, and which the Germans call Rechtsphilosophie or Natur-

recht (Philosophie de Droit, Droit Naturel). Cicero, who at one time intended to write a book on the civil law, throws out some remarks on the subject, but these are rather philosophical than legal, and it would seem either that no later philosopher, whether Greek or Roman, whether Academic or Stoic, followed in this path, or else that the treatises of those who did were not thought worthy of being preserved, or even of being quoted by the compilers of Justinian's *Digest*.

This absence of what the enlightened modern layman, though certainly not the professional English lawyer, expects in a refined and comprehensive system of jurisprudence, raises the question which those who approach the study of law, especially in a university, doubtless often put to themselves—Has the Roman law suffered from the want of a foundation of legal philosophy, or is that foundation really needless, and can a practically useful and scientifically symmetrical system of law exist without it?

In order to answer this question let us consider what is meant by the Philosophy of Law, or the Science of Law in general, conceptions to which it might be convenient to restrict the terms Jurisprudence (or General Jurisprudence) hitherto somewhat laxly used<sup>1</sup>, and what are the proper relations of such a science on the one hand to a working system of law, and on the other hand to the principles and considerations which guide the legislator.

Seeing that in each of the so-called moral or social or political sciences the essential characteristic is its method, and that it is by its possession of a method that its claims to be a science must be tried, we had better begin by inquiring what method or methods the science of law in general recognizes and applies; and whether, if there be more than one, any one of these is entitled to be deemed the right method. As law is a science

<sup>1</sup> As has been proposed by Dr. Holland in his admirable *Elements of Jurisprudence*.

directed to practice, the test of rightness will evidently be the practical utility of the method in producing a system of law which shall be symmetrical, harmonious, and suited to the needs of the people whose social relations it has to adjust and regulate.

Four methods are commonly spoken of as employed in legal science, being the following:—

The Metaphysical or *a priori* method.

The Analytic method.

The Historical method.

The Comparative method.

This classification is doubtless open to criticism, but being in actual use, it may serve our present needs.

The Metaphysical method, which, without stopping to search for a definition, we may describe as being the method which most German, French, and Italian writers on the Philosophy of Law or the 'Law of Nature' have adopted, begins by investigating the abstract ideas of Right and Law in their relation to Morality, Freedom, and the human Will generally. It may thus be regarded as that branch of metaphysics, of psychology, of ethics, perhaps also of natural theology (according to the delimitation of these departments of inquiry which any one may adopt), which concerns itself with the civil relations of men to one another in the most general and abstract form of those relations. It proceeds to deal with the fundamental legal conceptions or categories of the subject, such as Sovereignty, Obedience, Right, Claim, Duty, Injury, Liability, and with the notions involved in certain fundamental and universal legal institutions such as the Family, Property, Inheritance, Marriage, Contract, in each case endeavouring to discover the ethical or psychological basis of the conception or institution, and to build up the institution in its simplicity, purity, and perfection on that basis, determining the form which it ought to take—that is to say, which God or Nature designed it to take—in conformity to its essence and indwelling creative principle. In the lan-

guage of Plato, it seeks to discover and describe the Idea (*εἶδος*) of the conception or institution. In particular, this method treats the notion of Right from all possible sides, connecting it with the Deity, with nature in general, with man's nature, with the family, with the primordial social and political relations of men, and endeavours in like manner to determine the conception of Duty and the essence of Moral Obligation, and the reasons why Obligation attaches to certain human relations, whether it springs out of these relations, *e.g.* out of those of the Family, or whether, coming from some other source, it gives to them a new moral quality. With certain philosophers the method extends itself to politics, and discusses questions some of which hardly belong to the legal sphere, *e.g.* the rights of majorities as against minorities; the grounds on which a ruler may demand submission, or those on which subjects may properly resist or depose a ruler; the relations of civil authority to ecclesiastical authority, and the limits within which, in case of conflict, obedience is due to one or to the other, perhaps even the limits within which the legislator may fitly enforce duties primarily moral.

The writers who have followed this method may be divided into two classes. Some remain in the field of abstractions. Positing a few extremely general ideas or principles, they develop out of these by way of deduction or explication the rest of their doctrine down to such legal details, usually scanty, as they condescend to give. The whole system is, or seems to be, spun out of the author's fundamental conceptions. Others, while using abstract terms with equal boldness, turn out when closely scrutinized to have really drawn their notions from the concrete, and to be merely generalizing from phenomena, more or less numerous, which they have seen or heard or read of. Obviously, even the more professedly abstract writers of the former class do in fact found themselves largely, often more largely than they fancy, upon observation, for this no man can help

doing, however much he may prefer the 'high *priori* road.' There is, however, a marked difference between the way in which this method is handled by different types of thinkers. Some soar so high through the empyrean of metaphysics that it is hard to connect their speculations with any concrete system at all. Others flutter along so near the solid earth of positive law that we can (so to speak) see them perching on the stones, and discover the view they take of the questions with which the practical lawyer or legislator has to deal.

The worth of the books, abundant on the Continent of Europe but scarce in England and the United States (though a little less scarce in Scotland), which have been composed by writers of this school, will be estimated differently by those who enjoy speculation for its own sake, and by those who think it a waste of time unless it bears fruit in truths of definite practical utility. If the latter criterion of value be accepted, the importance of these treatises cannot be placed very high. The foliage is luxuriant, but the fruit scanty. A vigorous and ingenious mind will doubtless, in whatever way he may treat the subject, stimulate thought in the student, and will probably throw out just and suggestive remarks which may be treasured up as practically helpful. As some brilliant thinkers, at the head of whom stand Immanuel Kant and G. W. F. Hegel, have adopted this method in handling the Philosophy of Law, and have given a powerful impulse to many able disciples, it would be foolish and presumptuous to disparage their treatises. Nevertheless, the general conclusion of English lawyers has been that not much can be gathered from lucubrations of this type. They are decidedly hard reading; and the harvest reaped is small in proportion to the time spent. Threading its way through, or, as some would say, playing at hide-and-seek in, a forest of shadowy abstractions, this method keeps too far away from the field of concrete law to throw much light on the difficulties and controversies which the student of any given

system encounters. Nevertheless, while this is the general character of the school, there are some books referable to it wherein one finds legal conceptions analysed with an acuteness which cannot but sharpen the reader's wits, and others which pile up much ingenious and subtle thinking round the points where law and ethics come into contact, some legal problems being really ethical problems also. Even a student who has experienced many disappointments will not lightly abandon the hope that some lawyer with a gift for speculation will one day employ this method—in itself a method with legitimate claims to respect—to produce a book nearer to the realities of the subject than any which the last two centuries have seen. There is more to be expected from such a man than from a metaphysician who thinks he understands law. Higher and rarer gifts are no doubt needed for metaphysics than for law; indeed even high poetic genius is not so rare as a really original genius for speculation. But the lawyer who rises into metaphysics has at any rate his body of practical knowledge to keep him in the path of sense: the metaphysician dealing with law may easily lose himself in mere words.

The Analytic Method, standing in a marked and sometimes a scornful opposition to the method we have been considering, leaves metaphysics and ethics on one side, and starts from the concrete, that is to say, from the actual facts of law as it sees them to-day. It takes the terms, whether popular or technical, which are in current use. It endeavours to define these terms, to classify them, to explain their connotation, to show their relation to one another. It is of course frequently obliged, when it attempts, as it must attempt, to be logical, to modify the existing terminology, and attach a new specific and technical sense of its own to some words, or even to invent terms altogether new.

This method, though it is essentially, in its more obvious and rudimentary form, so much a matter of common sense as to have been more or less employed by

all who have thought or written about law, and may possibly have been used in Egypt under the Fourth Dynasty, is most familiar to us as that employed with boldness and spirit by Jeremy Bentham, and subsequently proclaimed by the school he founded to be the only helpful mode of handling the subject. That school rendered a service to legal study in England by the keen east wind of criticism which they unloosed to play upon our law, and which ended by uprooting a good many old and probably rotten trees. They roused an interest in the discussion of general legal doctrines which had been wanting during the first three quarters of last century. But they fell into two grave errors.

They laid the foundations of legal science in the so-called Theory of Utility, which, be it sound or unsound, has nothing to do with the Analytic Method, nor with Positive Law. In the first place, it is a theory of human action which properly belongs to ethics or psychology; and secondly, in so far as it can be deemed to affect law, it affects neither the classification and exposition, nor the application of law (except in so far as it may subserve interpretation), but the making of law. That is to say, it belongs not to the jurist but to the legislator. Its place is that of a practical guide to the science we call the Principles of Legislation. But in this application it is no new discovery, for all legislators have at all times professed, and many have honestly sought, to be guided by it. Expediency, to use the older and less formal term, is a principle obvious in legislation and dangerous in law, for though the commentator may properly use it, the judge may readily abuse it. That Bentham, who was first and foremost a reformer, should incessantly insist on the doctrine of utility, till he almost crushed his legal analysis under the weight of his ethical theory, was perhaps natural. He was really trying to create a Theory of Legislation. But John Austin, the most prominent of his professional disciples, was a writer on law rather than a reformer, so in him the fault

is less excusable. Indeed, Austin pushed the habit further, for he must needs, after basing Law on Utility, identify Utility with the Law of God, in doing which he wanders off into the field of Natural Theology, and virtually repeats the error, which he had censured in the Roman lawyers, of assuming a Law of Nature as the basis of legal doctrines. So that Bentham and he are not unjustly described by the Germans as the authors of 'theories of Natural Law.'

The second error of this school was that of relying too much upon current English notions and terms. They did not extend their view far enough either into the past, or over the legal systems of other times and countries. Bentham was, to be sure, chiefly occupied with schemes of reform, and did not profess to be a jurist. Austin deserves credit for having gone to Roman law, and sought in it those general ideas in which he found, or thought he found, English law lacking. Unfortunately he did not fully master the Roman system; and his overweening self-confidence betrayed him into a dogmatic censoriousness which was unbecoming even when he was exposing the errors of Blackstone, and was still less pardonable when he poured scorn on the legal luminaries of Rome. He did not perceive how deep some of the difficulties of legal theory lie, nor that there are some conceptions which it is safer to describe than to attempt to define. Hence his solutions are sometimes crude, and his efforts, in themselves most laudable, after exactitude, are apt to fail for want of subtlety. On several fundamental questions, such as the origin and essence of law and the nature of sovereignty, Austin is palpably wrong, and the most eminent of those later writers who started as his disciples have been largely occupied in disclaiming and correcting his mistakes.

The really great merit of the English Analytic School—a merit which was no doubt the main source of its influence, but which we are now in some danger of

forgetting—was its destructive energy. When Bentham began his career, case law, which reigned supreme, was by the legal profession generally, though of course not by such a man as Lord Mansfield, regarded as a mere string of precedents. No idea of philosophical arrangement, much less of literary finish, had begun to work upon the mass—

‘Quum neque Musarum scopulos quisquam superarat,  
Nec dicti studiosus erat.’

Blackstone had indeed rendered the immense service of presenting within moderate compass and in graceful diction a complete view of the law. But he brought an insufficient grasp of history and philosophical principle, and still less an exact analysis, to his exposition, finding little to criticize and nothing to require amendment in rules and a procedure which half a century later few ventured to justify. This genial optimism, which was satisfied with any explanation, because it took the law as it stood to be the best possible, provoked Bentham. He writes with the air of one who does well to be angry; and the tradition descended to Austin, by whose time the grosser scandals of the law were beginning to be removed.

Between Bentham and Austin there is one conspicuous difference<sup>1</sup>. Bentham had not only a vigorous but a fertile and inventive mind, acute and ingenious, if sometimes warped or liable to become what is now called ‘cranky.’ He drops plenty of good things as he goes along. Austin is barren. Few or no suggestive thoughts are to be gathered where he has passed. His dry, persistent iteration, with its honest struggle after precision of terms, has a certain value as a mental discipline, just as it tests one’s powers of endurance to traverse a stony and waterless desert. An old Scottish lady consoled her friend, who had been dragged two

<sup>1</sup> Some excellent remarks on the intellectual characteristics of Bentham may be found in Mr. Leslie Stephen’s *English Utilitarians*, vol. i (1902).

miles in a broken carriage by runaway horses, with the remark that it must have been a precious experience. But it is generally better to get one's discipline from books which also yield profitable knowledge. Of this there is in Austin nothing which may not nowadays be found better stated elsewhere. Most recent authorities are now agreed that his contributions to juristic science are really so scanty, and so much entangled with error, that his book ought no longer to find a place among those prescribed for students.

How then, it may be asked, did it happen that Bentham and even Austin made a great impression upon some powerful minds in the last generation? Bentham did, because he was the first man who had the courage to denounce the artificialities, absurdities, and injustices of the unreformed law and procedure of England. No small part of the credit for the reforms which Romilly, Brougham, and their fellow workers carried out belongs to the man who had begun to call for them full thirty years before. Austin did, because in his time systematic legal study, and in particular legal education, were almost extinct in England. There was no legal teaching either in the old Universities, or in London. Though the grosser abuses of procedure had been removed, yet the subtleties of special pleading, as well as the long-winded and highly artificial intricacies of conveyancing, still flourished, and the law was regarded as a forest of details through which it was useless, even if possible, to drive paths for the student to follow. A disciple of the old reformer who brought to the novel enterprise of teaching and systematizing law a faith in the reformer's doctrines and a zeal for general principles, not unnaturally received the sympathy and the deference of the eager youth who believed, and rightly believed, that the practice of the law, as well as its substance, would gain from the application of an independent and fearless criticism to it. By this service Austin has earned our gratitude, and deserves to be remembered with respect. So, though

the legal writings of Bentham and his disciples have now only a historical interest, we must not forget that they stimulated men to handle law in a new spirit, and that those whom they influenced had much to do with the establishment of the modern schools of law and the introduction of new methods of preparation for professional work.

The third method is the Historical. Instead of taking law as a datum, like the two other previous methods, it seeks to find how law sprang up and grew to be what it is. It sees in law a product of time, the germ of which, like the germ of the State, exists in the nature of man as a being made for society, and which develops from this germ in various forms according to the environing influences which play upon it. Although law may not have been created by the State, it tends as it grows to become more and more closely associated with the State as a function of the latter's energy. Though its leading doctrines and its fundamental institutions are in some respects essentially the same in all civilized communities, still every given system is, in the historian's view, for ever changing, growing, and decaying, both in its theory and in its substance, *i.e.* both in the ideas which create and underlie the legal conceptions and rules, and in the particular forms which those rules have assumed no less than in the institutions by which such rules are put in force.

The utilities of the Historical Method as applied to any given system of law are two.

It explains many conceptions, doctrines, and rules which no abstract theory or logical analysis can explain, because they issue, not from general human reason and the nature of things, but from special conditions in the country or people where the law in question arose. All law is a compromise between the past and the present, between tradition and convenience. Hence pure analysis, since it deals with the present only, can never fully explain any legal system.

This is not to say that the Historical method is a mere record of accidents. On the contrary it endeavours to eliminate, or at least to reduce to due proportions, that element of accident which results from the personal fancies and arbitrary volition of individual lawgivers. It conceives of national character and the circumstances of national growth as creative forces, whereof law is the efflux and expression, being itself a living organism, which in its turn helps to shape the mind of the people. Accordingly it shows that each nation, rather than individual men, however potent, is, through what the Germans call its Legal Consciousness (*Rechtsbewusstsein*) the maker and moulder of its law.

A second merit of this method is that of indicating that the conceptions and rules which prevail at any given time, however obviously reasonable and useful they may appear to the generation now living, will not always appear so, but must undergo the same change and decay which previous rules have experienced. It teaches us never to condemn the past because it is not the present, nor ever to forget when we praise the present that it too will some day be the past. This is one of those truisms which men are always forgetting to apply, and of which legislators in particular need to be often reminded.

The risk principally incidental to the Historical method is, that it is apt to lapse, either into mere antiquarianism on the one side, or into general political and social history on the other. Some charge it with retarding improvement by justifying the past. Those who oppose reforms have often so abused it: just as those abuse it who when they palliate crimes by dwelling on the 'so-called conditions of the age' attenuate all moral distinctions. 'In judging Phalaris,' a modern lecturer is reported to have said, 'we must not forget that the moral standard of Phalaris' time is not that of our own.' Nevertheless History, when she explains and is supposed to justify the past, justifies it as the past, and must

not be deemed to defend it for the purposes of the present.

It is, however, a weak point in the Historical method as applied to the science or philosophy of law that it is more applicable to the law of any particular country than to the theory of law in general, for the details of legal history vary so much in different countries that immense knowledge and unusual architectonic power are needed to combine their general results for the purposes of a comprehensive theory. Indeed, I doubt if any man of the requisite capacity (unless perhaps Rudolf von Ihering) has yet produced a treatise on jurisprudence or the philosophy of law by means of this method. The thing, however, may be done, and so will doubtless be done some day. Everything happens at last.

Lastly, there is the so-called Comparative Method, which is the youngest of the four. It is concerned with space as the Historical method is with time. It collects, examines, collates, the notions, doctrines, rules, and institutions which are found in every developed legal system, or at least in most systems, notes the points in which they agree or differ, and seeks thereby to construct a system which shall be Natural because it embodies what men otherwise unlike have agreed in feeling to be essential, Philosophical because it gets below words and names and discovers identity of substance under diversity of description, and Serviceable, because it shows by what particular means the ends which all (or most) systems pursue have been best attained. The process is something like that which a Roman Praetor might have followed in constructing the general or theoretical part of his *ius gentium*<sup>1</sup>. If indeed we are to suppose the Praetor ever really did study the laws of the various neighbours of Rome, he was one of the founders of this method, though to be sure the Roman commissioners, who are said to have

<sup>1</sup> See Essay XI, p. 571 sqq.

been sent out to examine the laws of other countries before the Decemviral legislation, preceded him in this attempt.

The comparative science of jurisprudence appears, however, in two forms. One of these must, like the science of comparative grammar, crave the aid of history, for the study of the differences between two systems becomes much more profitable when it is seen how the differences arose, and this can be explained only by social and political history. This form may be deemed an extension of the historical method, which it resembles in helping us to disengage what is local or accidental or transient in legal doctrine from what is general, essential, and permanent, and in thereby affording some security against a narrow or superficial view. It is really an historical study of law in general; and, like history, it is not directed to practical ends.

The other form, though it cannot dispense with the aid of history, because the differences between the laws of different countries are not explicable without a knowledge of their sources in the past, has a narrower range in time, being directed to contemporary phenomena. It has moreover a palpably practical aim. It sets out by ascertaining and examining the rules actually in force in modern civilized countries, and proceeds to show by what means these rules deal with problems substantially the same in those countries. For example, it takes such a topic as the liability of an employer for the acts of his servant, or the structure and management of incorporated companies, compares the enactments it finds in France, in Germany, in the British Colonies and in the States of the American Union, points out their differences, and seeks to determine which mode of handling the difficulties of the subject is the simplest and most likely to work well in practice. The next step would be to test each legislative experiment by the results it has secured in each country. Here, however, the task becomes more difficult, and requires qualities in the in-

investigator which are not altogether those needed by the jurist.

What the Comparative method does for legal training and legal theory it does in its first mentioned and historical form. Ample as the materials may appear, they are really somewhat scanty, because there have been in the world not many distinct types of legal system or doctrine, and few of these have reached a high development. Of the ancient and long since departed systems little is left, and that little not very helpful for this particular purpose. There are some fragments of old Celtic law from Ireland, with larger fragments of old Teutonic law chiefly from Iceland, Norway, Friesland, and the Carolingian Empire, some old Slavonic land and family customs, besides what may be gleaned from the ancient books of India, and what has recently been discovered in Egypt, in the clay tablets of Babylon, and in inscriptions among the ruins of Greek cities. Of the modern systems, on the other hand, there are besides those of Teutonic origin, practically only three worth mentioning: Hindu law, which has been fully developed only in two or three directions; Muhamadan law, which is deficient on some of the sides we should deem the most important; and the Roman law, which now covers all those parts of the civilized world that are not covered by English law, including the continent of Europe and the colonies of European nations (some British colonies as well as French, Dutch, German, and Portuguese) except those which lie in the temperate parts of North America and in Australasia. So far, therefore, as the doctrines of law in its civilized and developed forms, suited to a progressive modern nation, are concerned, the comparative method is virtually restricted to a comparison of English and Roman conceptions and rules. And the fundamental ideas and principles of English law itself have been in some departments so much affected by Roman law that they can hardly be treated as independent material for comparative study.

It is when we leave the field of legal philosophy and jurisprudence in general for the field of particulars and details that the practical value of the Comparative method begins. An examination of the various ways in which economic and social problems have been dealt with in recent times, and in which commerce has been regulated and crime checked, is in the highest degree interesting and useful. But that is not quite the kind of legal study which we are here primarily engaged in considering. No doubt the way in which questions of liability and responsibility and negligence, to take a familiar example, are dealt with in the laws of different countries, does throw light upon general juristic conceptions and upon the lines which Courts ought to follow in developing these difficult branches of any concrete system. But on the whole, it is rather to the province of legislation than to that of law that this part of comparative jurisprudence belongs; and, as has been already observed, the utility for practical guidance of the results which an examination of the legislation of various civilized states supplies is somewhat reduced by the difficulty of determining how much of those results, be they good or evil, is in each case attributable to legal enactments, how much to the social and economic environment in which the enactments work.

If we are to attempt to estimate the respective worth of these four methods for the creation of a theory or philosophy or science of law, we must begin by settling for whom such a science is designed and to whom it will be useful.

Three kinds of persons will primarily and directly profit by having such a science built up on the best lines, viz. the teachers and students of law, the practitioners of law, including both advocates and judges, and the makers of law, *i.e.* legislators and draftsmen. Legislators, however, whether monarchs or members of legislative assemblies, have in modern countries seldom sought to acquire any specifically legal knowledge,

though some persons who sit in the legislatures of modern countries usually happen to possess it. Thus it is rather of the two other classes we must think, that is to say, of the value of a scientific theory for facilitating the acquisition of legal knowledge by the learner, and of its value in helping the practitioner (whether advocate or judge) to apply it with accuracy, perspicacity, ingenuity, and promptitude. In proposing this test I do not mean to ignore the importance which belongs to the philosophy of every great branch of learning, as an end in itself, apart from all practical benefits to be derived from it. That importance is, however, as the Romans say of freedom, *res inaestimabilis*, a thing too precious to receive a valuation in any recognized currency. Practical utility, on the other hand, can be tested and valued, so it is to the practical utility of this science in making men thorough masters of law that we had better confine our view.

All the four methods are legitimate and capable of being applied in a truly scientific spirit. None therefore is to be either neglected or disparaged. If, however, we judge them by their fruits, we shall find that the Historical has given the best crop. The Metaphysical tends to be not merely abstract but vague and viewy. Of the treatises in which it has been employed the best are indeed not to be deemed empty. Scattered through not a few of them one finds acute and suggestive remarks. They subserve a sound analysis by their treatment of ethical problems: and sometimes they present what are really considerations of practical expediency disguised in the robes of sacerdotal transcendentalism. The difficulty which forbids many among us to give more study to these books is the shortness of life. Much talent, sometimes of a high order, has gone to the making of them. But they are, and not solely the German ones, terribly hard reading.

The Analytic method keeps much nearer to the realities of law, and is serviceable for the clarifying of our

ideas. Its English votaries have, however, generally wanted breadth of view, and have tried to force definitions on facts, instead of letting the facts prescribe the definition. They have been unequal to the subtlety of nature (for law also is a product of nature), and this largely because they have neglected the materials for induction which history supplies.

The Comparative method (as already observed) suffers from a lack of material for the purposes of a philosophy of law in general, and becomes in practice an examination of Roman conceptions with the help of light from England in those departments of English law which have been least influenced by Rome<sup>1</sup>, and of some glimmers from the East and from the laws of ancient European peoples.

The Historical method, on the other hand, may at least be relied upon to give us facts. Facts are always helpful, when men have been trained to use them. It is the business of historical criticism to impart this training, just as it is the business of logic to teach men how to analyse a current conception and to distinguish the various senses in which a term may be used.

If the question is propounded—How should these four methods, or some or one of them, be used for the purpose of legal instruction and the formation of a legal mind and power of handling legal problems, may we not answer it in some such way as the following?

The philosophy or theory of Law should begin by determining the place of law among the human or moral as opposed to the physical sciences, and should examine its relations to Psychology, Ethics, Politics, and Economics. As this inquiry will start from a general survey of the nature of man and the general ideas he forms, it will fall within the scope of what we have called the Metaphysical method.

<sup>1</sup> An example of how stimulating this may be made is furnished by the treatment of Possession in the acute and learned lectures on the Common Law of Mr. O. W. Holmes (now Chief Justice of Massachusetts).

The notions and conceptions which are essential to law and lie at the bottom of all systems will then be investigated, and particularly the following fundamental conceptions—Right, Obligation, Duty, Liability, Law, Custom. Some will prefer to deduce these conceptions by the metaphysical method from the phenomena of human nature and the principles that connect these phenomena. Some will prefer to start from current notions as embodied in current language, and to reach correct definitions by analysing the meaning conveyed by each term and setting out the facts it is intended to cover. Whichever method be adopted—and there is less real difference between the two than the description here given of them might seem to convey—the Historical method ought to accompany and aid the application of either. For although the object of the inquiry is to obtain a statement which shall be adequate and exact for the science of law as a fully developed product of civilized societies, we always need to be warned by History against assuming that our present notions are sufficiently wide, and sufficiently possessed of the elements of necessity and permanence to secure that our propositions shall be generally true and enable our definitions to hit what is really essential. The once popular definition of law as a Command of the State is an instance of the danger of forgetting the past, for the fact that it would have been palpably untrue in certain stages of political development shows that it does not rest upon a sufficiently broad foundation.

From these general conceptions the inquiry will advance to a second order of ideas and categories, more specifically and purely legal, such as Ownership, Possession, Contract, Tort, Marriage, Guardianship, Slavery, Conveyance, Pledge, Lien, Prescription, Inheritance, Sale, Partnership, Bailment, Crime, Fraud, Negligence. Here we come still closer to the rules of concrete systems. A German metaphysician may no doubt deduce the abstract idea of Ownership or Con-

tract from the general principles he has previously laid down in his speculative treatment of the subject. A Socratic analyst may by testing current terms and phrases, and unfolding the meanings involved in these terms, arrive at definitions of them. But the examination of the conceptions and the definition of the terms must be mainly based on a study of the facts which in one or more actual legal systems these conceptions cover. In this study the Historical method can render effective help, because the rules actually regulating in any given system all the relations denoted by these terms are sure to have something irregular or apparently arbitrary about them, something which pure reason would not have suggested. The forms, for instance, which Possession, Inheritance, and Pledge have taken both in Roman and in English law have many peculiarities explicable only by tracing the causes that produced them. The definition which the jurist will propound for the purposes of his science of law in general will avoid such peculiarities, but he cannot afford to be ignorant of them or of their origin, else he may miss some side of their significance.

Although in theoretical Jurisprudence the part of History is on the whole secondary, it is nevertheless indispensable. For History shows us cases where things that are really different go by the same name, and other cases where things that are really the same go by different names, cases where a rule has been extended beyond, and others where it has not been extended to, its proper or natural range, and thus it guides the jurist, explaining the facts on which he has to found his theory. The Comparative method renders a similar service in preventing him from laying too much stress on the special shape in which a doctrine or institution appears in the particular system whose history he is studying, and generally in pointing out identity of substance or effect coupled with diversity of form or expression.

All the above-named categories or conceptions or

institutions, together with some few others of minor importance, belong to the science of law in general, because they appear in every fully developed system. When, however, we get more into particulars, it becomes increasingly difficult to lay down general doctrines or suggest general rules applicable to all communities, because details must be settled with reference to the needs and usages of a given community, and that which suits one would hardly suit another. Here therefore the Philosophy or Science of Jurisprudence will bid farewell to the student, handing him over to those who teach the law of England or Scotland or France or Russia, as the case may be, and bidding him remember to apply the general principles he has mastered to the criticism of the details which he will thenceforth be occupied in learning.

The principles which constitute the Science or Theory of Law in general can be adequately stated within moderate compass. The subject is not a large one, unless a writer spreads himself out in ethics on the one hand or accumulates historical details on the other. Nor is it in the knowledge to be given that the value of the study will chiefly lie; it is rather in the training to use the right methods in the right way. Before he is plunged into details, the student ought to acquire the habit of looking for principles, of analysing terms, of perceiving that legal doctrines have all had their growth from rude beginnings and will change further. These aptitudes will serve him when he enters the domain of technical law, which is a domain less of Reason than of Authority. And authority, though it may be called the reason of the past, rules not because it is reason but because it has the sanction of a past pronouncement.

Arguments founded on the reason of things or on the tendency of historical development will avail nothing in practice against a positive rule, whether contained in a statute or deducible from a decided case. Seldom indeed will a judicious advocate invoke either Reason or

History, unless perhaps in arguing before the House of Lords a point whereon little authority exists. But in reasoning from decided cases, and even in interpreting statutes, his mastery of the methods already described will stand him in good stead. Nor is it to be forgotten that the judge and the writer of text-books have, each of them, important functions in guiding the development of the law. When a question is to be dealt with regarding which authority is scanty or the decisions are conflicting, a jurist belonging to either of these classes may apply the philosophic habit of mind formed by his theoretic studies to the task of finding a solution which shall be sound and durable, because conformable to principle, and standing in the true line of historical development.

Let us return, now that we have sketched a scheme for a Theory or Science of Law in general, to the question whence we started, whether the Romans, who never produced any such theory or science, suffered from the want of it. If they did suffer, why do we praise their treatment of law, and why in particular do we call it a philosophical treatment? If they did not suffer, what becomes of the importance of a Science or Theory to the modern lawyer? Why should he trouble himself about it at all?

What is it which we admire in the Roman jurists, and in the Roman law generally?

The characteristic merits of the Roman law—and I speak of course only of the Private Law, for Public or Constitutional Law must be considered apart—are its Reasonableness and its Consistency. It is pervaded by a spirit of good sense. Except in two departments, those of the Paternal Power and of Slavery, its rules almost always conform to considerations of justice and expediency. Very little needs to be excused as the result of historical causes. Even Slavery and the *Patria Potestas*, the former universal in the ancient world, the latter so deep-rooted among the Romans that it could never be altogether expunged, are in the later centuries

so steadily and carefully mitigated that most of their old harshness disappears. The moral tone of the law is, take it all in all, as high as that of any modern system; and in some few points higher than our own. By its Consistency I mean the harmony and symmetry of its parts, the maintenance through a multiplicity of details of the leading principles, the flexibility with which these principles are adapted to the varying needs of time, place, and circumstance. So the excellence of the jurists resides in their clear practical sense, in the air of enlightenment and of what may be called intellectual urbanity which pervades them. Most of them express themselves with a concise neatness and finish which gives us the pith of their view in the fewest and simplest words. They dislike what is arbitrary or artificial, taking for their aim what they call elegance (*elegantia iuris*), the plastic skill (so to speak) in developing a principle which gives to law the character of Art, preserving harmony, avoiding exceptions and irregularities. Yet they never sacrifice practical convenience to their theories, nor does their deference to authority prevent them from constantly striving to correct the defects of the law as it came down from their predecessors.

In these respects the Roman law and the Roman lawyers of the classical age (the first two and a half centuries of the Empire) may be deemed more philosophical than our own law or its luminaries. Our law, equal to the Roman in its sense of justice and in its subtlety, and in some respects distinctly superior to the Roman, is also a far larger and more complex structure, as it has to regulate a far more complex society. But it has less symmetry and consistency, more intricacy and artificiality, than the Roman: and few of our legal writers can be placed on a level with the greatest of the classical jurists. Compare Lord Coke for instance, or Lord St. Leonards, with Papinian or Gaius. Lord St. Leonards was a man greatly admired by the profession, and his books secured an authority unsurpassed,

if indeed equalled; by any other legal writings of the century<sup>1</sup>. His knowledge was immense, and it was minute. His treatises show the same acuteness and ingenuity in arguing from cases which his forensic career displayed. But these treatises are a mere accumulation of details, unillumined and unrelieved by any statement of general principles. In literary style, and no less in the cast and quality of his intellect, he is harsh and crabbed, but his frequent obscurity must be due less to a want of clear thinking than to the fact that our legal textbooks have so rarely aimed at excellence of literary form that this famous case-lawyer had no ideal of lucidity or finish before him. Lord St. Leonards is not an exceptional instance. That sound and very learned legal author whom the early Victorian era so much valued, Mr. John William Smith (Smith's *Leading Cases* and *Contracts*), illustrates the same tendencies.

Now the merits we have noted in the Roman law and the Roman jurists are largely merits of method. To set forth the causes to which the excellence of the Roman law is ascribable would involve a long digression, and I have dealt with those causes elsewhere. So let us confine ourselves to the jurists. They reason and they write as men who have been thoroughly trained, who have been imbued with a large and liberal view of law, who have philosophy and analysis and the sense of historical development equally at their command. They are endowed in fact with the qualities which, as we have been led to think, a course of the Theory or Science of Law ought to impart. How then did they acquire these qualities?

<sup>1</sup> Lord Mansfield in the eighteenth century or Lord Cairns in the nineteenth, perhaps the two most philosophical minds that have adorned the English bench, would doubtless, if they had written on law, have shone as legal writers far more than Lord St. Leonards; and it is of course true that in order to have a fair comparison our great judges ought to be thrown into the English scale. But the form in which their wisdom appears makes it less available than the form in which we have that of the Romans. So too Lord Justice Mellish, the most solid and cogent reasoner of his time, and Lord Bowen, the most subtle and ingenious, would doubtless have produced admirable work had not their time been absorbed by their forensic and judicial duties.

First, by the study of philosophy. Though our data scarcely justify a general statement, it seems probable that many of the jurists, especially of such as grew up at Rome, received instruction in Greek philosophy. It has been suggested that not a few professed the doctrines of the Porch. Anyhow the conception of Nature as a force or body of tendencies prompting and guiding the progress of law was familiar to them, and appears to have influenced their ideas. Then by a searching and sifting of legal terms and maxims, what may be called an exegetic method, they sharpened the edge of their minds and gave clearness to their notions. Both the philosophical and the rhetorical training given to young men fostered the habit of analysis; and the disputations which went on among the lawyers, stimulated by the controversies of the two great schools, Sabinians and Proculians, doubtless trained men in dialectic, wherein the framing and the dissecting of definitions play no small part. The history of law does not seem to have been taught, and regarding some parts of their earlier legal history the Romans of the later Empire may have known less than we know to-day. The sketch taken from Pomponius which we have in the beginning of Justinian's *Digest* is uncritical, and in many points defective. But these jurists, from their study of the development of equitable principles through the action of the Praetor, had a training in historical method which must have been eminently profitable. During the last two centuries of the Republic and the first century of the Empire, the law of Rome was being constantly amended and developed far less by the comparatively rough method of legislation than by the delicate methods of interpretation, discussion, and the issuing of praetorian Edicts, and developed in such wise that the new had always arrived before the old departed, so that the process of evolution was always before their eyes, and its lessons familiar to them.

Finally, the administration of justice by the *Praetor*

*peregrinus*, who doubtless based himself mainly upon the commercial usages of the merchants who from various quarters resorted to Rome, and still more the issuing of provincial edicts by the magistrates who were sent to rule the provinces according to systems which combined some Roman rules and principles with other rules which belonged to the particular province, supplied abundant materials for observing in what points the special and peculiar law of Rome agreed with or differed from the laws of other peoples and states<sup>1</sup>. The jurists were thus led, not by theory, but by the practical needs of the case, to apply and to profit by the Comparative method, no less than by the three other methods above enumerated. And accordingly they did in fact obtain, without any paraphernalia of a Philosophy or Science embodied in separate treatises or ostentatiously taught as a separate subject, those very gifts and aptitudes which a systematic and enlightened scheme of legal education ought to confer. They did not set out with abstractions, like our German and Scottish friends. They did not, like Bentham and Austin, crack a set of logical nuts, in the effort to divide and define the matter and the leading conceptions of law. But they applied to the handling of their own concrete rules and problems a mastery of general principles and a love for harmony and consistency which are essentially philosophical. They were pervaded by the sense of historic growth and change, for had they not before them the relations of the old and the new in many institutions—the development of *Formula* beside *Legis Actio*, of *Ius Gentium* beside *Ius Civile*, of *Bonorum possessio* beside *Haereditas*, of *Longi temporis praescriptio* beside *Usucapio*? The one thing in which it may be said that a systematic

<sup>1</sup> There was practically only one set of laws or customs belonging to highly civilized communities which the Romans could compare with their own law, those, namely, which they found in the various Greek cities. These laws and customs, though varying a good deal in detail, from city to city, seem to have borne a family likeness to one another. The laws of the Italic cities were probably on the whole similar to those of Rome herself. But the customs of the Carthaginians, of the Syrians, and of the Egyptians, had many peculiar features.

science of law might have helped them was the arrangement and distribution of topics. For this they certainly cared little and did little. But the taste for systematic arrangement was never strong in the ancient world. Perhaps the modern appreciation of it dates back to the scholastic philosophy of the Middle Ages, which spent much thought on what the logicians called Division. Perhaps it has been reinforced by the more recent progress of Natural History, which furnishes in the classification of the animal and vegetable kingdoms the grandest example of orderly schemes of distribution based on scientific lines.

This excellence of the Romans in the sphere of concrete law confirms the view we were led to take that the contents of a Philosophy or Science of Law in general are not large, being indeed confined to the defining of the relation of Law to Ethics and other cognate branches of philosophy, and to the examination of some fundamental legal conceptions, important no doubt, but not very numerous. The solid and essential value of legal science begins in the manipulation of the material presented by an actual system of law, in the moulding of the old customs so as to reconcile them with the always changing needs of the people. And this has been the doctrine and practice of the greatest foreign masters of the Roman law in modern times. It was the doctrine of Savigny, who opposed his historical method to the abstractions of the contemporary Hegelians, and it prevailed in the struggle. I remember the way in which it was conveyed to me by one of the greatest of Savigny's school, Dr. Karl Adolf von Vangerow, to whose brilliant and stimulating lectures I listened at Heidelberg, now many years ago. Inspired by my Scottish and Oxford training with the notion that in order to study a subject rightly one must begin with its metaphysics, I asked the professor, on one of the days when his students were permitted to call on him, what book on the Philosophy of Law (*Rechtsphilosophie*) I ought to read. He raised

his eyebrows till they seemed to reach the top of his head, and said with a deprecating wave of his hand, 'I doubt whether that kind of reading will help you with your legal studies. I see little use in it. But if you really do want to study such a topic—well, there is the *Naturrecht* of my colleague Herr Dr. Röder: you can look at it.' Nearly all the jurists to whom the development of modern Roman law in the nineteenth century in Germany has been due have taken a similar view, and have spent their powers either on the same questions as those which occupied the Roman sages or on the application of Roman principles and doctrines to the phenomena and conditions of modern times, and especially of modern commerce. They have been philosophical in their use of the analytic and historical methods, philosophical, that is to say, as compared with Lord Coke or Lord St. Leonards, and they have greatly improved on the division and classification of topics which we find in the Roman books. But they have troubled themselves about the abstract philosophy of law just as little as those two famous judges, or as those august Romans who divided their time between the composition of legal treatises and advising the Emperor on the ordinances which he issued for the whole civilized world.

Not a few of the great Roman jurists (including Julian, Papinian, and Ulpian) sat in the imperial consistory, and were practically not only judges of the highest Court of Appeal but also legislators. An estimate of their scientific merits must include this branch of their activity, whether as settling the form of decrees to be passed by the Senate, or as drafting enactments to be issued in the name of the Emperor. For legal science is not merely either expository on the one hand, or on the other dispensatory and corrective, securing to each what is his, but is also Constructive and Ameliorative; framing rules under which society may advance steadily and smoothly, may get rid of obsolete doctrines, may

find new facts adequately dealt with under new rules. It was a great advantage for the Empire, and one which furnished some compensation for the absence of representative legislatures that the business of law-making lay in the hands of competent legal experts. Legislation presents itself to us as being above all things an expression of the will of the people, who know where the shoe pinches them, and have the general interest, not that of a monarch or a privileged class, in their minds. Yet a wise despot, with pure purposes and a command of the best legal advice, may be expected to legislate in the general interest, and most of the legislation of the emperors during the first three centuries, though it was often misguided in the sphere of financial administration, was conceived in the interest of the population at large. What was specially due to the lawyers who advised the Emperor was the policy followed in amending the general private law, and in bringing it into a more orderly and consistent condition. In this respect they vindicated their claim to be truly scientific. The work of law reform went on upon broad principles, unhesitating and unrelenting, till the anomalies and injustice of the old system had been almost entirely removed. Yet there was left for a long time in the provinces a local variety of law which corresponded to and respected the local needs and sentiments of the populations. No passion for a rigid uniformity seems to have blinded the advisers of the Emperor to the truth that the first business of law is to subserve the well-being of the people and to win their confidence as well as command their obedience. In this respect also they were not merely 'priests of justice,' as they liked to call themselves, but also worthy servants of science. The Roman Empire maintained itself in the East for more than eleven centuries after the last of the classical jurists. In the West its influence survived its political existence, and its law in particular became the foundation of that which came to prevail over Continental Europe. As it was largely owing to

the strength derived from its legal and administrative structure that the Eastern Empire lived so long, so the permanence of the Roman law in the West is some proof of the attachment of the people to it, and so of its intrinsic merits. Both facts are alike a tribute to the scientific character of the system and to the scientific genius of the men who moulded it. For no system could have passed through the changes which the East underwent, or survived the storms which broke upon the West, save one which by the dominance of clear and broad principles and the symmetrical development of rules from those principles had become at once intelligible, flexible, and consistent.

Let us see what are the conclusions to which we have, by this somewhat devious course, been led.

I. There are four chief methods of studying law—the Metaphysical, the Analytical, the Historical, and the Comparative.

II. Each of these has its proper sphere and its distinctive value, even if the two latter are of most general practical service.

III. All four ought to find a place in a complete scheme of legal training.

IV. The two former are applicable only to the rudiments and to some particular parts of the subject, the two latter are profitable all through it, and especially so when they can be combined.

V. The Roman jurists pass so lightly over the theoretical side of law that the first method supplies them with little more than a few general phrases. Although their definitions are the result of analysis, they do not formally or of set purpose employ the second. They use the Historical method freely, though almost unconsciously. At one stage in the growth of their law they applied to some extent the Comparative method, being led to it by the facts they had to deal with. But they seldom mention any law but their own.

VI. The Romans, though saying little about the broad

aspects or so-called Philosophy of Law, do in fact pursue it in a philosophic spirit; and to this spirit the excellence of their system is largely due.

VII. Their example shows us that it is not the effort to discuss law in a metaphysical or abstract way that makes a body of law truly philosophical, but rather the power of so framing general rules as to make them the expression of legal principles, and of working out these rules into their details so as to keep the details in harmony with the principles.

In other words, it is Reasonableness, Simplicity, Self-consistency that make the excellence of a legal system, and the best methods of study are those which attune the lawyer's mind to seek after these qualities, and which enable him to hold a middle course between viewiness and the pursuit of an impossible perfection on the one hand and bondage to the letter on the other.

## XIII

# THE RELATIONS OF LAW AND RELIGION

### THE MOSQUE EL AZHAR

To the modern European world Religion and Law seem rather opposed than akin, the points of contrast more numerous and significant than the points of resemblance. They are deemed to be opposed as that which is free and spontaneous is opposed to that which is rigid and compulsive, as that which belongs to the inner world of personal conscience and feeling is opposed to that which belongs to the outer world of social organization and binding rights. The one springs from and leads to God, who is the beginning and the end of all religious life; the other is enforced by and itself builds up and knits together the State. Even where the law in question is the revealed Law of God the contrast remains. The efforts which we find in the New Testament, and especially in some of St. Paul's Epistles, to reconcile the law delivered to Israel with the dispensation of the New Covenant, all point to and assume an antagonism. Grace, that is to say, the spontaneous goodness and favour of God, is felt as the antithesis to the Law; and it is only when human nature has been brought into complete accord with God's will that the antithesis vanishes, and we have the Perfect Law of Liberty.

This law of liberty, moreover, is not positive law at

all, but supersedes that law ; for when all men have been so made perfect, the need for human law has ceased because their several wills, being in accord with the will of God, must needs be also in accord with one another.

This antagonism of Law and Religion has been conspicuous in the relations to each other of the lines of thought followed by the ministers of religion on the one hand and the students or practitioners of law on the other. In the theology of the Reformers of the sixteenth and two following centuries Legalism is a term of reproach and is contrasted with the freedom of the Gospel. Readers of the *Pilgrim's Progress* will remember the part played in it by old Mr. Legality. The clergy have been apt to dislike lawyers, to accuse them of cramping the freedom of the Church, and of desiring to bind it in State fetters. Erastianism, of which some lawyers and statesmen have been known to be proud, is a name of dark reproach on ecclesiastical lips, while the legal profession on its part, though it has always had to yield precedence to the other gown, conceives that the Church needs to be strictly controlled, gladly seizes occasion for limiting the action of her ministers, often suspects them of trying to evade or pervert the law, and is prone to bring accusations, more or less railing, against them, as seeking to compass their (possibly excellent) ends by irregular or even illegal methods.

But in earlier times, and in many countries, the two lines of thought, the two branches of learning, the two professions, whether as teaching or as practising professions, were either united or deemed to have a close affinity. In the lowest forms of organized society, such as we find among the aborigines of Canada and South Africa, the first kind of profession that appears is usually that of the wizard or practitioner of magic, and the rudiments of a priest are developed out of the medicine man, who represents the most rudimentary form of the physician. But in this stage of progress there is no religion properly so called, and the usages that prevail

and which are the material out of which law will grow, are too few, too rude, and too often interrupted by violence, to form a system of settled and harmonized rules. When, however, Religion and Theology begin to emerge from the superstitions of the savage state, and when custom, already settled, and growing more complex with the progress of culture, has enabled civil society to organize itself in institutions, Law and Theology are usually found in close affinity. Law everywhere begins with Custom. Now many of the Customs which form Law are concerned with worship, because the relations they regulate are relations depending on religion. The Family is a religious as well as a natural organism, for it is often sacred, and in many peoples is held together by the common worship which its members owe to the spirits of their ancestors. Hence the maxims that regulate marriage, and the relation of parents to children, and the devolution of property, have a religious basis, and are precepts of religion no less than rules of law. To take vengeance for the killing of a near relative is a duty which the pious son or brother owes to the ghost of the slain; while on the other side the slaughter has created a legal right the enforcement of which, by compelling the payment of a proper compensation to be exacted from the slayer or his kinsfolk, will also satisfy the religious obligation. Other relations of men to one another not primarily religious become so by being placed under supernatural protection. Where a promise or agreement is to be rendered specially binding, the party engaging himself takes an oath invoking the Divine Power, and perhaps takes it at a shrine, or (as in Iceland) on a temple-ring, or (as in the Middle Ages) on the relics of a saint. These contracts are not confined to private affairs. Treaties are made in the same solemn way. Compacts such as that for the single combat of Paris and Menelaus in the *Iliad*<sup>1</sup>,

<sup>1</sup> Il. iii. 276-280. The appeal in this case is to Zeus, to the Sun, to the Rivers and to the Earth.

are placed under the sanction of the gods by a formal appeal to them as witnesses. And when a person who had violated such an oath dies suddenly, his death is ascribed to the anger of the Powers to whose keeping his promise had been committed<sup>1</sup>. In such cases the priest of the deity invoked is apt to become the interpreter of the obligation undertaken, or the arbiter as to how far it has been performed. Possibly he is made the keeper of an object for which safe custody is desired, or the depositary of an object whose ownership is disputed. Sometimes, indeed, it is rather within the breasts of chiefs or kings (since they act as judges and exercise executive power) than in those of priests that the knowledge of customs and maxims is deemed to reside. But in these cases the royal office has itself, if not a priestly, yet a sacred character, and the priest plays no leading part in the political or social system. The nature of the religion, and its more or less mystical tendency, have of course a good deal to do with the place allotted to the priesthood in early societies.

Where legal rules take the form of written records embodying what is held to have been delivered to a people either directly by the deity or through sages recognized as inspired or guided by some divine power, the sanctity of law reaches its maximum. It is then a part of religion, and those who know it and expound it have a religious no less than a legal function.

In such documentary records Law and Religion are often so closely interwoven as to be scarcely separable. Many rules are secular in one aspect, religious in another, so that it may be doubted which kind of motive prompted them, which kind of object they were designed to secure. A regulation of ceremonial purity may have its, perhaps forgotten, origin in considerations of a sanitary nature. A sacrifice prescribed as an atonement

<sup>1</sup> Thus we are told by an early Irish annalist that 'the sun and the wind killed Laoghaire (king of Ireland in the time of St. Patrick) because he broke his oath to the men of Munster.'

for sin may also operate as a civil penalty. Offences against the community may be deemed primarily offences against the deity and so dealt with; and a frequent punishment for what we should now call crimes is to devote the culprit to the wrath of the powers of the nether world, or to deprive him of the protection of those who rule the upper world, and therewith expose him to outlawry, the oldest of all legal sanctions.

In nations living under the influence of such ideas, the exponents of Law and Religion tend to be the same persons, because these two branches of public administration are conceived as being the same, or at least two different sides of the same thing. Such persons may or may not be priests performing sacrifices or consulting the deity through oracles, or omens, or a sacred lot. But they are the depositaries of the sacred traditions, and it is they who interpret those traditions and apply them to concrete cases. As such they are usually among the ablest and most educated persons in the community, sometimes prominent members of the ruling class.

Yet religion must not in such a state of society be conceived as the dominant power, which gives birth to Law. In early societies the duties and acts which belong to the external or secular side of life are more important than is the part of life concerned with the emotions felt towards the deity, whether of reverence, love, or fear. But in the observance of all the established customs and in the performance of all the prescribed ceremonies, that which is pleasing to the gods is not separated even in thought from that which is salutary for the community. The service of the deity consists, apart from occasions of orgiastic excitement, not in the emotional attitude of the soul, but in the discharge of the duties recognized as owed to the family and the community, duties which are more or less moral according to the character of the religion—for righteousness may hold a higher or a lower place among them—but which, whether they relate on the one hand to sacrifices offered

and fasts observed, or on the other hand to the fulfilment of all that the tribe or the State expects from its citizens, are external duties. In most early nations, these duties are prescribed not by religious emotion, but by settled usages and rules which have the sanction alike of the State whose welfare is involved in their observance, and of the unseen Powers that protect it. The people have not yet begun to distinguish by analysis the three elements of Law, Morality and Devotion, though here and there the voices of lofty spirits, such as the prophets of Israel, are heard proclaiming the supremacy of the law of righteousness as the true expression of the Will of God, and obedience to it as the truest service that can be rendered by His creatures.

The relation borne by Law, Morality, and Worship, each to the other, differs widely in different peoples. The student of early society must be always on his guard, like the student of natural history, against expecting a greater uniformity than in fact exists, and against generalizing broadly from a few striking instances. Even so brilliant a speculator as Sir Henry Maine fell into the error of assuming the system of paternal power to be practically universal in certain stages of society. Among our Scandinavian and Low German ancestors, for example, it would appear (so far as our imperfect data go) that the worship of the gods had not very much to do with legal usages and civil polity, though to be sure other influences came in at a comparatively early stage to turn the current of their development<sup>1</sup>. The same may be true of the Gadhelic tribes, though the knowledge we have regarding their usages and worship while still heathen is lamentably scanty. There is, however, in the records of early Rome and of the Greeks, as well as in those of some Eastern nations, a good deal to illustrate the view I have been trying to state.

<sup>1</sup> But in Norway the Assembly is usually held at a temple, as in Iceland the Goði is both a priest and a chief, and the temple is the place where judicial oaths are taken. See Essay V.

A striking example of conditions of thought and practice in which religion had (at a comparatively advanced stage) been so involved in law as to be almost stifled by law is furnished by the Jewish people as we find them under Roman dominion. The lawyers referred to in the New Testament<sup>1</sup> (a class of whom there are but few traces before the Captivity) are not priests (though of course a priest might happen to be learned in the law), yet they have a quasi-sacerdotal position as conversant with and able to interpret a body of rules which are of divine origin, and embrace the relations of man to God as well as to his fellow men. Between religious duty and religious ceremony on the one hand and the performance of civil duties on the other there is no line of demarcation: all are of like obligation and are tried by similar canons. Hence piety tends to degenerate into formalism: hence the precisians who insist upon petty externalities and neglect the weightier duties deserve and incur the rebukes of a higher spiritual teaching. It may indeed be said that one great part of the work recorded in the Gospels, regarded on its historical side, was to disjoin Law from Religion or Religion from Law. And this work was performed not merely by superseding parts of the law known as that of Moses, or by giving a new sense to that law, but also by transforming Religion itself, purging away the externals of sacrifice and other ceremonial rights, and leading the renewed and purified soul into 'the glorious liberty of the people of God.'

That majority of the Jewish race which did not accept the teachings of Christ continued for many centuries, scattered and depressed as it was after the destruction of Jerusalem, to treat its ancient law-books and the traditions which had gathered round them as being both a body of civil rules and a religious guide of life. De-

<sup>1</sup> The *γραμματεῖς* (scribes), *νομικοί* (lawyers), and *νομοδιδάσκαλοι* (doctors of the law) of the New Testament seem to be different names for the same class, and identical with the *ιερογραμματεῖς* of Josephus.

spite the tendency to formalism which has been noted, there were among the Rabbis of the early centuries A.D. not a few who dwelt upon the moral and emotional side of the Mosaic Law, and who through it sustained the spirit of the sorely tried nation.

In the Christian Church also ceremonies and external observances came before long to play a great part in worship, and were for ages an essential element in the popular conception, indeed in the practically universal conception, of Christianity itself both as a theology and as a religion. The atmosphere which surrounded nascent Christianity was an atmosphere saturated with rites and observances. There were in the primitive Church some few usages and in the New Testament some few texts on which it was possible to erect a fabric of ceremonial worship. But even if these conditions had been absent, the tendencies of human nature to create a body of ritual and to attach a sort of legal sanction to the external duties which custom prescribed would have prevailed.

How far the rites and practices which nearly every branch of the Christian Church has to a greater or less extent enjoined are each of them interwoven with the vital tenets of the faith, is a question not likely to be settled in any future that we can foresee. But the conception of the 'Kingdom of the Heavens' as something dissevered from the obligations imposed by legal tradition has also remained ever since in Christianity as a principle of profound significance, which has at different times emerged in various forms to become sometimes a destroying, sometimes a vivifying and transforming force. Such sayings as 'Where the Spirit of the Lord is, there is liberty,' or 'He hath made you kings and priests to God,' or 'Ye are not under the Law but under Grace,' have from time to time roused men to hold themselves delivered from all bonds of custom expounded or rules enforced by ecclesiastical authority.

I will not, however, attempt to follow out the intricate

relations between the two conceptions, as they appear in the long course either of Christian or of Jewish annals, but will pass on to consider the phenomena of their connexion in another field, one in which the phenomena are comparatively simple, and lie open to-day to the study of every traveller in a land where the old and the new stand in striking contrast.

The best modern instance of the identity of Religion and Law is to be found in that originally misconceived and subsequently perverted form of Judaism which still prevails extensively over the eastern world, and recognizes Muhamad of Mecca as the last and greatest of the prophets of Jehovah. In Islam, Law is Religion and Religion is Law, because both have the same source and an equal authority, being both contained in the same divine revelation. I cannot better illustrate their union than by giving a short account of an ancient and splendid University where they are taught as one, hoping that so much of digression as is thereby involved will be pardoned in respect of the interest which this famous seat of learning deserves to excite, and of the light which it casts on the early history of the Universities of Europe—of Bologna and Paris, of Padua and Salamanca and Prague, and of our own Oxford and Cambridge.

About three hundred and fifty years after Muhamad, and towards the end of the tenth century of the Christian era, Johar, general of the Fatimite Sultans established at Tunis, conquered Egypt. When he built Cairo (El Kahira, 'the Victorious'), not far from the decayed Memphis, he founded in the new city a mosque which presently obtained the name of El Azhar, that is to say, 'The Flowers' or 'The Flourishing.' The Fatimites, belonging to the schismatic sect of the Shiites, were particularly anxious to establish their ecclesiastical position against the orthodox Sunnites, and, just as Protestant princes in the sixteenth century founded universities for the defence of their tenets—as, for instance, Elector John of Saxony set up the University of Jena

—so the second Fatimite ruler of Egypt, Khalif Aziz Billah, resolved to attract learned men to his capital. He gathered famous teachers to the Mosque, and there was soon a great afflux of students. Sultan Hakim (probably a madman), who went so far beyond the doctrines of Shiism as to declare himself an incarnation of Ali and a Mahdi, closed El Azhar, and transferred the University to another mosque which he had founded. However, the teaching staff was subsequently brought back to El Azhar (which returned finally to Sunnite orthodoxy with the conquest of Egypt by Saladin in 1171 A.D.), and it has been now for many centuries the greatest University in the Musulman world, being situate in what has been, since the decline of Bagdad, the greatest purely Musulman city<sup>1</sup>. The number of students sometimes reaches ten thousand; at the time of my visit (in 1888) it was estimated at eight thousand.

The whole teaching of the University is carried on within the walls of the Mosque, a large group of buildings, approached by six gates, and standing in the oldest part of Cairo. The chief entrance is from the Alley (or arcade) of the Booksellers in the Bazaar. At the outer portal, in the portico, the visitor leaves his shoes. To the left of the inner portal I found a noble square hall, said to date from the fourteenth century, as lofty as the chapel of Magdalen College and about as large, though different in shape, with beautiful marbles on the walls, and an aisle separated from the rest of the chamber by a row of tall columns, supporting slightly pointed arches. The sunlight came in through large openings, filled by no glass, under the roof. In the centre there were sitting or kneeling or crouching some eighty or ninety men in an irregular circle, mostly young men, yet many over thirty and some as old as fifty, with

<sup>1</sup> Stambul (Constantinople) is larger, but Stambul has always had a large Christian element, whereas Cairo was till about thirty years ago almost wholly Muhamadan. Moreover Cairo was better situated for drawing students from North Africa and Western Asia than Stambul, which is almost on the outermost edge of the Musulman world.

their shoes laid beside them on the matting. In front of them, sitting cross-legged on a low wooden throne, was an elderly professor, holding a book in his hands, and appearing to read from it. Now and then a question came to him from the circle, which he answered quickly; but otherwise the audience were perfectly still, and no sound was heard save his own low voice and the beating of the wings of the birds as they flew to and fro above. The book was an authoritative commentary on the Sacred Law, to which he added his own explanations as he read; and he was treating of the four requisites of prayer, especially of the first of the four, viz. Devotional Intent. No one took notes, but all listened with the closest attention. He was the Chief Sheykh of the Mosque, and in virtue of his office, also the Sheykh ul Islam or chief ecclesiastical and legal authority of Egypt, which, being expressed in the terms of an English University, would make him Chancellor, Regius Professor of Divinity and Regius Professor of Civil Law rolled into one, and therewithal also Archbishop of Canterbury and Lord High Chancellor.

In the similar but rather less spacious and ornate room opposite I found another class, smaller, and composed of somewhat younger men, listening to a lecture on what the Muslims call Dealings, *i.e.* civil law. The subject was Wills, and the requisites to the validity of a will, such as the sanity, freedom and full age of the testator, were being explained with reference to a book of authority which lay before the lecturer, a younger man than the Chief Sheykh. He spoke with a fluency, clearness and evident power of interesting the class, which reminded me of a brilliant teacher whom I had heard twenty-five years before discoursing on the same subject at Heidelberg.

Led hence under the lofty gateway which gives access to the great court, I saw, like an earlier traveller, characters inscribed above the gate, and was told by my Virgil that their import was—'Actions must be judged

by their intent, and every man shall be requited according to what he purposed'—a maxim which belongs in one sense to religion, in another to law, but requires, like the corresponding phrase of our civilians—*Actus non est reus nisi mens sit rea*—to be carefully defined and qualified before it can be applied, seeing how often good intent is followed by bad result.

The great Court of the Mosque is a quadrangle nearly as large as that of Christ Church, Oxford, and was once, like that of Christ Church, surrounded by arcades resting on columns, of which now only a few remain. There are three tanks for ablutions and a great cistern of Nile water beneath, whence vessels are filled by boys who carry it round among the groups. It is the hour of forenoon rest between the morning lecture and the noontide meal, and a confused din of many voices rises from the six or seven hundred persons scattered through the quadrangle, whose ample space they do not crowd. The men, mostly young, are sitting or lying all over the flagged surface, reading or talking or reciting with a book open before them, many swaying backwards and forwards as they chant, all in the blaze of sunlight. Piles of thin, tough cakes, of which more anon, stand here and there. Through the groups walks a sturdy official bearing aloft a formidable symbol of order, two long and heavy flat strips of leather attached to a stout handle, wherewith he coerces any disturber of the peace of the Mosque. Discipline is easily maintained, for the Oriental, unless violently excited, is submissive to authority, and dangerous only in a mob. Moreover the students are mostly poor, and therefore attentive to their studies. The arcade on the south-east side is filled with knots of boys from eight to fourteen years of age sitting round their teachers, each with a metal slate, a brass ink-horn, and a reed pen; some gathered round a teacher armed with a long palm stick. They read aloud from the slate what they have written, thus learning by heart verses of the Koran, copies of which are set up on

wicker stands, because the sacred volume must never be lower than the reader's waist.

Adjoining the great quadrangle is the Liwan, or hall for prayer and preaching. It is really two parallel halls, partially separated by a wall, and divided into nine aisles by rows of columns nearly four hundred in number, the shafts of granite or marble with carved capitals. They were doubtless brought hither from Christian churches long since destroyed<sup>1</sup>, churches that may have echoed to the voices of Athanasius and of Cyril. Along the side towards Mecca are four short recesses (Kiblas) resembling the apses of an early Christian basilica, though much smaller, one for each of the four legal orthodox sects of Muslims. Beside the chief Kibla there is placed, high up on the wall, a small wooden box containing relics, among which is one equally fit to be revered by Jews, Christians and Muslims, viz. a piece of Noah's Ark. The effect of the hall is due rather to its vastness and to the maze of pillars than to any beauty in form or decorations; for the walls are plain, and the low roof makes the interior more sombre than either the famous mosque of Kêrwan or the still more rich and majestic mosque of the Ommyad Khalifs at Cordova. As I entered this Liwan, the hour of midday prayers had arrived, and the crowd of students rose suddenly and, turning towards the four Kiblas, performed their devotions. This done, the multitude, passing noiselessly, for every foot is unshod, through the maze of columns, sorted itself into classes, each grouped in an incomplete circle round its own professor. Every regular professor has his column, at whose foot he sits, leaning against it; and here he reads or talks loudly enough to be heard over the din by those near him, for the clamour of many voices is lessened by the amplitude of the chamber. The younger or less privileged lec-

<sup>1</sup> The columns of the ancient and most sacred mosque at Kairoan or Kêrwan (in the territory of Tunis), built by Sidi Okba, the conqueror of North Africa, were brought from Christian churches, and many from the great basilica of Carthage, the floor of which has been recently uncovered.

turers mostly gather their hearers outside the Court, though I found a class of youths learning the elements of grammar at the foot of one of the Liwan columns. The lectures were mostly on grammar, which has a religious side, because it includes prosody and the proper pronunciation of the Koran. One eminent professor, who was also Select Preacher for the time being, was discoursing on Ibn Malek's treatise on Arabic Grammar, holding in his hand the treatise, which is a poem of one thousand verses. All the class had copies, and continued to listen with untroubled gravity while a cat walked across between them and the professor. Another teacher, lecturing on logic, was being interrupted by a running fire of questions from his pupils, which he answered with swift promptitude and terseness.

There are about two hundred and thirty professors, that is to say, persons authorized to teach and engaged in teaching<sup>1</sup>. As in the universities of mediaeval Europe, graduation consists in a certificate of competence to teach; and this is given to those who have spent the prescribed time in study by inscribing in the copy of the book which the graduate has been studying a statement by the teacher that he has mastered the contents of that book. When a certificate of wider attainments is sought, the candidate is examined orally by two or three sheiks. As in the Middle Ages, there are no written examinations; and indeed writing is but little used, the aim of teaching being rather to cultivate the memory. The books studied are always the same, so there is no occasion for examination statutes and Notices of Boards of Studies. The freshman begins with what is called *Balagha*, the use of language, a subject which comprises grammar, logic (with the elements of metaphysics), and rhetoric. Next follows theology, the Nature of God and the functions of the Prophet, after which comes the Law, including both the precepts of

<sup>1</sup> In the session of 1898-9 there were 198 professors and 7,676 students attached to the Mosque itself (without counting its dependent *Kuttabs*).

religion as applied in practice and those of what we should call civil or secular law, both of them based on the Koran and the Hadith or sacred tradition. Instruction is no longer given in medicine here. When taught, it was taught, as it is still in the University of Fez, from an Arabic translation of Aristotle. The course prescribed for one who aspires to be a Kadi (Judge of the Sheriat or Sacred Law) is fourteen years, but an even longer time would be needed to fit a man to be a Mufti or doctor of the law. Five or six years, I was told, would qualify a student to become a village schoolmaster, able to teach the elements of religion and to advise the peasants on questions of divorce, just as in rural England the schoolmaster used to draw wills, with much ultimate benefit to the legal profession: and the same length of study might enable a man to become Imam (curate in charge) of a small mosque. Study consists, in every branch, chiefly in learning by heart. Even religion is taught through rules for prayer and almsgiving, which must be exactly remembered. But there is also a large field for the development of subtlety of mind in the casuistical distinctions which form a large part of law, both moral and civil. Neither physical science, nor history, nor any language save Arabic is recognized, nor (which is more surprising) do arithmetic and mathematics now find a place<sup>1</sup>.

The students come from all parts of the Musulman world, but the large majority from Egypt: and the Muslim legal sect to which most Egyptians belong (the Shafite) is accordingly the most numerous<sup>2</sup>, amounting to nearly half the total. They are mostly poor, and live to some extent on the charitable gifts of the citizens,

<sup>1</sup> In 1896 (eight years after my visit) instruction began to be provided in geometry, algebra, arithmetic and geography, but it is given by secular teachers appointed by the Egyptian Government, not by the regular staff of the Mosque.

<sup>2</sup> In 1898-9 the numbers of the four sects were as follows:

Shafites—Professors, 86; Students, 3,495.

Hanefites—Professors, 41; Students, 2,168.

Malckites—Professors, 68; Students, 1,983.

Hanbalites—Professors, 3; Students, 30.

paying nothing for their instruction. But a certain number share in a kind of endowment which deserves notice, because it is the germ of a College—a germ, however, which never grew into a plant.

The word *Riwak* (accent on the last syllable), properly a colonnade or corridor, is used at El Azhar to denote an apartment or set of apartments, allotted to certain students as sleeping-quarters. There are in the Mosque buildings many Riwaks, and several are set apart for students coming from some particular countries<sup>1</sup>. There is one for the Syrians, one for the natives of Mogreb (North-West Africa, from Tripoli to Morocco), one for the Kurds, one for the natives of Mecca and Medina (El Haramain), one for the Sudanese of Senaar, and so forth. Some are well ventilated and comfortable, such as that endowed by Ratib Pasha for Hanefites: some plain and bare. It is of course only in the three or four colder months that a roof is needed; during the summer nights quarters *à la belle étoile* are preferable. Practically, I was told, every student who wished could obtain quarters in a Riwak, because only the poor desire to be so accommodated: and a sleeping-place means no more than a bit of floor on which to spread your prayer carpet and place your chest of books and clothes. But the Riwaks (or most of them) also supply rations of bread to those students who apply for them when they have reached a certain stage of proficiency, that is, have mastered two or three books and obtained a certificate to that effect. These rations consist of wheaten cakes, thin and tough, and are supplied out of endowments which have from time to time been bestowed on the Mosque or on particular Riwaks by pious founders. These wheaten cakes are in fact the

<sup>1</sup> Place of birth constituted an important basis of classification in mediæval Universities. In Oxford, as in Paris, the students were divided into the Northern and Southern nations (whence the two Proctors), and in each of the Universities of Glasgow and Aberdeen there are still four Nations, a system of organization preserved for the purposes of the election of a Lord Rector. Nations exist also in the University of Upsala.

very rudest form of what is called in Scotland a Bursary, and in England an Exhibition or Scholarship; and the assignment of a Riwak as lodgings to students from a particular district may be compared with the earliest provision of a dwelling and a pittance for students in England, the acorn out of which there has grown the superb system of the Colleges of Oxford and Cambridge, many of them originally connected with particular counties.

The Mosque, that is to say the University, as distinguished from the particular Riwaks, had at one time considerable endowments, called in Arabic Wakfs (pronounced Wakufs); but a large part of these endowments were seized by Muhamad Ali early in the nineteenth century (about 1820). In respect of them a considerable sum is now paid from the public treasury, and a further income is derived from the Wakfs which not having been seized, are now administered by the Government department in charge of charitable foundations. The present income of such foundations as remain is trifling, and the slender incomes of the senior professors are supplemented by small payments from Government and by gifts from pious persons. The richer students are also expected to offer gifts, and sometimes a charitable citizen will send a sheep to give the poor students a better dinner on a feast-day<sup>1</sup>.

Before leaving the University I was presented to its head, the Sheik El Azhar, whom I found sitting to hear and determine divers matters, his lectures having been disposed of in the forenoon. He was too great a man to rise to receive me, nor is it easy to rise when one sits cross-legged; but he placed his hand upon his heart with a dignified courtesy and invited me to seat

<sup>1</sup> In 1898-9 the total sum paid to El Azhar out of the public treasury was LE (Egyptian pounds) 6,611, and out of the administration of the Wakfs LE 5,224, besides a sum of LE 1,512 derived from the endowments of the several Riwaks. The best endowed Riwaks are those of the Turks (516) and of the Mogrebins (364). I owe these figures to the kindness of my friend Vacoub Artin Pasha, the energetic and enlightened head of the educational administration of Egypt. The Egyptian pound is about twenty shillings and fourpence.

myself beside him. His disciples were kneeling round him. He was more like an old Lord Chancellor than an old archbishop, with an air rather of complacent judicial shrewdness than of apostolic unction. When it had been explained to him that I was a lawyer and that law was taught in the Universities of England, he remarked that religion consists in conduct and behaviour, whereto I replied that the Roman jurists stated another side of the same truth when they said, '*Iuris praecepta haec sunt, honeste vivere, alterum non laedere, suum cuique tribuere.*'

It was impossible to spend a day in El Azhar without being struck by its similarity to the Universities of Europe as they existed in the thirteenth and fourteenth centuries.

In both an extreme simplicity of appliances. Nothing more than a few buildings capable of giving shelter has been needed here or was needed there: for a University is after all only a mass of persons possessing or desiring learning, a concourse of men, some willing to teach and others eager to be taught.

In both a like simplicity of educational arrangements. Every graduate is, or may be if he likes, a teacher, and graduation is nothing more than a certificate of knowledge qualifying a man to teach.

In both, comparatively slender funds, which however increase slowly by the gifts of private benefactors. The whole establishment of El Azhar costs about £14,000 sterling a year, rather more than half of which goes in salaries to the professors, while about £1,600 goes in prizes and charitable aid to the students. Eight thousand (roughly speaking) are taught there at a cost of £1 15s. per student. The University of Oxford and its colleges (taken together) with about three thousand undergraduate students have an annual revenue of about £333,000<sup>1</sup>; Harvard University in Massachusetts with

<sup>1</sup> Of this sum (which has been arrived at after deducting outgoings on estates, so that as respects this kind of property it represents net revenue) £55,000 is the revenue of the University and £278,000 the revenue of all the Colleges, including fees and room rents.

nearly four thousand students has £235,000 (of which tuition fees contribute £114,000).

In both, the greatest freedom for the student. He may study as much or as little as he pleases, may select what professor he pleases, may live where he pleases, may stay as long as he pleases, and may be examined or not as he pleases.

In both, a narrow circle of subjects and practically no choice of curriculum. El Azhar teaches even fewer branches than did Oxford or Bologna in the thirteenth century, for in Musulman countries the Koran has swallowed up other topics more than theology, queen of the sciences, and the study of the Civil and Canon Laws did in Europe. But a vast range of matters which are to-day taught in German, in American, and even in English Universities lie outside both the Trivium and Quadri-vium and the professional faculties as they stood in the Middle Ages.

In both, little separation between teachers and pupils, and a mixture of students of all ages, from boys of twelve to men of fifty. In Oxford there is a tradition that marbles used to be played by students on the steps of the Schools. Why not, when one sees boys of twelve learning to read the Koran at El Azhar? Oxford may well have been then, like this mosque now, a school for persons of all ages.

In both, a body of men liable to turbulence, and easily roused by political passion. A multitude living together without family ties or regular industrial occupation is prone to fanaticism; and the students of El Azhar, like the Softas at Constantinople, like the monks of Alexandria in the days of Cyril and Hypatia, have sometimes raised tumults; though these would be repressed more savagely here, should they displease the ruling powers, than were those for which Paris and Oxford were famous in days when their scholars were fired by religious or political excitement, and when the movements of public opinion and the tendencies we now

call democratic found through the eager crowd of university youth their most free and prompt expression.

Finally, in both, a kind of teaching and study which tends to the development of two aptitudes to the neglect of all others, viz. memory and dialectic ingenuity. The first business of the student is to know his text-book, if necessary to know every word of it, together with the different interpretations every obscure text may bear. His next is to be prepared to sustain by quick keen argument and subtle distinction either side of any controverted question which may be proposed for discussion. As the habit of knowing text-books thoroughly—and the knowledge of Aristotle and the *Corpus Juris* possessed by mediaeval logicians and lawyers was wonderfully exact and minute—made men deferential to authority and tradition, so the constant practice in oral dialectical discussion made men quick, keen, fertile, and adroit in argument. The combination of brilliant acuteness in handling points not yet settled, with unquestioning acceptance of principles and maxims determined by authority, is characteristic of Muhamadan Universities even more than it was of European ones in the Middle Ages, and tended in both to turn men away from the examination of premises and to cast the blight of barrenness upon the extraordinary inventiveness and acuteness which the habit of casuistical discussion develops. And the parallel would probably have been closer could it have been drawn between the Musulman Schools, not as they are now, but as they were during the great age in Bagdad in Spain and in Egypt, and the schools of Western Europe in the days of Abelard or Duns Scotus. For El Azhar to-day impresses one as a University where both thought and teaching are in a state of decline, where men gnaw the dry bones of dogmas and rules which have come down from a more creative time.

To what causes shall we ascribe the striking contrast

between the later history of schools which at one time presented so many similar features? Why has Musulman learning stood still in the stage it reached many centuries ago, while Christian learning, developing and transforming itself, has continually advanced? Why has El Azhar actually gone back? Why does it accomplish nothing to-day for the deepening, or widening, or elevating of Musulman thought?

Of racial differences I say nothing, because to discuss these would carry us too far away from our main subject. Their importance is apt to be overrated, and they are often called in to save the trouble of a more careful analysis, being indeed themselves largely due to historical causes, though causes too far back in the past to be capable of full investigation. Here it is the less necessary to discuss them, because many races have gone to make up the Musulman world, and some of these had attained great intellectual distinction before Islam appeared. Nor will I dwell on the tremendous catastrophe which overwhelmed the Musulman peoples of Western Asia in the twelfth, thirteenth, and fourteenth centuries, when many flourishing seats of arts and letters were overwhelmed by a flood of barbarian invaders, first the Seljukian Turks, then the Mongols of Zinghis Khan, then the Ottoman Turks whose rule has lain like a blight upon Asia Minor, Syria, and Irak for the last fourteen generations of men. Before the Seljuks and the Mongols came, philosophy and learning, science and art, had in some favoured spots reached a development surpassing that of contemporary Christian states, a development which in the schools of Irak and of Persia had wandered far from orthodox Musulman traditions, but which certainly showed that Islam is not incompatible with intellectual development. That culture, however, which had adorned the days of the earlier Khalifs, decayed even in Spain and in Barbary, where it was not destroyed by a savage enemy. It was not strong enough to recover itself in Syria, Asia Minor, or

Egypt, and could neither elevate and refine the Turk nor send up fresh shoots from the root of the tree he had cut down. Even in Persia, though Persia remained a national kingdom, preserving its highly cultivated language and its love of poetry, creative power withered away. While therefore giving full credit to the Arabs, Syrians, and Persians of the earlier Musulman centuries for their achievements, we are still confronted by the fact that the soil which produced that one harvest has never been able to produce another. Scarcely any Musulman writer has for five hundred years made any contribution to the intellectual wealth of the world. Even the Musulman art we admire at Agra and Delhi, at Bijapur and Ahmedabad, was largely the work of European craftsmen. The majestic mosques of Constantinople are imitations of Byzantine buildings. Thus we are forced back upon the question why the Universities of Islam, with all that they represent, have languished and become infertile.

Among the causes to be assigned we may place first of all the greater intellectual freedom which Christianity, even in its darkest days, permitted. The Koran, being taken as an unchangeable and unerring rule of life and thought in all departments, has enslaved men's minds. Even the divergence of different lines of tradition and the varieties of interpretation of its text or of the Traditions, has given no such opening for a stimulative diversity of comment and speculation as the Christian standards, both the Scriptures themselves, the product of different ages and minds, and the writings of the Fathers, secured for Christian theology.

In the second place, the philosophy, theology, and law of Islam have been less affected by external influences than were those of Christian Europe. Greek literature, though a few treatises were translated and studied by some great thinkers, told with no such power upon the general movement of Musulman thought as it did in Europe, and notably in the fifteenth and sixteenth cen-

turies; and Greek influence among Muslims, instead of growing, seems to have passed away.

Thirdly, there has been in the Musulman world an absence of the fertilizing contact and invigorating conflict of different nationalities with their diverse gifts and tendencies. Islam is a tremendous denationalizing force, and has done much to reduce the Eastern world to a monotonous uniformity. The Turks seem to be a race intellectually sterile, and like the peoples of North Africa in earlier days, they did not, when they accepted the religion of Arabia, give to its culture any such new form or breathe into it any such new spirit as did the Teutonic races when they embraced the religion and assimilated the literature of the Roman world. Only the Persians developed in Sufism a really distinct and interesting type of thought and produced a poetry with a character of its own; and the Persians, being Shiites, have been cut off from the main stream of Musulman development, and have themselves for some centuries past presented the symptoms of a decaying race.

Lastly, the identification of Theology and Law has had a baleful influence on the development of both branches of study. Law has become petrified and casuistical. Religion has become definite, positive, frigid, ceremonial. Theology, in swallowing up law, has itself absorbed the qualities of law. Each has infected the other. In El Azhar theology is taught as if it were law, a narrow sort of law, all authority and no principle. Law is taught as if it was theology, an infallible, unerring, and therefore unprogressive theology. Religious precepts are delivered in El Azhar as matters of external behaviour and ceremony. Some of the duties enjoined, such as prayer, are wholesome in themselves; some, such as almsgiving, are laudable in intention, but beneficial in result only when carried out with intelligence and discrimination; some, such as pilgrimage to Mecca, are purely arbitrary. All, however, are dealt with from the outside: all become mechanical, and the precise

regulations for performing them quench the spirit which ought to vivify them. The intellect being thus cramped and the soul thus drilled, theology is dwarfed, and its proper development arrested. It is not suffered to create, or to help in the creation of, philosophy: and accordingly in El Azhar, philosophy, in that largest sense in which it is the mother of the sciences, because embodying the method and spirit whence each draws its nutriment, finds no place at all.

We are thus brought back to that general question of the relations of religion and law in the Musulman world from which, in the interest naturally roused by the sight of a University recalling the earlier history of Oxford and Cambridge, I have been led to turn aside.

The identification of religion and law rests upon two principles. One is the recognition by Islam of the Koran as a law divinely revealed, covering the whole sphere of man's thought and action. Being divine it is unerring and unchangeable.

The other is the promulgation of this revelation through a monarch both temporal and spiritual, Muhamad, the Prophet of God.

Since the revealed law is unerring, it cannot be questioned, or improved, or in any wise varied. Hence it becomes to those who live under it what a coat of mail would be to a growing youth. It checks all freedom of development and ultimately arrests growth, the growth both of law and of religion.

Since the revelation comes through a prophet who is also a ruler of men, a king and judge, as well as an inspired guide to salvation, it is conveyed in the form of commands. It is a body of positive rules, covering the whole of the Muslim's conduct towards God and towards his fellow men.

Three results follow of necessity.

Religion tends to become a body of stereotyped observances, of duties which are prescribed in their details, and which may be discharged in an almost me-

chanical way. The Faith is to be held, but held as a set of propositions, which need not be accompanied by any emotion except the sense of absolute submission to the Almighty. Faith, therefore, has not the same sense as it has in the New Testament. It is by works, not by faith (save in so far as faith means the acceptance of the truths of God's existence and of the prophetic mission of Muhamad) that a Muslim is saved. There is little room for the opposition of the letter and the spirit, of the law and grace, for religion has been legalized and literalized. Nevertheless there is in many Muslims a vein of earnest piety, and a piety which really affects conduct. Those Westerners who have praised Islam have often admired it for the wrong things. They admire the fierce militant spirit, and the haughty sense of superiority it fosters. They undervalue the stringency with which it enforces certain moral duties, and the genuine, if somewhat narrow piety which it forms in the better characters.

Law becomes a set of dry definite rules instead of a living organism. It is a mass of enactments dictated by God or His mouthpiece, instead of a group of principles, each of which possesses the power of growth and variation. The two motive powers, whether one calls them springs of progress or standards of excellence, which guided the development and made the greatness of Roman Law, the idea of the Law of Nature and the idea of Utility, as an index to the law of nature, are absent. There is no room for them where the divine revelation has once for all been delivered. Reason gets no fair chance, because Authority towers over her. Forbidden to examine the immutable rules, she is reduced to weave a web of casuistry round their application. It is only through the interpretation of the sacred text and of the traditions that the Law can be amended or adapted to the needs of a changing world: and one reason why the Musulman world changes so little is to be found in the unchangeability of its Sacred Law. The difficul-

ties which European Powers have found in their efforts—efforts which to be sure have been neither zealous nor persistent—to obtain reforms in the Ottoman Empire, are largely due to the fact that the Sacred Law has a higher claim on Muslim obedience than any civil enactment proceeding from the secular monarch.

Such a system will obviously give little scope for the development of a legal profession. Advocacy is unknown in Musulman countries. The parties conduct their respective cases before the Kadi<sup>1</sup>. They may produce to him opinions signed by doctors of the law in favour of their respective contentions, but the only notion the Musulman (*i.e.* the non-Occidentalized Musulman) can form of an advocate in our sense of the word is a paid, and presumably false, witness.

The community suffers politically. The duty of unquestioning obedience, and the habit of blind submission to authority, dominate and pervade the Musulman mind so completely that its only idea of government is despotism. Nothing approaching to a free ruling assembly, either primary or representative, has sprung up in a Musulman country; and it would need almost an intellectual revolution to make such a system acceptable or workable there<sup>2</sup>.

Finally, it is a consequence of the system described that there is an absolute identity of State and Church. The Church is the State, but it is a highly secular State, wanting many of the attributes we associate with the Church. It commands as a matter of course the physical force of the State, and needs no special anathemas of its own. Its priests, so far as it can be said to have priests, are lawyers, and its lawyers are priests, and its students graduate from the University into what is one

<sup>1</sup> Whether this system tends to facilitate the bribing of judges, almost universal in countries ruled by a Musulman monarch, *quaere*.

<sup>2</sup> I do not mean to suggest that races like those of Arabia, Syria, and Persia, may not under the contact and stimulus of European literature and thought again develop an intellectual life of their own. But it can hardly be a life on the orthodox lines of Islam. The first thing to be hoped for is that Syria and Asia Minor may get rid of the Turk, who has never shown himself fit for anything but fighting.

and the same profession. As the Church is pre-eminently a militant Church, born and nursed in war, its head, the Khalif, is also of right supreme temporal sovereign. The Pope is Emperor, and the Emperor is Pope. They are not two offices which one man may fill, as the Emperor Maximilian wished to be chosen Pope. They are one office. And accordingly when any spiritual pretender arises, claiming to be a prophet of God, he becomes forthwith, *ex necessitate terminorum*, a temporal ruler, like the Mahdi of the Sudan at the present moment (1888). The only exception to this absolute identification of Church and State (which is of course a fact making most powerfully for despotism) is to be found in the incompetency of the Khalif to pronounce upon the interpretation of the sacred law. This attribute of the Pope is lacking. The spiritual head of the Musulman world, for this purpose, and therewith also its legal head, is a lawyer, the Sheik-ul-Islam, to whom it belongs to deliver authoritative interpretations of questions arising on the law, *i.e.* on the Koran and the Traditions. Such an opinion is called a Fetwa. Against it even a Khalif cannot act without forfeiting his right to the obedience of his subjects, so when any Sovereign claiming to be Khalif wishes to do something of questionable legality, he takes care to procure beforehand from the Sheik-ul-Islam a fetwa covering the case. Being in the Khalif's power, the Sheik rarely hesitates, yet he is in a measure amenable to the opinion of his own profession, and might be reluctant to venture too far. So too the Khalif, though he might depose a recalcitrant Sheik (were such a one ever to be found), and replace him by a more pliant instrument, must also have regard to public sentiment, a power always formidable in the sphere of religion, and the more formidable the more the mind of a people is removed from the influence of habits properly political, and is left to be coloured by religious feeling.

Islam these owes features of its religion, its law and its politics to its source in a divine revelation complete,

final, and peremptory. But it is not the only religion that has a like source. The Musulmans class three religious communities as Peoples of the Book. The other two are the Jews and the Christians. Of the Jews I have spoken already. Their system, as it stood at the time of our Lord's appearing, resembled in many points that which Islam subsequently created, though there was never in it any complete identification of the spiritual and the secular power, because it had a regular hereditary priesthood, which, though for a time acting as leader and ruler, had no permanent coercive secular authority. The Jewish system had, moreover, in the words of the Prophets and in the Psalms influences complementary to the Mosaic law and the Traditions, and corrective of any evils which might spring from undue respect for the latter. Moreover, the historical development of that system was checked by external conquering forces, which ultimately deprived it of the chance of becoming a temporal power.

What, however, shall we say of Christianity? Why has the course of its history been so unlike that of Islam? Why has its origin in a divine revelation not impressed upon it features like those we have been considering? I must be content to indicate, without stopping to describe, a few, and only a few, of the more salient causes.

The Christian revelation as contained in the Old and New Testaments is not, except as regards sections of the Mosaic law, a series of commands. It is partly a record of events, partly a body of poems, partly a series of addresses, discourses, and reflections, speculative, hortatory, or minatory, and mostly cast in a poetic form, and partly a collection of precepts. These precepts are all, or nearly all, primarily moral precepts, which are addressed to the heart and conscience, and they proceed from teachers who had no compulsive power, so that such authority as the precepts possess is due only to their intrinsic worth, or to the belief that they express the Divine will. Especially in the case of

the New Testament (though the same thing is essentially true of the Prophets) the precepts are directed not so much to the enjoining of specific right acts fit to be done as to the creation of a spirit and temper out of which right acts will naturally flow. Had the Pentateuchal law been taken over bodily into Christianity, things might have been different, though the other elements of the revelation would have kept its influence in check. But fortunately among the forces that were at work in the primitive Church, there were some strongly anti-Judaic, so any evil that might have been feared from that quarter was averted.

It is impossible to make a code out of the New Testament. The largest collection of positive precepts, delivered with the most commanding authority, is that contained in the fifth, sixth, and seventh chapters of St. Matthew's Gospel. But these are so far from being laws in the ordinary sense of the word that no body of Christians has ever yet come near to obeying them. Indeed hardly any body of Christians has ever seriously tried to do so. They are obviously addressed to the heart and intended not so much to prescribe acts as to implant principles of action.

Similarly the Epistles are either moral exhortations and expositions of duty or else metaphysical discussions. Neither out of them can any code be framed which a lawgiver could attempt to enforce. Even on the external observances of religion and constitution of the Church, so little is said, and said in such general terms, that Christians have been occupied during the last four centuries in debating what it was that the authors of the Epistles meant to enjoin.

After the canonical Scriptures come the Fathers of the Church, whose writings were at one time universally, and by a large part of Christendom still are, deemed to enjoy a high measure of authority. They may be compared to those early Musulman writers from whom the traditions of Islam descend, or to the early recorders

of and commentators on those traditions. The Fathers, however, did not generally affect to lay down positive rules, but were occupied with exhortation and discussion. Neither out of their treatises could a body of law be framed, nor did any one think of doing this till long after their day. Even then it was as guides in doctrine and discipline, not as the source of legal rules, that they were usually cited.

Christianity began its work not only apart from all the organs of secular power, but in the hope of creating—indeed for a time, in the confidence that it would create—a new society wherein brotherly love should replace law.

Before long it incurred, as a secret society, the suspicion and hatred of the secular power, and had indeed so much to suffer that one might have expected its professors to conceive a lasting distrust of that power in its dealings with religion. This, however, did not happen. So soon as the secular monarch placed his authority at the disposal of the Church, by this time organized as a well-knit hierarchy, the Church welcomed the alliance, and began ere long to invoke the help of carnal weapons. This was the time when she might in her growing strength have been tempted to impose her precepts upon the community in the form of binding rules. But the field was already occupied. She was confronted and overawed by the majestic fabric of the Roman law. In the East that law continued to be upheld and applied by the civil authorities. In the West it suffered severe shocks from the immigration of the barbarian tribes; but as it was associated with Christian society, the Church clung to it, and was in no condition for some centuries to try to emulate or supersede it. When the time of her dominance came in the eleventh, twelfth, and thirteenth centuries, she did indeed build up a parallel jurisdiction of her own, with courts into which laymen as well as clerks were summoned, and she created for these courts that mass of decrees, almost rivalling the Civil

Law in bulk and complexity, which we call the Canon Law. In the canon law there may seem to be an analogue to the sacred law of Islam. But the resemblances are fewer than the differences. The canon law never had any chance of ousting the civil law, which had already entered on a period of brilliant development and potent influence at the time when the decrees of earlier Councils and Popes were beginning to be formed into a systematic digest of rules; and temporal rulers were generally able to hold their own against Popes and archbishops. Moreover the canon law, being partly based on or modelled after the Roman civil law, escaped some of the faults that might have crept into it had it been erected on a purely theological foundation. The Church was already so secularized that its law was largely secular in spirit, and ecclesiastical jurists were at least as much jurists as they were churchmen. The question propounded in the twelfth century, whether an archdeacon could obtain salvation, shows that the churchman who betook himself to legal business was deemed to be quitting the sphere of piety. Thus law, canon as well as civil law, remained law, and religion remained religion. The canon law is the law of the Church as an organized and property-holding society or group of societies. It is the law for dealing with spiritual offences. It is the law which regulates certain civil relations which the Church claims to deal with because they have a religious side. But there is no general absorption of the civil by the ecclesiastical, no general lowering of the spiritual to the level of the positive, the external, and the ceremonial. In the fifteenth and sixteenth centuries the New Learning and the great ecclesiastical schism removed the danger, if danger there ever was, that there should descend upon Christianity that glacial period which has so long held Islam in its gripe.

## XIV

# METHODS OF LAW-MAKING IN ROME AND IN ENGLAND

### INTRODUCTORY.

THE relations borne by the growth and improvement of the law of a country to that of the constitutional development of that country as a State are instructive in many aspects—instructive where the lines of progress run parallel to one another, instructive also where they diverge. I propose in the following pages to consider them as they concern the organs and the methods of legislation at Rome and in England. The political side of this subject is a very large one, indeed too large to be discussed here, for it would involve a running commentary upon the general history of these two States. I will only remark that the inquiry would show us, among other things, the fact that the progress of Rome from a republic, half oligarchic, half democratic, to a despotism, did not prevent the phenomena which mark the evolution of its legislation from bearing many resemblances to the evolution of legislation in England, where progress has been exactly the reverse, viz. from a strong (though indeed not absolute) monarchy to what is virtually a republic half democratic, half plutocratic. The present inquiry must be confined to the legal side of the matter, viz. to the Organs and the Methods of Legislation regarded not so much as the results of poli-

tical causes, but rather as the sources whence law springs and the forces whereby it is moulded.

The working of these Organs and Methods may be studied, and their excellence tested, with regard to both the aspects of law itself, its Substance and its Form. The merit of a system of Law in point of Substance is that it be righteous and reasonable, satisfying the moral sentiments of mankind, giving due scope to their activity, securing public order, and facilitating social progress. In point of Form, the merit of Law consists in brevity, simplicity, intelligibility, and certainty, so that its provisions may be quickly found, easily comprehended, and promptly applied. Both sets of merits, those of Substance and those of Form, will depend partly on the nature of the persons or bodies from whom the Law proceeds, that is the Organs of Legislation, partly on the Methods employed by those persons or bodies. But the merits of Substance open up a field of inquiry so wide that it will be better to direct our present criticism of Organs and Methods chiefly to those excellences or defects of the law which belong to its form. I propose to consider these as they worked in Rome, and have worked down to and in our own time in England, assuming the broad outlines of the legal history of both States to be already known to the reader, and dwelling on those points in which a comparison of Rome and England seems most likely to be profitable.

## I. LAW-MAKING AUTHORITIES IN GENERAL.

First let us see what, speaking generally, are the authorities in a community that make the Law, and How—that is to say, by what modes or through what organs, they make it.

Broadly speaking, there are in every community two authorities which can make Law:—the State, *i.e.* the ruling and directing power, whatever it may be, in which the government of the Community resides, and the Peo-

ple, that is, the whole body of the community, regarded not as organized in a State, but as being merely so many persons who have commercial and social relations with one another. There is, to be sure, a school of juridical writers which does not admit that the people do or can thus make Law, insisting that Custom is not Law till the State has in some way expressly recognized it as such. But this view springs from a theory so incompatible with the facts in their natural sense, that a false and unreal colour must be put upon those facts in order to make them fall in with it. It is unnecessary to pursue a question which is apt to become merely a verbal one. Let it suffice to say that Law cannot be always and everywhere the creation of the State, because instances can be adduced where Law existed in a country before there was any State; and because the ancient doctrine, both of the Romans and of our own forefathers—a doctrine never, till recently, disputed—held the contrary. A great Roman jurist says, with that practical directness which characterizes his class, ‘Those rules, which the people without any writing has approved, bind all persons, for what difference does it make whether the people declare their Will by their votes or by things and acts<sup>1</sup>?’ This is the universal view of the Romans, and of those peoples among whom the Roman law, in its modern forms, still prevails. And such has been also the theory of the English law from the earliest times.

Now the State has two instruments or organs by which it may legislate. One is the ruling Person or Body, in whom the constitution expressly vests legislative power. The other is the official (or officials), whether purely judicial, or partly judicial and partly executive, to whom the administration of the law is committed, and whom we call the Magistrate. This distinction does not refer to the instances in which legislative authority is, by an act of the Governing Power,

<sup>1</sup> Julian in *Dig.* i. 3. 32.

specially delegated to some magisterial person or body. Those instances are really to be deemed cases of mediate or indirect legislation by the supreme Government (like the power given by statute to a railway company to make by-laws). The position of the Magistrate is different, because judicial administration, and not legislation in the proper sense, is the work he has been set to do.

Similarly the People have two modes of making Law. In the one they act directly by observing certain usages till these grow so constant, definite, and certain that everybody counts upon them, assumes their existence, and feels sure that they will be recognized and enforced. In the other they act indirectly through persons who have devoted themselves to legal study, and who set forth, either in writing or, in earlier times, by oral discourse, certain doctrines or rules which the community accepts on the authority of these specially qualified students and teachers. Such men have not necessarily either any public position or any direct commission from the State. Their views may rest on nothing but their own reputation for skill and learning. They do not purport to make law, but only to state what the law is, and to explain it; but they represent the finer and more highly trained intellect of the community at work upon legal subjects, just as its common and everyday understanding, moved by its sense of practical convenience, is at work in building up usages. So the maxims and rules these experts produce come to be, in course of time, recognized as being true law, that is to say, as binding on all citizens, and applicable to the decision of disputed questions.

Taking then these four Organs or Sources, we find that one Source—the People, as makers of Customary Law—is so vague and indeterminate that one can say little about it as an Organ, though the process by which Custom makes its way and is felt to be binding is a curious process, well deserving examination. Two remarks

may however be made on it. The first is this, that it is essential to the validity of a rule claimed to have been made by Usage that it shall possess a certain extension in Time and a certain extension in Space. It must have prevailed and been observed for so long a period that no one can deny its existence. It must have prevailed over so wide an area, that is to say, have been used by so many persons, that it cannot be alleged to be a merely local usage, unknown outside the locality, and therefore not approved by the tacit consent of the community at large. (The size of the area is of course in each case proportioned to the size of the whole community. A custom observed by a population of a few thousand people in a canton of Switzerland may make the custom law for the canton, though observance by a similar number would not make a similar custom law for a large country like Bavaria.) The other remark is that sometimes the observance of a custom by a particular class of the community, as for instance by agriculturists or merchants, may suffice to establish the rule for the community at large<sup>1</sup>. This happens where the custom is by its nature such that only agriculturists or merchants (as the case may be) would need to have a custom on the matter at all. Universality of practice by them is then sufficient to make the custom one valid for the whole community, which may be taken to have tacitly approved it. Sometimes, however, the usage of a particular class is deemed to become law by its being imported as an implied condition into legal transactions, especially contracts, entered into by members of that class; and this view has been frequently taken by our English Courts of mercantile usages, which they have in the first instance enforced rather as unexpressed elements in a contract than as parts of the general law. It need hardly be added that the fact that the meaning and extent of a rule of Customary Law are often uncer-

<sup>1</sup> The 'Ulster Custom' is an interesting instance, but it never quite got the strength of becoming law.

tain, and give rise to judicial controversy, does not prevent the rule itself from being valid previous to its determination in such controversy, for this is exactly analogous to a disputed question regarding the interpretation of a statute. Though the meaning of a statute may have been doubtful until determined by the Courts, the statute was operative from the first, and is rightly applied to ascertain the validity of rights which accrued before its meaning was determined.

We have thus to examine three Sources of Law—the Governing Person or Body, the Magistrate, and the Jurists or Legal Profession. These are the three recognized and permanent legislative organs of a community. Every mode of creating law discoverable in any organized community may be reduced to one of these, and in most civilized communities all of these may be found co-existent. Sometimes, however, one or other is either absent or is present in a quite rudimentary condition. In the East, as for instance in such countries as Turkey or Persia, there is little that can be called general legislation. Hatt's are no doubt occasionally promulgated by the Sultan, though they are sometimes not meant to be observed, and are frequently not in fact observed. So far as new law is made, it is made by the learned men who study and interpret the Koran and the vast mass of tradition which has grown up round the Koran. The existing body of Musulmān law has been built up by these doctors of law during the last twelve centuries, but chiefly in the eighth and ninth centuries of our era: and a vast body it is. The Kadi or judge is himself a lawyer, and he might mould the system by his decisions, but decisions are not reported, and the authority of a Kadi is deemed lower than that of one of the more learned Muftis or doctors of the law. On the other hand there are countries, such as Russia for instance, where the direct promulgation of his will by the Sovereign is the only recognized form of legislation, the decisions of judges and the opinions of legal writers

joying a much lower authority. In other countries, as in Germany, legal writers are numerous and influential, but the magistrates, their decisions having been but little reported, have, till our own time, held for the most part a subordinate place, and played a comparatively small part in the development of law. This was at one time the case in France also, where cases decided by the higher courts of law used to stand little, if at all, above treatises composed by legal writers of established reputation. Nowadays, however, cases are more fully reported, and an authority is accorded to decisions scarcely lower than that which they have long enjoyed in England and America.

At Rome, and also in England, all these three main Sources or Organs have existed in full force and efficiency, though not in equal efficiency at different periods in the history of either State. At Rome, as in England, we begin with customary law. The customary law of the Quirites is known to and administered by a small privileged class; and so far as there is any legislation at all, it is the work of members of this class who carry in their minds and expound and insensibly amplify the sacred traditional ordinances. Then direct legislation by the people in their assemblies, and afterwards (though in its germ perhaps almost concurrently) the law-making action of the magistrate begin to appear. They go on hand-in-hand for many centuries, seconded by the never intermitted labours of the jurists, until at last the magistrate's work is over, the jurists have lost their impulse or their skill, and the direct activity of the Sovereign (who is by this time a monarch) becomes the chief surviving fountain of law. I propose to take these three sources and compare the way in which they acted in the Roman city and Empire with their action and development—in many respects parallel, in a few respects contrasted—in England, whose law has now spread over a large part of the British Empire.

## II. JURISTS AS MAKERS OF LAW.

Let us begin with the Jurists, since they are the first repositories and interpreters of those customs out of which law grew. One may distinguish three stages in their attributes and their action at Rome. In the first stage, during the days before the enactment of the Twelve Tables, and even after that date down to the third century, B.C., they were a small body of men, all of them patricians, and some of them priests, retaining in their memory and transmitting to their disciples a number of rules and maxims, often expressed in some carefully phrased and scrupulously guarded form of words, such as the *lex horrendi carminis*, which Livy quotes in his account of the trial of Horatius for killing his sister<sup>1</sup>. An important place among these rules was held by the formulas which it was necessary to use in actions or other legal proceedings; the slightest variation from the established phraseology of which would be a fatal error. Such knowledge, with the connected knowledge of the days on which ancient superstition forbade or permitted legal proceedings to be taken, was in these early times strictly reserved by its possessors to their own class, as a sacred deposit of political as well as religious importance.

In the following period, which may be said to extend till the end of the free Republic, these restrictions vanished. The progress of the plebeians in political power as well as in wealth made it impossible to exclude them from the possession of legal lore. Some plebeians became no less distinguished as sages of the law than patricians had been; indeed Tiberius Coruncanius, the first plebeian chief pontiff, is occasionally described as the founder of the later school of scientific lawyers. He is said to have been the first person who offered himself to the public as willing to advise on legal questions.

<sup>1</sup> Book i. chap. 26.

The profession attracted many able and ambitious men, because it was one of the three recognized avenues to high office, the alternative to arms and to political oratory. One may fairly call it a profession in this sense, that those who adopted it made it the main business of their life, and by it won their way to fame and influence. But it was not such a profession as the bar is in modern countries, not a gainful profession whereby a fortune could be amassed, not a close profession into which entrance is granted only upon definite terms and subject to definite responsibilities. Any man who liked might declare himself ready to give legal advice or settle legal documents. He had no examination to pass, no fees to pay, no dinners to eat. He acquired no right of exclusive audience of the Courts; he became amenable to no jurisdiction of his compeers or of any constituted authority. The absence of these things did not, however, prevent the Roman lawyers from having a good deal of what might be called professional feeling, a high sense of the dignity of their calling, and a warm attachment to the old forms and maxims of the law. These Republican jurists composed treatises, only a few scattered extracts from which have come down to us, and gave oral teaching to the disciples who surrounded them while they advised their clients, as they sat in state in the halls of their mansions.

With the fall of the Republic there begins a third period which covers about three centuries. It had been the custom for a man who had a point of law to argue before a *iudex*<sup>1</sup> trying a case to endeavour to obtain from some eminent jurist an opinion in his favour, which he produced to the *iudex* as evidence of the soundness of the view for which he was contending. Now Augustus, partly to enlarge and inspirit the action of the jurists, partly to attach them to the head of the State,

<sup>1</sup> The *iudex* (who is not to be thought of at this period as a judge in our sense—he is more like a jury of one, or a referee) was not necessarily a skilled lawyer, and therefore was presumably not competent to decide a knotty technical point by the force of his own knowledge.

permitted certain of the more eminent among them to give *responsa*, i.e. answers or opinions on points of law, under and with his authority, directing such opinions, when signed and sealed, to be received by a *iudex* trying a case as settling a controverted point. His successor, Tiberius, issued formal commissions to the same effect<sup>1</sup>. Here we enter the third stage, for from this time forward not only did it become obligatory on the *iudex* to defer to an opinion given by one of the 'authorized' jurists, but there was also created an inner privileged order within the whole body of jurists, this inner order consisting of those, usually no doubt the most conspicuous by learning and ability, who had obtained the imperial authorization. And out of this privileged class the Emperor was apparently accustomed to choose the great judicial officers of state, the praetorian prefect—in later times the quaestor also—the members of the Imperial Council, and possibly the chief judicial magistrates of the provinces, so that the career of a jurist continued to be, though in a somewhat different form, one of the main paths to distinction and power. Oratory, which had formerly swayed the people, was now practically confined to the Senate and the Law Courts, and thus became separated from politics: for even in the Senate few ventured to speak with freedom. As the profession of law was now the chief rival to the profession of arms it drew to itself a large part of the highest ability of the Empire. After the great decline in literature and art which marks the period of the Antonines, the standard of learning, acuteness, and philosophical grasp of mind among the jurists still continued to be high. Even their Latin style is more pure and nervous than we find among other writers of the third century. The period of

<sup>1</sup> The precise nature of the action taken by Augustus and Tiberius is the subject of some controversy, as to which see Goudy's edition of Muirhead's *History of Roman Law*, p. 292, Sohm, *Institutionen*, § 18, and Krüger, *Geschichte der Quellen des Römischen Rechts*, § 15. *Responsa* had been given in earlier days by the *Pontifices*, and Augustus was *Pontifex Maximus*. As to a similar practice among Muslims see Essay XII, p. 663 *ante*.

their productive activity—that which we commonly call the classical period of Roman Law—may be said to close with Herennius Modestinus, who was praetorian prefect about the middle of the third century of our era. Thereafter we possess only a few names of notable jurists, scattered at long intervals, and apparently inferior to their predecessors.

Although throughout these three periods the jurists may fitly be described as a Source of Law, their function was by no means the same from the beginning till the end. In the first period they were the depositaries of a mass of customs which changed very little; and they did not so much create law as give a definite shape and expression to it in the carefully phrased rules and unvarying formulas which each generation handed down to the next. The events and circumstances of the second period, which saw the knowledge of the old customs much more widely diffused, and saw also a considerable growth of statute law, threw upon them the duty of expounding both customs and statutes, and of covering the ground which neither customs nor statutes had occupied. This meant a good deal in a thriving and expanding community, so the *interpretatio iuris* (as the Romans call it) which they describe as the chief service rendered by these legal sages, became large in quantity, though it was almost entirely confined to the filling up of interstices, and did not attempt to produce new principles or lay down broad rules. Its authority, moreover, was a purely moral authority, based upon nothing but the respect paid to the intellect and learning of the particular jurist from whom some doctrine or dictum emanated, regard being of course had to the length of time during which, or the approval of the profession with which, a doctrine or dictum had been accepted. With the introduction in the third period of a specific commission from the Emperor, the jurist, that is the authorized jurist, became recognized as competent to make law (*iuris conditor*). He acted only by interpreting,

*i.e.* by delivering an opinion on a point previously doubtful, but his decision, once given, had an authority independent of his personal fame, the authority of the Emperor himself, by this time a source of law through the magisterial powers conferred upon him for life. Let us note further, that whereas in the earlier part of the second period it was largely through the modelling of the system of actions and pleading that the influence of the jurists was exerted, in the later part of that period and during the whole of the third, it was chiefly by means of their writings that they developed the law. Most of these writings were the work of men who enjoyed the *ius respondendi*; yet some of those who belong to a time before that right began to be granted carry no less weight. Antistius Labeo does not seem to have enjoyed it, but he is always quoted with the greatest respect, and it seems doubtful whether it was possessed by Gaius, who was, centuries after his death, placed among the five most authoritative writers.

It does not here concern me to enlarge upon the labours of the great legal luminaries of the earlier Empire, either as writers of treatises (it is in this capacity that we know them best, from the fragments of their works preserved in Justinian's Digest) or as advisers of the Sovereign, assessors in his supreme Court of Appeal, and prompters of his legislative action. For the present purpose it is sufficient to suggest some reasons which may account for the more considerable part which the Roman jurists played as a source of law than that which can be attributed to legal writers in England. Though some few of our English treatises are practically law, constantly cited and received as authorities—Coke upon Littleton supplies an example from former times, and Lord St. Leonards on Vendors and Purchasers from our own—they are not to be compared in point of quantity or importance with the text-books out of which Justinian's compilation was framed. In earlier days it was no doubt different. The writings of Glanvill and

Bracton, with the book ascribed to Britton and the treatise called Fleta, were all to some extent recognized as law in the fourteenth century; that is to say, they would have powerfully, and in most doubtful cases decisively, influenced the mind of any judge to whose knowledge they came when he had to determine a point of law. In that age there was no such distinction drawn between what is and what is not legally binding as the wider experience and the more precise analysis of modern times has made obvious to our minds. Moreover, in an age when customs were still uncertain, because largely fluid and imperfectly recorded, the statement of what a writer held to be law had an incomparably greater force than in later days. And it may be added that the extracts from the Roman Law, of which Bracton's treatise, for instance, is full, would, at least to the ecclesiastical lawyers, carry with them the authority of the Roman law itself. After the fifteenth century, comparatively few books hold a place of authority; and perhaps the best example of those which do is Littleton's *Treatise on Tenures*. By this time the abundance of reported cases began to make it less necessary to have recourse to treatises; nor was the writing of them a favourite occupation of the earlier common lawyers.

### III. DIFFERENCE BETWEEN THE ACTION OF ROMAN AND THAT OF ENGLISH JURISTS.

What are the causes of this singular difference between the course of legal development in England and that which it took in Rome? The most obvious is the different position in which the imperial commission placed certain of the more eminent jurists. They were thereby practically erected into legislators, for their formally expressed opinions were treated as though proceeding from the Emperor himself, and the Emperor was from the first virtually, and afterwards technically also, a fountain of legislation. True it is that this authority

was not at first extended to the treatises of these jurists. It attached, at least in earlier days, only to the *responsa* which they had authenticated by their seal, and a *responsum* probably carried authority only for the particular case in which it was delivered. But nothing was more natural than that its weight should be accepted for all purposes, and that the utterances of the privileged jurists, whether contained in a collection of *responsa* or in any other kind of law-book, should command a deference seldom yielded to any private writer, however eminent. Nor does the fact that both in their *responsa* and in their other writings these jurists differed from one another, maintaining opposite views on many important points, seem to have substantially detracted from their influence. Such divergences were indeed, down to Justinian's time, a source of embarrassment to practitioners and judges. Looking at the thing as a matter of theory, we may wonder how the inconvenience could have been borne with, for unless a statute was passed settling a controverted point, the point might remain always controvertible. But this is one of the many instances in which we find that a system which seems, when regarded from outside, unworkable, did in fact go on working. Probably, when the controversy was one of importance, there came after a time to be a distinctly preponderating view, which practically settled it; and possibly the sense of responsibility under which the authorized jurists wrote contributed to make them not only careful but guarded and precise in the statement of their conclusions.

Another cause for the greater relative importance of the Roman jurists as creators or moulders of law may be found in the social position of the legal profession at Rome. In England the profession is and always has been followed primarily as a means of livelihood. Out of the many who have failed to find it remunerative, some few have devoted themselves to study and have enriched our jurisprudence by valuable treatises. But

the general tendency has been for the men of greatest mental vigour and diligence, and also for the men of the widest practical legal experience, to be so completely absorbed by practice as to have no leisure for the composition of books. English law-books are written mostly by young men who have not yet obtained practice, or by older men who through the negligence of Fortune, the undiscernment of solicitors, or perhaps some deficiency in practical gifts, have never succeeded in obtaining it. In some remarkable instances they are the work of persons whose eminence has raised them to the judicial bench. But they are hardly ever written, and indeed could scarcely be written, by the men in full practice, yet such men have the great advantage of being in daily contact with the working of the law as a concrete system, and they include, not indeed all, but a great part of the best legal talent of each generation. At Rome, however, the jurist of republican days, making no gain from his professional work, and not needing it, for he was a man of rank and means, took practice more easily, and devoted a good deal of his time to the literary side of his life. Thus we are told that Labeo spent half his year in Rome giving instruction to his disciples and advice to his clients, the other half in the country composing his admirable treatises. Under the Empire the profession doubtless attracted a large number of persons of lower station and smaller means. But the habit of writing and of teaching went on among the leaders.

In this habit of teaching we may find a further reason for the prominence of the jurist. The giving of oral instruction in law to those who were preparing themselves for its practice, was at Rome always an important branch of a jurist's activity. Cicero tells us how he and others among the youth of his own generation stood as disciples round the chair of Mucius Scaevola, gathering the crumbs of legal wisdom which dropped from his lips, putting questions and doubtless taking notes

of the explanations which the sage deigned to give. Other leading luminaries were surrounded by similar groups. Two centuries later, Gaius is generally thought to have been a teacher of law, and won his high reputation largely by the educational treatise which has come down to us. And in still later times the two great law schools of Beyrut and Constantinople were the chief homes of legal learning, and those who lectured in them among the chief legal lights of the Roman world. Four members of the Commission which prepared the Digest were chosen by Justinian from among these teachers, and given the place of honour next after Tribonian, the president of the Commission. In England, on the other hand, legal teaching had during the last century and a half fallen sadly into abeyance, and has only within the last few years shown signs of reviving. Yet it is clear that the practice of teaching is of the utmost value for the composition of treatises, not only because it supplies a motive and an occasion, but also because it tends to make a book more systematic and lucid, since the teacher feels in lecturing the paramount necessity of logical arrangement and of clear expression. The best survey, at once concise and comprehensive, of English law that has ever appeared—Mr. Justice Blackstone's book—was founded on oral lectures given in Oxford: and the great works of Chancellor Kent and Justice Story in America had a like origin. The merits of these two last-named writers are just the kind of merits which the habit of teaching tends to produce. Nor ought we to forget a more recent example, the small but eminently acute and suggestive volume of lectures on the Common Law of Mr. Oliver Wendell Holmes, now Chief Justice of Massachusetts.

The main cause of the smaller number in England of legal writers who have taken rank as Sources of Law, is doubtless to be sought in the fact that the highest juridical talent of the most experienced men has with us poured itself through a different channel, finding its

expression in the decisions of the Judges. It is our series of Reported Cases, now swollen to many hundreds of volumes, a mass of law so large that few lawyers possess the whole of it, that really corresponds to the treatises of the great Roman jurists. The Reports fill a place in English legal studies corresponding in a general way to that which those treatises filled in the Roman Empire. They are the work of a similar class of men, those who from active practice have risen to the highest places in the profession. Men in such a position have rarely the leisure to occupy themselves with writing law-books, nor have they usually an impulse to do so, since what they have to say can be adequately delivered in their spoken or written judgements. And though the merits of our English judicial decisions are not altogether the same as those of the great Roman text-books, still the judgements of the most eminent judges will, if taken as a whole, bear comparison either with those text-books or with any other body of law produced in any country. In logical power, in subtle discrimination, in breadth of view, in accuracy of expression, such men as Lord Hardwicke, Lord Mansfield, Lord Stowell, Sir William Grant, Mr. Justice Willes, Sir George Jessel, Lord Cairns, and Lord Bowen, to take a few out of many great names, may fairly rank side by side with Papinian or Ulpian, with Pothier or Savigny.

This is not the place for an attempt to estimate the respective advantages of case law and text-book law. But it may be remarked that they have more in common than might at first sight appear. English text-books are almost entirely a collection of cases with comments interspersed. Sometimes a general rule is stated which may go a trifle further than the cases do; sometimes an opinion is thrown out on a point not covered by authority. Still the cases are the gist of the book. I have heard an eminent judge<sup>1</sup> of our own

<sup>1</sup> The late Lord Justice W. M. James.

time observe that the easiest way to codify the law of England would be to enact that some eight or ten established text-books, such, for instance, as Jarman on Wills, Chitty on Contracts, Williams on Executors, Lindley on Partnership, Smith's Mercantile Law, Sugden on Powers, Smith's Leading Cases, Hawkins on the Interpretation of Wills, Dicey on Domicil, should have the force of statutes. To do this would add little to the volume of the existing English law, for the text-books mentioned are in reality digested summaries of decisions that lie scattered through the Reports. And similarly the treatises of the Roman lawyers contain a large number of cases, *i.e.* opinions given by eminent lawyers upon sets of facts laid before them or imagined by them in order to show the application of a principle. The Romans themselves attribute high authority to a concurrent line of decisions<sup>1</sup>; and doubtless decisions given by magistrates or by emperors found their way into, and influenced the text-books, though we do not know what means were taken of recording them. In fact the difference between the English and the Roman system resides chiefly in two points. With us the binding force of a rule depends on its having been actually applied to the determination of a concrete case. With the Romans an opinion delivered in a *res iudicata* is not necessarily weightier than if it was delivered in any other way. It is valid simply because it proceeds from a high judicial authority. Probably in early imperial days there was a difference between the force of a jurist's *responsum* signed, sealed, and produced to a *iudex*, and an opinion expressed in any other way by the same jurist, like our distinction between so much of a judgement as is needed for the decision of the case and the accompanying *obiter dicta*. But any such difference seems to have presently disappeared. And secondly, while the opinions on points of law of English jurists are scattered here and there over hundreds of volumes, with only a chronological

<sup>1</sup> *Dig.* i. 3. 38.

arrangement, those of Roman jurists were gathered into systematic treatises.

The Roman system has the merits of logical arrangement, of consecutiveness, of conciseness; the English, wanting these, has advantages in being so copious as to cover an immense variety of circumstances, and in consisting of opinions delivered under the stress of responsibility for doing justice in the particular case. It presents moreover to students an admirable training in the art of applying principles to facts. Both systems have the defect of uncertainty, because under both there may be a conflict of views resting on equal authority. Broadly regarded, both may be said to spring from the same source. According to German writers, the law made by the jurists springs from what these writers call the 'legal consciousness of the people,' and derives its ultimate authority from Custom, *i.e.* from the tacit acceptance by the people of certain doctrines and rules. We in England dwell upon its formal recognition by the Courts as the proof of its authority. But in both cases that which becomes recognized as law has passed through and been shaped in the workshop of Science. It is the learning and skill of trained professional students, whether English judges or Roman text-writers, that has done the work which the people, or the Courts for the people, have accepted.

#### IV. MAGISTRATES AND JUDGES AS MAKERS OF LAW.

We come now to consider the second of the three great sources of law, the Official or Magistrate. He holds an intermediate place between the Jurist on the one hand, and the Supreme Power, whether an Emperor or a Parliament, on the other, speaking with more of plenary authority than the former and with less than the latter. He may at first sight appear to be not really a species by himself, but merely a particular instance of

legislation by the Supreme Power in the State, acting not directly (*i.e.* not as itself enunciating legal rules) but mediately, by delegating its function of legislation to a person clothed with its authority and speaking in its name.

This view has in fact been held by some writers. That it is, however, an erroneous view will appear, when we come to scrutinize the Roman facts as the Romans understood them, and the English facts as they were understood in the fifteenth century. Delegation by the supreme legislative authority to some officer or magistrate no doubt may, and frequently does, take place. In England, for example, Acts of Parliament sometimes commit the duty of making rules to an official, such as the Lord Chancellor, or to such a body as the Council of Judges of the Supreme Court of Judicature, or to the Privy Council, that is to say, to a Minister advised by his permanent official staff, who procures the approval of the Crown in Council to what he issues in the form of an Order in Council<sup>1</sup>. Where the function is so delegated, the rules or ordinances made in pursuance of the statute have the full force of the statute that gave power to make them. Here the phenomenon is too common and too simple to need explanation or discussion. It is quite another thing to maintain that the legislative action of the Magistrate is always of this character, a mere instance of the exercise of delegated power. The view is not historically true of the Roman Magistrate—Praetor, Censor, Aedile, or whatever else he may be, firstly because he did not in fact receive any such delegation from the people; secondly, because nobody supposed him to have received it. He was always distinctly conceived of as acting by his own authority, whatever that may be, a matter to which we must presently return. It is not true of the English Judge—whether of the *iudices terrae* of the Common Law Courts when they take

<sup>1</sup> Orders in Council are also issued in certain cases under the prerogative of the Crown without statutory delegation.

shape, in the twelfth and thirteenth centuries, or of the Chancellor of the fifteenth, or of indeed their modern successors, seeing that the theory of the English law and constitution has remained in these points, at least, substantially unchanged. That theory is that the judges of the Common Law Courts are nothing more and nothing less than the officers who expound and apply the Common Law, a body of usages held to be known to the people and by which the people live, usages which existed, in their rudimentary state, as far back as our knowledge extends, most of which have not been formally embodied in any legislative act, but which have been always recognized as binding. Such customary rules are not law because they are declared to be so by the judges; on the contrary the judges enforce them because already, antecedently to their decision, binding law. The judges have never received delegated authority from Parliament. So far as authority has been delegated to them it is the authority of the Crown. But the Crown cannot empower them, and never purported to empower them, to make the law. This is abundantly clear regarding the Common Law Courts, who are merely the exponents of the customs of the land.

The case of the mediaeval Chancellor is rather different. He is rather more than an exponent of the law. He virtually creates law by his executive action. But he does not do so by any expressly delegated power. At a time when it was well settled that the Crown alone could not (except possibly in some few directions—and even this was not admitted by the House of Commons) legislate, Parliament, so far from giving even by implication any authority to the Chancellor, was jealous of and tried to fetter his action. To allege that what are called the legislative functions of any English judge arise from a commission given him by the Supreme Power, *i.e.* Parliament, to exercise them, is an inversion of historic truth and legal doctrine, an attempt to sup-

port a false theory by imaginary facts<sup>1</sup>. It is easier and safer to look at our system in the aspect it bore to those who witnessed the earlier stages of its growth, and to recognize the existence of a peculiar form of law-making—that which naturally and inevitably arises out of the application and administration of the law, especially where that law is largely customary, not embodied in formal declarations of a sovereign's will. If therefore we are to have a theory of the position of the Magistrate or Judge, a definition of his functions, we must rather call him (however vague the expression may appear to those who prefer the phantom of precision to the substance of truth) the recognized and permanent organ through which the mind of the people expresses itself in shaping that part of the law which the State power does not formally enact. He is their official mouthpiece, whose primary duty is to know and to apply the law, but who, in applying it, expands it and works it out authoritatively, as the jurists do less authoritatively. He represents the legal intelligence of the nation, somewhat as upon one theory of papal functions the bishop of the old imperial See represents the religious intelligence and spiritual discernment of the Christian community on earth; and therefore, like the Pope, he represents the principle of that development which it is his function to guide. As the Romans call their Praetor the living voice of the law, so is the Magistrate always, in England as at Rome, the voice whereby the people, the ultimate source of law, shape and mould in detail the rules which seem fitted to give effect to their constant desire that the law shall be suitable to their needs, a just expression of the relations, social, moral, and economic, which in fact exist among them. The Magistrate is by no means their only voice, for they also

<sup>1</sup> If the view in question is defended as being if not historically true yet a convenient analysis of the actual facts of the case in modern England, the answer is that the Judge, as we know him to-day, can be represented as a delegate of Parliament only by arguing that Parliament commands whatever it does not forbid—a way of making facts square with a pre-conceived theory, which is not only opposed to English traditions, but essentially unreal and fantastic.

express themselves, especially upon urgent questions, by direct legislation; and the more they get accustomed to do so, the narrower does the province of the Magistrate become. But there are many things which legislation cannot do in the earlier stages of a State's growth, partly because proper machinery is wanting, partly because political dissensions intervene, partly because legal ideas are still fluid, fluctuating, and unfit for expression in terms at once broad and definite. Moreover, in even the most highly organized States, some things always remain which a legislature cannot conveniently deal with, or where its action needs to be constantly supplemented, and perhaps even corrected, by some organ which can work in a more delicate and tentative manner.

So much—that I may not further illustrate what will become clearer from a survey of the Magistrate as he has appeared in history—may be said of Legislation by a State Official in general, whether he be a Roman *Magistratus* or an English Chancellor. Now let us come to the Roman Praetor.

In the early days both of Rome and of England the administration of justice belonged to the chief magistrate of the State and to the assembly of the people, who in the very earliest days had normally acted together. In England, although the judicial functions of the Assembly survived for some purposes (as they survive to-day in Parliament), the conduct of ordinary judicial work which could not conveniently be exercised by the Assembly passed to the king, and when judges appeared, they were his officers. In Rome also the king was the head of the judicial system: and when the kingly office was abolished, the functions that had been his were transferred to the two Consuls, who were virtually annual kings. After a time, owing to political disputes which need not be described here, a third annual magistrate was added, called the Praetor<sup>1</sup>, who, while capable

<sup>1</sup> The name Praetor meant Leader, and was originally applied to the Consuls. The Praetor's competence for military functions was equal to that of the Consuls. He had both *imperium* and *iurisdictio*.

of exerting nearly all the executive power of the Consuls, received the administration of justice as his special province. As the city grew and litigation increased, more Praetors were added. The first had been appointed in B.C. 367; the second, who presently became charged with suits in which one or both of the parties did not enjoy Roman citizenship, dates from about B.C. 247. He came to be called *Praetor peregrinus*, while the original Praetor was described as the Praetor of the City (*urbanus*). The latter remained the head of the judicial system, and I shall therefore speak of the Praetor in the singular. Other Praetors were added, partly in order to act in the provinces, partly in order to undertake special kinds of jurisdiction. By the time of Trajan there were eighteen of them.

In the later republican period we may speak of the Praetor as being partly a Judge, partly a Minister of Justice who directed the general working of the Courts. It was his duty to issue when he assumed office a statement of the rules by which he intended to guide his judicial action during his year, as well as a table of the formulae in which applications ought to be made to him for the exercise of his functions. These rules were published in a document called the Edict. It contained a concise statement of the cases in which he would allow an action to be brought, and of the pleas which he would admit as constituting defences to actions. This statement did not purport to supersede the old actions and rules which had either come down as a settled part of the ancient customary law, or had been enacted by any statute of the popular assembly. The Praetor always held himself to be bound by statutes<sup>1</sup>.

<sup>1</sup> The Praetor, said the Romans, does not make law (*Praetor ius facere non potest*). Yet they also called the rules which emanated from him *iura* (see Cic. *De Invent.* ii. 22) : and the whole body of rules due to his action was in later times described as *ius honorarium*, *ius praetorium*. Sometimes a right resting on *ius* is contrasted with one depending on the protection (*tuitio*) of the Praetor : Ulpian in *Dig.* vii. 4. 1. Those who put the Praetor's authority highest called the Edict *lex annua*, says Cicero, *Verr.* ii. 1. 42. This uncertainty of language corresponds to the peculiar character of these rules, which in one sense were, and in another were not, Law.

But his Edict added materially to the old actions and rules, incidentally modified them, ultimately did supersede many of them. He awarded remedies which the older law had not awarded. He recognized defences (*e.g.* in cases of fraud) which the old law had not recognized. He provided means of enforcing rights more effective than those which the old law had provided. As the later Romans said, he acted for the sake of aiding, or supplying the omissions of, or correcting, the old strict law, with a view to the public advantage<sup>1</sup>.

Each Edict was valid only for the Praetor's year of office. Each succeeding Praetor, however, usually repeated nearly all the declarations that had been contained in the Edicts of his predecessors, though it often happened that a new Edict introduced some improvement in point of form and expression, or perhaps so varied, or added to, the announcements in the last preceding Edict as to introduce an improvement in substance, for when a Praetor thought that it was necessary to promise a new remedy by action, or to recognize a new plea, it was his duty to insert it. In this way the practice of the Courts was continually changing, yet each single change was so slight that the process was very gradual, hardly more rapid than that which has gone on, at certain periods in the history of English law, through the action of the Court of Chancery, or that which went on in the Court of King's Bench under Lord Mansfield. There was no permanent enactment of a new rule, for a Praetor's declarations bound himself only and not his successors<sup>2</sup>. But as his promises were usually repeated by his successors, a Praetor when

<sup>1</sup> 'Ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.' Papinian in *Dig.* i. 1. 7.

<sup>2</sup> His declarations did not originally, in strictness of law, bind even himself, and it was found necessary to enact, by a *lex Cornelia* of B.C. 67, that the Praetor should not depart from the statements of his Edict ('ut praetores ex edictis suis perpetuis ius dicerent, quae res cunctam gratiam ambitiosis praetoribus qui varie ius dicere solebant, sustulit.' Ascon. in *Cic. Pro Cornelio*, 58.

The Edict regularly issued at the beginning of each year was called *Edictum perpetuum*, as opposed to *Edictum repentinum*, one issued for an emergency.

he promised a new remedy, practically created a new right, or enlarged and confirmed an old one.

To us moderns the function thus committed to a Magistrate seems a large function, and his power a possibly dangerous power. No modern constitutional State would vest such a power either in a Judge or in a Minister of Justice. But to the Romans the Praetor is (above all things) the representative of the Executive and Judicial Power of the State. He is the State embodied for certain purposes. He is something more than a mere minister, whom the people have chosen to serve them in a certain capacity. He represents the majesty of the State over against the people, and deals with them rather as a Ruler than as a Servant. Few nations have formed so strong and definite a conception of State power as the Romans did; and none, perhaps, expressed it so distinctly in the authority, very wide, very drastic, and yet eminently constitutional, which they entrusted to their great State officials. The conception was to them so dear, or so necessary, that even when the misdeeds of a monarch had led to the abolition of monarchy, they did not restrict the magisterial power itself, but divided it between two co-ordinate magistrates whose co-existence made each a check on the other; and when the powers of these two (the Consuls) were subsequently found to need limitation, they devolved upon other magistrates (the Tribunes) the right to step in and check the exertion in some particular instance of the consular power.

The Praetor, therefore, having (like the Consul) *imperium* (i.e. the power of issuing commands as an executive officer, and of compelling obedience to them by putting forth material force), is a stronger personality than the English Common Law Judge, and can act more boldly and more effectively. We hear of no demand for a restriction of his functions, but only of a statute which checked arbitrary discretion by requiring him to administer the law in accordance with his Edict. More-

over, while the English judge is, down till the Revolution, an official removable by the Crown, the Praetor has no one over him, and has, therefore, not only a more unfettered discretion in carrying out his judicial and quasi-legislative mission, but also a clearer sense of his duty to do so, because this is the function which the nation expects him to discharge. The English Judge is primarily a judge, appointed to pronounce a decision: the Praetor is also an executive magistrate, placed at the head of the whole judicial administration of what was originally a small community, with the duty of providing that the system works properly. His wider powers give him a sense of the obligation laid on him to see that justice is duly done, that the system of procedure is such as to enable justice to be done, that wrongs for which there ought to be some remedy have some remedy provided against them; in short, that the law as a machinery for setting things right and satisfying the demands of the citizens is kept in proper order, with such improvements and extensions as the changing needs of the nation suggest. His business is not merely to declare the law but to keep the law and its machinery abreast of the time.

The functionary who in England offers the nearest analogy to the Praetor, an analogy which has been so often remarked that only a few words need be spent on it, is the Chancellor. The Chancellor of the fourteenth, fifteenth, and sixteenth centuries was the organ of the prerogative of the Crown on its judicial side, and as that prerogative was then very wide, he was thus invested with an authority half judicial, half administrative, not unlike that of the Roman magistrate. As it belonged to the Crown to see that justice was done throughout the realm, and the means for doing it provided, the Chancellor was expected and obliged to supply new machinery if the old proved inadequate, and this he did in virtue of an authority which, in its undefined width and its compulsive power, resembled the Roman *im-*

*perium*. Accordingly when the development of the Common Law Courts stopped in the fourteenth century because the Common Law judges refused to go beyond the remedies which the Courts provided, and made only a limited and timid use even of their power of issuing new writs *in consimili casu*, the Chancellor went on. From the time of Edward the Third petitions to see right done, which had been previously addressed to the Crown, began to be addressed to the Chancellor, and the extraordinary range of his powers was expressed by the phrase that he acted in matter of the King's grace and favour, that is to say, he acted where the subject could not demand a remedy as of common right from the ordinary Courts of the land. Thenceforward the range of action of the Common Law Courts did not so much need to be extended, though a certain slight measure of development continued in them even as late as the days of Lord Mansfield, whose extension of the scope of the 'Common Counts for money had and received to the use of the plaintiff' has a faint flavour of praetorian methods. It was partly because the Common Law judges had halted that the Chancellor, if I may use a familiar expression, took up the running, and exerted the powers which the sovereign entrusted to him, and which, as keeper of the sovereign's conscience, he was held to be justified in exerting so as to provide fresh and efficient remedies for wrongs that defied either the rigid system of procedure or the feeble executive capacity of the Common Law Courts. During this period the Chancellor, though a judge, is also much more than a judge, and it is as a great executive officer, clothed with the reserved and elastic powers of the sovereign, that he is able to accomplish so much. Yet his action is not so free as was the Praetor's, for he does not directly interfere with the pre-existing Courts. He may walk round them: he may forbid a plaintiff to use the judgements they give; but he cannot remould their methods nor extend their remedies. The Praetor,

on the other hand, is in a certain sense the head of all Courts, so that his action covers the whole field of law. After a time, however, the creative energy of the Chancellor slackens, partly because the prerogative of the Crown was being narrowed, partly, apparently, from the example of the other Courts, for when Chancery decisions also began to be reported like those of other tribunals, he naturally felt himself more and more fettered by the record of the decisions of his predecessors. In the eighteenth century, precedents gather round the Chancellor and fence him in: he cannot break through so as to move freely forward on new lines of reform. He is like a stream which, as it deepens its channel, ceases to overflow its banks.

Before I note a further point of difference between the Praetor and our English Judiciary, and a further reason why the development of the law by the latter was so much less bold, I must advert to one feature which the Roman and English systems have in common. In both law is made through the control of procedure. The Praetor promises to give a certain action, or allow a certain defence, in certain states of fact; *i.e.* if a plaintiff alleges certain facts, the Praetor will allow him to sue, and will see that judgement is given in his favour should those facts be proved, while if a defendant alleges certain facts, the Praetor will allow these to be set forth in a plea, and will see that judgement is given in his favour if the facts as stated in the plea are proved. Similarly the English Courts are concerned not with abstract propositions of law, but with remedies. It is by granting a remedy, *i.e.* by entering judgement for the plaintiff or the defendant in pursuance of certain reasons which they deliver publicly, that the Courts become sources of law. And though the Chancellor goes further than the Common Law Courts, because in the early days of his action he laid hold of a person under circumstances to which no rule of law had been previously declared to apply, and compelled him to appear

as defendant in a suit, yet the Chancellor also never delivers a legal opinion except for the purpose of explaining the decree which he issues for adjusting the rights of the parties to a concrete dispute. So far, therefore, the Roman and the English officials moved on similar lines. Both were concerned with remedies; both acted through their control of procedure.

#### V. THE SYSTEM OF PRAETORIAN EDICTS AS COMPARED WITH ENGLISH CASE LAW.

Now, however, we arrive at a material difference between the Roman and the English Magistrates. The English judge never goes beyond the concrete case which is before him. If he declares the law, he declares it by deciding on the particular question which has arisen between two individuals. He may incidentally, if so minded, deliver a lecture on the law bearing on the subject, and may pass in review all the cases cited in argument. Still, his judgement is not intended to go beyond what is absolutely necessary for the settlement of that question, and his view of the law is not authoritative so far as it strays into cognate but distinct topics. It is only the *ratio decidendi* that can be quoted as an authority. No *dictum* thrown out incidentally is of binding force; and those who in the future have to deal with his decision are often able to narrow down the *ratio decidendi* to a very fine point, and show that it turned so much on the special facts of the case as to be of little importance as a precedent. But the Praetor speaks generally. In the Edict which he issues at the beginning of his term of office he lays down a rule, intended from the first to be applicable to a large class of cases; or, to speak more exactly, he makes a promise and announces an intention of dealing with a large class of instances. If the class were not a large one, he would not think it worth while to announce such an intention. He is thus led to take much more bold and

conspicuous steps, and he may effect at one stroke a larger reform than any single decision of an English Court can ever cause. He is far more distinctly aware of the fact that he is, though not formally legislating, yet taking action which may have the effect of changing the substance of the law.

In other respects also, the fact that the Praetor's changes are formally enounced in his Edict potently and beneficially influenced his reforming action. He was obliged to generalize and summarize. Where he had to set aside an ancient rule which had begun to be mischievous and deserved to be obsolete, instead of merely nibbling away at the edges of it as our English judges were apt to do, he dealt with it in a broad and intelligible way, either superseding it altogether or laying down certain marked exceptions in which he declined to follow it. When he was establishing a new rule he had to consider how wide a field he desired to cover, what sets of instances were to be provided for, what was the common principle underlying those instances, how that principle must be expressed so as fairly to include them without including others which he had no wish to touch. The chief merit of a rule of law is that it should seize a feature which a large set of instances really have in common, and should effectually provide for them and for them only. The Praetor was moreover at the same time driven to be terse in the formulation of his promises, because the Edict was by tradition a comparatively short document, observing that stern brevity which the famous example of the Twelve Tables had made familiar and excellent in Roman eyes. Thus the results of his reforming action, the advance made at each step in the development of the law, were always presented in a clear, a comprehensive, and above all a concise form, so that the profession perceived exactly what had been done, were able to take the Edict as a subject for commentary and elucidation, and as a starting-point for further improvements.

It was thus that the jurists treated it, seconding while also controlling by their opinion the action of the chief magistrate. He draws with a bold yet careful hand the outlines of the picture. They fill in the details, and so work round and over each of his summary statements as to bring out more fully all that it contained and involved, to trace his principles into their consequences and to illustrate their application. The action of the jurists was as essential to him as he was to them, for while their advice often prompted him, and while their elucidations and teachings developed the meaning and contents of what he laid down, their criticism reprobated any hasty or inconsequent steps into which zeal or self-confidence might betray him. Nor did such criticism remain fruitless. For it will be remembered as another feature of the Roman edict-issuing system, and indeed one of its most singular features, that each Edict was issued by each magistrate for his one year of office only, and had no validity thereafter. This was so because he was not conceived to act as legislator, but only as an administrator whose commands, though they are not law in the strict sense, must be obeyed while his power lasts. At the end of the year they cease with that power, but his incoming successor may of course repeat them and give them another year of life, and so on from year to year and from generation to generation.

Thus the Edict, so far as it can be called legislation, is tentative legislation. It is an experiment continually repeated; an experiment whose failure is a slight evil, but its success a permanent gain. Suppose the Praetor Sempronius to have introduced a new sentence into his Edict, promising to give an action in a particular set of cases. The profession doubt the merit of the sentence, canvass it, observe how it works, and before the end of the year come to one of three conclusions. They may approve it, in which case it will doubtless be repeated in next year's Edict. They may think it

fundamentally wrong. Or thirdly, they may hold that though its object was good, that object has been sought in a wrong way. See then what happens if it has been disapproved. Next year a new Praetor—Cornelius—comes into office. In issuing his Edict he either omits altogether the obnoxious addition which Sempronius had made, or he so modifies it as to meet the objection which the jurists have taken. There is here none of the trouble, difficulty, and delay which arise when a statute has to be passed repealing another statute. There are not even those difficulties which occur under our English system when a case wrongly decided has to be overruled.

Observe how that English system works. A decision is given, perhaps hastily, or by a weak Court, which in a little while, especially after other similar cases have arisen, is felt by the bar and the bench to be unsound. There is a general wish to get rid of it, but it is hard to do so. People have begun to act on the strength of it; it has found its way into the text-books; inferior or possibly even co-ordinate courts have followed it; conveyances or agreements have been drawn on the assumption that it is good law. The longer it stands the greater its weight becomes, yet the plainer may its unsoundness be. Cautious practitioners fear to rely on it, because they think it may someday be overruled, yet as they cannot tell when or whether that will happen, they dare not disregard it. Thus the law becomes uncertain, and not only uncertain, but also needlessly complex and involved, for later judges, feeling the unsoundness of the principle which this mischievous case has established, endeavour to narrow it down as far as possible, and surround it by a set of limitations and exceptions which confuse the subject and perplex the student. The matter may have one of three ultimate issues. Either lapse of time and the unwilling acquiescence of subsequent judges put its authority beyond dispute, as Mr. J. W. Smith says of a famous old instance, 'The pro-

fession have always wondered at Dumpor's case, but it is now too firmly settled to be questioned in a Court.' Or else, after a while, the point is carried to a Court of higher rank which has the courage to overrule the erroneous decision, and resettle the law on a better basis. Or possibly—though this but rarely occurs—a statute is passed declaring the law in an opposite sense to that of the unlucky decision. But it may be long before the second solution is found, partly because judges are chary of disturbing what they find, holding that it is better that the law should be certain than that it should be rational, and fearing to pull up some of the wheat of good cases with the tares of a bad case, partly because it may be a good while before a litigant appears willing to incur the expense of carrying the point to the higher and more costly tribunal. The third solution can be even less relied upon, for the legislature is busy and cares very little about the theoretical perfection of the law.

Even when the bad decision has been got rid of, a certain measure of harm is found to have been done. The authority of other cognate decisions may be impaired; transactions entered into, or titles accepted, on the faith of the case are shaken. One way or the other the law is injured. But on the Roman system these evils were, not indeed wholly, yet to a much greater extent avoided<sup>1</sup>. Not only is the error of one Praetor easily corrected by his successor, but the occasion recurs year by year on which it must be either corrected or reaffirmed, so that a blemish is much less likely to be suffered to remain. If five or six successive Praetors have each of them in their Edicts repeated the provision introduced by one of their predecessors, men may confidently assume that it will be supported and perpetuated by those who come after, either in its original form or possibly in a more general form which will include its

<sup>1</sup> A particular case decided in a particular way under a provision of the Edict which was omitted next year would of course not be disturbed, for the Romans held firmly to the principle *stare iudicatis*.

substance. There is no doubt some little temporary uncertainty during the first year or two, before the opinion of the profession has been unequivocally expressed. Such uncertainty can hardly be avoided in any system. But the fact that the Edict is annual gives ample notice that the provision is temporary and experimental, though, of course, fully valid during the particular year for which the Edict is issued. Thus the risk of mischief is reduced to a minimum.

Our data are too scanty to permit us to trace either the first beginnings of the Praetor's action, or the details of its working, or the changes which must unquestionably have passed upon it during the three centuries and a half when its importance stood highest, say from the end of the First Punic War to the time of the Emperor Hadrian (B.C. 241 to 117 A.D.). Even of the Edict itself, in its latest and most complete form, we have only fragments, and do not know by what stages it was brought to the perfection which led to its being finally settled in a form never thenceforward altered. This took place under Hadrian, when Salvius Julianus, a famous jurist who was Praetor at the time, gave it the shape in which it became permanent, an *Edictum Perpetuum* in a new sense; it was then enacted by a *Senatus Consultum*, and in the form so enacted it was thereafter quoted and applied. Apparently, however, the effect of its enactment was not to make it a part of the general statutory law, but only to determine the form in which it was thereafter put forth by the magistrates. After that time such Edicts as were issued were special, containing declarations of the imperial will, usually addressed to particular circumstances. They were no longer Edicts in the old sense, but mere imperial constitutions.

It need hardly be said that under the Empire the action of the Praetor, like that of all other magistrates, had been liable to be directed or supervised by the Sovereign or his legal advisers. An interesting illustra-

tion of that supervision is worth mentioning, because it also brings into relief the fact that other magistrates, as well as the Praetor and Aediles, enjoyed the power of creating law by their action, which may be called either administrative or judicial, seeing that it united the two characters. Before the time of Augustus there had been no such thing among the Romans as the giving of an inheritance, or a legacy, by means of a Trust, *i.e.* by imposing on the honour and good faith of the person to whom property was left a legal obligation to hand it, or a part of it, over to some one else as the real beneficiary. The practice of asking such a person to carry out the testator's wish had existed, but he could disregard the wish if he pleased. Augustus, however, on two occasions directed the Consuls (not the Praetor) to enforce such a request by their authority, thereby turning the moral into a legal obligation; and at the same time recognized an informal letter or writing (*codicilli*) as sufficient, where confirmed by a will, to impose a binding obligation on the heir. We are told that, in the latter case, having himself on one occasion performed what a testator had asked him, by way of trust, to do, he summoned a meeting of eminent jurists to advise him, and accepted the advice of Trebatius that the obligation should be held valid. These instances became the foundation of the extremely important changes which made the validity of Trusts, and that of *codicilli*, thenceforward a well-established legal doctrine<sup>1</sup>. As the origin of Roman trust inheritances is due to the action of the magistrates, so English trusts owe their legal force to the Chancellor; and through the operation of the practice of creating them, coupled with the Statute of Uses (27 Henry VIII, c. 10), there grew up the modern system of conveyancing.

<sup>1</sup> 'Primus divus Augustus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur aut ob insignem quorundam perfidiam, iussit consulibus auctoritatem suam interponere, quod quia iustum videbatur et populare erat, paulatim conversum est in adsiduam iurisdictionem' (*Inst.* ii. 23. 1). See also *Inst.* ii. 25.

The merits of our English Case Law system are very great. It is an abiding honour to our lawyers and judges to have worked it out with a completeness and success unknown to any other country. They have accumulated in the Reports an unequalled treasure of instances, conjunctions of circumstances raising points of law far more numerous than the most active intellects could have imagined. These points have been argued with the keenness which personal interest supplies, and decided under that sense of responsibility which the Judge feels when he knows not only that his judgement is to determine the pecuniary claims or social position of suitors, but also that it is to constitute a rule which will be canvassed by the bench and the bar, and find its place in volumes that will be studied long after he has quitted this mortal scene. There is therefore a practicality about English Case Law, a firm grasp of facts and reality, as well as a richness and variety, which cannot be looked for in legal treatises composed even by the ablest and most conscientious private persons, who, writing in their studies, have not been enlightened by forensic discussion nor felt themselves surrounded by the halo of official dignity. If the treatises of the great Roman jurists do to a large extent possess these same merits, it is because they too were, in a measure, public officers, and because much of the law they contain arose out of concrete cases<sup>1</sup>.

The characteristic defects of Case Law which must be set against these merits are two. There is, first of all, its frequent uncertainty. As has been remarked already, one must always assume a certain percentage of ill-decided cases which it is hard to get rid of. And it may often happen that a particular point, which specially needs to be determined in the interests of legal science, remains for years, or even centuries, unsettled,

- Not that all the cases we find in the *Digest* are concrete cases, for a good many seem to have been imagined for the sake of illustrating the applications of a principle. Cf. the illustrations in Macaulay's Indian Penal Code.

because it is never brought before the Courts in a neat form which raises just the issue that wants settling. Sometimes it hardly matters which way the decision goes: the important thing is to have a decision, yet there is no means provided of getting one, unless by invoking the legislature, which is usually too much occupied with political controversies or administrative problems to care for settling such a point. And secondly there is the utterly unsystematic character from which Case Law necessarily suffers, and which it necessarily imparts to the whole law of the country. This defect is too familiar from everyday experience to need any illustration. It is the capital defect, one might say almost the only defect, of the law of England; and people have so long talked in vain about remedying it by means of a Code, that they have at last grown tired of the subject, and seem to be settling down into despair. I refer to it for the sake of pointing out how the institution of the Roman Praetor met a similar danger. The Romans had, to be sure, no great turn for scientific arrangement—their efforts at codification and the structure of their legal treatises show that—but the Praetor's Edict had the immense advantage of presenting all the gist and pith of the newer law in a compact form, clearly and concisely set forth. The Edict thus became a centre round which the jurists could work, a point of departure for all further legislation, a main line of road running through the network of lanes, courts, and alleys that had been built up by a multitude of statutes and treatises. It was capable of being constantly amended and extended so as to take in all changes in the law, while yet retaining its own character; and it gave a unity, a cohesion, a philosophical self-consistency to the Roman law which it must otherwise have wanted even more than does our own. A German writer has somewhere remarked, in commenting on the crude and fragmentary character of the Roman Criminal Law, with whose development the Praetor had comparatively little to do,

that the faults of that branch of legal science show how absurd it is to ascribe the merits of Roman jurisprudence to any special gift for legislation bestowed by Heaven on the Roman people. The excellence of their private civil law is (he observes) due simply to the fact that they had the good sense, or perhaps the good luck, to have provided in the Praetorship an office specially charged with the duty of constantly amending the law so as to bring it in accord with the growing civilization and enlarging ideas of the people. There is much truth in this. The Romans, however, did not invent their Praetor with any such conscious purpose. Their merit was that, when they saw him occupied in developing the law, they gave him free scope, and supported him in his beneficent work. He is a unique figure among the law-making organs of the nations. Since he is the choice of the people, he is able to do things which the minister of an absolute monarch might prudently shrink from doing; and the people permit him to retain his functions, even in days when the habit of directly legislating had so much increased that it might have been supposed that legislation would restrict or supersede his action. No modern republic would vest such power in an official, nor would any modern monarch be permitted by public opinion so to vest it.

Nevertheless, though he belongs to a world which cannot return, the Praetor's career may suggest to us that every civilized nation ought, in some way or other, to provide an organ representing its legal intelligence which shall mould and supervise the gradual and symmetrical development of its law. It may be suggested that all modern States do provide such an organ in their legislatures, whose business is largely, in some instances almost entirely, that of making law, and which presumably contain the most capable men whom the nation possesses. When we have considered the conditions under which legislatures work, as I propose now to do, we shall be better able to judge how far they

fulfil the function which the Praetor discharged at Rome.

## VI. DIRECT LEGISLATION AT ROME.

### A. *The Popular Assembly.*

We have now compared the organs and the methods of legislation which existed in the Roman Republic and Empire with those of England, so far as relates to the action of the jurists, magistrates, and judges. Taking first the Roman jurisconsults and authors of legal treatises, it was suggested that their English analogues were rather to be found not so much in text-writers as in the judges, the result of whose labours is preserved in the vast storehouse of the Reports; while in considering the action of the Roman Magistrates, especially of the Praetor, in the creation of law, stress was laid on the advantages which the peculiar position of this great head of the whole judicial system presented for the gradual and harmonious development of legal rules, an advantage which the disconnexion of the Chancellor from the Common Law Courts did not permit in England. This led to an examination of the English method of developing and amending of the law by the decisions of the Courts, a method which, if it loses something in point of symmetry, has the advantage of providing an unrivalled abundance of materials for the determination of every question that can arise, and of subjecting each disputable point to the test of close and acute scrutiny.

We may now go on to examine another mode of creating law, that namely which proceeds immediately from the supreme power in the State, and which may, as contrasted with the indirect creation of law by jurists, or magistrates, be called Direct Legislation.

The organ of such direct legislation is the supreme authority in the State, whether such authority be a Person or a Body, whether such body be the council of an

oligarchy or a popular assembly, and whether such popular assembly be primary or representative.

The method whereby Direct Legislation is enacted is the public proclamation (usually, and now invariably, but of course not necessarily) in writing by the Supreme Authority, of its will as intended to bind the citizens and guide their action. And the result is what we call Statute Law as opposed to Common Law. The distinction is a familiar one to both nations. The later Romans contrast *Ius* and *Lex*<sup>1</sup>: we contrast Common Law and Statute.

Let us first inquire what were, at different periods in the long annals of the Roman State, its various organs of direct legislation, and how each of them worked. It is of course only in outline that so large a subject can be treated.

The Roman State lasted 2,206 years—from the unauthenticated 'founding of the city' (for which I assume the traditional date of B.C. 753) down to the well authenticated capture of Constantinople by the Turks in A.D. 1453. Some would carry it down to 1806 and thus give it a life of 2,559 years, but the feudal Romano-Germanic Empire is such a totally different thing in substance from the Empire at Rome or at Constantinople, that although its sovereigns often claimed to legislate after the manner of Constantine and Justinian, nothing would be gained by bringing it and them within the scope of our inquiry. Now during this long period of two and twenty centuries, from Romulus to Constantine the Sixteenth, three such organs were successively developed. The first was the popular assembly of the citizens; the second, the administrative council of magistrates and ex-officials; the third, the autocratic monarch. The first co-existed for a certain time with the second, the second with the third. The rights of the first and

<sup>1</sup> By the time of Justinian the distinction had come to be between *Ius* as the old Law, including republican statutes, *Senatus consulta*, the Edicts of magistrates and the writings of the jurists, and the new Law, which consisted of imperial ordinances, and was called sometimes *Ius Novum*, sometimes *Leges*.

the second seem to have never been formally extinguished, even when the third had become in practice the sole source of law. Still we may, with substantial accuracy, limit the action of the first to the republican period, that of the second (so far as properly legislative) to the earlier two centuries of the imperial monarchy, while in later ages the third alone need be regarded.

As I am not drawing a historical sketch, but merely attempting to point out how each organ acted in producing law, I shall not stop to discuss any constitutional questions as to the rights or powers at various times of these organs respectively, but shall assume each to have been in its own day duly recognized as competent to legislate. That is the view presented to us by Gaius (writing in the second century A.D.) and in the *Digest* and *Institutes* of Justinian enacted in the sixth century A.D. The Emperor says, 'The written law consists of statutes, resolutions of the *plebs*, decrees of the Senate, the ordinances of emperors, the edicts of magistrates, the answers of jurisconsults <sup>1</sup>.' We have already considered the two latter, and have now the four former kinds of legislation to examine, all of which may be called, in a wide sense of the term, Statutes, *i.e.* declarations of the will of the State formally promulgated as law.

The legislative power of the Roman people was exercised, during the Republic, through three assemblies, those of the curies (this soon lost all practical importance), the centuries, and the tribes. Passing by the interesting and difficult questions as to the composition of these bodies, their respective functions, and the time when each may be said to have acquired or lost its authority, we may remark several features which they had in common, and which impressed a peculiar character on the laws that emanated from them. The differences between them do not affect the points to which I

<sup>1</sup> 'Scriptum ius est lex, plebiscita, senatus consulta, principum placita, magistratum edicta, responsa prudentum. Lex est quod populus Romanus senatorio magistratu interrogante, veluti consule, constituebat: plebiscitum est quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat' (*Inst.* i. 2. 3, 4).

am going to call attention. All these *comitia* (literally, meetings) are Primary assemblies, that is to say, they are not representative bodies, but consist of the whole body of citizens, just like a Homeric *ἀγορά*, an Athenian or Syracusan *ἐκκλησία*, a Frankish *mallum*, an Old English Gemot, an English seventeenth-century Vestry, a New England Town Meeting, an English Parish Meeting under the Local Government Act of 1894, an Icelandic Thing, a Basuto Pitso. The Roman assemblies are, therefore, large bodies consisting of thousands, often many thousands, of persons, and fluctuating bodies, in which not always the same persons will be present, and in which those who live near the place of meeting will tend to preponderate. Further, they are—and this is a remarkable feature of the Roman system—bodies composed of minor bodies, and determining their decision by a system of double voting. Each individual votes in the group to which he belongs, *curia*, *centuria*, or *tribus*, as the case may be; and it is by the majority of curies, centuries, or tribes that the decision of the assembly as a whole is given, the collective voice of each of these groups being reckoned as one vote, and a small group having as much weight as a large one. Thus there may be a majority of group votes for a proposition while the majority of votes of individuals is against it. This mode of voting, unfamiliar to modern political constitutions, survives in the Rectorial elections of two (Glasgow and Aberdeen) of the four Scottish Universities, where the students vote by ‘nations’; and it has sometimes happened that a person is on this method chosen to be Lord Rector against whom a majority of the votes given by the individual electors has been recorded<sup>1</sup>. So under the Constitution of the United States, when no candidate for President has received a majority of the votes given, the House of Representatives chooses one of the five candidates who has received most votes, and in doing so the House votes

<sup>1</sup> See 52 & 53 Vict. c. 55, § 14, subs. 4.

by States, *i.e.* the majority of the Representatives from each State determine the vote of that State, and the majority of States (not of individual Representatives) prevails. Thirdly, these assemblies can be convoked and presided over only by a Magistrate, and their action may be stopped by another Magistrate. Fourthly, no discussion takes place in them. They meet only to vote on propositions submitted by the presiding Magistrate, who alone speaks, and who speaks only to put the question. Fifthly, they vote once only, and that vote is final and supreme, requiring no assent of or confirmation by any other body, but operating directly to create a rule binding all members or subjects of the State.

Such a machinery seems almost as if calculated either to check legislation by throwing obstacles in its way, or else to make legislation hasty and imprudent. The passing of a long measure or a complex measure might be thought scarcely possible under it; while at the same time it secures no opportunities for criticism and revision, and for the reconsideration at a future stage of decisions too hastily taken when the measure was first submitted. Thus there would appear to be a double danger involved in such a system, the danger of not moving at all, and the danger, when the people do move, of going too fast and too far. It must be remembered, however, that not very much direct legislation was needed. The improvement of ordinary private law was for the most part left to the Praetor and the jurists, while one great branch of modern legislation lay almost untouched during the Roman Republic, that of the regulation of powers and functions of administrative departments. There was comparatively little general administrative law in our modern sense in Italy, because in Rome the magistrates and Senate had a pretty wide discretion, and through the rest of Italy the local communities managed their own affairs. So too in the provinces administration was left either to the local municipalities or to the Roman governors, proconsuls, or propraetors.

Even if the method of legislating which these assemblies followed be deemed ill fitted to secure that the merits of any change in the substance of the law should be carefully weighed, it need not have been equally deficient in making it excellent in point of form, *i.e.* clear, consistent, symmetrical. In this respect the absence of means for discussion and amendment may have worked for good. Statutes enacted in the form in which they have been originally proposed are more likely to be plain and simple than those which have been cut about, pared down, and added to by the action of some revising Committee or of a Second Chamber, probably dissimilar in opinion from the First Chamber, possibly disposed to differ for the sake of differing. The volume of direct legislation may, under a system like that of Rome, be comparatively small. But the fewer changes in the law are made by statute so much the better for the harmonious development and inner consistency of the whole body of law, which suffers far less often from permitting the survival of an occasional anomaly or absurdity than from frequent tinkering, that is to say, from the introduction of exceptions to general rules, or the multiplying of provisions for special cases. So far, therefore, as quantity is concerned, the small amount of legislative work which the Roman *comitia* turned out was a matter for satisfaction, not for regret.

As respects the quality of that work, the character of the Assembly produced some remarkable consequences. That it might be understood and approved by the ordinary citizens, the bill proposed must be comparatively short, terse, clear. In many cases it would have been previously discussed at public meetings, which the magistrate could summon; but those who would attend the meetings might be but a small proportion of those called upon to vote in the *comitia*. As it could not be amended by the Assembly, and would reflect credit or discredit on the name of the proposing Magistrate who was responsible for it, it must be prepared with scrupu-

lous care. As it would become operative immediately on its being approved by the single vote of the Assembly, with no opportunity of correcting it at any later stage or in any other legislative body, an error would be serious to the community, and specially damaging to the proposer. Moreover, as it could not be amended in the Assembly, it escaped all risk of having its drafting spoiled and of losing what original merits of breadth, lucidity, logical arrangement, and conciseness of expression it might possess. No one could move to add or to omit a clause. No large principle could be qualified by the insertion of limiting words. No savings for particular cases could be suggested, and possibly accepted in order to buy off opposition. 'Yes' or 'No' to the whole bill—these were the only alternatives. And the simpler the bill, so much more probable the 'Yes'; whereas in assemblies with power to amend, a 'Yes' has to be purchased by compromises and concessions, which, whatever effect they may have on the substance of a measure, destroy the elegance of its form. The statutes passed by the Roman people had, therefore, owing to these causes, three great merits. There were few of them. They were brief. They were clear. We possess fragments, in some cases pretty large fragments, of a good many; and in all the drafting is excellent. The sharp, stern, almost grim conciseness and precision of the Twelve Tables seem to have been always present to the mind of the Roman draftsman as the model he ought to follow.

It is worth remarking that the earliest Roman conception of a *Lex* or Statute was different from that which we find in the imperial period, as well as from that which any modern jurist would naturally form. The word *lex* meant in early Latin simply a set form of words; and when applied to an enactment by the *comitia*, it described, not a special kind of legal rule, but merely the expression of the people's will in set terms. And the original conception of a statutory enactment was that of

a contract made between the Citizens in the *comitia* and the Magistrate representing the Corporate State. Hence the definition of *Lex* which we find given by Papinian (*Dig. i. 3. 1*), 'the common covenant of the republic' (*communis reipublicae sponsio*), probably descends from the old practice according to which the Consul or other presiding Magistrate asked (*rogavit*) the *comitia* whether such and such was their wish, submitting to them the form of words whereby they were to agree to bind themselves. Just as in the Roman *stipulatio* the questioner asks the promiser whether he promises to do such and such a thing, to which the latter answers, 'I promise' (*spondeo*); so the Consul asks the Quirites whether they wish and order that such and such a thing shall be done (*Velitis, iubeatis, Quirites?*), whereto the citizens answer, 'Be it as you ask' (*Uti rogas*). Thus the first (or at any rate a very early) form in which the notion of a formally enacted, as distinct from that of a Customary, Law emerges in Rome is that of a Contract.

The Romans were like the English in this, that they seldom did anything formally till it had for a great while been done practically. Long after the power of legislation had passed in substance from the king of England to his subjects represented in his Great Council, the forms of the Constitution continued to suggest that the monarch was still the prime agent in legislation. To-day the so-called Royal Veto, which ought rather to be called the right of the Crown to take further time to consider the resolutions of the two Houses, subsists in theory unimpaired, though it has not been exercised since 1707. So when actual power passed from the *comitia* to the Emperor in the days after Julius Caesar and Augustus, the rights and functions of the Assembly were not formally extinguished. Magistrates continued to be elected by the *comitia* till the accession of Tiberius, and the right of legislation remained for a great while afterwards legally vested in them. Statutes appear to have been passed by them as late as the time of Nerva. The *comitia*

themselves died out by obsolescence, without being ever formally abolished, and apparently they went on meeting occasionally in a purely formal way long after they had ceased to be a reality, just as the name *Respublica Romana* survived in documents and inscriptions when the old associations it evoked had been forgotten<sup>1</sup>. And the popular assemblies died out all the more quietly because they had never met of themselves, by simple operation of law. Like the English Parliament, but unlike the American Congress and the Chambers of some European countries, they needed to be convoked by the Executive<sup>2</sup>.

## VII. DIRECT LEGISLATION AT ROME.

### B. *The Senate.*

When legislation by these assemblies ceased the turn of the Senate came. This body, a Council of Elders as old as Rome itself, perhaps in its original form corresponding to the Council which surrounded the Homeric king, seems to have claimed, even during the Republic, the right of general legislation, a right which the popular party denied, and which was probably not well founded in law, although its undoubted competence to issue administrative decrees for temporary purposes made the claim plausible, and raised many questions of delicacy and difficulty regarding the exact limits of its power. Moreover the Senate, whose proper function was to advise the magistrates, came to have a sort of ill-defined authority over them, and they often found it prudent to shelter themselves under that authority; so sometimes

<sup>1</sup> I saw a few years ago, in the ruins of Salona in Dalmatia, a lately uncovered inscription, dating apparently from the sixth or seventh century A.D., in which the protection of God is asked for the 'respublica Romana.' It need hardly be said that the term has in strictness nothing to do with the form of government, no more than has our English term 'Commonwealth.'

<sup>2</sup> The Crown is now in England bound by statute to summon Parliament, but should the Crown omit to do so, Parliament could not legally meet of itself, save that upon the demise of the Crown it does forthwith come together to swear allegiance to the new Sovereign.

a resolution directing a magistrate to take such and such a course might be quoted as possessing legal validity, especially if the course was one which lay within the scope of his official discretion. The whole subject was full of uncertainty, and a controversy seems to have gone on among constitutional lawyers regarding the Senate's powers, similar to that which long raged in England over the so-called dispensing power of the Crown<sup>1</sup>. When the *comitia* ceased to be convoked, except occasionally as a matter of form to give effect to the monarch's will, it was natural that the legislative functions of the Senate should win full recognition, for they furnished exactly the method of legislation which the Emperors desired. As the Roman State remained a republican commonwealth in theory and in strict intendment of law long after it had passed under the sway of a monarch, and as it was the object of the monarch to keep up this theory, he found it easy and safe to act through the Senate, which (though absolutely obedient to him) still wore the air of an independent body, rather than in his own person, ample as was the magisterial authority wherewith he was clothed. Thus the Senate at the same moment acquired power and lost it. It became recognized as entitled to make law, but it found itself the mere instrument of the Emperor for that purpose. From the time of Tiberius down to that of Hadrian, many laws were passed by the Senate; and though its action became thenceforward less frequent and less important, its rights lasted as long as it lasted itself, that is to say, till it died out in the disorder of the seventh century. They are referred to by Justinian as if still existing, but we do not hear of any practical use made of them in his time. One of the latest measures ascribed to the Senate is, oddly enough, a decree for regulating the election of Popes, and preventing tumults thereat.

<sup>1</sup> This is illustrated by the words of Gaius, 'Senatus consultum legis vicem obtinet quamvis fuerit quaesitum' (Gai. *Inst.* i. 4). Ulpian however says, 'Non ambigitur senatum ius facere posse' (*Dig.* i. 3. 9). It too exerted a sort of dispensing power: cf. Sallust, *Cat.* 29.

The Senate was in most respects much better fitted for legislative work than the popular assemblies had been, indeed than most assemblies have been in any country. It was composed of men of mature age, versed in affairs, many of them having filled high office, others having served as judicial referees, if we may so render the term *iudices*; all therefore, or nearly all, possessing some knowledge, and many a large knowledge, of law and of administration. It was large enough to comprise persons of very varied experience, while small enough (in normal times) to be business-like, and to avoid the danger of degenerating into a mob<sup>1</sup>. Like the *comitia*, it voted only once on a proposition, and that one vote was sufficient to pass a law. Again like the *comitia*, it could only deal with what the magistrate brought before it, private members having no initiative. But, unlike the *comitia*, it could debate a proposition and make amendments thereto; that is to say, when a particular draft measure was submitted, it was able, being thereby seized of the matter, to reject the proposition as drafted, and to pass one containing different provisions. There does not seem to have been anything analogous to our English system of going into Committee, and afterwards making a report to the House; but, as the decrees submitted were short and simple compared to those which the British legislature deals with, the method of amending the proposal submitted, or debating and passing an alternative proposal, was doubtless sufficient for the needs of the case. What was lacking to the Senate was not machinery, but force. It was a tool in the hands of the Emperor, and was used by him as a means of formally enacting and promulgating measures on which he had already decided. His influence soon came to be

<sup>1</sup> Though Augustus found over a thousand members in it, many of them unworthy, and was obliged to purge it carefully down to a reasonable strength (Sueton. *Octav.* 35). Whether there were senators with no legal right to speak but only to vote—they voted, as in the English Parliament, by dividing into two bodies—is matter of controversy. There was no closure, so senators used to talk against time.

so fully recognized that the later lawyers sometimes cite not the *Senatus consultum* itself, but the speech (*oratio*) in which the Emperor proposed it to the Senate, although in these cases the legal validity of the law seems to be attributed to the vote of the Senate. After Hadrian it would appear that legislative decrees were always passed at the instance of the monarch.

Under an indulgent Emperor, and in matters of ordinary private law, there might of course be no great reason why amendments should not be suggested or even opposition made, by an active senator, to bills proposed by the presiding magistrate, although the magistrate himself was usually merely the mouthpiece of the monarch. But the habit of servility grew so fast, that even this remnant of independence seems to have soon become rare. Nothing was so dangerous as to give offence to a sovereign whose power was restrained only by his good nature.

The checks which have been noted as existing in the case of the *comitia* on prolixity or obscurity in the terms of a statute, were absent in the case of the Senate. Yet the good habits formed in earlier centuries were not lost. The *Senatus consulta* which remain to us are favourably distinguished by their clearness and brevity. The ease with which they could be passed, or repealed when passed, does not appear to have led to their being drawn carelessly as regards either substance or form. It may however be remarked that having been originally not so much laws as resolutions of a body primarily advisory, intended to express its opinion, and to guide or strengthen the hands of an executive magistrate, they continued to be couched in language hardly so technical as that of the old *leges*. They are less imperative in form, and often express quite as much in their preamble, which contains the motives that have suggested the decree, as through the more strictly enacting part. Occasionally they approach dangerously near, as preambles

are apt to do, to becoming rhetorical declarations of policy.

The *Senatus consulta* actually preserved, or known to us by name, are less numerous than might have been expected. The same may be said of the *leges*, or rather of such among them as were of general and permanent effect, not mere acts of an executive nature. If we could suppose that the legislative activity of the Roman State had manifested itself only through *leges* and *Senatus consulta*, it would be hard to understand how that State, developing as it did, could have got on and attained its amazing development in wealth and population with so few legislative changes. The explanation, of course, is that the Praetor and the jurists were doing the main part of the work, just as during the eighteenth century in England the judges and text-writers were steadily developing our private law, which was but little altered by statute through the whole of that century. During the later Republic and the earlier Empire direct legislation was (speaking generally) resorted to either to abolish some deeply rooted rule or else to establish some new departure, which a magistrate hesitated to undertake on his own responsibility.

## VIII. DIRECT LEGISLATION AT ROME.

### C. *The Emperor.*

The third and last form of direct Roman legislation is that of imperial ordinance. In one aspect it is the most important form, because nearly all the law of statutory origin which has come down to us was enacted by the Emperors, the number of *leges* and *Senatus consulta* being slight in comparison. The Emperors, moreover, spoke the last word. It was their legislation which gave to the Roman law the shape in which it descended to the modern world both in the East and in the West.

The Emperor's legislative authority grew up slowly

and almost imperceptibly out of the rights which he enjoyed as holder of several great magistracies, or invested with the powers which belonged to them. Although, in later times, the imperial function of legislation was ascribed to a formal transfer made to him by the people of their own authority<sup>1</sup>, it is important to remember that its true parent is to be sought, not in *leges*, nor even in *Senatus consulta*, not in any representation by him, as the heir of the Assembly, of the ancient right of popular sovereignty, but rather in the Edicts of the magistrates, whether their formal enunciations on entering office of the rules by which they proposed to act, or their less public instructions to their subordinate officials.

Even the action of the jurists, and the custom of issuing answers on points of law (*responsa*), contributed something to the conception of the Emperor as a source of law, for he was, as a magistrate, an authoritative exponent of the contents of the customary law, and of the interpretation of the statute law; and if an answer given under his commission by an authorized jurist was binding on a *iudex*, how much more weight was due to a declaration proceeding from himself, the fountain-head of authority? That the imperial ordinances have not preserved the outward forms and character of the republican statutes is a consequence of these facts and of the conception I have described. They are not expressed in the same strict and highly technical language as the old statutes were. As regards some of them, and especially some of those which belong to the first two centuries of the Empire, it is hard to say whether they were originally intended to have a general application, for they may have been mere instructions or declarations of opinion, given for the special occasion and purpose only. In fact the Emperors found it necessary to protest against the tendency to attach legal weight to all their words. Trajan, for instance, who seems to have left the cha-

<sup>1</sup> Cf. Just. *Inst.* i. 2. 6: cf. *Dig.* i. 4. 1.

racter of being more indulgent than most of his predecessors or successors—witness the story of the widow through whom and the prayers of Pope Gregory he obtained salvation<sup>1</sup>—declares that when he makes an answer to a particular request he by no means desires to be taken as establishing a precedent. He felt, no doubt, that in many cases the precedent would be of questionable value, according to the proverb that hard cases make bad law. However, the tendency was too strong to be resisted. All declarations emanating from the supreme authority in the State were taken to be binding on its subjects: and we may imagine how often a wily advocate, or an adulatory judge, would, with loud professions of loyalty, insist on regarding as law what the Emperor had intended to be merely a good-natured compliance with the petition of some unlucky or importunate suppliant.

It is not necessary for our immediate purpose to describe the various forms which the legislation of the Emperors took. They are classed as Rescripts, answers to questions or petitions, Edicts or general proclamations, Mandates or instructions to officials, Decrees (*decreta*), decisions of the Emperor as being at first practically, and at last legally also, a Supreme Court of Appeal<sup>2</sup>. In later times the general name of Constitutions (*constitutio est quod imperator constituit*), was given to them; and in what has to be said further, minor differences between the above mentioned forms may be ignored, and the various kinds of constitutions may be treated together as being all of them enunciations by the sovereign power of those general rules of law which it desired to have observed by its subjects—as being in fact on the same footing as an imperial Ukase in Russia, or an Act of Parliament in England.

Such legislation by an irresponsible autocrat as that

<sup>1</sup> Dante, *Purgat.* canto x.

<sup>2</sup> Sometimes the speeches delivered to the Senate are included, but in these cases the law seems (as already observed) to have been deemed rather senatorial than imperial.

with which the Roman State ended, stands at the opposite pole from that legislation by a primary assembly with which the Roman State began. The latter organ was a stiff, heavy, cumbrous machine, which it was hard to set in motion, and which could work only under certain prescribed forms. The former was not only immensely powerful, but so readily applicable, playing so swiftly and so smoothly, that it was likely to be used too often and to act too fast. The Roman Emperor occupied, it must be remembered, a position different from that of any absolute sovereign in modern times. The Czars in Russia now, the Prussian and French kings in the last century, are, or were, the heads of their respective nations, and therefore not only to some extent likely to participate in national ideas and sentiments, but also largely amenable to national public opinion. However complete their legal sovereignty and practical control, the misuse of their legislative powers could not escape popular censure. A national king is naturally restrained by the fear of displeasing his fellow countrymen. But the monarch of the Roman world, a world where the old Roman nationality had, before it expired, so far crushed the other subject nationalities that none of them could offer any resistance to the levelling pressure of the imperial authority, found himself unguided and uncontrolled by any influence, except the dread of a palace conspiracy or a military rising. Public opinion possessed then no voice, such as it afterwards found in the church, or finds now in the press. The various peoples who, from the second or third century A.D. onwards, called themselves Romans, had not been sufficiently fused together to have a common public opinion. It was not till the sixth or seventh or eighth century that the greatly narrowed Eastern Empire began to have a social and moral coherence, and developed into what might be called a National power.

This unique position of the Roman Emperor made legislation a great deal easier for him than for any

modern monarch, easier than for the ruler of China, because there was no vast body of ancient customs he might fear to break through, easier than for a Turkish Sultan, because there was no quasi-ecclesiastical authority like the Sheik-ul-Islam or the whole body of Muslim doctors he might fear to offend. And the fact already noted that the powers of the popular Assembly had not been formally vested in him, worked in the same direction. Had there been any legal transference of legislative functions, some of the old forms and methods would have passed over with the transfer. There would have been at any rate a pretty sharp line drawn between the officially promulgated ordinances of the Emperor and the merely occasional and informal expressions of his will. But (as has already been noted) the Emperor did not legislate as the assignee of the popular power of legislation. His function of making laws sprang from his authority as a magistrate, and the undefined character of that authority remained with him, and helped to make his exercise of it infinitely various in shape and expression. Accordingly in later days no line was formally and technically drawn between the more and the less solemn declarations of his sovereign will. He was not bound by the laws. He made law as a part of his daily administrative and juridical action. He legislated, one might almost say, as he talked and wrote. He exhaled law. Whenever an idea occurred to him, or to the minister authorized to speak in his name, he had only to sign, in the purple ink reserved (in those later days) for the monarch, a few lines, and therewith a law sprang at once into being.

This was the theory, and this was also to some extent the practice. Still the exigencies of a position which threw on one man a prodigious burden of toil and responsibility, compelled the Emperors to make regular provision for the discharge of their legislative and judicial work. A Council soon grew up, consisting at first chiefly of Senators, afterwards largely of jurists,

whose members acted as assessors to the Emperor when he heard civil or criminal cases, and who also advised him on projects of legal change. At first it was a fluctuating body, composed of persons whom the monarch summoned for each particular occasion, though doubtless some of the ablest and most trusted men would be invariably summoned. But under Trajan and Hadrian it became a regularly organized chamber of formally nominated and salaried officials, in which, besides jurists, there sat some Senators and Knights, and a few of the chief court officers, together with the Praetorian Prefect, who seems after the second century to have held the leading place. As it was numerous, we may suppose that particular members were summoned for particular kinds of business, or that it often worked by committees. In all these points it furnishes an interesting parallel to the English Privy Council. And it was itself, under the name of Consistorium, which it took in the time of Diocletian, the model on which the papal Consistory was ultimately built up by the bishop of the imperial city. Some of its chief members were the immediate ministers of the sovereign, journeying with him, as Papinian accompanied Septimius Severus to York, or directing legal and judicial business from Rome, while he made progresses through the provinces, or warred against the barbarians on the frontier. Among the duties of the Emperor's legal councillors, that of prompting, directing, and shaping legislation must have been an important one. Probably there was a regular staff for the purpose, a sort of Ministry of Justice, directed by the Praetorian Prefect, and in later times by the Quaestor, with a body of draftsmen and clerks. How much the Emperor himself contributed, or how far he examined for himself what was submitted to him, would depend on his own special knowledge and industry. Rude soldiers like Maximin, debauchees like Commodus, would leave everything to their advisers, and if these had been wisely selected by a preceding Em-

peror, things might go on almost as well as under a capable administrator like Hadrian, or a conscientious one like Severus Alexander<sup>1</sup>. The number of constitutions enacted was enormous, judging not only from what the Empire must have needed, but from the laws, or fragments of laws, which remain to us in the Codes of Theodosius II and Justinian; and as the legislative action, both of the Senate and of the Magistrates (other than the Emperor), had almost wholly ceased after Hadrian's time, while the local rules and customs of the provinces tended to be more and more superseded by the law of the ruling city, legislation may, at least for a considerable period, have rather increased than diminished in volume.

The good and bad points of a system which commits the making of laws to an absolute sovereign are easily summed up. Autocratic power is the most swift and efficient of all instruments for effecting reforms. Used with skill, tact, and moderation, it can confer incalculable benefits on a country. To be able at your pleasure to abolish obsolete institutions, to curtail the offensive privileges of a class, to override vested interests, to remove needless anomalies and antiquated forms of procedure, to simplify the law by condensing a confused mass of statutory provisions, or expressing the result of a long series of cases in a single enactment, and to do all this without the trouble of justifying your enlightened purposes to the dull and the ignorant, or of mitigating hostility by concessions and compromises which ruin the symmetry and reduce the effectiveness of your scheme—this is indeed a delightful prospect for the law reformer. The power of trying experiments is seductive to the philanthropist or the philosopher, for there are many problems which ought to be attacked by experimental methods, since nothing but an experiment

<sup>1</sup> Of whom we are told that he never sanctioned any Constitution without the advice of at least twenty jurisconsults. After Hadrian the *Consiliarius Augusti* had a position of recognized dignity.

can test the merit of a promising plan. Yet experiments are just the things which in popularly governed countries it is rarely possible to try, because the bulk of mankind, being unscientific, will seldom permit a thing to be tried till it has been proved to be not merely worth trying but absolutely necessary, while when it has been tried, and has not worked well, it is almost as hard to persuade them either to vary it or to drop it altogether. To tell the multitude that the scheme you propose may fail, though you think it worth trying, is to discredit it in their eyes. To admit that it has failed is to destroy your own credit for the future.

So again, if it is a question of improving the form and expression of the law, an absolute monarch evidently enjoys the finest possible opportunities of creating a perfect system. He can command all the highest legal ability of the State. He can bestow upon his commission of legislators or codifiers the widest discretion. When they have finished their work he can subject it to any criticism he pleases before enacting it as law. When he enacts it, he can abolish all pre-existing law by a stroke of the pen. Even afterwards he can readily correct any faults that may have been discovered, can suppress old editions, can provide means by which the law shall be regularly from time to time amended, so that all new statutes and all interpreting decisions shall be incorporated with it or appended as supplements to it. Few are the philanthropic enthusiasts, few are the theoretical codifiers, who have not sighed for an Autocrat to carry out their large designs.

According to that law of compensation which obtains in all human affairs these advantages are beset by corresponding dangers. Ease begets confidence, confidence degenerates into laxity and recklessness. As the laws of metre and rhyme help the versifier by forcing him to study and polish his diction, so he who is not now and then stopped by obstacles is apt to advance too quickly, and may not consider whither he is going. If

an error can be readily recalled it is lightly ventured, and the hasty legislator discovers too late that it is not the same thing to recall an error as never to have committed it. In the field of legislation the danger of doing too much is a serious danger, not only because the chances of error are manifold<sup>1</sup>, but because the law ought to undergo as few bold and sudden changes as possible. The natural process whereby the new circumstances, new conditions, new commercial and social relations that are always springing up become recognized in custom and dealt with by juridical science before direct legislation impresses a definite form upon the rules that are to fix them—this process is the best, and indeed the only safe way by which a nation can create a refined and harmonious legal system. Even the certainty of the law is apt to suffer if legislation becomes too easy, for the impatient autocrat may well be tempted, when some defect has been discovered, to change it forthwith, and then to find that the change has been too sweeping, so that steps must be taken backward, with the result of rendering doubtful or invalid transactions which have occurred in the meantime. If these dangers are to be avoided, it must be by entrusting legislation to the hands of advisers not only learned and skilful but also of a conservative spirit. In war and politics boldness is quite as needful as caution, but in reforming the law of a country the risk of going too slow is less serious than that of going too fast.

These observations are illustrated by the course of events at Rome. At first, while the magistrates were still hard at work in building up the law by their Edicts, and the jurists no less active in developing it on conservative lines by their *responsa* and treatises, the Emperors used their legislative power sparingly because they were guided by accomplished lawyers. Comparatively few constitutions are cited from the days of Trajan

<sup>1</sup> Τὸ μὲν γὰρ ἀμαρτάνειν πολλαχῶς ἐστὶ, τὸ δὲ κατορθοῦν μοναχῶς, says Aristotle: 'You can hit only in one way, but you may miss in many.'

and Hadrian, and even from those of the Antonines. These constitutions are short, clear, precise, introducing only those new rules or deciding only those questions which it was necessary to establish or deal with. After the time of Diocletian<sup>1</sup>, when the powers of the old magistrates had withered away and the fountain of juristic genius had dried up, direct legislation became far more copious, and began to range more widely over all sorts of subjects. Serviceable it certainly was in the way of abolition, for there was much to be abolished. But it tended to become always more and more rash and heedless in its dealings with the pre-existing law. Apart from the harshness or bad economics which frequently marred its provisions, it was often injudicious in matters of pure legal science. If in some cases it cleared the ground of antiquated rules and forms, in others it merely shore away abruptly and inartistically the more conspicuously inconvenient applications of an old doctrine, while leaving the doctrine itself to create future difficulty. It acted too much with reference to the particular evil dealt with, too little with a view to the law as a whole. It was, in a word, too unmindful of that *elegantia*, that inner harmony and consistency with principle which had been always before the eyes of the elder jurists. Legal style and diction experienced a similar declension. From and after the days of Diocletian, the language of imperial ordinances grows more and more rhetorical, pompous, and turgid. The imperial utterances had never emulated the scrupulous exactitude and technicality of the republican *leges*. But they were, during the first two centuries of the Empire, simple and concise. Afterwards, while becoming more prolix they became also less exact. These faults are, to be sure, not mainly due to the more palpably despotic position of the Emperor, but rather to the steady deterioration of juridical and literary capacity which mark these later

<sup>1</sup> Many of Diocletian's rescripts are well expressed and show a mastery of the old legal principles.

centuries. That the decline was less evident in the department of law than in most other branches of intellectual life may be ascribed, partly to the nature of the subject, which does not invite florid treatment, partly to the absence of Greek rhetorical models, Greek being eminently the language of rhetoric, partly, perhaps, also to the influence of the two great law schools of Beyrut and Constantinople, and to the fact that the writings by which the lawyer's mind was formed were still the admirable works of the luminaries of the early Empire. Still the fall is a great one. How much more repellent is the extreme of over-ripe laxity than the extreme of primitive stiffness may be felt by any one who will compare the weak and wordy 'New Constitutions' (*Novels*) of Justinian with the crabbed strength of the Twelve Tables, abrogated by Justinian himself after a thousand years of reverence. There is, in fact, only one fault which the later imperial legislation may appear to have avoided when we compare it with that of modern England or America. It goes much less into detail. It does not seek to exhaust possible cases, and provide for every one of them. This merit, however, is due, not so much to skill on the part of the Roman draftsmen, as to the range of power allowed to Roman officials and judges, and to the faint recognition of the rights of the individual subject. The tedious minuteness of modern English and American statutes, if it grieves the scientific lawyer, is after all a laudable recognition and expression of that respect for personal liberty and jealousy of the action of the executive which have distinguished the English race on both sides of the Atlantic. Thus that which might appear to be an excellence of the later imperial legislation in point of form is seen to be an evil in point of substance, for it is due, not to any superiority of legal skill, but to the existence of an autocracy which did not care to limit the discretion of its subordinate officers.

IX. DIRECT LEGISLATION IN ENGLAND:  
PARLIAMENT.

It remains for us to consider the organ of direct legislation in England, and the work which that organ turns out. Here again I must turn away from the large field of historical inquiry. The history of English statutes, their development out of petitions addressed to the sovereign in his Great Council, the mode in which they were drafted, debated, and passed, the rules of interpretation which have obtained regarding them, their influence at different epochs upon the growth of the Common Law, the development and value of the functions of non-official members of Parliament in preparing them and getting them passed, the decay of those functions which the last few years have seen—all these would supply interesting and instructive matter, not merely for an essay but for a treatise. But seeing how long we have had to wait for a philosophical history of the law of England in general, one need not be surprised that this particular department still waits for its historian<sup>1</sup>.

In England there has been, through the long course of our history, only one organ of Direct Legislation, viz. the Great Council of the nation. It began as a Primary Assembly of all freemen. It passed, between the time of Athelstan and that of Henry III, through a phase in which it had, owing to the growth of the nation and to the practical limitation of its membership, almost ceased to be Primary in fact, though its theoretical character, as embracing the whole people, had not been abrogated. Since the time of Edward I it has consisted of two branches, one of which is Primary, the other Repre-

<sup>1</sup> The admirable *History of English Law* of Professors Pollock and Maitland stops soon after the point at which parliamentary legislation begins. Since the passage in the text was written, the book of Sir C. P. Ilbert, entitled *Legislative Methods and Forms*, has been published. It is full of valuable information and acute remarks upon modern English legislation, and brings together a mass of historical facts never previously collected.

sentative; and this present phase is evidently drawing to its end.

Thus the history of Direct Legislation in England stands contrasted with the history of such legislation in Rome in two points: (1) that we in England have always had an organ which in intendment of law was the same from beginning to end, and admittedly supreme; and (2) that we have never had more than one organ at the same time, whereas at Rome the theoretically complete and unrestricted legislative power of the popular assembly coexisted, for a time, with the legislative power of the Senate, and the theoretically complete and unrestricted legislative power of the Senate coexisted for a certain period with the legislative power (stronger, but at first carefully disguised) of the Emperor. It may seem absurd to speak of two organs of direct legislation as each complete and supreme: yet such would seem to have been the theory of the Roman law. We in England came near having a similar state of things in the days when the Crown claimed, and was sometimes permitted to exert, a power of legislating apart from Parliament and not in virtue of any permission by Parliament. But this power was never formally recognized by the law.

The Parliament of the United Kingdom and that eldest and strongest of its numerous progeny, the Congress of the United States, seem at first sight well composed and admirably equipped for securing legislation which shall be excellent in point both of Substance and of Form. As to excellence of Substance, these assemblies ought to be able to make such laws as the people wish and need, for they are popular in character, giving full expression to the wishes of all classes, and enabling any person or section aggrieved by existing defects in the law to state his complaints and suggest a remedy for them. The British Parliament, moreover, consists of two Houses, one of which, while deficient in the strength that comes from popular election, is by its

composition capable of looking at questions from a point of view unlike that of the Lower House. It contains many men of great ability and knowledge of affairs, so that it could well discharge (if so disposed) the functions of criticism and revision. So the American Congress has also the advantage of being composed of two branches, either of which can criticize and amend the bills passed by the other.

As regards excellence of Form, which is that with which we are here specially concerned, several notable merits may be claimed for the British Parliament. The House of Lords, as has been just observed, contains among the fifty or sixty persons (out of nearly six hundred members) who habitually attend its sittings not a few possessing intellectual power and practical experience, with (usually) some seven or eight distinguished lawyers, the flower of the legal profession. Being a representative body, the House of Commons contains persons who are presumably above the average in knowledge of the world and its affairs, as well as in intellectual capacity. Among these there are to be found many men (though a smaller proportion than is found in the American Congress or in some colonial legislatures) who possess a technical acquaintance with the laws of the country, and ought to be specially well fitted to amend them, while at the same time any such tendency as professional men might have to indulge in mere technicalities is likely to be corrected by the presence of a majority of laymen. They deliberate in full publicity, and thereby can obtain from all quarters suggestions that may direct or help them. They are responsible to those who have sent them up, and who can closely watch their conduct. Ample opportunities are provided for the discussion of every measure, and for curing any defect which may lurk in any Bill brought forward either by the Ministers of the Crown, liable through their position to a fire of hostile criticism, or by a private member. Every Bill has to pass through seven stages in

the House of Commons <sup>1</sup>, and six in the House of Lords, and at each of these stages it may be debated at indefinite length <sup>2</sup>. That must be, one would think, either a very trivial or a strangely hidden blemish which escapes the notice of keen, experienced, and often unfriendly critics on twelve successive occasions <sup>3</sup>. Could any machinery be better adapted to secure that the laws passed shall be expressed in the most clear and precise terms, that each shall be well arranged and self-consistent, that every new statute shall be properly fitted into those that have gone before, and shall, in effecting any change, repeal expressly the parts of previous statutes which it affects, so as to provide against possible uncertainty or discrepancy?

Why is it then that we hear so many complaints about the condition of the laws of England as to the number of points which remain unsettled, as to the confusion in which some great departments of law lie, as to the undue length of our statutes, their obscurity, their inconsistencies, their omissions? I do not inquire to what extent these complaints are well founded. It is enough to note that they proceed not merely from scientific jurists, who might be supposed to be enamoured of an impossible ideal, but from such practical men as compose our commercial classes, such technically competent as well as practical men as the judges of the land.

Somewhat similar complaints are made in the United States. The methods of legislation used there are generally similar to those of Britain, both in the Federal Congress and in the forty-five State Legislatures, and every one of these bodies consists of two Houses, each

<sup>1</sup> Now (1900) reduced to six by the discontinuance of the habit of putting the question that Mr. Speaker do leave the chair when the House of Commons goes into Committee.

<sup>2</sup> Now, however, subject to the power of imposing the closure of debate, a power the growing frequency of whose exercise has greatly altered the character of the House.

<sup>3</sup> Now reduced to eleven. The number of stages for a Bill which passes through both Houses must be calculated by subtracting one from the number reached by adding the stages in each House, because a Bill coming from either House to the other obtains its first reading as a matter of course, without debate.

jealous of the other. The chief difference is that the Americans consolidate their statutes at certain intervals, so that the statute law, both Federal and State, is brought within a smaller compass than that of the United Kingdom. Subject to this and to some minor dissimilarities, the remarks which follow on the causes why British legislation is less perfect than might be expected from the elaborate machinery provided for producing it apply to the United States also <sup>1</sup>.

The methods of British legislation, and the dangers incident to those methods, are exactly the opposite to those which we have noted in Rome. Both under the Republic, when statutes were passed at the instance of a magistrate with no possibility of amendment by the Assembly, and under the later Empire, when the monarch or his advisers could issue a law with as much ease and as little personal fear of consequences as a counsel can draw a will or the articles of a joint stock company, no provision was made for independent criticism, nor for discussion, nor for the interposition of delays. The excellence of the law depended on the person who prepared and proposed it, and on him alone <sup>2</sup>; and the law could be issued to take effect as soon as the Assembly had given its one vote or the Emperor his one signature. The Senate could indeed debate and might amend the forms of decrees submitted to it, but as it was really a mere instrument in the Emperor's hand it exercised these powers very sparingly.

With us in England the opportunities for debate, for resistance, and for amendment are so ample as to prevent many things from being done which ought to be done, and to impress an unscientific cumbrousness, prolixity, and inelegance upon most of the work we turn out. Too many persons are concerned, and few of them

<sup>1</sup> As to the actual methods and difficulties of Parliamentary legislation, see the penetrating and careful analysis contained in Sir C. P. Ilbert's *Legislative Methods and Forms*, chap. x.

<sup>2</sup> Although, as observed above, the Emperor might, if he liked, cause a draft Constitution to be debated in his Consistory.

have any care or taste for technical excellence. The House of Commons is overloaded with work, some of it work which it had better not attempt, but which it does attempt in deference to the clamorous demands of particular sections of opinion. A reform in the substance of the law excites little interest unless it has either some political (*i.e.* party) importance, or has a considerable pressure of public opinion behind it. A reform in the form and expression of the law, having neither of these forces to back it up, excites no interest at all. Accordingly it is neglected, for a Ministry is disposed to think first of pleasing its own supporters, then of winning popular favour in general, and accordingly gives the time at its disposal to measures deemed likely to secure for it political advantage.

Private (*i.e.* unofficial) members of Parliament might supply what is lacking in the Ministry by bringing forward and passing modest and useful Bills, calculated either to remove minor defects in the substance of the law or to improve its form. But the Ministry now commands so large a part of the available time of the House of Commons, and the opportunities given to members for arresting the progress of other members' bills are so abundant, that hardly anything can be accomplished by an unofficial member. In the United States, where all members are unofficial, the despotism of the British Ministry, which after all is a responsible despotism, is replaced by the irresponsible despotism of the Committees, which are as much disposed as is a British Ministry to be swayed by sectional pressure or by the prospect of political gain.

The British House of Commons is too large for discussing what may be called the technical or formal part of legislation. Its debates in Committee on points of substance are often excellent. But it cares little for harmony, propriety, and conciseness of language. If an inexperienced enthusiast for legal symmetry observes, in proposing an amendment, that his terms will not affect

the substance, though they will improve the form, of the clause, he is impatiently rebuked for occupying the time of the House with what 'will make no difference.' On the other hand, changes in substance are constantly made in Committee which have the effect of rendering the form of the measure worse than when it came from the draftsman's hands. Clauses are put in or struck out, exceptions are added, references to other statutes are inserted, which make the sense of the enactment difficult to follow and its construction uncertain. Sometimes these faults are corrected in that later consideration which is called the Report stage. Sometimes they are not, either because they have escaped notice, or because the Ministry are in a hurry, and do not wish to risk the further raising of questions likely to give trouble. The House of Lords ought to correct all such blemishes. But it seldom does so, either from indolence, or because it does not wish to differ with the House of Commons except where it has some class interest, political or economic, to contend for. In fact, that function of revision which modern theory attributes to the House of Lords is not discharged.

The facilities which Parliamentary procedure affords for delaying the progress of Bills in the House of Commons are so ample, not to say profuse, that the practice has grown up of drafting Bills, not in the form most scientifically appropriate, but in that which makes it easiest for them to be carried through under the fire of debate. To lay down those broad, clear, simple propositions of principle which conduce to the intelligibility and symmetry of the law is to invite opposition, and to make the process of opposing easier for those who desire to resist, but have not the technical knowledge needed for a minute discussion. To bury a principle out of sight under a mass of details; to avoid the declaration of a principle by enacting a number of small provisions, which cover most of the practically important points, yet do not amount to the declaration of a new

general rule; to insert a number of exceptions, not in themselves desirable, but calculated to avert threatened hostility; to hide a substantial change under the cloak of a reference to some previous Act which is to be incorporated with the Act proposed to be passed; to deal with some parts of a subject in one year, and postpone some other parts to be dealt with in another measure next year, while leaving yet other parts to the chances of the future, though all ought to have been included in one enactment;—these are expedients which are repellent to the scientific conscience of the draftsman, but which are forced on him by the wishes of the Minister who is in charge of the Bill and who foresees both the objections that will be taken to it and the opportunities for obstructing it which parliamentary procedure affords. Yet the Minister may well plead that, with the limited time at his disposal, these expedients are essential to the passing of his Bill. Any one can see what complication, what obscurity, what uncertainty in the law must needs result from this way of amending it.

Thus it has come about that our English statute law is more bulky and even more unscientific in its form (whatever the excellence of its matter) than was the statute law of the Roman Empire when Theodosius II, and afterwards Justinian, set themselves to call order out of chaos. No Theodosius II, no Justinian, need be looked for in England. Yet much might be done to reduce the existing statutes into a more manageable mass, and something to improve the form in which they come from the hands of the legislature. The former work, previously in the hands of the Statute Law Commission, has since that body came to an end been entrusted to another body called the Statute Law Committee, which is conducting a general revision of the statutes. It has issued a Revised Edition coming down to A.D. 1886, and under its auspices a number of useful Consolidation Acts have been passed, whereby the Statute Law, and in a few instances the Common Law also,

relating to particular departments has been brought together and enacted as an orderly whole. The more difficult enterprise of providing better methods for turning out new law in a clear, concise, and scientifically ordered form, is rarely discussed, even by lawyers, and seems to excite no public interest. It raises many difficult questions which this is not the place to treat of, so I will be content with observing that the remedy for the present defects of British statutes which seems least inconsistent with our parliamentary methods, would be to refer each Act, after it had passed both Houses, but before it received the royal assent, to a small committee consisting of skilled draftsmen and of skilled members of both Houses, who should revise the form and language of the Act in such wise as, without in the least affecting its substance, to improve its arrangement and its phraseology, the Act being formally submitted once more to both Houses before the royal assent was given, so as to prevent any suspicion that a change of substance had been made. It is, however, unlikely that Parliament will consent to any proposal of this nature; and even if some such expedient were adopted it would, at least in some cases, fail to remove the faults above described, because they are necessarily incident to legislation by large assemblies on matters which excite popular feeling and involve political controversy.

#### X. SOME REFLECTIONS SUGGESTED BY THE HISTORY OF LEGISLATION.

The chief reflections which a study of Roman and English modes of law-making seem to impress upon the inquirer's mind are the three following.

The first is that the law of best scientific quality is that which is produced slowly, gradually, tentatively, by the action of the legal profession. At Rome it was produced by the unofficial jurists under the Republic,

by the authorized jurists under the earlier Empire, by the magistrates who framed and went on constantly revising the Edicts from the time of the Punic Wars to that of Hadrian. In England it has been produced by the writers of text-books, but still more by the judges from the time of Glanvil and Bracton down to our own day. Our private law is as much a growth of time as is our Constitution, or as are our ideas on such subjects as economics or ethics. What has been true of the past will be true of the future; and though we can foresee no changes in the future comparable to those which have built up the existing fabric of our law out of the customs of the thirteenth century, we must expect the process of change to continue as long as life itself, and must beware lest by any attempt at finality we should check a development which is the necessary concomitant of health and energy.

The second is that the special point wherein the Roman system had an advantage over our own, and indeed over that of all modern countries, was the existence of an organ of government specially charged with the duty of watching, guiding, and from time to time summing up in a concise form, the results of the natural development of the law. The Praetor with his Edict is the central figure in Roman legal history, and a unique figure in the history of human progress. The Roman statutes of the Republic were not, except perhaps in their brevity, superior to our statutes down to the time of George III. The imperial constitutions, especially the later ones, are inferior in substance and perhaps not better in form than our later English statutes. The treatises of the Roman lawyers, if more convenient in point of form than our volumes of Reports, contained discussions not more acute and subtle, nor so great a wealth of matter; and they were not more free from discrepancies. But neither England nor the United States has ever had or can have any one who could conduct legal reforms in such a way as did the Praetor.

A third reflection is that the various departments of legislation are not equally well suited to be developed by one and the same organ of legislation. Administrative law can hardly be created except by the direct action of the sovereign power in the State, whether the monarch or the Legislative Assembly acting at the instance of the Executive. In every country that kind of law has been so created, and its growth belongs to a comparatively late stage in the progress of a State. As the need for a more elaborate civil and military administration increases, so does the organ appropriate for legislating on such matters become evolved. A very large part of recent legislation in England<sup>1</sup> and in the United States belongs to this category, and similarly a large part of the Codes of Theodosius II and of Justinian are filled by such matters.

A system of procedure, civil and criminal, with the judicial machinery required to work it, may be created either by the direct legislative action of the supreme power, or by custom and the action of the Courts. Both at Rome and in England it was through usage and by the Courts themselves that the earlier system was slowly moulded; both at Rome and in England it was direct legislation that established the later system. Functions discharged by both the Praetor and the Chancellor are the offspring of custom and not of statute. But the judicial system of the Roman Empire, as well as the mode of procedure by *formulae* (established by the *Lex Aebutia* probably about B.C. 200) and the criminal *quaestiones perpetuae* of the later Republic, and similarly all the changes made in English procedure and the English Courts during the last two centuries, culminating in the sweeping reconstruction effected by the Judicature Act of 1873, were the work of direct legislation.

Criminal law has everywhere grown out of Custom, and has in all civilized States been largely dealt with by

<sup>1</sup> According to Sir C. P. Ilbert (*op. cit.*) nine-tenths,

direct legislation. In most European countries it has been codified by statute, to the general satisfaction of the people; and the conspicuous success of the Indian Penal Code shows that English criminal law is susceptible of being so treated. Thus we may say that all the branches of law which I have enumerated are fit matters for direct legislation by the sovereign power, and less fit to be left to jurists and magistrates.

As to private law in the narrower sense of the term, the law of property, of inheritance, of contracts, of torts, and so forth, it has already been remarked that it was at Rome and is in England the offspring of Custom, that is to say, of the usages of the community, and of the reflections and discussions of lawyers, bringing these usages into a precise shape and developing them in points of detail, together with the decisions of judges stamping them as recognized in those points of detail as well as in their general principles. As time went on, direct legislation was more and more resorted to both at Rome and in England either to define or to change the law which jurists, magistrates, and judges had wrought out of materials provided by custom. It was often necessary, because there were faults in the law which the Courts had not the power, even if they had the wish, to alter. Yet direct legislation has seldom been successful except either in expunging such faults, or in systematizing what was already well settled. Compare, for instance, the modern law of negotiable instruments, built up by the custom of merchants and the Courts, and not reduced to the form of a statute till nearly every question had been thoroughly worked out by lawyers in the course of judicial practice, with the law of Joint Stock Companies, which is mainly the product of direct legislation. The former is as definite and practically convenient as the latter is confused and unsatisfactory. It is quite true that the latter topic is one which could not well have been left to usage and the Courts. Yet such a comparison indicates the difficulties which con-

front a legislature when it attempts to create *de novo*, that is to say, on general principles and without much help from custom. The law of Joint Stock Companies with limited liability is one of those departments which needs to be treated by the method of constant experiment, varying from time to time the remedies needed against the new forms in which fraud and trickery appear, and meeting by fresh provisions the devices by which crafty men evade the rules intended to protect the unwary<sup>1</sup>.

A magistrate like the Roman Praetor might perhaps deal with such a branch of law more effectively than can either an English judge or the English Parliament—more effectively than a judge, because his powers would be wider; more effectively than Parliament, because he could more promptly and easily drop a provision which had proved inefficient, and try the working of a new one without purporting to make it a part of the permanent law of the land.

It follows from these considerations that some branches of the law are much more fit than others to be embodied in a code, and that the discussions, more frequent and more animated thirty years ago than they are to-day, as to the merits and drawbacks of codification, ought to have distinguished more carefully than they did between the adaptability to diverse departments of law of a system of rules enacted in a form intended to be final. We may hope to have some light upon this subject from the working of the new German Code. In any case, it may be suggested that a society in which the ideas and habits that relate to any one side of its life are changing—as for instance those relating to the civil status of women have changed in England during the last fifty years, or in which the methods of business are changing, as those relating to joint stock

<sup>1</sup> It must, however, be added that the difficulties which surround this most unsatisfactory branch of our law are partly due to the recurring collision of two different theories, that of *Caveat emptor* (let the buyer beware) and that which would exact *uberrima fides* (the amplest good faith) from a company promoter or director

enterprise have changed both in England and America—does ill to stereotype in a form difficult to amend the particular legal rules which govern it at any given moment, however adequately that form may for the moment embody the substance of those rules.

## XV

# THE HISTORY OF LEGAL DEVELOPMENT AT ROME AND IN ENGLAND

IN the last preceding Essay the organs of legislation, and the methods whereby they were worked at Rome and in England respectively, were discussed and compared. A consideration of the course which legal change took, in its various phases of development, reform or decay, may be completed by inquiring into the general causes and forces which determined and guided the process of change. To justify the selection of Rome and England for comparison it is necessary to recur to two points only in which the history of institutions in these two States presents a remarkable analogy. Both have been singularly independent of outside influences in the development of their political character and their legal institutions. The only influence that seriously told on Rome was that of the Greeks: yet how thoroughly Roman all the institutions that ever had been Roman remained down till the second century of the Empire, after Hellenic influence had for more than two hundred years been playing freely and fully upon literature and thought! So English institutions have been far less affected by external influences than have been those of any other part of European Christendom. In France, Italy, Germany, and Spain, the traces of Roman dominion were never obliterated, and Roman law too,

both through its traditions and through the writings which embody it, has always been a more potent factor than it ever was here. These countries have, moreover, borrowed more from each other than we have done from any one of them, except, perhaps, in the days when Normandy gave a Continental tinge to the immature feudalism of England. And, secondly, both Rome and England have extended their institutions over vast territories lying beyond their own limits. Each has been a conquering and ruling power, and the process by which each grew into a World State from being, the one a City and the other a group of small but widely scattered rural tribes, offers striking points of resemblance as well as of contrast. I might add that there are similarities in the character of the two nations, similarities to which their success in conquering and ruling is due. But, for the moment, it is rather to law and institutions than to character that I seek to direct the reader's attention.

Since the law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions, the causes which modify the law are usually to be sought in changes which have passed upon economic and social phenomena. When new relations between men arise, or when the old relations begin to pass into new forms, law is called in to adjust them. The part played by speculative theorists or by scientific reformers who wish to see the law made more clear and rational is a relatively small factor in legal change, and one which operates only at rare moments. The process of development, if not wholly unconscious, is yet spontaneous and irregular. Alterations are made, not upon any general plan or scheme, but as and when the need for them becomes plain, or when it has at least become the interest of some ruling person or class to make them.

The relation of the general history, political, economic, and social, to changes in laws and institutions is

best seen at certain definite epochs. It is indeed true that in nations which have reached a certain stage of civilization the conditions of life, and the relations of men and classes to one another, never remain quite the same from generation to generation. Every mechanical discovery, every foreign war or domestic insurrection, every accession or loss of territory, every religious or intellectual movement leaves things somewhat different from what it found them. Nevertheless, though the process of change is, except in savage or barbarous peoples, practically constant and uninterrupted, it becomes at certain particular moments much more swift and palpable, rushing, so to speak, through rapids and over cataracts instead of gliding on in a smooth and equable flow. These are the moments when a nation, or its ruler, perceives that the economic or social transformations which have been taking place require to be recognized and dealt with by corresponding changes in law and institutions, or when some political disturbance, or shifting of power from one class or group to another, supplies the occasion for giving effect to views or sentiments hitherto repressed. Accordingly it is profitable to give special attention to these transitional epochs, because it is in them that the relation between causes and consequences can be studied most easily and on the largest scale. Let us see what are the epochs in Roman and in English history which may be selected as those marked by conspicuous legal or institutional changes before we examine the relations of these changes to the forces which brought them about.

#### I. FIVE CHIEF EPOCHS OF LEGAL CHANGE AT ROME.

In the thousand years of Roman history that lie between the first authentic records of the constitution and laws of the city, say 451 B.C., when the Decemviral Commission, which produced the laws of the Twelve Tables, was appointed, and 565 A.D., when Justinian died, hav-

ing completed his work of codification and new legislation<sup>1</sup>, we may single out five such epochs.

1. The epoch of the Decemviral Legislation, when many of the old customs of the nation, which had been for the most part preserved by oral tradition, were written down, being no doubt modified in the process.

2. The days of the First and Second Punic Wars, when the growth of population and trade, the increase of the number of foreigners resident in Rome, and the conquest by Rome of territories outside Italy, began to induce the development of the Praetorship as an office for expanding and slowly remodelling the law.

3. The end of the Republic and early days of the Empire, when there was a brilliant development of juridical literature, when the opinions of selected jurists received legal authority from the Emperor's commission, when the Senate was substituted for the popular assemblies as the organ of legislation, and when the administration of the provinces was resettled on a better basis—all these changes inducing a more rapid progress of legal reform.

4. The reigns of Diocletian and Constantine, when imperial legislation took a fresh and vigorous start, and when the triumph of Christianity brought a new, a powerful, and a widely pervasive force into the field of politics and legislation.

5. The reign of Justinian, when the plan of codification whose outlines Julius Caesar had conceived, and which Theodosius II had done something to carry out, was at last completed by the inclusion of the whole law of Rome in two books containing the pith of the then existing law, and when many sweeping reforms were effected by new legislation.

It is less easy to fix upon epochs of conspicuous

<sup>1</sup> It is convenient to stop with Justinian, because he gave the law the shape in which it has influenced modern Europe, and because our historical data became much more scanty after his time. But of course the history of the law goes on to A.D. 1204, and in a sense even to A.D. 1453, in an unbroken stream, the codes issued by the later Emperors, and especially the *Basilica* of Leo the Philosopher, being based upon Justinian's redaction.

change in English legal institutions and law, because English development has been on the whole more gradual, and because the territorial limits of the area affected by change have not expanded to anything like the same extent as did the territories that obeyed Rome. Rome was a City which grew to be the civilized world: the *Urbs* became *Orbis Terrarum*. The English were, and remain, a people inhabiting the southern part of an island, and beyond its limits they have expanded (except as respects Ireland), not by taking in new territories as parts of their State, but by planting semi-dependent self-governing States which reproduce England<sup>1</sup>. However, one may, for the sake of a comparison with Rome, take the five following epochs as those at which the process of change became the most swift and the most effective for destruction and creation.

## II. FIVE EPOCHS OF LEGAL CHANGE IN ENGLAND.

1. The time of Henry II, when the King's Courts became organized, and began to evolve a Common Law for the whole realm out of the mass of local customs.

2. The times of Edward I and Edward III, when the solidification of the kingdom saw the creation of a partly representative legislature, the enactment of important statutes, and the establishment of a vigorous organ for the development and amendment of the law in the Chancellorship.

3. The time of Henry VIII and Edward VI, when the progress of society and an ecclesiastical revolution caused the passing of several sweeping legal reforms, separated the courts and the law of England from a system of jurisprudence which had influenced it in common with the rest of Western Christendom, and permanently reduced the power of the clergy and of clerical ideas.

<sup>1</sup> I do not include India or the Crown Colonies, because the population of these is not English.

4. The epoch of the Great Civil War and Revolution, when legislative authority, hitherto shared or disputed by the Crown and the Houses of Parliament, passed definitely to the latter, and particularly to the popular branch of Parliament, and when (as a consequence) the relation of the Monarch to the landholding aristocracy, and that of the State to its subjects in religious matters, underwent profound alterations.

5. The reigns of William IV and Victoria, when the rapid growth of manufacturing industry, of trade, and of population, coupled with the influence as well of new ideas in the sphere of government as of advances made in economic and social science, has shaken men loose from many old traditions or prejudices, and has, while rendering much of the old law inapplicable, made a great deal of new legislation indispensable.

Now let us consider what are the forces, influences, or conditions which at all times and everywhere become the sources and determining causes of changes in laws and institutions, these latter being that framework which society constructs to meet its needs, whether administrative or economic or social.

Five such determining causes may be singled out as of special importance. They are these.

1. Political changes, whether they consist in a shifting of power as between the classes controlling the government of a country, or affect the structure of the governmental machinery itself, as for instance by the substitution of a monarch for an assembly or of an assembly for a monarch.

2. The increase of territory, whether as added to and incorporated in the pre-existing home of a nation or as constituting a subject dominion.

3. Changes in religion, whether they modify the working of the constitution of the country or involve the abolition of old laws and the enactment of new ones.

4. Economic changes, such as the increase of indus-

trial production or the creation of better modes of communication, with the result of facilitating the exchange of commodities.

5. The progress of philosophic or scientific thought, whether as enunciating new principles which ultimately take shape in law, or as prompting efforts to make the law more logical, harmonious and compendious.

The influence of other nations might be added, as a sixth force, but as this usually acts through speculative thought, less frequently by directly creating institutions and laws, it may be deemed a form of No. 5.

The two last of these five sources of change, viz. commerce and speculative or scientific thought, are constantly, and therefore gradually at work, while the other three usually, though not invariably, operate suddenly and at definite moments. All have told powerfully both on Rome and on England. But as the relative importance of each varies from one country to another, so we shall discover that some have counted for more in the case of Rome, some in that of England. The differences throw an instructive light on the annals of the two nations.

### III. OUTLINE OF LEGAL CHANGES AT ROME.

The legal history of Rome begins with the law of the Twelve Tables. This remarkable code, which, it need hardly be said, was neither a code in the modern sense, nor in the main new law, but rather a concise and precise statement of the most important among the ancient customs of the people, dominated the whole of the republican period, and impressed a peculiar character upon the growth of Roman law from the beginning till the end of the thousand years we are regarding. It gave a sort of unity and centrality to that growth which we miss in many other countries, England included, for all Roman statutes bearing on private law were passed with reference to the Twelve Tables,

nearly all commentaries grouped themselves round it, and when a new body of law that was neither statute nor commentary began to spring up, that new law was built up upon lines determined by the lines of the Twelve Tables, since the object was to supply what they lacked or to modify their enactments where these were too harsh or too narrow. Its language became a model for the form which later statutes received. It kept before the minds of jurists and reformers that ideal of a systematic and symmetrical structure which ultimately took shape in the work of Theodosius II and Justinian. Now the law of the Twelve Tables was primarily due to political discontent. The plebeians felt the hardship of being ruled by customs a knowledge of which was confined to the patrician caste, and of being thereby left at the mercy of the magistrate, himself a patrician, who could give his decision or exert his executive power at his absolute discretion, because when he declared himself to have the authority of the law, no one, outside the privileged caste he belonged to, could convict him of error. Accordingly the plebs demanded the creation of a commission to draft laws defining the powers of the Consuls, and this demand prevailed, after a long struggle, in the creation of the Decemvirs, who were appointed to draft a body of general law for the nation. This draft was enacted as a Statute, and became thenceforth, in the words of Livy<sup>1</sup>, 'the fountain of all public and private law.' Boys learnt it by heart down to the days of Cicero, and he, despite his admiration for things Greek, declares it to surpass the libraries of all the philosophers<sup>2</sup>.

For some generations there seem to have been comparatively few large changes in private law, except that

<sup>1</sup> 'Decem tabularum leges quae nunc quoque in hoc immenso aliarum super alias acervatarum legum cumulo fons omnis publici privati que est iuris' (iii. 24).

<sup>2</sup> 'Bibliothecas mehercule omnium philosophorum unus mihi videtur xii tabularum libellus, si quis legum fontes et capita viderit, et auctoritatis pondere et utilitatis ubertate superare' (*De Orat.* i. 44). An odd comparison, and one in which there is more of patriotism than of philosophy.

declaration of the right of full civil intermarriage between patricians and plebeians, which the Twelve Tables had denied. But the knowledge of the days on which legal proceedings could properly be taken remained confined to the patricians for nearly a century and a half after the Decemvirs. The plebs had, however, been winning political equality, and three or four years after the time when the clerk Flavius revealed these pontifical secrets it was completed by the admission of the plebeians to the offices of pontiff and augur.

Meanwhile Rome was conquering Italy. The defeat of Pyrrhus in B.C. 275 marks the virtual completion of this process. A little later, the First Punic War gave her most of Sicily as well as Sardinia and Corsica, and these territories became provinces, administered by magistrates sent from Rome. She was thus launched on a policy of unlimited territorial expansion, and one of its first results was seen in two remarkable legal changes. The increase in the power and commerce of Rome, due to her conquests, had brought a large number of persons to the city, as residents or as sojourners, who were not citizens, and who therefore could not sue or be sued according to the forms of the law proper to Romans. It became necessary to provide for the litigation to which the disputes of these aliens (*peregrini*) with one another or with Romans gave rise, and accordingly a Magistrate (*Praetor peregrinus*) was appointed whose special function it became to deal with such disputes. He was a principal agent in building up by degrees a body of law and a system of procedure outside the old law of Rome, which received the name of *Ius Gentium* (the law of the nations) as being supposed to embody or be founded on the maxims and rules common to the different peoples who lived round Rome, or with whom she came in contact<sup>1</sup>. Through the action of the older Urban Praetor much of this *ius gentium* found its way into the law administered to the

<sup>1</sup> As to the *ius gentium* see Essay XI, p. 570 sqq.

citizens, in the way described in the last preceding Essay. Similarly the Proconsuls and Proprætors, who held their courts in the subject provinces, administered in those provinces, besides the pure Roman law applicable to citizens, a law which, though much of it consisted of the local laws and customs of the particular province, had, nevertheless, a Roman infusion, and was probably in part, like the *ius gentium*, generalized from the customs found operative among different peoples, and therefore deemed to represent general principles of justice fit to be universally applied. The Edicts which embodied the rules these magistrates applied became a source of law for the respective provinces<sup>1</sup>.

These remarkable changes, which may be said to belong to the period which begins with the outbreak of the First Punic War (B.C. 264), started Roman law on a new course and gave birth to a new set of institutions whereby new territories, ultimately extended to embrace the whole civilized world, were organized and ruled. It was through these changes that the law and the institutions of the Italian City became so moulded as to be capable not only of pervading and transforming the civilizations more ancient than her own, but of descending to and influencing the modern world. Now these changes, like those which marked the period of the Twelve Tables, had their origin in political events. In the former case it was internal discontent and unrest that were the motive forces, in the latter the growth of dominion and of trade, trade being the consequence, not so much of industrial development as of dominion. But in both cases—and this is generally true of the ancient world as compared with the modern—political causes play a relatively greater part than do causes either of an economic or an intellectual and speculative order<sup>2</sup>.

<sup>1</sup> As to this see Essay II, pp. 77, 78.

<sup>2</sup> Of course I do not mean to disparage the immense importance of economic causes always and everywhere, but in the ancient world, where communities were mostly small, they tended more quickly to engender political revolutions, and thus

How much is to be set down to external influences? The Roman writers tell us of the sending out of a body of roving commissioners to examine the laws of Athens and other Greek cities to collect materials for the preparation of the Twelve Tables. So too the contact of Rome with the Greek republics of Southern Italy in the century before the Punic Wars must have affected the Roman mind and contributed to the ideas which took shape in the *ius gentium*. Nevertheless any one who studies the fragments of the Twelve Tables will find in them comparatively few and slight traces of any foreign influence; and one may say that both the substance of the Roman law and the methods of procedure it followed remain, down till the end of the Republic, so eminently national and un-Hellenic in their general character that we must assign a secondary part to the play of foreign ideas upon them.

The next epoch of marked transition is that when the Empire of Rome had swollen to embrace the whole of the West except Britain and Western Mauretania, and the whole of the known East except Parthia<sup>1</sup>. It was the epoch when the Republican Constitution had broken down, not merely from internal commotions, but under the weight of a stupendous dominion, and it was also the epoch when the philosophies of Greece had made the Roman spirit cosmopolitan, and dissolved the intense national conservatism in legal matters which distinguished the older jurists. Here, therefore, two forces were at work. The one was political. It laid the foundations of new institutions, which ripened into the autocracy of the Empire. It substituted the Senate for the popular Assembly as the organ of legislation. It gave

their action became involved with politics. In the modern world, where nations are mostly large and political change is usually more gradual, economic factors frequently tell upon society and affect the working of institutions without leading to civil strife. The more the world develops and settles down, and the further it moves away from its primitive conditions, the greater becomes the relative significance of the economic elements.

<sup>1</sup> 'Parthos atque Britannos' are aptly coupled by Horace as the two peoples that remained outside the Empire.

the head of the State the power of practically making law, which he exercised in the first instance partly as a magistrate, partly through the practice of issuing to selected jurists a commission to give answers under his authority<sup>1</sup>. The other force was intellectual. It made the amendment of the law, in a liberal and philosophical sense, go forward with more boldness and speed than ever before, until the application of the new principles had removed the cumbrousness and harshness of the old system. But it should be remembered that this intellectual impulse drew much of its power from political causes, because the extension of the sway of Rome over many subject peoples had accustomed the Romans to other legal systems than their own, and had led them to create bodies of law in which three elements were blent—the purely Roman, the provincial, and those general rules and maxims of common-sense justice and utility which were deemed universally applicable, and formed a meeting-ground of the Roman and the provincial notions and usages. So here too it is political events that are the dominant and the determining factor in the development both of private law and of the imperial system of government, things destined to have a great future, not only in the form of concrete institutions adopted by the Church and by mediaeval monarchy, but also as the source of creative ideas which continued to rule men's minds for many generations.

Nearly three centuries later we come to another epoch, when two forces coincide in effecting great changes in law and in administration. The storms that shook and seemed more than once on the point of shattering the fabric of the Empire from the time of Severus Alexander to that of Aurelian (A.D. 235 to 270), had shown the need for energetic measures to avert destruction; and the rise to power of men of exceptional capacity and vigour in the persons of Diocletian and Constantine enabled reforms to be effected which gave the

<sup>1</sup> Described in the last preceding Essay, pp. 677, 678.

imperial government a new lease of life, and made its character more purely despotic. Therewith came the stopping of the persecution of the Christians, and presently the recognition of their religion as that which the State favoured, and which it before long began to protect and control. The civil power admitted and supported the authority of the bishops, and when doctrinal controversies distracted the Church, the monarchs, beginning from Constantine at the Council of Nicaea, endeavoured to compose the differences of jarring sections.

These changes told upon the law as well as upon institutions. New authorities grew up within the Church, and these authorities, after long struggles, obtained coercive power. Not only was the spirit of legislation in such subjects as slavery and the family altered—marriage and divorce, for instance, began to be regarded with new eyes—but a fresh field for legislation was opened up in the regulation of various ecclesiastical or semi-ecclesiastical matters, as well as in the encouragement or repression of certain religious opinions. The influence on law of Greek customs, which seemed to have been expunged by the extension of citizenship to all subjects a century before Constantine, makes itself felt in his legislation.

Besides these influences belonging to the sphere of politics and religion, economic causes, less conspicuous, but of grave moment, had also been at work in undermining the social basis of the State and inducing efforts to apply new legislative remedies. Slavery and the decline of agriculture, particularly in the Western half of the Empire, throughout which there seems to have been comparatively little manufacturing industry, had reduced the population and the prosperity of the middle classes, and had exhausted the source whence native armies could be drawn. Thus social conditions were changing. The growth of that species of serfdom which the Romans called *colonatus* belongs to this period. The financial strain on the government became more severe.

New expedients had to be resorted to. All these phenomena, coupled with the more autocratic character which the central government of the Empire took from Diocletian onwards, induced a greater and sometimes indeed a hasty and feverish exuberance of legislation, which was now effected solely by imperial ordinances.

Industrial decay seems to have been more rapid in Western than in the Eastern provinces, though palpable enough in such regions as Thrace and Greece. But everywhere there was an intellectual decline, which appeared not least in the sinking of the level of juristic ability and learning. The great race of jurists who adorned the first two and a half centuries of the Empire had long died out. We hear of no fertile legal minds, no law books of merit deserving to be remembered, during the fourth and fifth centuries of our era. The mass of law had however increased, and the judges and practising advocates were, except in the larger cities, less than ever capable of dealing with it. The substitution of Roman for provincial law effected by the Edict of the Emperor Antoninus Caracalla had introduced some confusion, especially in the Eastern provinces, where Greek or Oriental customs were deeply rooted, and did not readily give place to Roman rules. The emperors themselves deplore the ignorance of law among practitioners: and presently it was found necessary to prescribe an examination for advocates on their admission to the bar. Accordingly the necessity for collecting that which was binding law and for putting it into an accessible form became greater than ever. It had in earlier days been an ideal of perfection cherished by theorists; it was now an urgent practical need. It was not the bloom and splendour but the decadence of legal study and science that ushered in the era of codification. A century after the death of Constantine, the Emperor Theodosius II, grandson of Theodosius the Great, reigning at Constantinople from A.D. 408 to A.D. 450, issued a complete edition of the imperial constitutions in force,

beginning from the time of Constantine, those of earlier Emperors having been already gathered into two collections (compiled by two eminent jurists) in current use. Shortly before a statute had been issued giving full binding authority to all the writings (except the notes of Paul and Ulpian upon Papinian) of five specially famous jurists of the classical age (Papinian, Paul, Gaius, Ulpian, Modestinus). The advisers of Theodosius II had intended to codify the whole law, including the ancient statutes and decrees of the Senate and Edicts of magistrates so far as they remained in force, as well as the writings of the jurists, but the difficulties were too great for them, and they contented themselves with a revised edition of the more recent imperial constitutions.

Justinian was more energetic, and his codification of the whole law of the Empire marks an epoch of supreme importance in the history not merely of Rome but of the civilized world, for it is possible that without it very little of the jurisprudence of antiquity would have been preserved to us, so that the new nations which were destined to emerge from the confusion of the Dark Ages might have lacked the foundation on which they have built up the law of the modern world. It is indeed an epoch which stands alone both in legal and in political history.

Justinian's scheme for arranging and consolidating the law included a compilation of extracts from the writings of the jurists of the first three centuries of the Empire, together with a collection of such and so many of the Constitutions of the Emperors as were to be left in force, both collections being revised so as to bring the contents of each into accord and to harmonize the part of earlier date (*viz.* that which contained the extracts from the old jurists) with the later law as settled by imperial ordinances. It was completed in the space of six years only—too short a time for so great a work. It was followed by a good deal of fresh legislation, for the Emperor and his legal minister Tribonian, having

had their appetite whetted, desired to amend the law in many further points and reduce it to a greater symmetry of form and perfection of substance. The Emperor moreover desired, for Tribonian was probably something of a Gallio in such matters, to give effect to his religious sentiments both by laying a heavy hand on heretics and by making the law more conformable to Christian ideas. Thus the time of Justinian is almost as significant for the changes made in the substance of the law as for the more compendious and convenient form into which the law was brought.

Some thirty years before the enactment of Justinian's Codex and Digest (which, though intended for the whole Empire, did not come into force in such Western provinces as had already been lost) three collections of law had been made by three barbarian kings for the governance of their Roman subjects. These were the *Edictum* of Theodorich, King of the East Goths, published in A.D. 500, the *Lex Romana Visigothorum*, commonly called the *Breviarium Alaricianum*, published by Alarich II, King of the West Goths (settled in Aquitaine and Spain), in A.D. 506, a year before his overthrow by Clovis, and the *Lex Romana Burgundionum*, published by the Burgundian King Sigismund in the beginning of the sixth century. These three compilations, each of which consists of a certain number of imperial Constitutions, with extracts from a few jurists, ought to be considered in relation to Justinian's work, partly because each of them did for a part of the Roman West what he did for the East, and, as it turned out, for Italy and Sicily also, when Belisarius reconquered those countries for him, and partly because they were due to the same need for accessible abridgements of the huge mass of confused and scattered law which prompted the action of Justinian himself. They are parts of the same movement, though they have far less importance than Justinian's work, and, unlike his, include little or no new law.

The main cause of the tendency to consolidate the law and make it more accessible was the profusion with which Diocletian and his successors had used their legislative power, flooding the Empire with a mass of ordinances which few persons could procure or master, together with the decline of legal talent and learning, which made judges and advocates unable to comprehend, to appropriate and to apply the philosophical principles and fine distinctions stored up in the treatises of the old jurists. Here, therefore, political and intellectual conditions, conditions rather of decline than of progress, lay at the root of the phenomenon. But in the case of Justinian something must also be credited to the enlightened desire which he, or Tribonian for him, had conceived of removing the complexities, irregularities and discrepancies of the old law, bringing it nearer to what they thought substantial justice, and presenting it in concise and convenient form. Plato desired to see philosophy in the seat of power, and in Justinian philosophic theory had a chance such as it seldom gets of effecting permanently important changes by a few sweeping measures. Yet theory might have failed if it had not been reinforced by the vanity of an autocrat who desired to leave behind him an enduring monument.

This rapid survey has shown us that two forces were always operative on the development of Roman law—internal political changes and the influence of the surrounding countries. As Rome conquered and Romanized them, they compelled her institutions to transform themselves, and her law to expand. Economic conditions, speculative thought and religion had each and all of them a share in the course which reforms took, yet a subordinate share.

IV. OUTLINE OF THE PROGRESS OF LEGAL CHANGES  
IN ENGLAND.

Let us now turn to England and see what have been the forces that have from time to time brought about and guided the march of legal change, and what have been the relations of that change to the general history of the country.

As with Rome we began at the moment when the ancient customs were first committed to writing and embodied in a comprehensive statute, so in England it is convenient to begin at the epoch when the establishment of the King's Courts enabled the judges to set about creating out of the mass of local customs a body of precedents which gave to those customs definiteness, consistency and uniformity. Justice, fixed and unswerving justice, was in the earlier Middle Ages the chief need of the world, in England as in all mediaeval countries; and the anarchy of Stephen's reign had disposed men to welcome a strong government, and to acquiesce in stretches of royal power that would otherwise have been distasteful. Henry II was a man of great force of character and untiring energy, nor was he wanting in the talent for selecting capable officials. He had to struggle, not only against the disintegrating tendencies of feudalism, but also against the pretensions of the churchmen, who claimed exemption from his jurisdiction, and maintained courts which were in some directions formidable rivals to his own. He prevailed in both contests, though it was not till long after that the victory was seen to have remained with the Crown. It was his fortune to live at a time when the study of law, revived in the schools of Italy, had made its way to England, where it was pursued with a zeal which soon told upon the practice of the Courts, sharpening men's wits and providing for them an arsenal of legal weapons. It is true that the law taught at the Universities was the Roman law, and that the practitioners were

almost entirely ecclesiastics. Now the barons, however jealous they might be of the Crown, were not less jealous of ecclesiastical encroachments and of the imperial law. They could not prevent judges from drawing on the treasures which the jurists of ancient Rome had accumulated, but they did prevent the Roman law from becoming recognized as authoritative; so that whatever it contributed to the law of England came in an English guise, and served rather to supplement than to supersede the old customs of the kingdom.

In this memorable epoch, which stamped upon the common law of England a character it has never lost, the impulse which the work of law-making received came primarily from the political circumstances of the time, that is, from the desire of the king to make his power as the receiver of taxes and the fountain of justice effective through his judges, and from the sense in all classes that the constant activity of the Courts in reducing the tangle of customs to order, no less than the occasional activity of the king when he enacted with the advice and consent of his Great Council statutes such as the Constitutions of Clarendon, was a beneficial activity, wholesome to the nation. But though political causes were the main forces at work, much must also be allowed to the influence of ideas, and particularly to the intellectual stimulus and the legal training which the study of Roman jurisprudence had given to the educated men who surrounded and worked for the king and the bishops.

The development of English institutions has been at all times so slow and so comparatively steady that it is not easy to fix upon particular epochs as those most conspicuously marked by change. However I take the epoch of Edward I and Edward III. Under Edward I, whose reign was one of comparative domestic tranquillity, the organ of government whose supreme legislative authority was to become unquestioned took its final

shape in passing from a Great Council of magnates to an Assembly consisting of two Houses, in one of which the chief tenants of the Crown sat, while the other was composed of representatives of the minor tenants and of boroughs. Under his grandson the chief judicial Minister of the Crown began to sit as a Court, granting redress in the name of the Crown in cases or by methods which the pre-existing Courts were unable or unwilling to deal with. Parliament passed under Edward I some statutes of the first magnitude, such as *Quia Emptores* and *De Donis Conditionalibus*, which impressed a peculiar character on the English land system, and introduced some valuable improvements in the sphere of private rights and remedies. But the legislature was, for two or three centuries, in the main content to leave the building up of the law to the old Common Law Courts and (in later days) to the Chancellor. The action of this last-named officer was, during the fifteenth, sixteenth and seventeenth centuries, of capital importance, so that the establishment of his jurisdiction is one of the landmarks of our legal history. It was really a renewal, two hundred years after Henry II's time, of that king's efforts to secure the due administration of justice through the realm, but it grew up naturally and spontaneously, with less of conscious purpose than Henry II had shown. Both the legislature and the Chancellor were the outcome of political causes, but it must not be forgotten that in the methods taken by the Chancellor (hardly reduced to a system till the seventeenth century) we find the working of a foreign influence which thereafter disappears from English law, that, namely, of the civil and canon laws of Rome and of the Roman Church, for the Chancellors of the fourteenth and fifteenth centuries were all ecclesiastics and drew largely from Roman sources.

The days of the Reformation bring two new and powerful influences to bear upon laws and institutions. One of these influences is economic, the other religious.

The growth of industry and trade had so far disintegrated the old structure of society and brought about new conditions that not a few new laws, among which the most familiar and significant are the Statute of Uses and the Statute of Wills, were now needed. The nation was passing out of the stiffness of a society based on landholding and recognizing serfdom into a larger and freer life. At the same time the religious revolution which severed it from Rome, which was accompanied by the dissolution of the monasteries, and which ended by securing the ascendancy of a new body of theological ideas and of simpler forms of worship, involved many legal changes. The ecclesiastical courts were shorn of most of their powers, and the law they administered was cut off from the influences that had theretofore moulded and dominated it. The position of the clergy was altered. New provisions for the poor soon began to be called for. New tendencies, the result of a bolder spirit of inquiry, made themselves felt in legislation. One sees them stirring in the mind of Sir Thomas More. It was some time before the religious and economic changes, took their full effect upon the law. But nearly all the remarkable developments that make the time of Henry VIII and Elizabeth an epoch of legal change, may be traced not so much to politics as to the joint influence of commerce (including the growth of personal, as distinguished from real, property) and of theology. Even the oceanic power and territorial expansion of England, which began with the voyages of Drake and the foundation of the Virginia Company and of the East India Company, did not affect either the law or the institutions of the country. The establishment of distant settlements was largely the result of the growing force of commercial enterprise, in which there was at first very little of political ambition, though it cordially lent itself to a political antagonism first to Spain and then to France.

With the time of the Great Civil War we return to

an era in which, though religion and commerce continue to be potent forces, the first place must again be assigned to political causes. The struggle which overthrew the old monarchy effected two things. It extinguished the claims of the Crown to a concurrent legislative or quasi-legislative power. The two Houses of Parliament were established as an engine for effecting legal changes, prompt in action and irresistible in strength<sup>1</sup>. Towards this England had long been slowly tending, as during a century before Augustus Rome slowly tended to a monarchy. The work was completed at the Boyne and Aughrim, but the decisive blow was struck at Naseby. And, secondly, it occasioned the accomplishment of several broad and sweeping reforms in institutions as well as in law proper. A Parliamentary Union of England, Scotland and Ireland was effected which, though annulled by the Restoration, was a significant anticipation of what the following century was to bring. The old system of feudal tenure and the relics of feudal finance were abolished. New provisions were made, and old ones confirmed and extended, for the protection of the freedom of the subject in person and estate. Commercial transactions were regulated, perhaps embarrassed, by a famous enactment (the Statute of Frauds) regarding the evidence required to prove a contract. Such of these things as lay outside the purely political sphere were due partly to the development of industry and commerce, which had gone on apace during the reign of James I, and was resumed during the government of Cromwell and Charles II, partly to that sense which political revolutions bring with them, that the time has come for using the impulse of liberated forces to effect forthwith changes which had for a long time before been in the air. On a still larger scale, it was the Revolution and Empire in France that led to

<sup>1</sup> As Milton says:—

‘And that two-handed engine at the door  
Stands ready to strike once and strike no more.’

the remodelling of French institutions and the enactment of Napoleon's Codes<sup>1</sup>.

As usually happens, an era of abnormal activity in recasting institutions and in amending the law was followed by one of comparative quiescence. It was not till the middle of the reign of George III that the beginnings of a new period of transition were apparent, not till after the Reform Bill of 1832 that the largest among the many reforms towards which men's minds had been ripening were effected. These reforms, which have occupied the last sixty-seven years, have touched every branch of law. They include a great mitigation of the old severity of the criminal law and the introduction of provisions for repressing those new offences which are incident to what is called the progress of society. They have expunged the old technicalities of pleading by which justice was so often defeated. They have striven to simplify legal procedure, though they have not succeeded in cheapening it, and have fused the ancient Courts of Common Law with those of Equity. They have removed religious disqualifications on the holding of offices and the exercise of the suffrage. They have dealt with a long series of commercial problems, and have in particular made easy the creation of corporations for business and other purposes, given limited liability to their members, and laid down many regulations for their management. They have altered the law of land, enlarging the powers of life owners, and rendering it easier to break entails. They have reorganized the fiscal system, simplified the customs duties, and established a tariff levied for revenue only. They have codified the law, mainly customary in its origin, relating to such topics as negotiable instruments, sale and partnership. They have created an immense body of administrative law, extending and regulating the powers of various branches of the central govern-

<sup>1</sup> Although the Napoleonic government was in many things only completing work begun under Lewis the Fourteenth.

ment, and, while remodelling municipal government, have created new systems of rural local government. As regards the central institutions of the country, several new departments of State have been called into being. Ecclesiastical property has been boldly handled, though not (except in Ireland) diverted to secular uses; a new Court of Appeal for causes coming from the extra-Britannic dominions of the Crown has been set up, and the electoral franchise has been repeatedly extended.

These immense changes have been due to three influences. The first was the general enlightenment of mind due to the play of speculative thought upon practical questions which marked the end of last and the beginning of this century, and of which the most conspicuous apostles were Adam Smith in the sphere of economics and Jeremy Bentham in the sphere of legal reform. The second was the rapid extension of manufacturing industry and commerce, itself largely due to the progress of physical science, which has placed new resources at the command of man both for the production and for the transportation of commodities. The third influence was political, and was itself in large measure the result of the other two, for it was the combination of industrial growth with intellectual emancipation that produced the transfer of political power and democratization of institutions which went on from the Roman Catholic Emancipation Act of 1829 to the Local Government Act of 1894. Could we imagine this industrial and intellectual development to have failed to work on political institutions as it in fact did work, it would hardly the less have told upon administration and upon private law, for the new needs would under any form of government, even under an oligarchy like that of George II's time, have given birth to new measures fitted to deal with them. The legislation relating to Joint Stock Companies (beginning with the Winding-Up Acts), which filled so important a place in the English

Statute-book from 1830 to 1862, and which still continues, though in a reduced stream, would under any political conditions have been required owing to the growth of commerce, the making of railways, the increased need for the provision of water, gas and drainage. And there went on, hand and hand with it, an equally needed development by the Courts of Equity of the law of partnership, of agency and of trusts, as applied to commercial undertakings. What the political changes actually did was to provide a powerful stimulus to reform, and an effective instrument for reform, while reducing that general distaste for novelties which had been so strong in the first half of the eighteenth century.

If we now review the general course of changes in institutions and law in the two States selected for comparison we shall be struck by two points of difference.

#### V. SOME DIFFERENCES BETWEEN THE DEVELOPMENT OF ROMAN AND THAT OF ENGLISH LAW.

The branch of private law which is most intimately connected with the social and economic habits of a nation, and which, through social and economic habits, most affects its character, is that branch which touches Property, and the connexion of property with the Family. The particular form which the institutions relating to property, especially immovable property, take, tells upon the whole structure of society, especially in the earlier stages of national growth. The rules, for instance, which govern the power of an owner to dispose of his property during his life or by will, and those which determine the capacity of his wife and children to acquire for themselves by labour or through gift, and to claim a share in his estate at his decease if he dies intestate, or even against his last will—these rules touch the richer and middle classes in a community and affect their life. So one may perhaps say that the development of this branch of law comes nearer than any other

to being the central line of legal development, bearing in mind that it is the needs and wishes of the richer and middle classes which guide the course of legal change. Here, however, we discover an interesting point of comparison between Roman and English legal history.

At Rome it is the history of the Family, especially as taken on its economic or pecuniary side, the most important part of which is the Law of Inheritance, that plays the largest part. The old rules, which held the Family together, and vested in the father the control of family property, were at first stringent. From the third century B.C. onwards they began to be modified, but they were so closely bound up with the ideas and habits of the people that they yielded very slowly, and it was not till the bold hand of Justinian swept away nearly all that remained of the ancient rules of succession, and put a plain and logical system in their place, that the process was complete.

In England, on the other hand, it is the Law of Land that is the most salient feature in the economico-legal system of the Middle Ages. Among the Teutons the Family had not been, within historic times at least, a group closely bound together as it was among the Italians, whereas the historical and political conditions of the eleventh and twelfth centuries had in Western Europe made landholding the basis of nearly all social and economic relations. Hence the land customs then formed took a grip of the nation so tight that ages were needed to unloose it. The process may be said to have begun with a famous statute (*Quia Emptores*) in the reign of Edward I. Its slow advance was quickened in the seventeenth century by political revolution; and the Act of 1660 which abolished knight service recorded a great change. The peaceful revolution of 1832 gave birth to the series of statutes which from 1834 down to our own day have been reshaping the ancient land system, but reshaping it in a more piecemeal and perplexing fashion than that in which Justinian reformed the

law of succession by the 118th and 127th Novels. Problems connected with landholding still remain in England, as they do in nearly all States, especially where population is dense; but they differ from the old problems, and though disputes relating to the taxation of land give trouble, and may give still more trouble, questions of tenure have lost the special importance which made them once so prominent in our legal history.

Both Rome and England have been, far beyond any other countries except Russia, expanding States. Rome the City became Rome the World-State. The Folk of the West Saxons went on growing till it brought first the other kingdoms of South Britain, Teutonic and Celtic, then the adjoining isles of Ireland and Man, then a large part of North America, then countless regions far away over the oceans under the headship of the descendants of Cerdic and Alfred. But in the case of Rome this expansion by conquest was the ruling factor in political and legal evolution, the determining influence by which institutions were transformed. In England, on the other hand, it is the relations of classes that have been the most active agency in inducing political change, and the successive additions of territory have exerted a secondary influence on institutions and an insignificant influence on law. Not only has English law been far less affected (save at the first two of the five epochs above described) by foreign law or foreign thought than Rome was, but the increase of England by the union, first of Scotland and then Ireland, and by the acquisition of transoceanic dominions, has not interrupted the purely insular or national development of English law. The conquest of Ireland, which began in the twelfth century but was not completed till the seventeenth, made no difference, because Ireland, always since the twelfth century far behind England in material progress and settled social order, received a separate civil administration with separate Courts. As these Courts administered English law, they followed in the path which Eng-

land had already travelled and did not affect the progress of law in England. Nothing speaks more of the long-continued antagonism of the Teutonic and the Celtic elements in Ireland, and of the dominance of the Teutonic minority over the Celtic majority, than the practical identity of the common law in the two countries, and the total absence of any Celtic customs in that law. The few and comparatively slight differences which exist to-day between the law of England and that of Ireland are all due to statute. One is the absence of judicial divorce in Ireland, which an Act passed so recently as 1857 introduced in England. The second is to be found in the law relating to land, largely altered by statutes passed for Ireland by the British Parliament of our own time. The third is the existence in Ireland of what are admitted to be exceptional and supposed to be temporary penal provisions, the last of which is the Prevention of Crime Act of 1887. As regards Scotland, when her king became king of England, and when, a century later, her Parliament was united with that of England, she retained her own law intact. In some few respects her law, founded on that of Rome, and her system of judicial administration are better than those of England, nor has she failed to contribute distinguished figures to the English bench and bar; but, as she stands far below England in population and wealth, she has affected the law of the larger country as little as the attraction of the moon affects the solid crust of the Earth.

The vaster territorial expansion of the eighteenth and nineteenth centuries has told quite as little on the law of England as did the unions with Scotland and Ireland. When the English began to people what are now the self-governing colonies, and when India came under British sway, English law was too fully developed to be susceptible to influences from them, not to add that they were too distant to make any assimilation either desirable or possible. Had India lain no further from Eng-

land than Sicily and the Greek cities lay from Rome, had she been as near the level of English civilization as those countries were to that of Roman civilization, and had she been conquered in the reign of Elizabeth instead of in the reign of George III, the history of English institutions and English law must have been wholly unlike what it has in fact been. These three differences measure the gulf which separates the course of English from that of Roman development.

Another salient point in which the two States may be compared relates to the smaller part which purely political as compared with economic and intellectual changes have played in the development of English laws and institutions. Although there is a sense in which every political change may be described as the result of an economic or intellectual change, or of both taken together, still it is true that at Rome the desire to grasp political power counted for more in the march of events than it has done in England.

Economic changes sometimes operate on politics by raising the material condition of the humbler class and thereby disposing and enabling them to claim a larger share of political power. This happened at Rome more frequently in the earlier than in the later days of the Republic. In England it has happened more in later times than it did in earlier. Sometimes, however, economic causes so depress the poor that their misery becomes acute or their envy intense, whence it befalls that they break out into revolt against the rich. This was on the point of happening more than once at Rome, but has been no serious danger in England since the days of Richard II. Sometimes, again, the growth of immense fortunes and the opportunities of gaining wealth through politics threaten the working of popular institutions. This occurred at Rome; and was one of the causes which brought the Republic to its death. It is a peril against which England has had, and may again have, to take precautions.

Changes in thought and belief operate on politics either by weakening the deferential and submissive habits of the classes which have been excluded from power so that they insist on having their fair share of it, or by implanting in the minds of the middle and upper classes new ideas which grow strong enough to make them insist on bringing old-fashioned practice into accord with new and more enlightened theory. It was the concurrence of these two forms of intellectual change that gave its specially destructive character to the French Revolution. Ideas of course act most quickly and powerfully when they are such as rouse emotion, for that which remains a mere intellectual concept or speculative opinion is not a thing to stir or to shake established institutions. The best illustration is to be found in religious beliefs. But the notion of Equality—that is to say, the notion that rights vested in every man as a man demand that every man shall be treated alike—has also proved an energetic explosive. Influences of this kind counted for little at Rome. Neither have they, except in the form of religious beliefs, or when their force coincided with that exerted by religious convictions, become the source of strife or constitutional change in England.

One may indeed say that the course of England's political development has been less interrupted by convulsions than that of any other great State, for even the scars made by the Civil War were before long healed, so that hardly any of the old institutions perished, though some of them passed into new phases. The new buildings which popular government has within the present century added to the old edifice are built out of the same kind of stone, and (if one may venture to pursue the metaphor) weather to the same colour. So the growth of our law, both public and private, both criminal and civil, has been a gradual and quiet growth, due in the main to the steady increase in the magnitude and complexity of the industrial and commercial relations

of life, which have made the law expand and improve at the bidding of practical needs. Where politics have affected the law, this has been through the rise of the humbler classes, a rise largely due to economic causes. So likewise the influence of ideas, of new views as to what law should be and how it should serve the community, has been marked by few sudden crises, and has been ruled by practical good sense rather than by aspirations after a theoretical perfection. As regards private law, this remark applies to the Romans also, although the constant strain placed upon their institutions by their territorial expansion as well as the differences between a City State and a large rural State exposed their political system to more frequent shocks and ultimately to a more radical transformation.

Finally, it may be observed that the interest felt in law, and the amount of intellectual effort given to its development, was probably greater among the educated class in Rome than it has ever been in any large section of the English people. Romans of intellectual tastes had fewer things to think about, fewer subjects to attract or to distract them, than the English have had. Law was closely interwoven with public life. Country life and country sports, commerce, religion, travel and adventure, covered less of the mental horizon than these pursuits have covered to Englishmen of the upper or educated class, so that more of thought and time was left to be devoted to law. Nor were many Romans carried off into other regions, like the Greeks, by the love of art, or of music, or of abstract speculation.

From this reflection another arises, viz. that legal and constitutional studies, as a subject for research and thought, find the competition of other subjects more severe in England to-day than they did in the eighteenth century<sup>1</sup>. Historical inquiries, economic inquiries, and, to a still larger extent, inquiries in the realm of Nature,

<sup>1</sup> I owe this observation to my friend Mr. Dicey.

claim a far larger share in the interest of eager and active minds now than in the days of Hobbes or Locke or Bentham. They have done much to extrude law from the place it once held among subjects of interest to unprofessional persons. This is true all over the world; but legal topics, whether constitutional or belonging to the sphere of penal or administrative, or international or ordinary private law, seem now to claim even fewer votaries in England than they do in France or Germany, and certainly fewer than they do in the United States.

## VI. OBSERVATIONS ON FRANCE AND GERMANY.

The sketch which I have sought to draw of the relations of general history to legal history might have been with advantage extended to include the legal history of other States, and particularly of two such important factors in modern civilization as France and Germany. But, apart from the undue length to which an essay would stretch if it tried to cover so large a field, there is a good reason why we may deem these two countries less well suited for the sort of comparative treatment here essayed. Neither of them has had the kind of independent and truly national legal development which belonged to Rome and belongs to England. Each of them started on its career with a body of pre-existing law, made elsewhere, viz. the Roman law which had come down to France and to Germany from antiquity. In Gaul, even in the parts most settled by the Franks, the law of the Empire held its ground, though everywhere largely modified by feudal land usages, and in the northern half of the country, when it had ceased to be Gaul and had become France, in the form of customs and not of written Roman texts. In Germany the old Teutonic customary law was by degrees (except as regards land rights) supplanted by the *Corpus Iuris* of Justinian, in conformity with the idea, fantastic as that idea now appears to us, which regarded the Roman Em-

perors from Julius Caesar down to Constantine the Sixth as the predecessors in title of the Saxon and Franconian Emperors. Thus neither the French nor the Germans built up on their own national foundation a law distinctively their own. Moreover, both Germany and France stand contrasted with England as well as with Rome in the fact that neither country ever had a true central legislature or central system of law courts comparable with the Parliament and King's Courts of England. The German Diet, though enactments were occasionally made in it with its consent by the sovereign, enactments which however were not universally obeyed, dealt very little with law proper, even in the days of its greatest strength. Still less were the French States-General, even before their long eclipse, an effective legislature. Thus the development of the law of both Germany and France fell mainly into the hands of the jurists, qualified to some extent in Germany by the ordinances enacted by the electors, landgraves, and other princes, as well as by the free imperial cities, and (in later days) by the kings whose dominions formed part of the decaying Empire, and qualified in post-mediaeval France by the ordinances of the king. In both countries it was upon the Roman law, as modified by custom, that the jurists worked, and hence in neither did a body of law grow up which was truly national, in the sense either of having a distinctive national quality or of embracing the whole nation or of having been enacted by a national legislature. The first complete unity given to law in France was given by Napoleon. His Code was based on the Roman law theretofore used, which had to a considerable extent been already codified under Lewis XIV; yet the creation of one Code for the whole country was a step so bold that it could hardly have been attempted except by an autocrat and on the morrow of a revolution. The first modern effort to give unity to law in Germany, itself an efflux of the aspiration for national unity, was made by the General

Bills of Exchange Law (*Wechselordnung*) (1848-1850), while a general Commercial Code (*Gemeines Handelsgesetzbuch*) enacted in various States between 1862 and 1866 was re-enacted for the new Empire in 1871. The fuller unity long desired was attained in 1900, when the new general Code for the whole German Empire came into force. This similarity between the legal history of France and that of Germany seems the more curious when one remembers that, so far as mere political unity is concerned, France attained that unity comparatively early, one may say at the end of the fifteenth century, while Germany continued down till the extinction of the old Empire in 1806 to go on losing what political unity she had possessed. It was not till 1866 that she began to regain it, though the Customs Union of the German States, formed in 1829, had been a presage of what was coming.

#### VII. PRIVATE LAW LEAST AFFECTED BY POLITICAL CHANGES OR DIRECT LEGISLATION.

One phenomenon is common to the legal history in all these nations. That part of the law which has the greatest interest for the scientific student, and the greatest importance for the ordinary citizen, the private civil law of family and property, of contracts and torts, has been the part least affected either by political changes or by direct legislation. It has been evolved quietly, slowly and almost imperceptibly, first by popular custom, then by the labours of jurists and the practice of the Courts. Direct legislation by the supreme power has stepped in chiefly to settle controversies between conflicting authorities, or to expunge errors too firmly rooted for judges to rectify, or to embody existing usage in a definite and permanent form. In the sphere of private law, and even in that of criminal law (so far as not affected by politics), legislation scarcely ever creates any large new rule, and seldom even any minor rule which is

absolutely new, not an enlargement of something which has gone before. Pure legislative novelties mostly turn out ill. Fortunately, the good sense of Englishmen, like that of Romans, has rarely permitted them to appear.

The parallel drawn between the history of Roman and that of English law is less instructive when we reach the later stages of that history. It cannot be made complete, not only because we know comparatively little of the inner condition and practical working of the Courts after the time of Constantine, but because there was after his time both a political and an intellectual decay, which few will profess to discover in the England of this century. The expansion and enrichment of the Roman system had stopped even before Constantine, while that of English Law is still proceeding<sup>1</sup>. In England commerce is still growing, education is still advancing, new and complicated problems are still emerging, so that many forces continue to work for the development of law. Though we cannot foresee what lines this development will follow we may feel sure that some of the old causes of change are disappearing. The democratization of political institutions seems nearly complete, religious passions have grown cold, and all classes have been so fully admitted to a share in political power that any such bold reforms in central and local administration, in procedure, in penal law, and in one or two departments of private civil law as followed the Reform Bill of 1832, seem improbable. In some departments the possibilities of further progress appear to be exhausted, though there are others, such as those concerned with questions of the right of combination among employers or among workmen, and the character which motive imparts to acts in themselves lawful on which

<sup>1</sup> Within two centuries after Justinian's time official abridgements of his *Corpus Juris* began to be issued, and it was virtually superseded in the end of the ninth century by the *Basilica* of the Emperor Leo the Philosopher. The action of his successors was largely directed to cutting down the old law into a shape better fitted for the changed conditions of the Empire, and the declining intelligence of the people.

the last word is far from having been said<sup>1</sup>. But there are at least two real difficulties which remain to be grappled with. One relates to the methods of legal proceedings. Their cost is so great as to deter many persons from the attempt to enforce just claims, to impose a heavy and unfair burden upon successful litigants, and to furnish opportunities for blackmail (especially in libel cases) to men who are equally devoid of money and of scruples. All efforts to cheapen them have so far failed. The other problem relates to a matter of substance. What are the general principles to be followed in empowering the State to regulate the conduct of individuals or groups of individuals, in permitting the central government or a local authority to compete with individuals in industrial enterprises, and in restricting the power of combinations formed for commercial or industrial objects? This group of problems are being daily pressed to the front by political forces on the one hand and by industrial progress on the other. They are as urgent in the United States as in Britain. Nor are they matters for legislation only, for cases frequently arise which the best legislation cannot count upon having provided for, and which it needs not only technical skill but also a philosophic grasp of principles on the part of the bar and bench to conduct to a solution. The experience of the ancient world and that of the Middle Ages throws little light upon them. But as they have appeared simultaneously in many modern nations, each may have something to learn from the others. Comparative jurisprudence has no more interesting field than this: nor is there any task in labouring on which an enlightened mind may find a wider scope for the devotion of learning and thought to the service of the community.

I am tempted to venture on some other predictions as to the influences that may be expected to work on

<sup>1</sup> The interest excited by cases such as those of the *Mogul Steamship Company v. Macgregor* and *Allen v. Flood* illustrates this.

the legal changes of the coming century. But we have been pursuing an historical, not a speculative, inquiry, and it will be enough to suggest that industry and commerce, as quickened by the progress of physical science, are likely to be factors of increasing power, and that the purely political element in the development of law will count for less than that contributed by the effort to readjust social conditions and to give effect to social aspirations.

## XVI

# MARRIAGE AND DIVORCE UNDER ROMAN AND ENGLISH LAW

### I. INTRODUCTORY.

IN all communities that have risen out of the savage state, no legal institution is at once so universal, and also so fundamental, a part of their social system as is Marriage. None affects the inner life of a nation so profoundly, or in so many ways, ethical, social, and economic. None has appeared under more various forms, or been more often modified by law, when sentiment or religion prescribed a change. In a famous passage which has been constantly quoted, and often misunderstood, Ulpian takes marriage as the type of those legal relations which are prescribed by the Law of Nature, and extends that Law so far as to make it govern the irrational creatures as well as mankind<sup>1</sup>. If then the relation be so eminently natural, one might expect it to be also uniform. Yet it so happens that there is no relation with which custom and legislation have, in different peoples and at different times, dealt so differently. Nature must surely have spoken with a very uncertain voice when, as the jurist says, she 'taught this law to all animals.' Nor does this infinite diversity show signs of disappearing. While in most branches of law the progress of parallel development in various civilized states is a progress towards uniformity, so that

<sup>1</sup> See Essay XI, p. 587.

the commercial law, for instance, of the chief European countries and of the United States is, as respects nineteen-twentieths of its substance, practically identical, the laws of these same countries are, in what relates to the forms of contracting marriage, the effect of marriage upon property rights, the grounds for dissolving and modes of dissolving marriage, extremely different, and apparently likely to remain different. Even within the narrow limits of the United Kingdom, England and Scotland have each its own system. Ireland has a different law from England in respect of the mode of solemnization; while, as respects divorce, the divergence goes so far that grounds are recognized as sufficient for divorce in Scotland which are not admitted in England, while in Ireland a divorce, except by private Act of Parliament, cannot be obtained at all. And the efforts to assimilate these three diverse systems made by reformers during two or three generations have been followed by so little practical result that they have been of late years altogether dropped.

Out of the long and obscure and intricate history of the subject, and out of the many still unsolved problems it presents, I propose to select one subject for discussion, viz. the history of the Roman law of the marriage relation, as compared with the English law, and particularly with some of the later developments of English law in the United States. On the antiquities of the matter, and in particular on the interesting and difficult questions relating to primitive forms of marriage, and to the polyandry which is supposed to have marked the earlier life of many peoples, I shall not attempt to touch. Neither can I do more than glance at the ecclesiastical history of the institution, important as the church has been in influencing civil enactments and moulding social sentiment.

To elucidate the Roman system, some few technical details must be given, but I shall confine myself to those which are needed in order to facilitate a compari-

son between it and that of England, and to show how essentially the later Roman conception of the relation differed from that which Christianity created in mediæval Europe.

## II. CHARACTER OF MARRIAGE IN EARLY LAW.

When clear light first breaks upon the ancient world round the Mediterranean Sea we find that the relation of the sexes exists in three forms. The most savage tribes, such as those which Herodotus saw or heard of in Libya and Scythia, have no regular marriage at all. Some lived in a kind of promiscuity; some were probably polyandrous. The Eastern peoples—Persians, Lydians, Babylonians, and so forth—are polygamous, as was Israel in the days of Moses and Solomon, though in a much lesser degree after the Captivity, and as was the Trojan Priam of the Homeric poems. The Western peoples, and especially the Greeks and the Italians, were, broadly speaking, monogamous, although concubinage superadded to lawful marriage, especially among the Greeks, was not unknown. The contrast of the East and the West was marked; and this particular difference was not only characteristic but momentous, since it presaged a different course for the social development of the two regions<sup>1</sup>. So when the Teutonic and Celtic peoples came later on the stage, they too were generally monogamous, though among the heathen Celts the tie seems to have been somewhat looser than among the Teutons, and a plurality of wives may have been not uncommon in heathen times. Tacitus, while dwelling on the sanctity of German marriages, observes that occasionally the chieftains had more than one wife, owing to the wish of other families for alliance with them<sup>2</sup>. Polygamy slowly died out of the East under Roman rule, though possibly never quite extinguished,

<sup>1</sup> Euripides (*Androm.* vv. 173-180) contrasts the marriage usages of barbarians and Greeks, and dilates (cf. v. 465 sqq.) on the evils of polygamy.

<sup>2</sup> Tac. *Germ.* c. xvii.

for we find prohibitions of it renewed by the Emperors down to Diocletian, before whose time all subjects had become citizens. It maintained itself in the Oriental court of the Sassanid kings of Persia, and was indeed one of the features of Persian life which most shocked the philosophers of the later Roman Empire. As there is no trace of it in the Roman law<sup>1</sup>, it need not concern us further, since it has never, except in the singular instance of the Mormons, reappeared in any of the communities which have been regulated either by Roman or by Teutonic law<sup>2</sup>.

Before describing the Roman system, let us note three general features which belong to the marriage customs, not indeed of all, but certainly of most peoples in the earlier stages of civilization. They are worth noting, because they constitute the central threads of the history of the relation during civilized times.

(1) The marriage tie has more or less of a religious or sacred character, being generally entered into with rites or ceremonies which place it under supernatural sanctions. This is, of course, more distinctly the case where monogamy prevails.

(2) In the marriage relation the husband has a predominant position both as regards control over the person and conduct of the wife, and as regards property, whether that which was hers or that which was brought into common stock by her and by him.

(3) The tie is comparatively easy of dissolution by the husband, less easily dissoluble by the wife. This is a natural consequence of the inferior position which she holds in early society.

Although these three features are generally characteristic of the earlier stages of family law, they are not universally present; and their presence or absence in

<sup>1</sup> Although Julius Caesar, if we may credit Suetonius, caused a measure to be drafted for enabling him to marry as many wives as he liked for the sake of having legitimate issue (Suet. *Julius*, c. 52).

<sup>2</sup> Among the Jews it was (though forbidden by Roman law) not formally abolished till the tenth century.

any given community does not necessarily coincide with a lower or higher scale of civilization in that community. The temptation to generalize in these matters is natural, but it is dangerous. True as may seem the general proposition, that the higher or lower position of women in any society is a pretty good index to the progress that society has made, there are too many exceptions to the rule for us to take it as a point of departure for inquiry. Nor can these exceptions be always accounted for by any one cause, such as race or religion.

### III. THE EARLIER FORM OF ROMAN MARRIAGE LAW.

Now let us come to the Romans, of whom we may say that it is they who have built up the marriage law of the civilized world, partly by their action as secular rulers in pagan times, partly by their action as priests in Christian times. The other modifying elements, and particularly the Hebrew and Teutonic influences, which have worked upon the marriage laws of Christendom, are of quite inferior moment.

Roman law begins with two phenomena which seem at first sight inconsistent. One is the complete subjection of the wife to the husband on the legal side, as regards both person and property. The other is her complete equality on the social and moral side, as regards her status and the respect paid to her.

In describing the nature of this subjection, one must make it clearly understood that, strictly speaking, it was not by the mere fact of marriage, that is to say, by the legal act necessary to constitute marriage, that a woman entered that position of absolute absorption into the legal personality of her husband which is so remarkable a feature of the old law. Whatever may have been the case in prehistoric times, we find that at the time when the Twelve Tables were enacted (B.C. 449) a marriage could be contracted without any forms or ceremonies whatever, by the sole consent of the parties; and that,

where this was the case, the husband did not acquire any power over the wife, and the latter retained whatever property she previously possessed. It was therefore not marriage *per se* that created the power of the husband, for a woman might be legally married and not be under the marital power. But although this 'free marriage,' as we may call it (the term is not Roman, but invented by modern jurists), was legally possible, the custom, and in old days the almost invariable custom, of the people was to add to the marriage a ceremony not essential to its validity as a marriage, but one which had important legal consequences. We may safely assume that there was originally no true marriage without the ceremony, but at the time of the Twelve Tables this was no longer the case. The ceremony created a relation which the Romans called Hand (*manus*), and brought the wife into her husband's power, putting her, so far as legal rights went, in the position of a daughter (*filiae loco*). It gave the husband all the property she had when she married. It entitled him to all she might acquire afterwards, whether by gift or by her own labour. It enabled him to command her labour, and even to sell her, though the sale neither extinguished the marriage nor made her a slave, but merely enabled the purchaser to make her work, while still requiring him to respect her personal rights<sup>1</sup>. In compensation for these disadvantages the wife became entitled to be supported by her husband, and to receive a share of his property at his death, as one of the 'family heirs' (*sui heredes*), whom he could disinherit only in a formal way. She had by coming under his Hand passed out of her original family, and lost all right by the strict civil law to share in the inheritance of her father.

There were two forms of ceremony by which this power of the Hand could be created. One, probably

<sup>1</sup> Some writers doubt whether this power of sale existed, and refer to a supposed 'law of Romulus' mentioned by Plutarch which devoted to the infernal gods whoever sold his wife. But the balance seems to incline in favour of the existence of the power.

the older, had a religious character. It took place in the presence of the chief pontiff, and its main feature was a sacrifice to Jupiter, with the eating by the bride and bridegroom of a cake of a particular kind of corn (*far*), whence it was called *confarreatio*. It was originally confined to members of the patrician houses. The other was a purely civil act, and consisted in the sale by the bride of herself, with the approval of her father or her guardian (as the case might be), to the bridegroom, apparently accompanied (though there is a controversy on this point) by a contemporaneous sale by the bridegroom of himself to the bride. The transaction was carried out with certain formal words and in the presence of five witnesses (being citizens)<sup>1</sup>, besides the man who held the scales with which the money constituting the price was supposed to be weighed. The price was of course nominal, though it had in very early times been real.

These two forms have been frequently spoken of as if they were indispensable forms of marriage, so that marriage had always the Hand power as its consequence. But this, though it may probably have been the case in very early days, was not so in those historical times to which I must confine myself. And the proof of this may be found in the fact that if a woman was married without either of the above forms, she did not pass into the Hand of her husband unless or until she had lived with him for a year, and not even then if she had absented herself from his house for three continuous nights during that year<sup>2</sup>. And where the Hand power had not been created, the property rights of the wife, whatever they were<sup>3</sup>, remained unaffected by the marriage.

<sup>1</sup> There has been much dispute as to this ceremony: I give what seems the most probable view. It may descend from a more ancient sale of the wife by her relatives to the husband, similar to that which we find in some primitive peoples.

<sup>2</sup> This was in pursuance of the general rule that rights over a movable were acquired by a year's continuous holding: 'usus auctoritas fundi biennium, caeterarum rerum annuus esto.'

<sup>3</sup> If she was in the power (*potestas*) of her father, she had no property of her own. If she was *sui iuris*, she was under guardianship.

The period of three nights is fixed in the Twelve Tables, possibly as a precise definition of a custom previously more uncertain.

This was the old Roman system, and a very singular system it was, because it placed side by side the extreme of marital control as the normal state of things and the complete absence of that control as a possible state of things. Doubtless the marriages with Hand were in early days practically universal, resting upon a sentiment and a social usage so strong that women themselves did not desire the free marriage, which would put them in an exceptional position, outside the legal family of the husband. Nor can we doubt that the wide power which the law gave to the husband was in point of fact restrained within narrow limits, not only by affection, but also by the vigilant public opinion of a comparatively small community.

#### IV. CHANGE FROM THE EARLIER TO THE LATER SYSTEM AT ROME.

Before the close of the republican period the rite of *confarreatio* practically died out, or was referred to as an old-world curiosity, much as a modern English lawyer might refer to the power of excommunication possessed by ecclesiastical authorities. The patrician houses had become comparatively few, and the daughters of those that remained evidently did not wish to come under the Hand power<sup>1</sup>. The form of *coemptio*, which all citizens might use, lasted longer, and seems to have been not infrequently applied in Cicero's time. Two centuries later it also was vanishing, and Gaius tells us that the rule under which uninterrupted residence created the husband's power of Hand, and might be stopped by

<sup>1</sup> Nevertheless it was retained in a few families for the purpose of providing persons who could hold four great priestly offices, since by ancient usage none save those born from a marriage with *confarreatio* were able to serve these priesthoods. But its operation seems to have been restricted by a decree of the senate so as to apply only so far as religious rites were concerned (*quoad sacra*) (Gai *Inst.* i. 136).

the wife's three nights' absence, had completely disappeared (*Gai Inst.* i. III). So we may say broadly that from the time of Julius Caesar onwards the marriage without Hand had become the rule, while from the time of Hadrian onwards the legal acts that had usually accompanied marriage, which placed the wife under the husband's control, were almost obsolete.

This was a remarkable change. The Roman wife in the time of the Punic Wars had, with rare exceptions, been absolutely subject to her husband. She passed out of her original family, losing her rights of inheritance in it. Her husband acquired all her property. He could control her actions. He sat as judge over her, if she was accused of any offence, although custom required that a sort of council of his and her relatives should be summoned to advise him and to see fair play. He could put her to death if found guilty. He could (apparently) sell her into a condition practically equivalent to slavery, and could surrender her to a plaintiff who sued him in respect of any civil wrong she had committed, thereby ridding himself of liability. One can hardly imagine a more absolute subjection to one person of another person who was nevertheless not only free but respected and influential, as we know that the wife in old Rome was. It would be difficult to understand how such a system worked did we not know that manners and public opinion restrain the exercise of legal rights.

Such was the old practice. Under the new one, universal in the time of Domitian and Trajan, which is also the time of Tacitus, Juvenal and Martial, the Roman wife was absolutely independent of her husband, just as if she had remained unmarried. He had little or no legal power of constraint over her actions. Her property, that which came to her by gift or bequest as well as that which she earned, remained her own to all intents and for all purposes. She did not enter her husband's family, and acquired only a very limited right of intestate succession to his property.

This striking contrast may be explained by the fact that the disabilities which attached to the wife under the old system were not in legal strictness the consequence of marriage itself, but of legal acts which an almost universal sentiment and custom had attached to marriage, though in themselves acts distinct from it. A perfectly valid marriage could exist without these legal acts, and so far back as our authorities carry us, we find that a few, though probably originally only a very few, marriages did take place without them. Accordingly when sentiment changed, and custom no longer prescribed the use of confarreation or coemption, the power of Hand vanished of itself and vanished utterly. Had it been an essential part of the marriage ceremony, it would doubtless have been by degrees weakened in force and accommodated to the ideas of a new society. But no legislation was needed to emancipate the wife. The mere omission to apply one or other of the old concomitants gave the marriage relation all the freedom the parties could desire and perhaps more than was expedient for them.

We may now dismiss these ancient forms and address ourselves to the position of the wife under the normal marriage of later times—the so-called ‘free marriage,’ since this is the form in which the Roman institution descended to and has affected modern law<sup>1</sup>.

#### V. LATER MARRIAGE LAW: PERSONAL RELATION OF THE CONSORTS.

The following points deserve to be noted as characterizing the Roman view.

The act whereby marriage was contracted was a

<sup>1</sup> I pass by the distinction between *iustae nuptiae*, which could be contracted only between Roman citizens, and the so-called ‘natural’ marriage, or *matrimonium iuris gentium*, which was created by the marriage of a full citizen to a half citizen or an alien (*peregrinus*), because the latter is of no consequence for our purpose, and practically disappeared when all Roman subjects became citizens. It was a perfectly valid marriage, and the children were legitimate. As to their status, see Gai *Inst.* i. 78, 79.

purely private act. No intervention of any State official, no registration or other public record of any sort was required. The two parties, and the two parties only, were deemed to be concerned<sup>1</sup>.

The act was a purely civil act, to which no religious or ecclesiastical rite was essential either in heathen or in Christian times. There were indeed what may be called decorative ceremonies, some of which we find mentioned in poems like the famous Epithalamium of Catullus, but they had no more to do with the legal nature and effect of the matter than has the throwing of old shoes or rice at a modern English wedding.

The act required no prescribed form. It consisted solely in the reciprocally expressed consent of the parties, which might be given in any words, or be subsequently presumed from facts. 'Marriage is contracted by consent only' (*nuptiae solo consensu contrahuntur*) is the invariable Roman maxim. Even the conducting of the bride to the bridegroom's house, which has sometimes been represented as necessary<sup>2</sup>, seems to have been regarded rather as evidence needed in certain cases than as essential to the validity of the act<sup>3</sup>. A generally prevalent usage made a formal betrothal (*sponsalia*) precede the actual wedding. But the betrothal promise created no legal right. No action lay upon it, such as that which English and Anglo-American law unfortunately allows to be brought for breach

<sup>1</sup> Where either party was subject to the paternal power of his or her father (or grandfather), the consent of the father (or grandfather) (or both) was required, though in a few specified cases it might be either dispensed with or compelled. This was a consequence of the Roman family system. It was irrespective of the age of bride or bridegroom.

<sup>2</sup> The Emperor Majorian (A.D. 455-461) is said to have issued a constitution for the Western Empire, making the creation of a *dos* essential to the validity of a marriage; but this provision, which can hardly have been intended to be general, seems to have never taken effect. The Western Empire was then in the throes of dissolution.

<sup>3</sup> See Paul., *Sent. Recept.* xix. 8; *Dig.* xxii. 2. 5. The suggestion which may be found in some modern writers that Marriage fell within the class of the contracts created by the delivery of an object (the so-called Real Contracts), has no Roman authority in its favour, and is indeed based on a misconception of the nature of those four contracts, in all of which the obligation created is for the restoring of the object delivered. Marriage is assuredly not a bailment.

of promise of marriage. In early times formal and binding stipulations seem to have been often made on each side between the bridegroom and the father (or other male relative) of the bride for the giving and receiving of the bride; and if the promise were broken without sufficient cause, an action lay against the party in fault for the worth of the marriage<sup>1</sup>. This, however, disappeared. Under the influence of a more refined sentiment, not only could no promise of marriage be enforced, but if the parties made a contract whereby each bound him or herself to the other in a penal sum to become payable in case of breach, such a provision was held to be disgraceful (*pactum turpe*) as well as invalid. This was the law of later republican and imperial times. Betrothal had, however, some legal effects. It entitled either of the betrothed parties to bring an action for an injury (of an insulting nature) offered to the other. It rendered any one infamous who being betrothed to one person contracted betrothal to another. It entitled either party, if the espousal was broken off before marriage, to reclaim whatever gifts he or she might have bestowed upon the other.

As regards personal status, the wife acquired that of her husband (unless either had been formerly a slave), and his domicil became hers. In the old days of Hand power she had taken the name of his *gens*, but now she retained her own, besides her personal 'first name' (*praenomen*) (e.g. *Tertia*)<sup>2</sup>. Each spouse being interested in the character and reputation of the other, he could sue for damages if any insult was offered to her, she for insult to him. He is bound to support her in a manner suitable to their rank, whatever her private means may be. Though each can bring an action against

<sup>1</sup> This was at any rate a usage among the Latins; but how far in Rome seems doubtful.

<sup>2</sup> Under the Empire we usually find women using two names, from their father's *gens* and family (e.g. *Caecilia Metella*). Sometimes, it would seem, the name of the father's *gens* was followed by one taken from the mother (e.g. *Iunia Lepida, Annaea Faustina*). The subject is fully discussed by Mommsen, in his *Römisches Staatsrecht*.

the other, the action must not be one which affects personal credit and honour (*actio infamans*), and hence, though each has his and her own property, neither can proceed against the other by a civil action of theft, even if the property seized was seized in contemplation of a divorce<sup>1</sup>. It need hardly be added that if the wife's father, or grandfather, were living, she would remain, unless she had been emancipated, subject to the paternal power, being for all legal purposes a member of her original family and not of her husband's. But the person in whose power she is cannot (at least in imperial days) take her away from her husband. Antoninus Pius forbade a happy marriage to be disturbed by a father; and in the third century (perhaps earlier) the husband could proceed by way of interdict to compel a father to restore his wife to him<sup>2</sup>.

#### VI. LATER LAW. PECUNIARY RELATIONS OF THE CONSORTS.

This curiously detached position of the two consorts expressed itself in their pecuniary relations. Each had complete disposal of his or her property by will as well as during life, though the wife needed, down to a comparatively late time, the authority of her guardian<sup>3</sup>. Neither had originally any right of succession to the other in case of intestacy, nor had the wife any right of intestate succession to her children nor they to her, except that which the Praetor gave them among the blood relatives (*cognati*) generally, after the agnates (persons related through males). A state of things so inconsistent with natural feeling could not however always continue,

<sup>1</sup> A special action (*rerum amotarum*) was given in this case. Some jurists held that the joint enjoyment of household goods made the conception of Theft inapplicable to a wife's dealings, however unauthorized, with her husband's property. *Dig.* xxv. 2. 1.

<sup>2</sup> *Dig.* xliii. 30. 2.

<sup>3</sup> The guardianship of women of full age seems to have died out after women received power to select a guardian for themselves, a change which of course made his action purely formal.

so the Praetor created a rule of practice whereby each consort had a reciprocal right of succession to the other. But even in doing so, he placed this succession after that of other blood relations, as far as the children of second cousins. This postponement of a consort to blood relatives was carried even further by Justinian's legislation, for that emperor extended the category of relatives who could succeed in case of intestacy, and made no provision for the wife (beyond that which the Praetor had made), except to some small degree in case of a necessitous widow. The relationship of mother and child received a somewhat fuller recognition, for laws (*Senatus Consultum Tertullianum, Sc. Orphitianum*) of the time of Hadrian and Marcus Aurelius gave the mother and the children reciprocal rights of inheritance<sup>1</sup>, which, finding a place in the general scheme of succession based on consanguinity which Justinian established, have passed into modern law.

Distinct as were the personalities of the two consorts in respect of property, the practical needs of a joint life recommended some plan under which a provision might be made for the expenses of a joint household. This sprang up as soon as marriages without the concomitant creation of the *Hand* power had grown common. It became usual for the wife to bring with her land or goods, either her own, if she were independent, or bestowed by her father or other relative. This property, which was destined for the support of the married pair and their children, was called the *Dos*, a term which, since it denotes the wife's contribution to the matrimonial fund, must not be translated by our English word *Dower*, for that term describes the right of a wife who survives her husband to have a share in his landed estate. Many rules sprang up regarding the *Dos*, rules probably due in the first instance to custom, for as the instruments of marriage contracts were usually drawn

<sup>1</sup> The mother's succession was originally granted only where she had borne three children (if a freed-woman, four).

on pretty uniform lines, these lines ultimately became settled law<sup>1</sup>. The general principle came to be that property given from the wife's side, whether by her father, or by herself, or by some of her relatives, became subject to the husband's right of user while the marriage lasted, as enabling him to fulfil his obligation to support wife and children, but at the expiry of the marriage by the death (natural or civil) of either party, or by divorce, reverted to the wife or her heirs<sup>2</sup>. If, however, the property had been given by the wife's father, he might, if still living, reclaim it<sup>3</sup>. The *Dos* is said by the Romans to be given for the purpose of supporting the burden of married housekeeping, and therefore the administration and usufruct of it pertain to the husband, while the ultimate ownership remains in the wife, or in the father who constituted it, as the case may be. In the later imperial period a sort of second form of matrimonial property was introduced, called the gift for the sake of marriage (*donatio propter nuptias*). It was made by the husband, and remained his property both during and after the marriage. So far, as it was only theoretically separated from other parts of the husband's estate, it might seem to have no importance. But if he became insolvent, it did not, like the rest of his property, pass to his creditors, but went over to the wife, just as the *Dos*, although administered by the husband, remained unaffected by his insolvency. And just as the husband was entitled, where a divorce was caused by the wife's fault, to retain a part of the *Dos*, so if a divorce was caused by the husband's fault, the *donatio propter nuptias*, or a part of it, might be claimed by the

<sup>1</sup> The 'custom of conveyancers' has worked itself into English law in a somewhat similar way.

<sup>2</sup> This was the rule as settled by Justinian. Before his time, the husband took the *Dos* at the wife's death unless it had been given by her father.

<sup>3</sup> There are many less important rules regarding the extent of the husband's interest and the form in which the property is to be restored at the end of the marriage, which it is not necessary to set forth, as they do not affect the general principle. Indeed generally through these pages I am forced, for the sake of clearness and brevity, to omit a number of minor provisions.'

injured wife. The similarity of some of these arrangements to the practice of English marriage settlements will occur to every one's mind, though in England settlements are always created and governed by the provisions of the deeds which create them, whereas in Rome, although special provisions were frequently resorted to, there arose a general legal doctrine whose provisions were applicable to gifts made upon or in contemplation of marriage.

One further point needs to be mentioned. It was a very old customary (or, as we should say, common law) rule of Roman law that neither of the wedded pair could during the marriage bestow gifts upon the other, the reason assigned being the risk that one or other might by the exercise of the influence arising from their relation be deprived of his or her property to his or her permanent damage (*ne mutuato amore invicem spoliarentur*). This principle, which protects the wife from being either wheedled or bullied out of her separate property, and may be compared with the English restraint on alienation or anticipation applied to a wife's settled property, was also held to be occasionally needed to protect the husband's interests, and those of the children, from suffering at the hands of a grasping wife. It issues from the view which the Roman jurists enounce that affection must not be abused so as to obtain pecuniary gain; and one jurist adds that if either party were permitted to make gifts the omission to make them might lead to the dissolution of the marriage, and so the continuance of marriages would be purchasable<sup>1</sup>. Such gifts were accordingly held null and void, the only exception being that where property actually given had been left in the donee's hands until the donor's death, the heir of the donor could not reclaim it from the sur-

<sup>1</sup> 'Sextus Caecilius et illam causam adiciebat, quia saepe futurum esset ut dicerentur matrimonia si non donaret is qui posset atque ea ratione eventurum ut venalicia essent matrimonia.' This view was sanctioned by the Emperor Caracalla in his speech to the senate, which introduced the exception next mentioned in the text; *Dig.* xxiv. 1. 2.

viving donee. Needless to say that the rule only covered serious transfers of property, and did not apply to gifts of dress or ornaments or such other tokens of affection as may from time to time pass between happy consorts.

#### VII. GENERAL CHARACTER OF THE ROMAN CONCEPTION OF MARRIAGE.

Reviewing the rules which regulated marriage without the Hand Power, the sole marriage of the classical times of Roman law, we are struck by three things.

The conception of the marriage relation is an altogether high and worthy one. A great jurist defines it as a partnership in the whole of life, a sharing of rights both sacred and secular<sup>1</sup>. The wife is the husband's equal<sup>2</sup>. She has full control of her daily life and her property. She is not shut up, like the Greek wife, especially among the Ionians, in a sort of Oriental seclusion, but moves freely about the city, not only mistress of her home, but also claiming and receiving public respect, though so far placed on a different footing from men, and judged by a standard more rigid than ours, that it was deemed unbecoming for her to dance and shocking for her to drink wine.

The marriage relation is deemed to be wholly a matter of private concern with which neither the State nor (in Christian times) the Church has to concern itself. This was so far modified under the Emperors, that the State, from the time of Augustus, began to try to discourage celibacy and childlessness in the interests of the maintenance of an upper class Roman population, as opposed to one recruited from freed men and strangers. But these efforts were not, as we shall see, incompatible with adherence to the general principle that the formation and dissolution of the tie required no State inter-

<sup>1</sup> 'Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio;' Modestinus in *Dig.* xxiii. 2. 1.

<sup>2</sup> This was expressed in the phrase which the bride anciently used when brought to the husband's house: 'Ubi tu Gaius, ego Gaia.'

vention, nor even any form prescribed by State authority.

The marriage relation rests entirely on the free will of the two parties<sup>1</sup>. If either having promised to enter it refuses to do so, no liability is incurred. If either desires to quit it, he or she can do so. Within it, each retains his or her absolute freedom of action, absolute disposal of his or her property.

Compulsion in any form or guise is utterly opposed to a connexion which springs from free choice and is sustained by affection only.

These principles have a special interest as being the latest word of ancient civilization before Christianity began to influence legislation. They have in them much that is elevated, much that is attractive. They embody the doctrines which, after an interval of many centuries, have again begun to be preached with the fervour of conviction to the modern world, especially in England and the United States, by many zealous friends of progress, and especially by those who think that the greatest step towards progress is to be found in what is called the emancipation of woman.

#### VIII. DIVORCE IN ROMAN LAW.

Let us now see how the Roman principles aforesaid worked out in practice as regards domestic morality and the structure of society, that structure depending for its health and its strength upon the purity of home life at least as much as it does upon any other factor.

The last of the above-stated three principles is the derivation of all the attributes of the marriage relation from the uncontrolled free will of the parties. This principle is applied to the continuance of the relation itself. With us moderns the tie is a permanent tie, which, though freely formed, cannot be freely dissolved,

<sup>1</sup> 'Libera matrimonia esse antiquitus placuit,' says the Emperor Severus Alexander in the third century. *Cod.* viii. 38. 2.

whether by one of the parties or by both. Very different was the Roman view. To them it is even less binding than an ordinary business contract. Take for instance a bargain made between *A* and *B* for the sale and purchase of a house. Such a bargain creates what the Romans call an obligation, a bond of law (*vinculum iuris*) which enables either of the contracting parties to require the other to fulfil his promise, or to pay damages in case of default. In Roman law the act of entering into marriage creates no such bond. The business contract can be rescinded only by the consent of both the parties to it. The marriage relation can be terminated by the will of one only. Each party in forming it promised only that he, or she, would remain united to the other so long as he, or she, desired so to remain united. This is the logical consequence of the principle that marriages should be free; this was how the Romans understood that principle.

Accordingly divorce can be effected by either party at his or her pleasure, the doctrine of equality between the sexes being impartially applied, so that the wife may just as freely and easily divorce her husband as the husband may divorce his wife.

The early history of the matter is somewhat obscure, and need not detain us. It would seem probable that in the old days when marriage was accompanied by the Hand power, a husband might put away his wife if she had been convicted before the domestic council of certain grave offences<sup>1</sup>; and we gather that in such cases she was entitled to demand her emancipation, *i.e.* the extinction of the Hand power, by the proper legal method thereto appointed. Such cases were, however, extremely rare. When marriage unaccompanied by Hand power became frequent, we do not at first hear of any divorces. Our authorities declare that the first

<sup>1</sup> A so-called 'law of Romulus' is said to have enumerated poisoning the children, adultery, and the use of false keys as grounds justifying the husband in divorcing his wife, no parallel right being granted to her. And there seems to have been a provision regarding divorce in the Twelve Tables.

instance of divorce at Rome (they probably mean the first where no crime was alleged) was furnished by a certain Spurius Carvilius Ruga, who in B.C. 231 got rid of his wife, although warmly attached to her, on account of her sterility. Universal displeasure fell upon him for his conduct: and when L. Antonius put away his wife without summoning a council of friends and laying the matter before them, the Censors removed him from his tribe. But before long other husbands were found to imitate Spurius Carvilius. In the second century B.C. divorce was no longer rare. In the days of Julius Caesar it had become common, and continued to be so for many generations. The fragrance of religious sentiment had ceased to hallow marriage, and in the general decline of morals and manners it was one of the first institutions to suffer degradation. Not only Cn. Pompey, but such austere moralists as Cato the younger and the philosophic Cicero put away their wives: Cato his after thirty years of wedded life, Cicero two in rapid succession.

How far this decline had gone, even before the days of Cato and Cicero, appears from the singular speech delivered by Q. Caecilius Metellus, Censor in B.C. 131, in which he recommended a law for compelling everybody to marry, observing that if it were possible to have no wives at all, everybody would gladly escape that annoyance, but since nature had so ordained that it was not possible to live agreeably with them, nor to live at all without them, regard must be had rather to permanent welfare than to transitory pleasure<sup>1</sup>. We are told that both men and women, especially rich women, were constantly changing their consorts, on the most frivolous pretexts, or perhaps not caring to

<sup>1</sup> 'Si sine uxore, Quirites, possemus esse, omnes ea molestia careremus, sed quoniam ita natura tradidit ut neque cum illis commode nec sine illis ullo modo vivi possit, salutis perpetuae potius quam brevi voluptati consulendum.' Aul. Gell. *Noct. Att.* i. 6: cf. Liv. *Epit.* Book lix, and Sueton. *Vit. Aug.* Augustus, according to Gellius and Suetonius, caused this speech, delivered a century before, to be read aloud in the Senate in support of his bill *De Maritandis Ordinibus*, as being one which might fitly have been made for their own times.

allege any pretext beyond their own caprice. Nothing more than a declaration of the will of the divorcing party was needed: and this was usually given by the husband in the set form of words, 'keep thy property to thyself' (*tuas res tibi habeto*). Little or no social stigma seems to have attached to the divorcing partner, even to the wife, for public opinion, in older days a rigid guardian of hearth and home, had now, in a rich, luxurious, and corrupt society, a society which treated amusement as the main business of life, come to be callously tolerant. There were still pure and happy marriages, like that of Cn. Julius Agricola (the conqueror of Britain) and Flavia Domitilla; nor is it necessary to suppose that conjugal infidelity was the chief cause why unions were so lightly contracted and dissolved, for the mere whims of self-indulgent sybarites account for a great deal<sup>1</sup> Still the main facts—the prevalence of divorce, the absence of social penalties, and the general profligacy of the wealthier classes—admit of no doubt.

The Emperor Augustus, though by no means himself a pattern of morality, was so much alarmed at a laxity of manners which threatened the well-being of the community, as to try to restrict divorces by requiring the party desiring to separate to declare his or her intent in the presence of seven witnesses, being all full Roman citizens. This rule, enacted by the *lex Iulia de adulteriis*, and continued down till Justinian's time, does not seem to have reduced the frequency of divorces, though it would tend to render the fact more certain in each case by providing indubitable evidence. Martial and Juvenal present a highly coloured yet perhaps not greatly exaggerated picture of the license of their time; and Seneca truly observes that when vice has become embodied in manners, remedies avail nothing (*Desinit esse remedio locus ubi quae fuerant vitia mores sunt*).

<sup>1</sup> 'Aut minus aut certe non plus tricesima lux est  
Et nubit decimo iam Thelesina viro.' Mart. vi. 7.

IX. INFLUENCE OF CHRISTIANITY ON THE ROMAN  
DIVORCE LAW.

But a force had come into existence which was to prove itself far more powerful than the legislation of Augustus and his successors. The last thing that these monarchs looked for was a reformation emanating from a sect which they were persecuting, and from doctrines which their philosophers regarded with contempt. Christianity from the first recognized the sanctity of marriage, and when it became dominant (though for a long time by no means omnipotent) in the empire a new era began. The heathen emperors might probably have been glad to check the power of capriciously terminating a marriage, but public opinion, which clung to the principle of freedom, would have been too strong for them. All they did was to impose pecuniary penalties on the culpable party by entitling the husband to retain one-sixth of the *Dos* in case of the wife's infidelity, one-eighth if her faults had been slighter, to which, if there were children, one-sixth was added in respect of each child; but so as not to exceed one-half in all. (The custody of the children belonged to the father in respect of his paternal power.) If the husband was the guilty party, he was obliged to restore the *Dos* at once, instead of being allowed a year's grace.

Constantine and his successors had a somewhat easier task, because the Church had during several generations given to marriage a religious character, surrounded its celebration with many rites, and pronounced her benediction upon those who entered into it. A new sentiment, which looked on it as a union permanent because hallowed was growing up, and must have to some extent affected even heathen society, which remained for a century after Constantine both large and influential. Nevertheless, even the Christian emperors did not venture to forbid divorce. They heightened the pecuniary penalties on the party to blame for a separation by pro-

viding that where the misconduct of the wife gave the husband good grounds for divorcing her, she should lose the whole of the *Dos*, and where it was the husband's transgressions that justified the wife in leaving him, he should forfeit to her the property he had settled, the *donatio propter nuptias*. In both these cases the ultimate ownership of these two pieces of marriage property was reserved to the children, if any, the husband or wife, as the case might be, taking the usufruct or life interest. If there was no *Dos* or *Donatio*, then the culpable party forfeited to the innocent one a fourth part of his or her private property. The definition of misconduct included a frivolous divorce, so that capricious dissolutions were in this way discouraged.

If there were no fault on either side, but one or other partner desired to put an end to the marriage for the sake of entering a convent, or because the husband had been for five years in foreign captivity<sup>1</sup>, or because there had never been any prospect of offspring, such a divorce was allowed, and carried no pecuniary penalty with it. It was called *divortium bona gratia*.

Finally, if both the parties agreed of their own free wills to separate—the *divortium communi consensu*—they might do so without assigning any cause or incurring any liability. This rule, which prevailed from first to last, and is recognized even in the Digest and Code of Justinian, was only once broken in upon. In an ordinance issued by Justinian in his later years (*Novella Constitutio* cxxxiv) the pious austerity of the reformer broke out so vehemently as to enact that where husband and wife agreed to divorce one another without sufficient ground, both should be incapable of remarriage and be immured for life in a convent, two-thirds of their property going to their children. Even then, however, the emperor did not venture to pronounce the divorce legally invalid. The will of the parties pre-

<sup>1</sup> The older doctrine had been that foreign captivity destroyed marriage *ipso facto*.

vails, and they die unmarried, though they die in prison. This violation of the established doctrine was, however, too gross to stand. It excited general displeasure, and was repealed by Justin the Second, the nephew and successor of Justinian. So the divorce by consent lasted for some centuries longer, till in an age which had forgotten the ancient Roman ideas and was pervaded by the conception of the marriage relation which religion had instilled, the Emperor Leo the Philosopher declared this form of separation to be invalid.

Through the whole of this legislation on the subject of divorce, which is far more minute and intricate than the briefness of the outline here presented can convey, it is to be noted that the Romans held fast to two principles. One was the wholly private, the other the wholly secular, character of wedlock. There is no legal method prescribed for entering into a marriage, nor any public record kept of marriages. There is no suit for divorce, no public registration of divorce. The State is not invoked in any way. Neither is the Church. Powerful as she had grown before Justinian's time, even that sovereign does not think of requiring her sanction to the extinction of the marriage which in most cases she had blessed. Either party has an absolute right to shake off the bond which has become a fetter. He or she may suffer pecuniarily by doing so, but the act itself is valid, valid against an innocent no less than against a guilty partner, and valid to the extent of permitting remarriage, except (as observed in the last paragraph) for a few years at the end of Justinian's reign.

Religion had consecrated the patrician marriage with the sacred cake in early days, and there had been a public character in the so-called plebeian marriage with the scales and five witnesses. But the marriage of the Christian Empire was (so far as law went) absolutely secular and absolutely private.

## X. SOME OTHER FEATURES OF ROMAN MARRIAGE LAW.

Before leaving this part of the subject, a few minor curiosities of the Roman marriage law deserve to be mentioned. From the time of Augustus there were in force, during some centuries, various provisions<sup>1</sup> designed to promote marriage and the bearing of children by attaching certain burdens or disabilities to the unmarried and childless. Most of these, being opposed to the new sentiment which Christianity fostered, were swept away by the Emperor Constantine and his successors. Others fell into desuetude, so that before Justinian's time few and slight traces were left of statutes that had exerted a great influence in earlier days, though it may be doubted whether they did much to promote morality. The tendency of Christian teaching rather was in favour of celibacy, when adhered to from ascetic motives; and the passion for a monastic life which marked the end of the fourth century told powerfully in this direction, especially in the eastern half of the empire.

Similar sentiments worked to discourage second marriages, which earlier legislation had favoured, though the widow who remarried within the year of mourning (originally of ten, ultimately of twelve months) suffered infamy, by a very ancient custom, as did the person who wedded her. The marriage was, however, valid. The Christian emperors punished the consort who married again by debarring him or her from the full ownership of any property which came to him or her through the first marriage (*lucra nuptialia*), while leaving him (or her) the usufruct in it. But this applied only where there were children of the first marriage living, and was mainly prompted by a desire to protect their interests against a step-parent. The ancient world was singularly suspicious of step-mothers.

<sup>1</sup> Especially those contained in the *lex Iulia et Papia Poppaea*.

The rules with regard to prohibited degrees of matrimony varied widely from age to age. In early Rome even second cousins were forbidden to intermarry. There was in those days a usage permitting near relatives, as far as second cousins, to kiss one another without incurring censure (*ius osculi*). Plutarch oddly explains the permission as grounded upon the right of the male relatives to satisfy themselves in this way that the ladies of the family had not tasted wine. But obviously the wholesome habits of a simple society allowed a familiar intercourse among kinsfolk just as far, and no farther, as the prohibition of marriage between them extended<sup>1</sup>. Towards the end of the republican period, however, we find that even first cousins might marry, probably by custom, for we hear of no specific enactments. Tacitus (*Ann.* xii. 6) refers to the practice as well established. This freedom lasted till the Emperor Theodosius the First, who forbade their marriage under pain of death by burning. Though the penalty was subsequently reduced, marriages of first cousins continued to be forbidden and punishable in the western half of the empire, while in the eastern they were made permissible, and remain so in the system of Justinian. The marriage of uncle or aunt with niece or nephew had been prohibited, though apparently by no statute, until the Emperor Claudius, desiring to marry his brother's daughter Agrippina, obtained a decree of the Senate declaring such a marriage legal<sup>2</sup>. So it remained for a time, though the marriage of an uncle with a sister's daughter, or of an aunt with a nephew, was still deemed incestuous. Christianity brought a change, and the law of Claudius was annulled by the sons of the Emperor Constantine. It was also by these sovereigns that marriage with a deceased wife's sister, or a deceased hus-

<sup>1</sup> It is a curious instance of the variance of custom in this respect, that after it had in England become unusual for cousins of different sexes to kiss one another, the practice remained common in the simpler society of Scotland and still more in that of Ireland.

<sup>2</sup> Tac. *Ann.* xii. 5-7.

band's brother, which had previously been lawful, though apparently regarded with social disapproval, was expressly forbidden<sup>1</sup>. This rule was adopted by Justinian, in whose *Codex* it finds a place<sup>2</sup>.

Besides the full lawful marriage of Roman citizens, to which alone the previous remarks have referred, there were two other recognized relations of the sexes under the Roman law<sup>3</sup>. One of these was the marriage of a citizen, whether male or female, with a non-citizen, *i.e.* a person who did not enjoy that part of citizenship which covered family rights and was called *connubium*. This was called a natural marriage (*matrimonium naturale, matrimonium iuris gentium*) as existing under the Law of Nature or Law of the Nations (*ius gentium*), as contradistinguished from the peculiar law of Rome (*ius civile*)<sup>4</sup>. It was a perfectly legal union, and the children were legitimate: as of course were the children of two non-citizens who married according to their own law. When Roman citizenship became extended to all the subjects of the empire, the importance of this kind of marriage vanished, for it could thereafter have been applicable (with some few exceptions) only to persons outside the Empire, and marriages with such persons, who were *prima facie* enemies, were forbidden.

The other relation was that called concubinage (*concubinatus*). It was something to which we have no precise analogue in modern law, for, so far from being prohibited by the law, it was regulated thereby, being treated as a lawful connexion. It is almost a sort of unequal marriage (and is practically so described by some of the jurists) existing between persons of different station—the man of superior rank, the woman of a rank

<sup>1</sup> Many other prohibitions of marriages applying to persons holding official relations, or to persons of widely different rank, or to cases where adoptive relationships come in, need not be mentioned, as they have no longer any great interest.

<sup>2</sup> *Cod. Theod.* iii. 12, 2 sqq. ; *Cod. Justin.* v. 5. 5 and 8.

<sup>3</sup> The connexion of two slaves, called *contubernium*, was not deemed a legal relation at all, and children born from it were not legitimate. So also a free person could not legally intermarry with a slave.

<sup>4</sup> See Essay XI, p. 570.

so much inferior that it is not to be presumed that his union with her was intended to be a marriage. It leaves the woman in the same station in which it found her, not raising her, as marriage normally does, to the husband's level. The children born in such a union are not legitimate; but they may require their father to support them, and are even allowed by Justinian, in one of his later enactments (*Novella lxxxix*), a qualified right of intestate succession to him. They of course follow their mother's condition, and they have a right of inheriting her property. Even here the monogamic principle holds good. A man who is married cannot have a concubine, nor can any man have more than one concubine at a time. Though regarded with less indulgence by the Christian emperors than it had been by their predecessors, it held its ground in the Eastern Empire, even under Justinian, who calls it a 'permitted connexion' (*licita consuetudo*), and was not abolished till long after his time by the Emperor Leo the Philosopher in A.D. 887. In the West it became by degrees discredited, yet doubtless had some influence on the practice of the clergy, the less strict of whom continued to maintain irregular matrimonial relations for a great while after celibacy had begun to be enforced by ecclesiastical authority.

Children born in concubinage may be legitimated by the subsequent marriage of their parents, according to a rule first introduced by Constantine, and subsequently enlarged and made permanent by Justinian (*Cod. v. 27, 5 and 6; Nov. xii. 4; Nov. lxxxix. 8*); a rule of great importance, which was long afterwards introduced into the Canon Law by Pope Alexander III in A.D. 1160, and has held its ground in the modern Roman law of continental Europe, as it does in the law of Scotland to this day. The bishops, prompted by the canonists, tried to introduce it in England, but were defeated by the opposition of the barons, who at the great council held at Merton in 20 Henry III (A.D. 1235-6) refused

their consent in the famous words, 'We will not change the laws of England which hitherto have been used and approved<sup>1</sup>.' Nevertheless such power of legitimating the children of a couple born before their legal marriage seems to have been part of the ancient customs of England before the Conquest. The children were at the wedding placed under a cloak which was spread over the parents, and were from this called in Germany, France, and Normandy, 'mantle children<sup>2</sup>.'

I have already dwelt upon the most striking feature of the branch of legal history we have been tracing, the comparatively sudden passage from a system of extreme strictness—under which the wife's personality, with her whole right of property, became absolutely merged in that of her husband—to a system in which the two personalities remained quite distinct, united only by the rights which each had in matrimonial property, rights which were however not rights of joint-management, but exercisable (subject to limitations) by the husband alone so long as the marriage lasted, while the reversion was secured to the wife or her relatives. It is hardly less noteworthy that these two contrasted systems did for a considerable time exist side by side; and for a century, or perhaps more, must both have been in full vigour, though the freer system was obviously gaining ground upon the older and more stringent one.

Another fact, though more easily explicable, is also worth noting. In its earlier stages the Roman marriage bore a religious character, for we can hardly doubt that in primitive times Confarreation, the old patrician form with the sacrifice and the holy cake, was practically

<sup>1</sup> 'Ad breve Regis de bastardia utrum aliquis natus ante matrimonium habere poterit hereditatem sicut ille qui natus est post. Responderunt omnes Episcopi quod nolunt nec possunt ad istud respondere, quia hoc esset contra communem formam Ecclesie. Ac rogaverunt omnes Episcopi Magnates ut consentirent quod nati ante matrimonium essent legitimi sicut illi qui nati sunt post matrimonium quantum ad successionem hereditariam quia Ecclesia tales habet pro legitimis; et omnes comites et barones una voce responderunt quod nolunt leges Anglie mutare que usitate sunt et approbate.' 20 Henr. III, *Stat. Mert.*

<sup>2</sup> Pollock and Maitland, vol. ii. p. 397. I have heard of the cloak custom as existing in Scotland down almost to our own time.

universal among the original citizens, before the *plebs* came into a separate and legally recognized existence. Hence perhaps it is that marriage is described, even when that description had ceased to have the old meaning, as a 'sharing of all rights, both religious and secular.' In its middle period, which covers some five centuries, it was a purely civil relation, not affected, in its legal aspects, by any rules attributable to a theological or superstitious source. But when Christianity became the dominant faith of the Empire, the view which the Gospel and the usages as well as the teaching of the Church had instilled began thenceforward to influence legislation. These usages did not indeed, down till the eighth century, transform the fundamental conception of marriage as a tie formed solely by consent, and needing the intervention neither of State nor of Church. But they worked themselves into the doctrines of the Church in such wise that, in later days, they succeeded in making matrimony so far a sacred relation as to give it an indissoluble character, and not only restricted the circle of persons between whom it could lawfully be contracted, but abolished the power of terminating it by the mere will of the parties.

## XI. MARRIAGE UNDER THE CANON LAW.

When direct legislation by the State came to an end in Western Europe with the disappearance of the effective power of the Emperors in the fifth and sixth centuries, the control of marriage began to fall into the hands of the Church and remained there for many generations. To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit. It would be impossible within the limits of this Essay

to describe that law, which is copious, and embarrassed by not a few controverted points. All that it seems necessary to say here is that the Canon Law, which was collected and codified in the thirteenth and fourteenth centuries, so far adhered to the established Roman doctrine as to recognize, down till the Council of Trent, the main principle that marriage requires nothing more than the free consent of the parties, expressed in any way sufficient to show that the union which they contemplate is to be a permanent and lawful union. Marriage no doubt became, in the view of the mediæval Church, as of the Roman Church to-day, a sacrament, but it is a sacrament which the parties can enter into without the aid of a priest. Their consent ought, no doubt, in the view of the Church and of Canon law, to be declared before the priest and to receive his benediction. It is only marriages 'in the face of the Church' that are deemed 'regular' marriages<sup>1</sup>, and the Fourth Lateran Council under Innocent the Third directed the publication of banns. But the irregular marriage is nevertheless perfectly valid. It is indissoluble (subject as hereinafter mentioned), and the children born in it are legitimate. A good ground for this indulgence may be found not only in Roman traditions, but also in the fact that the Church was anxious to keep people out of sin and to make children legitimate, so that it always presumed everything it could in favour of lawful matrimony.

This view prevailed, and may be said to have been the common law of Christendom, as it had been of the old Roman Empire, down till the Council of Trent<sup>2</sup>. That assembly, against the strong protests of some of its members, passed a decree (Sessio XXIV, cap. i,

<sup>1</sup> See Lord Stowell's famous judgement in *Lindo v. Belisario* (*Consist. Cases*, p. 230), where 'he examines in an interesting way the requisites of marriage under the 'law of nature.'

<sup>2</sup> Canon VII of Session XXIV anathematizes those who deny the teaching of the Church that the adultery of one spouse does not dissolve the *vinculum matrimonii*, and Canon X those who deny that it is better and happier to remain in a state of virginity or celibacy.

*De Reformatione Matrimonii*) which, after reciting that clandestine marriages had been held valid, though blameworthy, declared that for the future all should be deemed invalid unless they took place in the presence of a priest and of two or three witnesses. Apparently it was not so much for the sake of securing the blessing of the Church upon every marriage as in order to prevent scandals which had arisen from the breach of a tie contracted in secret that the change, a grave and memorable change, was made. This great Council, which was intended to secure the union of Christendom under the See of Rome, really contributed to intensify the separatist forces then at work: and from it onwards one can no longer speak of a general marriage law even for Western Europe. Custom and legislation took thenceforward different courses, not only as between Protestant and Roman Catholic nations, but even as between different Protestant nations, there being no common ecclesiastical authority which Protestant States recognized. Thus the era of the Reformation is an era as marked in the history of marriage law as was the era of Constantine, when Christianity began to be dominant in the Roman Empire. And we shall see, when we return to the subject of divorce, that this is even more strikingly the case as regards the dissolubility of marriage than as regards the mode of contracting it.

Before passing on to sketch the legal history of the institution in England—since it is impossible to find space here for an account of its treatment in the laws of other European States—it is well to note what had been the general tendency of the customary law of the Middle Ages upon the character of the marriage relation.

One may sum up that tendency by saying that it had virtually expunged the free and simple marriage of the Romans under the later Republic and the Empire, and had substituted for it a system more closely resembling

that of the religious marriage with Hand power of early Rome. The ceremony had practically become a religious one, though till the Council of Trent a religious service was not absolutely essential to its validity. The relation had become indissoluble, except by the decree of the Pope, who in this, as in some other respects, practically filled the place of the old Roman Pontifex, though of course both *confarreatio* and the pontiff had been long forgotten<sup>1</sup>. It carried with it an absorption of the personality of the English wife into that of the husband, whereby all her property passed to him and she became subject to his authority and control. These conditions were the result partly of Teutonic custom, partly of the rudeness of life and manners; and such check as was imposed on them came from the traditions of the Roman law, and from the favour which the Canon law, much to its credit, showed to the wife. Of this favour some have found a trace in the phrase that occurs in the 'Form for the Solemnization of Matrimony' in the liturgy of the Church of England, where the bridegroom is required to say to the bride, 'with all my worldly goods I thee endow'; although, in point of fact, the law of England gives to the bride only a very limited (and now easily avoidable) right to one-third of the husband's real estate after his death<sup>2</sup>.

## XII. THE ENGLISH LAW OF MARRIAGE.

The influence of the Roman system was, of course, less in England than in countries where, as in France and Italy, the Roman law had maintained itself in force,

<sup>1</sup> The pontifices had a certain oversight over the sacred marriage by *confarreatio*, and their action was needed to effect a *diffarreatio*, when it was desired to extinguish the *manus* of the husband over a divorced wife.

<sup>2</sup> Others think that this expression, which would seem to refer not to real property but to chattels, is a relic of ancient Teutonic custom. As is observed by Messrs. Pollock and Maitland (*History of English Law*, vol. ii. p. 401), we must not assume that, from the days of savagery down to our own, all changes have been in favour of women. They had apparently more power over their own property in Anglo-Saxon times than in the thirteenth century.

either as written law or as the basis of customary law. But now that we come to consider the course which the English law of marriage has taken, let us note that this law has flowed in two distinct channels down till our own time. So much of it as pertained to the marriage relation itself, that is to say, to the capacity for contracting marriage (including prohibited degrees), to the mode of contracting it, and to its dissolution, complete or partial, belonged to the canon or ecclesiastical law and was administered in the spiritual courts. So much of it as affected the property rights of the two parties (and especially rights to land) belonged to the common law and was administered in the temporal courts. This division, to which there is nothing parallel in the classical Roman law, was of course due to the fact that mediaeval Christianity, regarding marriage as a sacrament, placed it under the control of the Church and her tribunals in those aspects which were deemed to affect the spiritual well-being of the parties to it. Nevertheless the line of demarcation between the two sides was not always, and indeed could hardly be, sharply or consistently drawn. The ecclesiastical courts had a certain jurisdiction as regards property. The civil courts were obliged, for the purposes of determining the right of a woman to dower and the rights of intestate succession, to decide whether or no a proper and valid marriage had been contracted. Their regular course apparently was to send the matter to the bishop's court, and act upon the judgement which it pronounced. But this was not always done. They often had to settle the question for themselves, applying, no doubt, as a rule the principles which the bishop's court would have followed, and (as has been explained by the latest and best of our English legal historians<sup>1</sup>) they often evaded the question of whether there had been a canonically valid marriage by finding that, as a matter of fact, the parties had been

<sup>1</sup> Messrs. Pollock and Maitland, in their admirable *History of English Law*, to which the reader curious in these matters may be referred.

generally taken to have been duly wedded, and by proceeding to give effect to this finding.

The ecclesiastical lawyers were not successful in their treatment of such questions as fell within their sphere. The effort to base legal rules on moral and religious principles leads naturally to casuistry, and away from that common-sense view of human transactions and recognition of practical convenience which ought to be the basis of law. They multiplied canonical disabilities arising whether from pre-contract, a matter to which they gave a far greater importance than had previously belonged to it, or from relationship, either of consanguinity or of affinity; and they indeed multiplied these impediments to such an extent as to make the capacity of any two parties to enter into matrimony matter of doubt and uncertainty, giving wide opportunities for chicanery, and an almost boundless scope for the interposition of the Roman Curia, whose sale of dispensations became a fertile and discreditable source of revenue. Their treatment of divorce will be presently examined. In their zeal to keep Christian people out of sin they recognized many clandestine unions as valid, though irregular, marriages, while at the same time applying strict rules of evidence which practically withdrew much of the liberty that had been granted by the lax theory of what constituted a marriage. These tangled subtleties regarding pre-contracts and prohibited degrees were at the time of the Reformation swept away by a statute of 1540 (32 Henry VIII, c. 38), which declared that all marriages should be lawful which were 'not prohibited by Goddis lawe,' and that 'no reservation or prohibition, Goddis lawe except, shall trouble or impeche any marriage without the Levitical degrees.'

Two principles, however, remained unaffected by the legislation of this period in England. The one was the indissolubility of marriage, a topic to which I shall presently return. The other was the freedom of entering into it, consent, and consent alone, being still all that

was necessary to make a marriage valid<sup>1</sup>. England, of course, did not recognize the decrees of Trent, so the old law continued in force after that Council, though motives like those which had guided the Council induced the ecclesiastical courts to lean strongly in favour of the almost universal practice of marrying before a clergyman, and to require in all other cases very strict evidence that a true consent, directed to the creation of lawful matrimony, had in fact been given. Moreover, where the marriage had been irregular, the spiritual courts might compel its celebration in the face of the Church. So things went on, with much uncertainty and some confusion between the act needed to constitute marriage and the evidence of that act, till the middle of the eighteenth century, when a statute was passed in A.D. 1753 (26 Geo. II, c. 33) which required all marriages to be celebrated by a clergyman and in a church (unless by dispensation from the Archbishop of Canterbury), and prescribed other formalities<sup>2</sup>. These provisions remained in force (except as to Jews and Quakers) until 1836, when a purely civil marriage before a Registrar was permitted as an alternative to the ecclesiastical ceremony<sup>3</sup>. During the Commonwealth marriages had been contracted before justices of the peace, but the Restoration legislation, while validating the marriages so formed, abolished the practice. The old law remained in Ireland, and that was how the question what kind of marriage ceremony was required by the common law came before the House of Lords in the famous case of *Reg. v. Millis*, which was an Irish appeal, and the decision

<sup>1</sup> The House of Lords was equally divided upon this point in the case of *Reg. v. Millis*, in 1843: but historical inquiry tends to confirm the view of Lord Stowell, that the presence of a clergyman was not essential (see *Dalrymple v. Dalrymple*, 2 Haggard, p. 54).

<sup>2</sup> The English Dissenters soon began to complain of this Act, as they were thenceforth (until 1836) obliged to be married in church. Charles James Fox used to denounce the Act as 'contrary to the Law of Nature.'

<sup>3</sup> A civil marriage is not, however, compulsory in England as it is in France and some other continental countries. In Scotland it has now become fashionable for Presbyterians to be wedded in church, but the Scottish law, as every one knows, does not prescribe either a clergyman or a registrar.

in which, declaring that by the common law the presence of a clergyman was required to make a marriage valid, seems to have been erroneous.

### XIII. PROPERTY RELATIONS OF THE CONSORTS UNDER ENGLISH LAW.

Now let us turn to the effect of marriage in the law of England upon the property and the personal rights of the wife.

That effect has generally been described as making the two consorts one person in the law. Such they certainly were for some purposes under the older Common Law of England. The husband has the sole management of all the property which the wife had when married, or which she subsequently received or earned by her exertions. In acquiring all her property he becomes also liable for the debts which she owed before marriage, but after marriage he has not to answer for any contract of hers, because her agreements do not bind him except for necessities. He is, moreover, liable for wrongs done by her. He cannot grant anything to her, or covenant with her; and if there was any contract between him and her before marriage, it disappears by her absorption into his personality. She can bring no action without joining him as plaintiff, nor can she be sued without joining him as defendant. She cannot give evidence for or against him (save where the offence is against herself); and if she commit a crime (other than treason or murder) along with him, she goes unpunished (though for crimes committed apart from him she may be prosecuted), on the hypothesis that she did it under his compulsion. So in a case, in the thirteenth century, where husband and wife had produced a forged charter, the husband was hanged and the wife went free, 'because she was under the rod of her husband' (*quia fuit sub virga viri sui*<sup>1</sup>).

<sup>1</sup> Pollock and Maitland, vol. ii. ch. vii. p. 404 (quoting Bracton, 429 b).

But this theory of unity is not so consistently maintained as was the similar theory of the Romans regarding the marriage with Hand power. For the wife's consent to legal acts may be effectively given where she has been separately examined by the Court to ascertain that her consent is free; and even the fact that she must be joined in legal proceedings taken by or against her shows that she has a personality of her own, whereas under the Roman *manus* she was wholly sunk in that of her husband. Thus it is better not to attempt to explain the wife's position as the result of any one principle, but rather to regard it as a compromise between the three notions of absorption, of a sort of guardianship, and of a kind of partnership of property in which the husband's voice normally prevails.

As respects her personal safety, she was better off than the Roman wife of early days, for the husband could punish the latter apparently even with death, after holding a domestic council, whereas the English husband could do no more than administer chastisement, and that only to a moderate extent. The marital right of chastisement seems to have been an incident to marriage in many rude societies. A traveller among the native tribes of Siberia relates that he found a leather whip usually hung to the head of the conjugal bed, almost as a sort of sacred symbol of matrimony; and he was told that the wife complained if her husband did not from time to time use the implement, regarding his neglect to do so as a sign of declining affection. And it would seem that this notion remains among the peasantry of European Russia to this day<sup>1</sup>.

Everybody has heard of the odd habit of selling a wife which still occasionally recurs among the humbler classes in England; and most people suppose that it descends from a time when the Teutonic husband could sell his consort, as a Roman one apparently could in the days of Hand power. There is, however, no trace

<sup>1</sup> Kovalevsky, *Modern Customs and Ancient Laws of Russia*, p. 44.

at all in our law of any such right<sup>1</sup>, though a case is reported to have arisen in A.D. 1302, when a husband granted his wife by deed to another man, with whom she thereafter lived in adultery<sup>2</sup>.

The compensation given to the English wife for the loss (or suspension during the marriage) of her control over her property is to be found in her right of Dower, that is, of taking on her husband's death one-third of such lands as he was seised of, not merely at his death, but at any time during the marriage, and which any issue of the marriage might have inherited. As this right interfered with the husband's power of freely disposing of his own land, the lawyers set about to find means of evading it, and found these partly in legal processes by which the wife, her consent being ascertained by the courts, parted with her right, partly by an ingenious device whereby lands could be conveyed to a husband without the right of dower attaching to them, partly by giving the wife a so-called jointure which barred her claim. The wife has also a right, which of course the husband can by will exclude, of succeeding in case of intestacy to one-third of his personal property, or, if he leave no issue, to one-half.

This state of things hardly justifies the sleek optimism of Blackstone, who closes his account of the wife's position by observing, 'even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of England.' The Romans, although they allowed to women a fuller independence, were more candid when they said: 'In many points of our law the condition of the female sex is worse than that of the male.'

<sup>1</sup> My friend Mr. F. W. Maitland, whose authority on these matters is unsurpassed, informs me that he knows of no such trace. The practice, however, seems to have been not uncommon. Several instances of the sale of a wife by auction, sometimes along with a child, are reported from Kent between 1811 and 1820.

<sup>2</sup> See Pollock and Maitland, vol. ii. p. 395.

#### XIV. GRADUAL AMENDMENT OF THE ENGLISH MATRIMONIAL LAW.

However, the Courts of Equity ultimately set themselves in England to improve the wife's condition. They recognized some contracts and grants between husband and wife. They allowed property to be given to trustees for the sole and separate use of a wife; and if it was given to her with an obvious intent that it should be for her exclusive benefit, they held the husband, in whom by operation of the general law it would vest, to be a trustee for the wife. When during marriage there came to a wife by will or descent any property of which the husband could obtain possession only by the help of a Court of Equity, they required him to settle a reasonable part of it upon the wife for her separate use. And in respect of her separate property, they furthermore permitted the wife to sue her husband, or to be sued by him. While these changes were in progress, there had grown up among the wealthier classes the habit of making settlements on marriage which secured to the wife, through the instrumentality of trustees, separate property for her sole use, and wherever a woman was a ward of Court, the Court insisted, in giving its consent to the marriage, that such a settlement should be made for her benefit.

By these steps a change had been effected in the legal position of women as regards property similar to, though far more gradual, and in its results falling far short of, the change made at Rome when the marriage without Hand power became general. But in England a recourse to the Courts has always been the luxury of the rich; and as the middle and poorer classes were not wont to go to the Courts, or to make settlements, it was only among the richer classes that the wife's separate estate can be said to have existed. At last, however, the gross injustice of allowing a selfish or wasteful husband to seize his wife's earnings and

neglect her was so far felt that several Acts were passed (the first in 1857), under which a woman deserted by her husband may obtain from a magistrate a judicial order, protecting from him any property she may acquire after desertion. By this time an agitation had begun to secure wider rights for married women. It had great difficulties to overcome in the conservative sentiment of lawyers, and of those who are led by lawyers, and more especially of members of the House of Lords.\* Not till 1870 did the British Parliament take the step which the Romans had taken long before the Christian era, and which many American States had taken in the first half of the nineteenth century. A statute of that year, amended and extended by others of 1874 and 1882, swept away the old rule which carried all the wife's property over to the husband by the mere fact of marriage; so that now whatever a woman possesses at her marriage, or receives after it, or earns for herself, remains her own as if she were unmarried, while of course the husband no longer becomes liable by marriage to her ante-nuptial debts. By these slow degrees has the English wife risen at last to the level of the Roman. The practice of making settlements on marriage still remains, especially where the wife's property is large, or where there is any reason to distrust the bridegroom; for though the interposition of trustees is no longer needed to keep the property from falling by operation of law into the husband's grasp, he may still press or persuade her to part with it, since she now enjoys full disposing power, and if she does part with it, she and the children may suffer. Thus custom sustains in England, and perhaps will long sustain, a system resembling that of the Roman *Dos*. Yet the number of persons possessing some property who marry without a settlement increases, as does the number of women whose strength of will and knowledge of business enables them to hold their own against marital coaxing or coercion.

It need hardly be said that the personal liberty of the wife was established long before her right to separate property. Says Blackstone (writing in 1763):—

‘The husband by the old law might give his wife moderate correction. For as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with his power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet*. But in the politer reign of Charles the Second this power of correction began to be doubted, and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the Courts of Law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour<sup>1</sup>.’

This touching attachment to their old common law still survives among ‘the lower rank of people’ in the form of wife beating. But among the politer classes the right to restrain a consort’s liberty (except under very special circumstances) may be deemed to have become exploded since the case of *Reg. v. Jackson* in 1891<sup>2</sup>. So that now the English wife, like the Roman, may quit her husband’s house when she pleases, and the suit for restitution of conjugal rights, whereby either could compel the other to live in the common household, is falling into disuse, if indeed it can still be described as in any sense effective since the Act, passed in 1884, which took away the remedy by attachment.

<sup>1</sup> Blackstone, *Commentaries*, vol. i. bk. i. chap. 15.

<sup>2</sup> 1 Q. B. p. 671 (in the Court of Appeal). The judgements are instructive. The Master of the Rolls goes so far as to doubt whether the husband ever had a legal power of correction, a curious instance of the way in which the sentiment of a later time sometimes tries to force upon the language of an older time a non-natural meaning, the new sentiment being one which the older time would have failed to understand. It would have been simpler to admit that what may well have been law in the seventeenth century is not to be taken to be law now, manners and ideas having so completely changed as to render the old rules obsolete.

The interest which belongs to these changes in the law, changes generally similar in their result in the English and in the Roman systems, though far more gradually made in the former than in the latter, is the interest of observing the methods whereby custom and legislation have sought to work out different possible theories of the marriage relation. There are usually said to be two theories, that of Mastery, and that of Equality. On the former the husband is lord of the wife's property as well as of her person. The law puts her at his mercy, trusting that affection, public opinion, and a regard for domestic comfort will restrain the exercise of his rights. On the other theory, each consort is a law to him- or herself, each can dispose of his or her property, time, and local presence without the assent of the other. The law allows this freedom in the hope that affection, respect, and the opinion of society will prevent its abuse. Yet these two theories, that with which both Rome and England began, that with which both Rome and England have ended, do not exhaust the possibilities of the relation. For there is a third theory which, more or less consciously felt to be present, has influenced both the one and the other, creating a sort of compromise between them. It is the theory of a partnership in social life and in property similar to the partnership which necessarily exists as regards the children of a marriage. This idea is expressed by the form which the Mastery theory took when it declared husband and wife to be 'one person in the law,' and in the Anglican marriage service where the wife's promise to obey<sup>1</sup> is met by the husband's declaration that he endows her with all his worldly goods. It also qualifies the theory of Equality and Independence by the practice of creating a settlement in England, and a *Dos* (and *Donatio propter nuptias*) at Rome, in which each of the married pair has an interest.

<sup>1</sup> This promise does not appear in the forms of marriage service commonly used by the unestablished churches of England, or most of them.

Any one can see that the Mastery theory, against which modern sentiment revolts, was more defensible in a time of violence, when protection for life and property had to be secured by physical force as well as by recourse to the law, than it is to-day. Any one can also see that there are even to-day households for which the Mastery theory may be well suited, as there also are, and always have been, even in days of rudeness and in Musulman countries, other households where the wife was, and rightly was, the real head of the family. Those moreover who, judging of other times by their own, think that the position of the wife and of women generally must have been, under the Mastery theory, an intolerable one, need to be reminded not only that the practical working of family life depends very largely on the respective characters of the persons within the family, and on the amount of affection they entertain for one another, but also that it is profoundly modified by the conception of their relations which rules the minds of these persons. Law, itself the product and the index of public opinion, moulds and solidifies that conception, and the wife of the old stern days of marital tyranny saw no indignity or hardship in that position of humble obedience which the independent spirit of our own time resents.

#### XV. DIVORCE UNDER THE CANON LAW.

There is one more point in which opposite theories of marriage have to be contrasted, and in which the contrast appears most strikingly. This is the point which touches the permanence of the relation.

We have already seen what were the provisions of the Roman law upon the subject of Divorce. Those provisions continued to prevail in Western Europe after the fall of the Empire, until, apparently in the eighth, ninth, and tenth centuries, new rules enforced by the Church superseded them in the regions where the im-

perial law had been observed. A similar change occurred later in other countries such as England and Germany, where the ancient customs of the barbarian tribes had allowed the husband, and apparently in some cases the wife also, to dissolve the marriage and depart. From the twelfth century onwards the ecclesiastical rules and courts had undoubted control of this branch of law all over Christian Europe. Now the Church held marriage to be a sacrament and to be indissoluble. Divorce, therefore, in the proper sense of the term, as a complete severance of a duly constituted matrimonial tie, was held by the Church inadmissible. This view was based on the teaching of our Lord as given in the Gospels<sup>1</sup>, and was enforced on every bridal pair in the liturgical form employed at marriage, as indeed it is in the English liturgy to-day. Nevertheless, the Church recognized two legal processes which were popularly, though incorrectly, called divorces.

One of these, called the divorce from the bond of marriage (*a vinculo matrimonii*), was in reality a declaration by ecclesiastical authority—that of the Pope, or a deputy acting under him—that the marriage had been null from the beginning on the ground of some canonical impediment, such as relationship or pre-contract. As already observed, the rules regarding impediments were so numerous and so intricate that it was easy, given a sufficient motive, whether political or pecuniary, to discover some ground for declaring almost any marriage invalid. The practice of granting divorces of this class, which was constantly made a means of obliging the great ones of the earth and augmenting papal revenues, may sometimes have been really useful for the purpose of dissolving the ill-assorted unions of those who could secure a decree from the ecclesiastical authorities. Technically, however, it was not a dissolution of marriage, but a declaration that no marriage had ever

<sup>1</sup> Messrs. Pollock and Maitland refer to the dooms of Aethelbert as showing the permissibility of divorce in early English law (*History of English Law*, vol. ii. p. 390).

existed, and therefore it rendered children born in the relation illegitimate<sup>1</sup>.

The other kind of divorce was that called 'from board and bed' (*a mensa et thoro*). It was a regular part of the jurisdiction of the Church Courts, and effected a legal separation of the two parties from their joint life in one household, while leaving them still man and wife, and therefore unable to marry any other person. The status of the children was of course not affected.

#### XVI. THE LATER LAW OF DIVORCE IN ENGLAND AND SCOTLAND.

This law prevailed over all Europe till the Reformation, and continued to prevail in all Roman Catholic countries till a very recent time. In some it still prevails, at least so far as Roman Catholics are concerned. But in most Protestant countries it received a fatal shock from the denial, in which all Protestants agreed, of the sacramental character of marriage, and from the revival, in some of such countries, of the view of marriage as a purely civil contract. Thus in Scotland the courts began, very soon after the Roman connexion had been repudiated, to grant divorces; and in A.D. 1573 a statute added desertion to adultery as a ground for divorce. In England, however, where the revulsion against the doctrines of mediæval Christianity was less pronounced, and where the Ecclesiastical Courts retained their jurisdiction in matrimonial causes, the old law went on unchanged, save that after the abolition of many of the canonical impediments, mentioned above, divorces *a vinculo*, declaring marriages to have been originally invalid, became far more rare. Nevertheless, attempts had been made by some of the more energetic English Reformers to assert the dissolubility of marriage. A draft ecclesiastical code (called the *Reformatio*

<sup>1</sup> But canonical ingenuity discovered methods by which in some cases the legitimacy of the children might be saved though the marriage was declared void.

*legum ecclesiasticarum*) was prepared, but never enacted; and Milton argued strongly on the same side in his well-known but little read book. About his time cases begin to occur in which marriages were dissolved by Acts of Parliament; a practice which became more frequent under the Whig régime of the early Hanoverian kings, and ultimately ripened into a regular procedure by which those who could afford the expense might secure divorces. The party seeking divorce was required to first obtain from the Ecclesiastical Court a divorce *a mensa et thoro*, which obtained, he introduced his private Bill for a complete divorce. It was heard by the House of Lords as a practically judicial matter, in which evidence was given, and counsel argued the case for and (if the other party resisted) against the divorce. It was usually by the husband that these divorce Bills were promoted, and indeed no wife so obtained a divorce till A.D. 1801<sup>1</sup>.

This characteristically English evasion of that principle of indissolubility for which such immense respect was professed lasted till 1857, long before which time the existence of a law which gave to the rich what it refused to the poor had become a scandal<sup>2</sup>. In that year an Act was passed, not without strenuous opposition from those who clung to the older ecclesiastical theory, which established a new Court for Divorce and Matrimonial causes, empowered to grant either a complete dissolution of marriage (divorce *a vinculo matrimonii*) or a 'judicial separation' (divorce *a mensa et thoro*). This statute adhered to the rule which the practice of the House of Lords had established, and under it a husband may

<sup>1</sup> There had also sprung up the practice of effecting private separations between a husband and a wife by means of a deed executed by each of them, and such a deed presently came to be recognized as a defence to a suit by either party for the restitution of conjugal rights.

<sup>2</sup> Probably the English Jews were permitted to exercise in the seventeenth and eighteenth centuries the right of divorce which their own law gave them. But in those days the Jews were so cut off from the general English society that the phenomenon passed almost unnoticed. They were a very small community, living practically under their personal law, as the Parsis do in Western India to-day.

obtain a divorce on proof of the wife's infidelity, whereas the wife can obtain it only by proving, in addition to the fact of infidelity on the husband's part, either that it was aggravated by bigamy or incest, or that it was accompanied by cruelty or by two years' desertion. To prevent collusion a public functionary called the Queen's Proctor is permitted to intervene where he sees grounds for doing so. Misconduct by the husband operates as a bar to his obtaining a divorce. Thus the law of England stands to-day. Attempts have been made to alter it on the basis of equality, so that whatever misconduct on the wife's part entitles a husband to divorce shall, if committed by the husband, entitle her likewise to have the marriage dissolved. But these attempts have not so far succeeded<sup>1</sup>.

The law of Scotland is more indulgent, and not only permits a wife to obtain divorce for a husband's infidelity alone, but also recognizes wilful desertion for four years as a ground for divorce. In other respects its provisions are generally similar to those of the English law. Ireland, however, remains under the old pre-Reformation system. There is no Divorce Court, and no marriage can be dissolved save by Act of Parliament. The bulk of the people are Roman Catholics, and among Protestants as well as Roman Catholics the level of public sentiment and of conjugal morality has apparently been higher than in England, nor have attempts been made, at any rate in recent years, to obtain the freedom which England and Scotland possess. The United Kingdom thus shows within its narrow limits the curious phenomenon of three dissimilar systems of law regulating a matter on which it is eminently desirable that the law should be uniform. England has a comparatively strict rule, and one which is unequal as between the two parties. Scotland is somewhat laxer,

<sup>1</sup> The Act of 1857 (amended in some points by subsequent statutes) contains provisions intended to prevent collusion between the parties, and empowers the Court to regulate the property rights of the divorced persons and the custody of the children (if any) of the marriage.

but treats both parties alike. Ireland has no divorce at all. So little do theoretical considerations prevail against the attachment of a nation to its own sentiments and usages.

I reserve comments on these systems till we have followed out the history of the English matrimonial law in the widest and most remarkable field of its development, the United States of America.

#### XVII. THE DIVORCE LAWS OF THE UNITED STATES.

When the thirteen Colonies proclaimed their separation from Great Britain in 1776, they started with the Common Law and all such statute law as had in fact been in force at the date of the separation. Accordingly they had no provision for dissolving marriages, nor any Ecclesiastical Courts to grant dissolutions, seeing that such tribunals had never existed in America, where there had been no bishops. Presently, however, they began to legislate on the subject, and the legislation which they, and the newer States added to the Union since 1789, have produced presents the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free, self-governing communities have ever tried. Both marriage and divorce belong, under the American Constitution, to the several States, Congress having no right to pass any laws upon the subject, except of course for the District of Columbia and the Territories. Thus every one of the (now) forty-five States has been free to deal with this incomparably difficult and delicate matter at its own sweet will, and the variety of provisions is endless. As it would require a great deal of space to present these in detail, I shall touch on only some salient points.

Originally, the few divorces that were granted were obtained, following the example of England, by means of Acts of the State legislature. The evils of this plan

were perceived, and now nearly all the States have by their Constitutions forbidden the legislature to pass such Acts, since Courts have been provided to which application may be made. These are usually either the ordinary inferior Courts of the State, or the Chancery Courts (where such survive). No State seems to have, like England, erected a special Court for the purpose. One State only, South Carolina, does not recognize divorce at all. In 1872, under the so-called 'carpet-bagger government,' set up after the War of Secession, a statute was passed in that State authorizing divorces for infidelity or desertion, but in 1878, when the native whites had regained control, this statute was repealed, so that now, if a divorce is obtained at all, it must be obtained from the legislature outside the regular law. South Carolina has the distinction of being to-day probably the only Protestant community in the world which continues to hold marriage indissoluble. No State has fewer Roman Catholic citizens; Presbyterians and Methodists are the strongest religious bodies.

The causes for which divorce may be granted range downwards from the strictness of such a conservative State as New York, where conjugal infidelity is the sole cause recognized for an absolute dissolution of the marriage, to the laxity of Washington, where the Court may grant divorce 'for any cause deemed by it sufficient, and when it shall be satisfied that the parties can no longer live together.' Desertion is in nearly all States recognized as a ground for dissolution. So is cruelty by either party, or the reasonable apprehension of it by either. So in many States the neglect of the husband to provide for the wife, habitual intemperance, indignities or insulting treatment, violent temper, and (in a smaller number) the persistent neglect of her domestic duties by the wife, grave misconduct before marriage unknown to the other party, insanity, an indictment for felony followed by flight, vagrancy, are, or have been, prescribed as among the sufficient grounds,

for divorce. In some States a sentence of imprisonment for life *ipso iure* annuls the marriage of the prisoner, permitting the other partner to remarry, and, in most, conviction for felony or infamous crime is a ground on which the Court may decree, and presumably will decree, the extinction of the marriage. Moreover, there are still a few States where over and above the judicial process open to a discontented consort, the State legislature continues to grant divorces by special statutes. Delaware is, or very recently was, such a State; and in the twenty years preceding 1887 it would seem that four-fifths of its divorces, not indeed very numerous (289 for twenty years), were so obtained. The laws of most States also provide for what the Americans call a 'limited divorce,' and the English a 'judicial separation,' equivalent to the old divorce *a mensa et thoro*. It leaves the marriage still valid, but relieves the parties from any obligation to live together; and in some States the Court in pronouncing a decree of divorce may change the name of the wife (in Texas and Arizona the name of either party), while in Vermont it may also change the names of the children who are minors.

Not less remarkable than the multiplication of grounds for divorce in the American States is the extreme laxity of procedure which has grown up. The Courts having jurisdiction are usually the Courts of the county, tribunals of no great weight, whose ill-paid judges are seldom men of professional eminence. The terms of residence within a State which are required before a petitioner can apply for a divorce are generally very short. The provisions for serving notice on the respondent or defendant to the divorce suit are loose and seem to be carelessly enforced. Some States allow service to be effected by publication in the newspapers, if the other party be not found within the State, and this of course often happens when the applicant has recently come to the State, most likely a distant one, from that in which he or she lived with the other consort. Fre-

quently he comes for the express purpose of getting his marriage dissolved. Although most States declare collusion or connivance by the other party to be a bar to the granting of a divorce, and some few States provide that a public official shall appear to defend in undefended petitions, the provisions made for detecting these devices are inadequate; and in not a few cases the proceedings do little more than set a judicial seal upon that voluntary dissolution by the agreement of the two consorts, which was so common at Rome. It is doubtless a point of difference between the Roman law and that of modern American States that in the former the parties could by their own will and act terminate the marriage: in the latter the Courts must be invoked to do so. But where the Courts out of good-nature or carelessness made a practice of complying with the application of one party, unresisted or feebly resisted by the other, this difference almost disappears. The facilities which some of the more lax States hold out to those who come to live in them for the requisite period, and who then procure from the complaisant Court a divorce without the knowledge of the other consort, constitute a grave blot on the administration of justice in the Union generally, for a marriage dissolved in one State (where jurisdiction over the parties has been duly created) is *prima facie* dissolved everywhere<sup>1</sup>; and although the decree might conceivably be reversed if evidence could be given that it had been improperly obtained, it is usually so difficult to obtain that evidence that the injured party, especially an injured wife, must perforce submit.

<sup>1</sup> In two or three States the law provides that when an inhabitant goes into some other State for the purpose of getting a divorce for a cause arising within the State, or for a cause which the law of the State would not authorize, a divorce granted to him shall have no effect within the State.

## XVIII. STATISTICS OF DIVORCE IN AMERICA.

Under these lax laws, and the not less lax administration of them, the number of divorces has in the United States risen with formidable rapidity. In 1867 there were 9,937 granted, in 1886, 25,535, an increase of nearly 157 per cent. in twenty years. The total number recorded to have been granted in those twenty years (and the record is probably not quite complete) is 328,716, a ghastly total, exceeding all the divorces granted in the same years in all other Christian countries<sup>1</sup>. The population of the Republic increased about 60 per cent. within the same twenty years. Taking the two census years 1870 and 1880, the percentage of increase was, for the population, 30.1, for divorce, 79.4, or more than twice as great; and while in many States the percentage of divorce increase is far larger than 79.4, there are only five in which divorce has not grown faster than population.

The increase is most rapid in the south-western States, in several New England States, and especially in the States of the far West, less marked in the north Atlantic States generally, and in those between the Atlantic and the Mississippi. It is greater in cities than in rural districts<sup>2</sup>.

It is, in the South, apparently somewhat greater among the coloured people than among the whites<sup>3</sup>. It is greater among native-born Americans than among immigrants from Europe. And it need hardly be said

<sup>1</sup> In Canada during the same twenty years only 135 divorces were granted in a population which was, in 1881, 4,324,000. In some provinces of the Dominion divorces could be obtained only by private Act of Parliament.

<sup>2</sup> In an interesting article in the *Political Science Quarterly* for March, 1893, Mr W. F. Willcox (now (1900) of the U. S. Census Office) argues that the divorce rate is influenced by depression of trade, declining when the lower middle and working class, among whom it is frequent, are less able to afford it.

Mr. Willcox quotes some remarkable figures from Japan showing an extremely high divorce rate there. In 1886 there were in Japan 315,311 marriages and 117,964 divorces. This is four and a-half times the rate in the U. S. of America, which comes next.

<sup>3</sup> The conditions prevailing among a coloured population which had, under slavery, no legal marriage, go far to explain this phenomenon.

that it is far larger among Protestants than among Roman Catholics. These points deserve to be remembered, because they throw some light on the causes which have produced the increase.

Some other facts to be noted before we pass on to consider those causes are the following.

The grounds on which divorces have been granted are often trivial, even frivolous. I select a few from a long list given in the American Official Report dealing with the subject <sup>1</sup>.

A wife alleges that her husband has accused her sister of stealing, thereby sorely wounding her feelings.

Another says, 'During our whole married life my husband has never offered to take me out riding (= driving). This has been a source of great mental suffering and injury.'

Another complains that her husband does not wash himself, 'thereby inflicting on plaintiff great mental anguish.'

Another says that her husband 'quotes verses from the New Testament about wives obeying their husbands. He has even threatened to mash the plaintiff, and has drawn back his hand to do it.' The decree which awarded a divorce to this wife contains the following: 'I find that when plaintiff was sick and unable to work defendant told her the Lord commanded her to work, and that he was in the habit of frequently quoting Scriptural passages in order to show her she was to be obedient to her husband.'

A wife alleges that her husband does not come home till ten o'clock at night, and when he does return he keeps plaintiff awake talking. He also keeps a saloon, which sorely grieves mind of plaintiff. He replies, say-

<sup>1</sup> This Report, published in 1889 by the United States Labour Bureau at Washington, contains many instructive data. The Annual Reports of the voluntary Association, called the League for the Protection of the Family, also deserve to be consulted. Its corresponding secretary is the Rev. Dr. S. W. Dike of Auburndale, Mass., who has written a number of thoughtful articles upon the subject, and to whom I am much indebted for documents supplied to me and for the expression of his own views.

ing, 'Plaintiff should not be ashamed of him because temporarily in the liquor business: that he may do better some day: his father was a high State Officer in Germany.' This wife gets a divorce on the ground of 'mental cruelty.'

In all these cases, and in many others enumerated in the Report where the grounds are equally slight, the divorce is granted. And similar cases are given in which the husband obtains divorce on the ground of the wife's cruelty.

'Mental cruelty' is of course a term hard to define, as may be seen by examining the views that have been expressed by English judges on cruelty, and it is not wonderful that the easy-going courts of most American States should give a wide extension to such an elastic conception.

Of the causes recorded as those for which marriages are dissolved, the most frequent are Desertion, which represents 38.5 of the whole number of divorces; then Infidelity; then Cruelty; then Intoxication. Of the total number of divorces granted during the twenty years 1867-1886, 65.8 per cent., very nearly two-thirds, were granted to wives and 34.2 per cent. to husbands. Of the total number granted for infidelity 56.4 per cent. were granted to husbands and 43.6 to wives. But in the other chief causes wives are more frequently the successful applicants. In cruelty they obtain seven times as many decrees; in desertion one and a-half times as many; in intoxication eight times as many. The Report, however, shows that intemperance is either directly or indirectly responsible for a larger proportion of the total cases than its place in the table represents.

I take from a valuable paper by an Ohio lawyer (Mr. Newton D. Baker)<sup>1</sup> some facts which illustrate the state of things in one of the so-called 'Western Reserve' counties in that great State. In Cuyahoga county the total yearly number of marriages is about 3,400, and the

<sup>1</sup> *Western Reserve Law Journal* for October, 1899.

number of divorce suits annually brought is about 500. In the year 1898-1899, the whole number of divorce suits brought in the Court of Common Pleas was 562 out of a total number of 3,848 suits for all causes, *i.e.* about 12 per cent. In the State of Ohio the annual number of marriages is from 33,000 to 40,000; the total number of divorce suits brought from 3,700 to 4,200; and the total number of divorces granted annually about 3,000 in a population of about 4,000,000. Mr. Baker observes that 'five of the causes on which the law allows divorce, *viz.* wilful absence of either party from the other for three years, extreme cruelty, fraudulent contract, any gross neglect of duty, and habitual drunkenness for three years, are all so vague and elastic as to amount to unrestricted license in the matter of divorce.' Out of 366 divorces granted in the year 1898-1899, wilful absence and gross neglect of duty accounted for 150, extreme cruelty for 109, habitual drunkenness for 88, and infidelity for 14 only (five being unaccounted for). He adds, 'The personal temper and disposition of individual judges (there are more than eighty in the State entrusted with power to dissolve marriages) have come to be so well recognized as the limits of the jurisdiction of the Common Pleas Court in granting divorces, that now it is the practice of many lawyers to continue and delay the hearing of divorce causes until some judge, known to be lenient in this matter, rotates to the bench of the Court in which such cases are set for hearing. . . . Many of the judges appear to be oblivious to the fact that one of the most important interests of society is at stake in every divorce proceeding, and either out of unscientific ideas upon the subject, or out of mere complaisancy towards attorneys and litigants, they have lent themselves to a looseness of practice which is in some degree responsible for the deplorable results.'

In the United States applications for divorce are mostly made after a marriage of short duration. In

one-half of the cases divorce was granted within six years from the date of marriage. Oddly enough, the average duration of a marriage terminated by divorce varies much between State and State. It is shortest in the southern States, falling to 6.48 years in Arkansas, and 6.91 in Tennessee, highest in the north-east, rising to 11.69 in New Jersey, and 12.12 in Massachusetts. This may be partly due to the fact that the more conservative States require a longer period of desertion to be proved. The duration of marriage is somewhat longer in cases where the wife applies, which may indicate either that she is more patient under her lot than the husband, or that her comparative ignorance of the world makes her less able to resort to the Courts. The fact that desertion is the cause most frequently assigned by wives may also have its effect.

It would be important to know what proportion the desire to marry some one else bears to the other causes which induce persons to seek to escape from their existing wedlock. Unfortunately American statistics of marriage, which are in many States loosely kept, do not enable us to answer this question<sup>1</sup>. Practising lawyers say that nothing is commoner. It would appear, however, from some European<sup>2</sup> figures that there is in reality no greater tendency for divorced men, and scarcely any greater tendency for divorced women, to remarry within a few years of the dissolution of their marriage than there is for widowers and widows to do so after the death of a consort; and it has often been

<sup>1</sup> The Report for 1891 of the League for the Protection of the Family says: 'Connecticut for two years reports the number of divorced persons married each year. In 1889 there were 286 such—135 men and 151 women, which is a little above one-third the number divorced in the year. In 1890 there were 477 divorces granted, or 954 individuals divorced; and there were 350 divorced persons—this year 207 women and 143 men—who married again during the year. An extended induction along this line should be possible. Guesses based on mere observation are untrustworthy guides in legislation or social reform.'

<sup>2</sup> This point has been worked out by M Bertilloo, a well-known French statistician. I owe my knowledge of it to an acute and suggestive paper (some of whose conclusions however seem to me questionable) by Mr. W. F. Willcox, of Cornell University, New York. 'The Divorce Problem': New York, 1891.

observed that persons who have been most happily married are among those most likely to marry again.

The rapid growth of divorce under the hasty legislation which marked the first half of the present century began about thirty years ago to create some alarm in the United States. The subject was much discussed, an association was formed to grapple with the evil, and in several States laws were passed restricting a little the causes entitling persons to be divorced<sup>1</sup>. In those States there has accordingly been some slight diminution in the number of divorces granted, but elsewhere the rate has gone on increasing, though apparently (for there are no very recent statistics) a little more slowly than it was doing down to 1886. In some States it seems, after increasing, to have now reached a stable average to the population. This would appear to be the case in Switzerland also.

#### XIX. DIVORCE IN MODERN EUROPEAN COUNTRIES.

It is not only in America that the evil grows. In all modern countries where divorce is permitted, that is to say in all Protestant and some Roman Catholic States, the same tendency is perceptible. Among the Protestant nations the impulse of the Reformation caused sooner or later a rejection of the old canonical doctrine of indissolubility; so we may say, speaking broadly, that in Germany, Switzerland, Holland, Denmark, Sweden and Norway, a marriage may be dissolved not only for the infidelity of either party (since in all these countries husband and wife are treated alike), but also for desertion and imprisonment for crime. Some laws go even further, allowing mutual consent to be a cause. Among Roman Catholic countries, France retained the canonical rule till the Revolution. The legislation of 1792

<sup>1</sup> Efforts have recently been made to induce States to adopt identical legislation on this among other topics and there seems to be a prospect that a certain number will do so.

granted extreme freedom, which was so largely used that we are told that in 1797 there were more divorces than marriages. In 1816 the principles of Catholicism regained control, and held it till 1884, when a law was passed permitting marriages to be dissolved for the infidelity of either party, or for the condemnation of either to an infamous punishment, and authorizing the transmutation into an absolute divorce of a judicial separation which has lasted for three years. The law of Belgium is similar, but goes a little further in allowing mutual consent to be a ground, though one surrounded by many restrictions. Austria and Hungary allow divorce (under rules similar to those of Protestant countries, *i.e.* on the grounds of infidelity, grave crime, desertion, cruelty, &c.) to non-Catholic citizens, while Italy, Portugal, and Spain adhere to the Tridentine system which recognizes only a judicial separation (*a mensa et thoro*) and not a dissolution of the tie. Russia still leaves matrimonial causes to the ecclesiastical courts, but allows them to dissolve marriages on the ground of infidelity, a heavy criminal sentence, or disappearance of one consort for five years<sup>1</sup>.

In nearly all these countries such statistics as are available show an increase in the number of divorces during recent years. For instance in Belgium, a predominantly Roman Catholic country, divorces rose between 1884 and 1893 from 221 to 497. In France the suits for divorce rose from 1773 in 1884 to 7445 in 1891. The number of divorces compared with the number of marriages almost doubled in those seven years. In the German Empire there were 5342 divorces granted in 1882 and 6178 in 1891. In Holland they were, in 1883, 189, in 1892, 354. A like period saw them rise in Sweden from 218 to 316, in Norway from 7 to 82 (!), in Greece from 251 to 788. The rise is slighter in Austria. Switzerland alone, though its law is comparatively lax, shows

<sup>1</sup> According to a high Russian authority, divorce was freely practised by the Russian peasantry under their ancient customs.

no increase<sup>1</sup>. In England divorces rose from 127 in 1860 to 390 in 1887, an increase much more rapid than that of population or of marriages<sup>2</sup>. Judicial separations rose between the same years from 11 to 50. In Scotland divorces which in 1867 numbered 32 had, in 1886, grown to 96, a still more rapid rise, as it covers only twenty instead of twenty-seven years. It is worth noting that in England it is usually the husband who petitions for a divorce, and almost always the wife who seeks a judicial separation.

The growth in so many otherwise dissimilar countries of this disposition to shake off the marriage tie is a remarkable phenomenon, which deserves more attention than it seems to have yet received in England. Though strongest in Protestant countries, it is not confined to them, as appears from the instances of Belgium, Bavaria and Greece. Though there is no divorce *a vinculo* in Italy or Spain, the same causes which make it frequent elsewhere may be at work, though less conspicuously, in countries where the State aids the Church in checking their outward manifestation. Divorce is an obtrusive symptom of the disease, not the disease itself.

What is the disease? or, lest we should seem to pre-judge the merits of the matter, what is the source of this disposition to look upon the marriage tie with eyes different from those of a century ago, and to yield more easily to the temptation to dissolve it? The cause, whatever it is, must lie deep, for it manifests itself under many different conditions; and it may possibly be not any single cause, but a combination of several concurrent social or moral changes, independent springs whose confluence swells the stream of tendency.

A similar phenomenon happened once before in history. At Rome also, as we have already seen, a very strict theory of marriage and a corresponding strictness

<sup>1</sup> I take the above figures from *Parliamentary Paper* [C-7639] of 1895. No figures are given for Russia or Denmark.

<sup>2</sup> *Parliamentary Return* of March 9, 1889.

in practice gave way to great laxity of the law and, after a short interval, to unbounded licence in practice. Let us see whether we can, by examining the phenomena which brought about this change in the greatest of ancient States, hit upon any clue that may serve to explain the facts of our own time.

## XX. COMPARISON OF THE PROCESS OF CHANGE AT ROME AND IN THE MODERN WORLD.

The Romans began with a doctrine of marriage which had four salient characteristics<sup>1</sup>:

A formal legal act almost invariably accompanying marriage.

A religious element in the oldest form of this act.

A subjection of the wife to the husband's power.

A complete absorption of the wife's property rights into the legal personality of the husband.

These characteristics all vanished; and under the newer law and custom of the city, and ultimately of the Empire—

The act of marriage required no formalities, and was entirely a private affair.

It was also a purely civil, not a religious, affair.

The wife became absolutely independent of her husband, remaining (unless she had been emancipated) in the legal family of her father.

The wife's property remained her own, though it was usual for the consorts to have some joint property.

Concurrently with and following on these changes there had come about in Rome a general decline of faith in the old deities, a faith partially, but not beneficially, replaced by Oriental superstitions. There had also come habits of luxury, a thirst for material enjoy-

<sup>1</sup> See above, p. 788 sqq. Although no formal legal act and no religious rites were absolutely required for marriage at the time when we first discover the Roman Law as a working system, the practice of using either such an act or such rites was all but universal.

ment, a passion for amusements, a general relaxation of the moral restraints which public opinion had formerly imposed. Marriage had begun to be regarded mainly from the point of view of pecuniary interest or social advancement. There was comparatively little sentiment attaching to it, and not much sense of duty. Men grew less and less willing to marry; women as well as men less and less faithful. Fewer children were born. As neither religious nor moral associations sanctified the relation, and as it could be terminated at pleasure, it was lightly entered on, and this very heedlessness, making it frequently a failure, caused it to be no less lightly dissolved. Thus social habits and a standard of opinion were formed, against which the reforming efforts of Augustus and his successors could do little, and which resisted even the far more powerful efforts of Christianity, until Roman society itself went to pieces in the West, and passed into new forms in the East.

This decadence of the matrimonial relation was doubtless facilitated by three peculiarities of the law, viz. the absence of all prescribed forms for marriage and divorce, which set caprice free from legal restraints or delays, the extinction of any necessary connexion as regards property between the two spouses<sup>1</sup>, and the fact that the legal family did not coincide with the natural family, for legally the wife remained in her father's family and did not enter her husband's. Nevertheless the underlying causes of that decadence were social and moral rather than legal causes.

In the modern world the change from the old state of things to the new has been slower and less complete. Still it offers a kind of parallel to the phenomena we have been considering.

Before the Reformation what were the features of the marriage relation in Europe?

It had a strongly religious character. Its formation

<sup>1</sup> The *Dos* supplied a connexion, but the wife's right to claim it at the end of the marriage was not greatly affected by her conduct (see pp. 795 and 803 *supra*).

was blessed by the Church. It was deemed a Sacrament. It was treated, for doctrinal reasons, as indissoluble. There were, to be sure, plenty of marriages essentially unhallowed, plenty of marriages contracted for the most sordid reasons, plenty of marriages with little affection; and there were also marriages tainted by sin. The standard of conjugal fidelity was in the fifteenth century a low one. Nevertheless the tie was deemed to be one which religion sanctified, and religious sentiment must have had a restraining effect upon tender consciences, and particularly upon the wife, women being usually more susceptible to religious emotion than men are.

It gave the husband, in most countries, and notably in England, an almost complete control over the property rights of the two spouses, and in this way held them together.

It gave the husband, and notably in England, almost complete control over the person and conduct of the wife, impressing upon her mind her dependence on him, and her duty to obey him. No doubt where the wife's intellect or will was the stronger of the two her intellect guided or her will prevailed. Nevertheless her normal attitude was that of a submissive identification of her wishes and interests with his.

Whether these things made for affection, and for happiness, the outcome of affection, is another question. What we have to remark is that at any rate they drew the bond very tight, and formed a solid basis for family life. Bride and bridegroom took one another for richer for poorer, for better for worse, in sickness and in health, till death should them part.

What has been the course of things since the Reformation?

In Protestant countries the religious character of marriage has been sensibly weakened. Although the ceremony, in most of such countries, and notably in England, still usually receives ecclesiastical benediction, the

tie is not to men's or even to women's minds primarily a religious tie. To most Protestants, the wedding service in church, or before a minister of religion, is rather an ornamental ceremony than essentially a sacred vow. The duties of the spouses are conceived of by them in a more or less worthy way, according to their respective religious and moral standards, but not generally, or at least seldom vividly, as a part of their duties towards God.

This is perhaps part of that general decline in the intensity of the feeling of sin which marks the Protestantism of our own time as compared with that of earlier centuries. I do not mean that people are any more sinful than they were—probably they are not. They were sinful enough in the seventeenth century. But wrong-doing presents itself more frequently to all but the most pious minds rather as something unworthy, something below their standard of honour, something disapproved by public opinion, than as something which deserves the wrath of God, and affects their true relation to Him as their Father. Thus the element of sin in any breach, be it slight or be it grave, of conjugal duty, would seem to be less present to the conscience of the average husband or wife now than it was formerly, at least if we are to take the literature (including the theological literature) of former times, when set beside that of our own, to be any guide.

The inquiry how far any similar change has passed upon sentiment in Roman Catholic peoples would lead us far, nor am I competent to pursue it. The conception of sin itself is not quite the same thing to pious Catholics as it is, or was, to pious Protestants. But, broadly speaking, marriage doubtless retains to Roman Catholics, and to the Orthodox church of the East, more of a sacred character than it does to Protestants, and the change in this respect from the sixteenth to the nineteenth century is doubtless greater among Protestants.

## XXI. TENDENCIES AFFECTING THE PERMANENCE OF THE MARRIAGE TIE.

In most countries, and notably in England and the United States, married women have obtained power over their own property, including their earnings, and are now less dependent upon their husbands for support than they were formerly.

In most countries married women have far greater personal independence than in earlier days. They can dispose of their lives as they please, and are permitted both by law and by usage an always increasing freedom of going where and doing what they will. For social purposes, they are in England (at least those who belong to the upper and middle classes are), and still more in the United States, though somewhat less in such countries as Germany and Sweden, entirely the equals of men, so that the retention of the promise to obey in the marriage service of the English Church excites amusement by its discrepancy from the facts.

Over and above these changes directly affecting the matrimonial relation, there are other changes which have modified life and thought. The old deference to custom and tradition, and therewith the stability of the social structure as a whole, have been weakened. Men move much more from place to place, so their minds have grown less settled. The habit of reading, and in particular the excessive reading of newspapers, may have produced a quickness of apprehension, but it has been accompanied by a measure of volatility and inconstancy in opinion. These in their turn have bred a liking for novelty and excitement, and have confirmed the disposition to question old-established doctrines. There is an increase, especially among women, of the things called 'self-consciousness' and 'nervous tension.' Both men and women are more excitable, and women in particular are more fastidious. Pleasures other than material are probably more appreciated, but the desire for

pleasure, and the belief that every one has a right to it, seem to be stronger and more widely diffused than ever before. Some will perhaps add that, in an age when the belief in a future state of rewards and punishments is less deep and less general than it once was, the desire to have out of this life all the pleasure it can be made to yield is naturally stronger; yet I doubt whether beliefs regarding a future life have ever influenced men's conduct so much as the whilom universality of those beliefs might lead us to assume.

All these tendencies are partly due to, and are certainly much increased by, that aggregation of population into great cities which makes one of the most striking contrasts between our time and the ages which formed English and American character. It is in industrial and progressive communities, such as those of Germany, Belgium, France, and England, that these tendencies are most pervasive and effective. They are even more pervasive and multiform in the United States than in Europe. It would be strange indeed if they did not affect the theory and the practice of domestic relations and the conception of the family. And their influence will evidently be greatest in the country where the ideas of democratic equality, and the notion that every human being may claim certain indefeasible 'human rights,' have struck deepest root.

The idea that men and women are entitled to happiness, and therefore to have barriers to their happiness removed, is strong in the United States, and has gone far to prompt both the indulgence of the laws and the over-indulgence shown in administering them. This idea has its good side. The fuller recognition of the right of women to develop their individuality and be more than mere appendages to men is one of the conspicuous gains which the last two or three generations have brought. It has helped to raise the conception of what marriage should be, so we must expect to find that it has made women less tolerant of an unsym-

pathetic or unworthy partner than they were in the eighteenth century.

It would not therefore be wonderful if, even apart from such facilities as legislation has allowed, and assuming that there was one and the same divorce law over all civilized countries, the United States should show, as Switzerland shows in Europe, an exceptionally high percentage of divorces to marriages. Newspapers are more read there than in any other country; and newspapers contain a great deal about matrimonial troubles which would be better left unpublished. The life of the middle class is more full of stir and change and excitement than it is in Europe. Both the process described as the emancipation of women, and the admission of women to various professions and employments formerly confined to men, have gone further there than in Europe. So has the carrying on of industries in factories instead of at home. So has the habit of living in hotels or boarding-houses.

All these conditions are less favourable than were the conditions of a century ago to the maintenance of domestic life on the old lines. And over and above these, there has come that extreme laxity of the law and of judicial procedure which has been already described. Thus we can easily account for the comparative frequency of divorce in the United States, while yet noting, for this is the point of real importance, that the phenomena of the United States are not isolated, but merely the most conspicuous instance of a tendency which is at work everywhere, and which springs from some widely diffused features of modern life.

The points of similarity between the history of divorce at Rome and its history in recent times need not be further insisted on. There is, however, one to which I have not yet adverted. At Rome the increase of conjugal infidelity and that of divorce would seem, from such data as law and literature give us, to have gone on

together, each fostering the other. Is there any like connexion discoverable now?

This is a question which it appears impossible to answer either generally or for any particular country. There are no statistics available, except for matrimonial causes coming into the Courts, and we can never tell what proportion the offences that are disclosed bear to those which remain hidden. There have been countries where the level of sexual morality was extremely low, at least among the wealthier classes, though no divorce was permitted. There may be countries where the very fact that the level is low keeps down the number of applications to the Court, because the injured party acquiesces and takes his or her revenge in like offences. Common talk, and literature which as regards the past may sometimes represent nothing more than common talk<sup>1</sup>, are unsafe guides, as any one will see who asks himself how much he knows about the moral state of his own country in his own time. He can form some sort of guess about the character of the 'social set' he moves in, but how little after all does he know about the classes above or below his own! Thus there can be very few persons in England whose means of information entitle them to say that the undoubted increase of divorce cases in our Courts since 1860 represents any decline in the average conjugal morality of the people. As regards the United States, I have heard the most opposite views expressed with equal confidence by persons who ought to have been equally well-informed. Judicial statistics do not prove that infidelity has become more common there, for the largest proportion of divorces granted is for desertion, 38.5 per cent. of the whole, those for infidelity being little more than half of that percentage, or about one-fifth of the whole.

<sup>1</sup> Sometimes not even that. A few years ago, in the United States Senate, some one quoted, in order to prove the corruption of public life in England, a play represented there, in which a Secretary of State or his wife was involved in a disgraceful job connected with an Indian railway. Nobody in England had taken such a thing seriously enough to comment on the absurdity of it.

At the same time the smallness of this percentage may count for less than might appear, for it is probable that in States where divorce can be obtained for other grounds, less serious and easier to prove than infidelity is, petitioners will, where they have a choice of several charges to make, put forward a less grave charge provided it is sufficient to secure their object. So far as my own information goes, the practical level of sexual morality is at least as high in the United States as in any part of northern or western Europe (except possibly among the Roman Catholic peasantry of Ireland), and experienced judges in America have told me that, odious as they find the divorce work of their courts, the thing which strikes them in the cases they deal with is more frequently the caprice and fickleness, the irritability and querulous discontent of couples who have married on some passing fancy, than a proclivity to breaches of wedded troth.

Indeed, so far from holding that marriages are more frequently unhappy in the United States than in western Europe, most persons who know both countries hold the opposite to be the case. On the whole, therefore, there seems no ground for concluding that the increase of divorce in America necessarily points to a decline in the standard of domestic morality, except perhaps in a small section of the wealthy class, though it must be admitted that if this increase should continue, it may tend to induce such a decline.

The same conclusion may well be true regarding the greater frequency of divorce all over the world. There is no reason to think that sexual passion leading to conjugal infidelity is any commoner than formerly among mankind. More probably passion is tending to grow rather weaker than it was formerly. But that which we call Individualism, viz. the desire of each person to do what he or she pleases, to gratify his or her tastes, likings, caprices, to lead a life which shall be uncontrolled by another's will—this grows stronger. So, too, what-

ever stimulates the susceptibility and sensitiveness of the nervous system tends to make tempers more irritable, and to produce causes of friction between those who are in constant contact. Here is a source of trouble that is likely to grow with the growing strain of life, and with the larger proportion which other interests bear in modern life to those home interests which formerly absorbed nearly the whole of a woman's thoughts. It is temper rather than unlawful passion that may prove in future the most dangerous enemy to the stability of the marriage relation.

## XXII. INFLUENCE OF THE CHURCH AND THE LAW.

The view of marriage as a tie which the parties intend to enter into for their lives, and which the law holds indissoluble, has hitherto rested not so much on any abstract theory or sentiment which men and women have entertained regarding it as upon the three authorities which have formed both sentiment and opinion. These three are the Church, the State, and Tradition, that is to say the beliefs which people adopt because they have come down from the past. The attitude of the Church has in Protestant nations sensibly altered. In some countries it altered in the sixteenth century. It has everywhere altered in the nineteenth. So, too, the support given to the old view by the State has in like manner become in those same countries much weaker, and in some countries, as for example in Switzerland and many American States, has almost disappeared. Public opinion has itself been largely formed by the Church and the Law, and may, when they have ceased to form it, be no longer an effective guardian of the permanence and dignity of marriage. In such democracies as those of the United States, the wish of an active minority to procure changes in the law easily prevails, because no one cares to resist, and because abstract principles suggest that the more everybody is

permitted to do as he pleases, the happier everybody will be. When the law has been changed, public opinion, that is to say the opinion of the majority who do not think seriously about the matter, soon adjusts itself to the new law, and little social blame attaches to those who use the licence which the law has granted. Seeing then how largely the law, whether of the Church or of the State, moulds the sentiment of the people on such a subject as this, and seeing that the Church no longer makes or administers law in Protestant countries, one may say that the civil law is practically left to keep their conscience. This tendency of the Church to abnegate its old functions makes the question of the way in which the Law should deal with divorce a question of critical importance<sup>1</sup>.

As regards America, the opinion of the wisest and best informed people, though far from unanimous in points of detail, agrees in thinking that many States have gone too far in the way of laxity.

### XXIII. DOES THE ENGLISH LAW OF DIVORCE NEED AMENDMENT ?

In England the topic has been less discussed; yet there are some who hold that women ought to be placed on the same footing as men, and allowed to obtain a divorce from an unfaithful husband, even if he has not been guilty of cruelty. Others would go even further and admit other grounds as entitling either party to a dissolution of the marriage. The late Lord Hannen, whose opinion was entitled to exceptional weight, for he had presided over the English Divorce Court for many years with singular ability and fairness, told me that he thought the English law might with advantage be somewhat relaxed, so numerous were the cases in

<sup>1</sup> Some of the Churches in the United States have however tried to deal with the matter. The Protestant Episcopal Church is at this moment (1902) considering a draft canon.

which it was obviously best that a miserable marriage should be extinguished altogether. Yet the example of the United States (not to speak of Rome) suggests the danger of any but a very slow and cautious advance in that direction. Great as is the hardship of chaining an innocent to a vicious or drunken or brutal consort, the evil of permitting people to get rid of one another merely because they are tired of one another is no less evident. When the question is asked, 'What is the best divorce law?' the only answer can be, 'There is no good divorce law.' There are some faults in human nature which always have existed and apparently always will exist; and there is no satisfactory method of dealing with them. All that can be done is to choose between different evils.

Upon the whole, after weighing the considerations on both sides, the balance seems to incline to a change in the law which should not only equalize the position of the wife and the husband, by giving the former the same right to dissolution as the latter, but should also allow dissolution in cases of hopeless lunacy and of long-continued desertion.

Throughout this discussion it has been assumed that marriages ought to be permanent, and that obstacles should be thrown in the way of those who seek to dissolve them. It may be asked whether this assumption is justified. There is a school of thought, small perhaps, but of long standing and supported by a few eminent names, which insists that marriage should last no longer than love does; and therefore that the pair should, as in Rome, be permitted to separate with freedom of re-marriage, whenever they are no longer held together by inclination. There is also a larger school, which feels so keenly the misery caused by ill-assorted unions as to think that the parties should be allowed to dissolve them, when certain terms for reflection and repentance prescribed by law have been completed.

I do not propose to argue afresh this question, for

it has been often and copiously argued. Yet it is not a question to be dismissed without argument, for in our day no moral or religious dogma, however long established or widely held, is permitted to rest upon authority alone. But to argue it fully would draw us far from the historical inquiry we have been engaged on. It is enough to indicate in a word or two the main grounds which have in fact led the vast majority of thoughtful men to the assumption aforesaid. The first of these is the interest of children. Few things can be more harmful to the moral well-being of the offspring of a marriage than the divorce of their parents, which destroys one or other of the two best influences that work on childhood and may poison even the influence that is left. The next is the fact that, though it is professedly in the interest of suffering wives that facility of divorce is usually advocated, such facility tends to the injury of wives even more than of husbands, because men are, it would seem, more fickle and more prone to seek the dissolution of marriage when they are tired of their partner, or have formed some illicit connexion, or seek to marry some other woman. The third is that whatever weakens the conception of the marriage tie as a permanent one strikes at the whole character and essence of the marriage relation. It is often said that when people know they have got to live together, they are forced to exercise the self-control necessary to enable them to live together. But the moral effect of the sense of permanence in wedded union goes deeper than this. It is in the complete identification of the two beings and the two lives that the true happiness of a happy marriage lies. The sense that each has absolutely committed himself or herself to the other—each taking charge of the joys and sorrows and hopes of the other, each trusting to the other his or her joys and sorrows and hopes—gives to the relation an incomparable sanctity, and makes the strongest possible appeal to the best feelings of each. If selfishness and falsehood

can be overcome by anything, it is by calling into action the sense of obligation to fulfil this trust which the enduring nature of the union is calculated to inspire. Were the union to cease to be thought of as enduring, were it to be in the minds of the parties, as their minds are moulded by the practice and the prevailing notions of society, merely the result and expression of a possibly transient passion, or of the willingness to try the experiment of a joint household, the sanctity and the sense of obligation would receive an irreparable blow.

Thus we are driven to the conclusion that numerous as the cases may be in which, if one looked only at the wretchedness of the parties to an ill-assorted union, one might desire to see that union dissolved, more harm than good may on the whole result from permitting the parties to dissolve their union at their pleasure, as the later Romans did, as the French did during the Revolution, and as some American States practically do to-day; and more harm than good may result even from extending in large measure the opportunities for divorce which the law of England or that of Scotland at this moment affords.

How vital to the future of humanity are the interests involved is admitted on all hands by those who would change, as well as by those who would uphold, the conception of marriage as a permanent relation. Great as is the contrast between that sensual and unworthy view which finds its expression in the polygamy of the East and the view which Christianity has formed among Western peoples, it is hardly greater than that which exists between the view of marriage as a life-union, dissoluble only when infidelity has shattered its basis, and the view which puts it at the mercy of the caprice of a volatile nature or the temper of an irritable one. Polygamy has been and remains a blighting influence on Musulman society, and on the character of individual Musulmans. So if marriage were to become a transitory relation, as it practically was among the upper classes in

the Roman Empire, the effects upon family life and on the character of men and women would in the long run be momentous.

#### XXIV. SOME GENERAL REFLECTIONS: CHANGES IN THEORY AND IN SENTIMENT REGARDING MARRIAGE.

A few words more to sum up the general result of our survey. We have seen that the relations of the wife to the husband have been regulated sometimes by one, sometimes by the other of two systems, which have been called those of Subordination and Equality<sup>1</sup>. In all countries custom and law begin with the system of Subordination. In some, the wife is little better than a slave. Even at Rome, though she was not only free but respected, her legal capacity was merged in her husband's.

This system vanishes from Rome during the last two centuries of the Republic, and when the law of Rome comes to prevail over the whole civilized world, the system of Equality (except so far as varied by local custom) prevails over that world till the Empire itself perishes.

In the Dark Ages the principle of the subordination of the wife is again the rule everywhere, though the forms it takes vary, and it is more complete in some countries than in others. It was the rule among the Celtic and Teutonic peoples before they were Christianized. It finds its way, through customs conformable to the rudeness of the times, into the law of those countries which, like Italy, Spain, and France, were only partially Teutonized, and retained forms of Latin speech. It holds its ground in England till our own time, though

<sup>1</sup> By Equality I do not mean any recognition of Identity or even Similarity as respects capacity and practical work (though the tendency is in that direction), but the equal possession of private civil rights and the admission of an individuality entitled to equal respect and an equally free play of action. Such Equality is perfectly compatible, given sufficient affection, with a complete identification of the consorts in the harmony which comes of the union of diverse but complementary elements.

latterly much modified by the process which we call the emancipation of women, a process which, under the influence of democratic ideas, has moved most swiftly and has gone furthest among the English race in North America. But in our own time the principle of equality has, in most civilized countries, triumphed all along the line, and so far as we can foresee, has definitely triumphed. One must imagine a complete revolution in ideas and in social habits in order to imagine a return to the system of Subordination as it stood two centuries ago.

As there have been two systems determining the relations of husband and wife in respect of property and of personal control, so also have there been throughout all history two aspects of the institution of marriage, one in which the sensual and material element has predominated, the other in which the spiritual and religious element has come in to give a higher and refining character to the relation. In this case, however, it is not possible to make the relative importance of these two aspects synchronize with the general progress of civilization, nor even with the elevation of the position of women. It is true that among barbarous and some semi-civilized races the physical side of the institution is almost solely regarded, and that we may suppose a remote age when primitive man was in this respect not much above the level of other animals. But there have been epochs when civilization was advancing while the moral conception of marriage, or at any rate the popular view of marriage as a social relation, was declining. The tie between husband and wife in the earlier days of Rome was not only closer but more worthy and wholesome in its influence on the lives of both than it had become in the age of Augustus. Christianity not only restored to the tie its religious colour, but in dignifying the individual soul by proclaiming its immortality and its possibility of union with God through Christ gave a new and higher significance to life as a whole, and to

the duties which spring from marriage. (The greatest advance which the Christian world made upon the pagan world was in the view of personal purity for both sexes which the New Testament inculcated, a view absent from the Greek and Italian religions and from Greek and Latin literature, though there had been germs of it in the East, where habits of sensual indulgence more degrading than those of the West were opposed by theories of asceticism, which passed into and tinged primitive and mediaeval Christianity.)

The more ennobling view of love and of the marriage relation held its ground through the Middle Ages. There was plenty of profligacy—as indeed the ideal and the actual have never been more disjoined than in the Middle Ages. But in spite of profligacy on the one hand, and the glorification of celibacy on the other, and notwithstanding the subjection of women in the matter of property and even of personal freedom, the conception of wedded life as recognized by the law of the Church and enshrined in poetry remained pure and lofty. That the Reformation took away part of the religious halo which had surrounded matrimony may be admitted. Whether this involved a practical loss is a difficult question. It may be that, in their anxiety to be rid of what they deemed superstition, and in their disgust at the tricky and mercenary way in which ecclesiastical lawyers had played fast and loose with the intricate rules of canonical impediment, the Reformers of Germany, Scandinavia, and Scotland forgot to dwell sufficiently on the fact that though marriage is a civil relation in point of form and legal effect, it ought to be, to Christians, essentially also a religious relation, the true consecration of which lies not in the ceremonial blessing of the Church, but in the solemnity of the responsibilities it involves. Yet it is not clear that, in point of domestic happiness or domestic purity, the nations which have clung to the mediaeval doctrine stood a century ago, or stand now, above those which had renounced it.

General theories regarding the influence of particular forms of religion, like theories regarding the influence of race, are apt to be misleading, because many other conditions have to be regarded as well as those on which the theorist is inclined to dwell.

Whoever regards the doctrines of the Roman Catholic Church respecting marriage and realizes her power over her members will expect to find a higher level of sexual morality in Roman Catholic countries than he will in fact find. So on the other hand will he be disappointed who accepts that view of the superiority in social virtues of peoples of Teutonic stock which finds so much favour among those peoples, for dissolutions of the marriage tie have latterly grown more frequent than they formerly were among Protestant and Teutonic nations, and are apparently less condemned by public opinion than was the case in older days.

The material progress of the world, the mastery of man over nature through a knowledge of her laws, the diffusion of knowledge and of the opportunities for acquiring it, are themes which ceaselessly employ the tongues of speakers and the pens of journalists, while they swell with pride the heart of the ordinary citizen. But they are not the things upon which the moral advancement of mankind or the happiness of individuals chiefly turns. They co-exist, as the statistics of recent years show, with an increase over all, or nearly all, civilized countries of lunacy, of suicide, and of divorce.

## XVII

### *INAUGURAL LECTURE*<sup>1</sup>

# THE ACADEMICAL STUDY OF THE CIVIL LAW

NARROW as is the sea that parts England from the continent of Europe, it has cut her off as effectually from many continental influences as if she lay far out in mid-Atlantic. When it is considered how close are our affinities of blood with the Low-German races, and how intimate during the Middle Ages were our relations, intellectual as well as political, with the whole of Western Europe, the individuality of the English people and its institutions appears singularly well-marked; and one is surprised to see in how many points the great nations of the continent resemble one another and understand one another, while all alike differ from us, and are comparatively incomprehensible to us. This strangeness of England is what most strikes the foreigner who comes among us; be he Frenchman, German, Spaniard, or Italian, he seems less at home in England than anywhere else in Christendom. As in the woodland wealth of our country, as in the architecture of our towns and the structure of our houses, so also in the social usages and mental habits of Englishmen one discovers something peculiar, something bearing witness to a prolonged isolation, to an exemption from those influences, speculative as well as practical, which have operated on all or nearly all the other members of the European commonwealth.

Such isolation has been in no respect more marked or more

<sup>1</sup> Delivered at Oxford, February 25, 1871, on entering on the duties of the Regius Professorship of Civil Law.

fruitful in results than in the case of our law. In spite of the immense power of the mediæval church, in spite of the influence of the universities, and of the strangers who flocked to them from all quarters, the Roman jurisprudence exerted a comparatively slight influence upon the technical development of our law and the formation of our habits of legal thought. Here, where the language, and to a great extent the customs of the people, were of Teutonic origin, it found a less congenial soil than in Italy or France, while there were no such political associations with the Roman name as those which gave the *Corpus Juris* its authority in Germany. Whatever be the cause, it is clear that Roman law was never thoroughly domesticated in England. True it is that one of the first notices we have of the existence of our University is that which mentions the Lombard Vacarius as lecturing on law (doubtless on the Digest of Justinian) at Oxford, under the patronage of Archbishop Theobald, in the days of King Stephen<sup>1</sup>; and there is abundant evidence that the study was regularly pursued there down till and in the sixteenth century. The statutes of the older colleges make provision for some of the fellows proceeding to degrees in law; and indeed the only law degrees Oxford has given, since those in canon law were abolished by King Henry the Eighth, have been degrees in civil law. But the customary or common law, unrecognized in the universities, gained exclusive possession of the seats of legal study in London. That hostility to the pretensions of the foreign laws which had been so forcibly expressed by the barons at Merton in Henry the Third's time, and again by the Parliament of Richard the Second, maintained ever after a watchful and jealous attitude. Persons who had mastered Roman law at Oxford were obliged, when they practised in the courts at Westminster, to disguise or disclaim any appeal to its authority; and when the Reformation finally broke the link between England and Rome, and

<sup>1</sup> 'Oriuntur discordiæ graves, lites et appellationes antea inauditæ. Tunc leges et causidici in Angliam primo vocati sunt, quorum primus erat magister Vacarius. Hic in Oxenefordia legem docuit, et apud Romam magister Gracianus et Alexander, qui et Rodlandus, in proximo papa futurus, canones compilavit.'—(Gervas. Dorob.; *Act. Pontif. Cantuar.*; *Theobaldus.*)

in doing so loosened the ties that bound English men of letters to the general movement of European learning and thought, the study of the canon law virtually expired among us, while that of the Civil Law maintained only a feeble and flickering life<sup>1</sup>. Its practical utility (except to practitioners in the ecclesiastical courts) was apparently at an end; and in the cloud of dullness and sluggishness that settled down upon Oxford and Cambridge at the end of the seventeenth century, it only shared the fate of other studies which had as much to commend them to an active and curious intellect. A few distinguished publicists and lawyers, such as Arthur Duck, Selden, Hale, Holt, and those two brightest ornaments of the English bench, Lord Hardwicke and Lord Mansfield, were well versed in its rules, but the great mass of English lawyers regarded it with suspicion and dislike, and the very praise which Hale bestows testifies to the slight interest felt in it. 'He set himself much,' says Bishop Burnet his biographer, 'to the study of the Romane law, and though he liked the way of judicature in England by juries much better than that of the civil law, where so much was trusted to the judge, yet he often said that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there, and lamented much that it was so little studied in England.'

The ancient rivalry of the Civil and the Common law proved eventually the cause of mischief to both. Having reigned supreme in the universities, the civil law had never taken root in the Inns of Court, and when it fell in the universities it fell utterly. On the other hand, the common lawyers, whose study was originally not recognized in Oxford or Cambridge, were well enough content with the position they had obtained for it in London, and do not seem to have seen how much was to be gained by introducing it into the ancient seats of learning. Thus both systems, to the loss as well of the profession as of the universities, came to be

<sup>1</sup> For some time after the breach Englishmen used to resort to continental universities, and there, of course, they found Roman law taught; but this practice died out before very long.

neglected in the very places where they might best have been cultivated in a philosophical spirit; and it was not until Mr. Viner founded his Chair in A.D. 1756 that English law was recognized in Oxford as an academic study, while in Cambridge no provision was made for the teaching of it until the beginning of the present century.

That isolation of England to which the neglect of the Civil Law may be ascribed has of late years perceptibly diminished. Owing partly to the more frequent and easy intercourse which improved means of communication have produced, partly to the removal of old national prejudices, partly to that increased recognition of the power of ideas which is commonly associated with the growth of democracy, civilized Europe has within the last eighty or ninety years become much more of a single intellectual commonwealth than it has been at any time since the Reformation, perhaps, indeed, since the fall of the Roman Empire. The long-standing jealousy of the Civil Law as a foreign system, associated with the overweening pretensions of emperors and popes, has at last vanished. A century ago this feeling was still so active, that Lord Mansfield's enemies found it worth while to charge him with having, as a Scotsman, an undue partiality for the Roman law, and designing, by means of its despotic principles, to sap the liberties of Englishmen—'corrupting by treacherous arts the noble simplicity and free spirit of our Saxon laws;' though as a matter of fact, Lord Mansfield left Scotland at the age of three, and the use which he made of his knowledge of Roman jurisprudence was made by applying its rational principles to the elucidation of the civil, and indeed chiefly of the commercial parts of the English system. Such prejudices seem now to lie far behind. We live in the midst of a general unsettling of respect for whatever exists, which does not spare the laws or even the constitution of England, and welcomes new ideas from every quarter. Thus the influence of the great German civilians begins to tell upon English students, while the rise of a vigorous historical school in England has quickened our curiosity in whatever helps to explain the ancient and the mediæval world. The

feeling so awakened has happily coincided with an interest in the scientific amendment of the form of English law, different from that desire to improve and correct its substance of which Bentham was the first exponent, and which inspired the labours of Romilly and Brougham.

The efforts of these great men were chiefly directed to the removal of harsh enactments, of rules due to economic errors, and of technicalities which defeated the ends of justice. Their modern successors, finding the law purged of its grosser faults, are rather concerned with its reduction into a more orderly and systematic shape. The three leading questions of reform at this moment are questions of form, relating not so much to substance as to the shape and form which the law ought to take. What are the best means of fusing legal and equitable procedure<sup>1</sup>? How may Acts of Parliament be drawn more concisely and symmetrically? How are we to frame, out of the vast and chaotic mass of our reported cases and statutes, an organized body of rules, a Digest or a Code? Finding themselves thus brought face to face with the problem which Justinian partially solved, and which several modern states, as notably France, Austria, Prussia, and Italy have again had to solve<sup>2</sup>, English lawyers are being driven to examine the means whereby codification was accomplished, and the results that followed it. They feel that for the execution of so great a work men are needed who have had something more than an empirical training, and are disposed to believe that in any systematic course of legal history and philosophy which might be devised to form the mind of the jurist as preliminary to his purely professional studies, a chief place should be assigned to the study of the Roman law. Thus, what with our own actual needs, what with the influence of the scientific spirit of the Continent, there has been awakened in England an interest in the Civil Law and an estimate of its worth which, although still matter rather of faith than of sight, is yet strong enough to give the Uni-

<sup>1</sup> This was effected by the Judicature Act of 1873.

<sup>2</sup> To these one may now add the new German Empire, which was coming into being when this Lecture was delivered in A.D. 1871. A Civil Code for the Empire began to be prepared in 1872 and came into force in 1900.

versity of Oxford not merely a motive for endeavouring to revive the study, but a reasonable hope that it may be revived with success, to the substantial benefit as well of the universities themselves as of the legal profession.

To prove that Roman law does deserve in England, and especially from the University, more attention than it now receives may well be thought, at least in Oxford, a spot which was long its home, a superfluous labour. That it fills so large a place in the world's history, that it is the fruit of so great an expenditure of human genius and industry, is of itself a sufficient reason why it should engage the labours of a learned body which has, in Bacon's words, taken all knowledge to be its province. I may therefore content myself with touching upon some of the purposes which the study may be made to serve, and indicating some of the directions in which it may most usefully be pursued; premising always that academical study has two objects, the furtherance of learning and discovery, and the preparation of young men to be, not merely useful and active in their future occupations, but also, in the widest sense of the word, good citizens. These two objects have been sometimes, under the names of Research and Education, opposed to one another, and no small controversy has been maintained touching their respective claims. Are they not in truth closely intertwined? since the greater the zeal wherewith a study is pursued, so much the greater is the teacher's influence on the taught; and since experience shows that when the work of education has been neglected by schools and universities, such neglect has not been caused by any absorption in abstract studies, but by mere dullness and self-indulgence, as fatal to study as they can be to education.

The various utilities of a knowledge of the Roman Law fall into two classes: those which connect it with the liberal studies of a university, and specially with classical philology, with history, and with ethics; and those which belong rather to the faculty of law, and entitle it to a place in a strictly professional curriculum.

Taking the former of these heads first, there is no more

obvious reason for pursuing the study than the light which it throws upon Roman history, which is, it can hardly be too often repeated, substantially the foundation of all modern European history. No people was ever so thoroughly permeated by legal ideas as were the Romans; none rated the dignity of the profession so high, spent so much pains in the elaboration of legal rules, and formed, let it be added, so worthy a conception of what law ought to be. Hence the whole political history of the Roman people and state is so involved with its legal institutions, that it can be understood only when regarded as derived from and conditioned by them. This is signally true not only of the regal and earlier republican period—in all early states of society, legal customs do for a people what a political constitution does in later times, or, in other words, public and private law are closely intertwined—it is true also of the republic in the days of Sulla and Julius Caesar, and of the long period of the Empire. Most of the constitutional arrangements of the Roman state depended upon those of private law, and many of the gravest political questions turned upon legal doctrines. The subject of the Agrarian laws, for instance, is intimately involved with the legal conception of possession, as distinct from ownership, and can hardly be mastered without a knowledge of technical theory. The structure of the *gens*, the nature of the agnatic tie and of the *patria potestas*, the judicial character of the chief administrative magistrates, the doctrine of adoption—all and each of them exerted a powerful influence on the political fortunes of Rome. Adoption, for instance, became from time to time under the Empire the means of working a system of appointment to the sovereign power, which could show the merits without the evils of hereditary succession. I forbear to dwell on the number of historical incidents, like that of Virginia and Appius Claudius, or of allusions in poetical and philosophical writers, such as those which every scholar remembers in Horace, Ovid, Juvenal, and most of all in Cicero, which only a knowledge of the civil law can elucidate. A student of the classics need not read the *Corpus Juris* merely for the sake of understanding

these, any more than one is bound to read Coke or Hale for the sake of better seeing the point of the numerous legal phrases in Shakespeare. Few would go so far as the enthusiastic civilian who maintained that every divine ought to learn Roman law, because there are passages in the New Testament which a knowledge of it serves to explain. But, though every scholar need not, some scholars certainly ought ; for there is much in the literature, and, indeed, in the literary spirit and feeling of the Romans, which is due to legal influences, and which can be fully apprehended and expounded by those only who have made themselves familiar with these influences in their source. In particular, such study is necessary in order to appreciate the character of the Empire in its relation to the peoples of the Mediterranean whom it embraced. Rome's great gift to the world was her jurisprudence ; and the most interesting chapter in her history is that which traces, coincidentally with the gradual extension of Roman citizenship and Roman law to the subject races, the steady amelioration in its positive rules, and its development from a harsh and highly technical system into one grounded on principles of reason and justice, principles which are indeed common to all civilized peoples, but which the Roman jurists were the first to expound and apply. To this great work was devoted, from the time of Augustus onwards, nearly all the genius and labour, not of Rome merely but of the Roman world, which was not expended on abstract speculation ; and it is more than an accident that long after the language of Virgil and Cicero had become debased in the hands of florid rhetoricians and soulless versifiers, its purity and its nervous precision were preserved in the hands of men like Papinian and Modestinus.

A second utility which may be claimed for our study, is its bearing upon the history of mediaeval and modern thought. When the Western Empire perished amidst the storms of the fifth century, its law did not perish with it, but remained a chief factor in European history, more widely, although less directly, influential. The barbarian conquerors, who brought with them only the rude customs by which they had

lived in their native forests, soon felt the need of a regular legal system, and were glad to recognize that which they found subsisting. They allowed their subjects, the Latin-speaking provincials, to use it; in some countries they came to use it themselves; parts of it were collected and published in such compilations as the *Breviarium* of the West Gothic Alarich the Second and the *Lex Romana Burgundionum*. At the close of the Dark Ages, the study of the original texts revived, first in Italy, then in France, England, and Spain. Schools of law arose all over Europe. Immense pains were spent on the interpretation of the Digest, and it became thenceforth, for many generations, the foundation of the education and a principal part of the knowledge of every lawyer and publicist. As the mighty fabric of ecclesiastical power grew up, it created with the help of Roman materials its own body of laws, varied of course by the nature of the subjects, and coloured by religious ideas, but substantially Roman after all. In this, as in so much else, the Papacy was, to use the forcible expression of Hobbes, 'the ghost of the old Empire, sitting on its tomb and ruling in its name.' And thus, in the hands of the very ecclesiastics who forbade its study, as hostile to their own pretensions and favourable to those of their antagonist, the Emperor, the doctrines of the Civil Law obtained a wider range than ever before. As its continued existence was one chief cause of the fantastic belief in the continued life of the Roman Empire, so that very belief became in turn the cause of its ultimate reception, in Germany, where it had not prevailed, no less than in Italy, where it had prevailed continuously, as effective and binding law. Being studied by all the educated men, the poets, the philosophers, the administrators of the Middle Ages, it worked itself by degrees into the thought of Christendom, losing the traces of its origin, as it became part of the common property of the world. A knowledge, therefore, of what it was, and of how it influenced mankind, helps to explain much which might otherwise have remained obscure in the literature of the Middle Ages and the Renaissance—much whose bearing a modern finds it hard to grasp, just because

law holds a different place in his conceptions, and because he does not realize the power it exerted over untrained and uncritical minds. Theology is an instance, but by no means the only instance, of a branch of inquiry over which legal notions once exercised a sway they have now lost.

The Middle Ages had received from antiquity, besides the Scriptures, only three bodies of literature containing systematized thought—the Church Fathers, the philosophy of Aristotle, known through translations, and the Roman law. The last counted for less than the two former in moulding ideas. But it counted for a great deal.

The history of law and of the evolution of legal conceptions, although in one aspect a professional subject, may also claim to be regarded as a branch of general academical study. Within the last few years, the application to it of the comparative method of inquiry has given it a new significance and interest, has enabled it to teach us much respecting the structure of primitive society, and has made it the means of illustrating many curious phenomena in the philosophy and politics of more recent times. Now to the student of legal history a knowledge of Roman Law is indispensable: first, because it was an independent system, uninfluenced by any preceding one, save to some slight extent by the customs of Greek cities, whereas all subsequent European systems have been influenced by it; and secondly, because it alone presents an uninterrupted continuity of development, stretching over ten centuries from the Twelve Tables to Justinian, and later still through the dynasties of Constantinople. No sudden intrusion of a new element, like that caused in England by the Norman Conquest, nor even the internal strife which altered the form of the Roman state, disturbed that equable and self-consistent expansion and amendment of the laws of Rome, which the widening relations of the city, as a commercial, a conquering, a world-embracing community, made necessary. Legislative power passed from the patrician curies to the popular Assemblies of the nation, from the Assemblies to the Senate and the Emperor, but the conduct of legislation remained in the hands of an educated profes-

sion, and the harmonious evolution of principles was not interrupted. Nearly all the phenomena which the history of law in other countries presents, find their parallel and explanation in the history of its growth at Rome: nor is the study without a practical value for the modern legislator. The nature and limits of the jurisdiction of our own Court of Chancery are better understood when compared and contrasted with the functions exercised by the Praetor as exponent of the *ius gentium*. The codification of Justinian has been constantly cited, and occasionally examined, in recent discussions respecting the propriety and the methods of digesting and codifying English law.

Assuming, without further argument, the claims of the Civil Law to be recognized among the general liberal studies of the University, I may proceed to consider its special utility to the lawyer, and the reasons for giving it a place among the studies of the legal faculty. Some zeal has of late been shown for the revival of such studies in England and in Oxford; and it will be generally admitted that young lawyers ought to be more regularly instructed in the science and art of their profession than they are now; that much of this instruction may be, and ought to be, given at the University; and that, apart altogether from the service to be rendered by teaching, it would be a gain to the country if law were cultivated and written upon at the Universities, in the same philosophical spirit, and with the same systematic fullness, as in the schools of Germany. There a great writer is often also a great teacher. Such were Savigny and Thibaut; such was that illustrious man whom Heidelberg lost five months ago<sup>1</sup>—a man whose learning was so vast and well-digested, whose expositions of law were so penetrating and luminous, so philosophical in method, so eloquent in language, so animated in delivery, that to have listened to him was to have gained a new conception of the power of oral teaching.

An obvious ground for cultivating it, and one likely to have weight with the practising lawyer, is the immense influence it has exerted on the jurisprudence of modern Europe. As

<sup>1</sup> Dr. K. A. von Vangerow.

respects England, this influence is matter rather of antiquarian interest than of practical utility. Much of our law, especially of our mercantile law, and of that which is administered in courts of equity, may indeed be traced to a Roman origin; while the Court of Admiralty, and even to some extent the probate and matrimonial Courts which have now replaced the ancient ecclesiastical tribunals, owe a more direct allegiance to the imperial jurisprudence. In the words of Lord Chief Justice Holt, 'Inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil Law, as all governments are sprung out of the Roman Empire, it must be owned that the principles of our law are borrowed from the Civil Law, and therefore grounded upon the same reason in many things.' But the bulk of English law is so vast, requiring so much labour to master it, and that which it has borrowed from other systems is now so thoroughly transformed and Anglicized, that one cannot honestly advise the student, on the mere ground that in some departments it has drawn freely from Roman sources, to spend time in examining those sources, instead of going straight to English textbooks. It is not so much because English law is like Roman, but because it is unlike, that the study is really to be recommended. Similarities, whatever their historical origin, are usually found to rest on that wish to follow reason and to secure what is practically convenient, which have moulded the rules of all highly finished systems. They need no further explanation. But dissimilarities suggest difficulties. Inquiry is provoked; reflection is stimulated; ideas emerge which may prove fruitful.

A lawyer who loves and appreciates his subject will hardly be content without knowing something of the rules and doctrines which prevail in other nations; and a man in brisk practice will find many occasions in which a knowledge of foreign or colonial law is of great value to him. Now in the acquisition of almost any foreign system of law, a knowledge of the outlines of the Civil Law renders the same kind of service which a knowledge of Latin renders in the acquisition

of one of the Romance languages; and just as one would advise a man who desired to learn French Spanish and Italian to begin by learning Latin, so the shortest way to know something of German Dutch and French law is to study the principles of the Civil Law, which are a master-key to that of all these countries. The House of Lords in Scotch appeal cases, the Privy Council in appeals from many of our colonies, as, for instance, from Lower Canada, British Guiana, the Cape, and Mauritius, administer a modified Roman law. And as the doctrines of international law are in their source Roman, they can be best understood and applied by one who is familiar with them in their original form as drawn from that imperial law which, when they first sprang up, was still dimly conceived of as extending its authority over all the states of Christendom.

I have placed last what I venture to believe to be the weightiest practical reason for pursuing this study, although, at the same time, that reason which it is most difficult to expound and establish—its educational and scientific worth as forming and strengthening those habits of mind in the possession of which a lawyer's excellence consists. In proof of this worth it is not sufficient to cite the examples of Germany, France, and Scotland, where the education of a legal practitioner is based upon the civil law; for the *Corpus Juris* is in all these countries the foundation of their municipal systems, while in Scotland and some parts of Germany, it is to some extent actually still in force. The reason which we in England have for urging that the study of Roman law should precede and accompany that of the law of our own country, must be sought in a perception of the defects, certainly obvious enough, of modern English jurisprudence. Here it is necessary to distinguish what laymen, and even lawyers, have often confounded—defects of substance and defects of form. Now, in point of substance, the English law is, with the exception of certain provisions of the law of real property, and of the law relating to married women—provisions which the progress of political change seems likely to remove—no whit inferior to any other body of law; almost always fair and reasonable,

conformed to the dictates of good sense, reflecting worthily the free and flexible spirit of our political institutions, and offering as few opportunities as may be to fraud and oppression. Its processes are of course technical, perhaps still too technical, and they are sometimes needlessly circuitous<sup>1</sup>; but, as a technical hardship may usually be met by a technical remedy, substantial justice seldom fails to be attained. With some cumbrousness, our procedure has the merit of variety and flexibility; and it is our especial honour to have worked out the method of trial by jury with a completeness unrivalled elsewhere, and to have alone (for in this, as in many other respects, Americans may practically be reckoned as Englishmen) succeeded in applying it to large classes of civil causes. But when English law is regarded in its formal and scientific aspect, as a system, the opinion formed of it must be very different. It is, in fact, not so much a system as a huge mass of isolated positive rules; some laid down, with little statement of a reason, for the sake of meeting a particular case; some deduced by the judges, though in a rather occasional and fragmentary way, from principles which were at first dimly and incompletely apprehended; some, again, created by statutes which have, especially of late years, cut across these pre-existing principles and rules in an irregular and reckless way. Just as lines of railway have been driven through modern London without regard to the old arrangement of the thoroughfares, and have crossed and recrossed streets and squares, effacing parts of them till perhaps only a house or two is left standing, so Acts of Parliament, drawn up to meet the exigency of the moment, have paid no respect to the symmetry, such as it was, of the common law, and, instead of attempting to mould and reconstruct it, have laid down new positive rules which infringe upon, or almost wholly destroy, its ancient principles, by removing from their operation large and heterogeneous classes of cases. The effect of this has been to make the old principle no longer really a principle, but a positive rule in the cases not affected by the statute; and thus, as the number of

<sup>1</sup> This defect was removed by the Judicature Act of 1873.

enactments and positive rules increases, the value of principles declines, and the confusion grows every year worse confounded. So it comes, owing partly to the way they have been produced, and partly to the way they have been amended, that the rules of our law are an aggregate of dicta on points of detail—dicta which with difficulty can be reduced to a reasonable number of leading doctrines. For not only do the exceptions to a rule frequently outnumber the cases which it governs, but it often happens that judicial decisions, or the words of an Act, have provided for many cases which naturally fall under and suggest a general principle, but have never ventured to enunciate the principle itself, which cannot therefore be laid down as being part of the binding law. Hence the tendency of an English practitioner is by no means towards a search for principles: indeed, he becomes absolutely averse to them; and the characteristic type of excellence which the profession has delighted to honour is the so-called 'case lawyer,' who bears in his memory a great stock of particular decisions, from which he can, as occasions arise, select that one whose facts most nearly approach the individual case upon which he is required to argue or advise. Such a practitioner may acquire a sort of instinct which will usually keep him right, but may be unable to state the general doctrines on which the solution of a class of cases depends.

The strain thus imposed on the memory is such that many persons succeed in mastering only some special department of the law; and even our most eminent counsel, men of the greatest powers of mind, may be heard to confess that they do not pretend to know our law as a whole, but must rest content with knowing where to find what they want as they may happen to want it. For the same reason our text-books are, with few exceptions, not systematic expositions of law, but mere heaps of cases from which, by the aid of an index, the practitioner must try to pick out a few resembling, or, as lawyers say, 'on all-fours with,' that set of circumstances whose legal character he is called upon to determine. They are, therefore, unfit to be put into the hands of a beginner.

The result of all this is to make the process of learning English law very slow and somewhat distasteful. Certain persons indeed there are who, having no feeling for symmetry, are willing to pick up their knowledge by scraps and morsels, and who, so to speak, roll themselves about in cases in the hope that bits of legal knowledge will stick. But minds of finer temper, minds trained by their University studies to ask for a reason, seek out a principle, group things together under their natural relations, are disheartened by this chaotic state of matters, make slow progress in the study, find themselves required to unlearn their best mental habits, and sometimes abandon the profession in disgust. I remember having been told by a very distinguished and able member of this University<sup>1</sup>, that when he began to read in a conveyancer's chambers he found his previous classical and philosophical training, so far from helping him, prove a positive hindrance and stumbling-block. This was seen to be an evil so long ago as Sir William Blackstone's time. In his introductory lecture as Vinerian Professor, delivered here in A.D. 1758, he says :—

' We may appeal to the experience of every sensible lawyer whether anything can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest ; with no public direction in what course to pursue his inquiries ; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning ; or else, by an assiduous attendance on the courts, to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little, therefore, is it to be wondered at, when we hear of so frequent miscarriages ; that so many gentlemen of bright imaginations grow weary of so unpromising a search, and addict themselves wholly to amusements, or other less innocent pursuits ; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives.

' The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice which, if ever it had grown to be gene-

<sup>1</sup> Now (1901) one of the Law Lords sitting in the House of Lords.

ral, must have proved of extremely pernicious consequence. I mean the custom, by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them in its stead at the desk of some skilful attorney, in order to initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business. A lawyer thus educated to the bar will find that he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to prove, and seldom expect to comprehend, any arguments drawn *a priori* from the spirit of the laws and the natural foundations of justice<sup>1</sup>.

Blackstone is here founding, on the unfortunate results of the usage of his own time, an argument for making the future barrister begin with a systematic theoretical study of English law. His reasoning will be generally felt to be sound, but it does not exclude the further improvement of giving the learner some knowledge of the principles of Roman law before he addresses himself to English. I shall state some grounds for thinking that what might appear the longest way round, through Roman law, may really be the shortest way to the scientific mastery of our own.

It is clear that no knowledge of the Roman system can be a substitute for a knowledge of the English; but the difficulties which the English presents to a beginner are such as to suggest the utility of a preliminary legal training which may render it more comprehensible and less distasteful. Now, the conspicuous merit of Roman law is, that it is clear and intelligible. It is a system instead of a mere congeries of rules and dicta, a system which, although it cannot be exhausted by the labour of a powerful intellect during a long life, may be mastered in its outline and leading principles in six or eight months of properly-directed industry. A philosophical mind is attracted by its symmetry; the taste is

<sup>1</sup> Although it is the custom of placing a youth (untrained in theory) in an attorney's office to learn practice which Blackstone is here condemning, the spirit of his concluding remarks is almost equally applicable to the present usage of entering a conveyancer's or pleader's chambers before one has gained any systematic knowledge (or indeed any knowledge whatever) of the law.

pleased by the graceful propriety of its diction; the learner's interest is kept awake by watching the skill and subtlety wherewith its technical rules are manipulated and kept in harmony with the dictates of equity and common sense. The number of dominant conceptions which it is necessary to acquire is so small, and these conceptions themselves so rational and, so to speak, natural, that it does not take long to obtain a general view of the whole, and discern the harmonious relation of its parts. The student finds the ethical and historical knowledge he has already acquired serviceable in this new field. He learns to regard law as a science, closely related to ethics, and to be dealt with in a philosophical spirit. And thus, when he passes on to the study of our English law, he finds himself the better able to grapple with its bulk and its want of arrangement, since he has already mastered the leading conceptions of jurisprudence in their concrete (which is, after all, their only serviceable) form, and knows how to arrange under appropriate heads the positive rules which it will be his business to remember and apply. So valuable is this experience, that I dare affirm that a youth who spends some eight months in the study of the Civil Law, and then proceeds to that of English law, will, when at the end of three years he is measured against his contemporary who has given exactly the same amount of time and pains to English law alone, prove to be not only a better jurist, but as good an English lawyer. This is the rather so, as that part of English law which the Roman law least helps to elucidate is now of much slighter importance than formerly—I mean the feudal law of land. A change has passed upon us, somewhat similar to that which Cicero saw passing at Rome. In his youth, he tells us, he like other pupils of the great *prudentes* was required to learn by heart the contents of the Twelve Tables, whereas in his later days it was the Praetor's edict that formed the basis of legal training. So Coke upon Littleton, which thirty years ago was held forth as a sort of Bible to the unfledged lawyer, is now seldom in his hands; his time is given rather to commercial law and to the doctrine of trusts and powers, and the principles govern-

ing incorporated companies and the relations of directors to intending investors and to shareholders—subjects to which the leading principles of the Roman law are more capable of being profitably applied.

It is not, however, merely as an introduction to his professional studies that the English lawyer will find the study of Roman law profitable: if rightly used it will be a guide and a help throughout his whole career. More than anything else, it will deliver him from the tendency to deal with law in a desultory method and an empirical spirit, by displaying to him fixed and general principles underlying the multitude of details. It will do for him what the knowledge of some foreign language does for the grammarian and the logician, in the way of freeing him from that bondage of words to which most men are all their lives subject. Setting him to compare the terms and conceptions of another law with those of his own, it will enable him to criticize the latter from an independent point of view, and so deliver him from the danger, common in all professions and to all systems, of mistaking the accidental for the essential, of exalting mere technical rules and phrases into necessary and permanent distinctions. Further, it may do much to supply, from its choice and abundant stores, the defects in English legal terminology. We are especially ill provided with terms fitted to convey the main conceptions of universal jurisprudence; and we find the want a serious impediment, not only to legal exposition and the conduct of legal argument, but also, as has been remarked by a distinguished jurist, now one of the ornaments of this University<sup>1</sup>, in the work of practical legislation. The terminology of the Romans was exact as well as copious; and it has been greatly amplified and improved by the labours of modern civilians. As it is, we often draw upon the Roman vocabulary, but what we borrow we are apt to use loosely, and in a sense different from that of the old Romans or of their modern commentators; whence further confusion.

There are two capacities or mental habits in which the distinctive excellence of a legal intellect chiefly consists—the

<sup>1</sup> Sir H. S. Maine.

power of applying general principles to concrete cases, and the power of enunciating a legal proposition with clearness and precision. Towards the formation of both of these the writings of the Roman jurists supply more aid than do those of their modern English rivals. The conspicuous merit of the Roman lawyer was his command of principles, and the skill with which he manipulated the rules of an originally very technical system, so as, without any loss of consistency or 'elegance,' to avoid the inconveniences which an adherence to technical strictness must often produce. As Savigny puts it, 'In our science, all results depend on the possession of leading principles, and it is precisely upon this possession that the greatness of the Roman jurists is based. The conceptions and maxims of their science appear to them not as if created by their own will; they are actual beings, with whose existence and genealogy they have become acquainted from long and familiar intercourse. Hence their whole course of proceeding has a certainty which is found nowhere else out of mathematics, and it is no exaggeration to say that they calculate with their ideas. This method is nowise the exclusive property of one or a few great authors: rather is it the common inheritance of all; and although the power of applying it is divided among them in very unequal measure, still the method itself is in all of them the same. . . . If they have a case to decide upon, they set out from the most vivid perception of it, and we see before our eyes the origin and development of the whole affair in all its phases. It is as if this particular case was the starting-point whence the whole science was to be explored. Hence with them theory and practice are really not distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see an instance of its application; in every case, the rule whereby it is determined: and in the facility with which they pass from the universal to the particular, and the particular to the universal, their mastery is incontestable.'

<sup>1</sup> *Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft*, c. 4.

Now every legal opinion, argument, and judgement chiefly turns on the application of known principles or rules of law to facts; and this either by way of fitting the law to the facts—that is, of expounding the nature, meaning, and limits of a principle in such wise as to make it appear to cover the facts proved; or conversely by way of fitting the facts to the law, that is to say, of setting forth the rule or principle, as admitted, and then of so stating the substantial result of the facts taken as a whole, as to make it appear that the case falls under this rule as already given. In this process the Roman jurists shone preëminent. English judges, certainly from no want of learning or acumen, but rather from a sort of caution, or from a traditional reluctance to deliver an opinion going any further than may be necessary, have generally been unwilling to formulate principles, preferring, where they could, to dilate on the special circumstances of the case, and base their decision thereon; and the consequence is to be seen in the prolixity of our Reports, and the uncertainty of much of the law contained in them. The labour of reading English cases is great in proportion to the quantity of positive law they embody; and their philosophical worth not commensurate with the genius and industry bestowed upon them by both bar and bench. The cases, if one may so call them, which we find in the Roman jurists give more law and more real intellectual training in a much smaller compass. They are often imaginary, invented to show the application of a rule, and are therefore short and clear, enforcing their principle with a directness which makes it easily apprehended and remembered. In reading them we seem to learn better than anywhere else how principles should be dealt with.

In the matter of legal expression the superiority of the Romans is scarcely less marked. The power of stating a proposition of law in comprehensive and exact terms, wide enough to cover all cases contemplated and yet precise enough to exclude cases more or less similar to which the rule is not intended to apply, is valuable to the text-writer and quite indispensable to the framer of statutes. Unfortunately it is one of which our statute-book bears few traces. Now the

legal language of the Romans is a model of terseness, perspicuity, and precision, and from a study of it, even allowing for the difference between the structure of the two languages, the English draftsman may derive many valuable suggestions.

Over and above the specific benefits enumerated, it must be added that a study of the Roman law would not merely tend to produce, but must necessarily precede, any extended healthy intercourse between our jurists and those of the rest of Europe, any participation by us in the general advancement of juridical science. 'England,' said an eminent continental jurist, surveying the progress made in his department, 'England sleeps for ever': and she sleeps because her lawyers have allowed themselves to become as completely isolated as though we were living in and legislating for a planet of our own. Certainly, when one remembers how in other branches of inquiry each country depends upon its neighbours, how meagre would be our scholarship, our ethics, our history, our criticism—never to speak of medicine and the whole circle of the sciences of nature—if in each of these subjects we trusted to our own efforts only—it does seem strange that in the matter of law we should be content to draw nothing from the labours of other nations. As the facts law deals with are in the main the same in all civilized countries, and the substance of its leading conceptions virtually identical, there must clearly be much for us to learn from other highly cultivated systems, and it is only our ignorance of the common legal vocabulary of Europe that keeps us from so learning. The habit, however, has grown so strong that we do not even care to profit by the experience of a country which speaks our own legal language—the United States—where many problems have been handled by the Courts and many experiments have been tried by the legislatures which are full of instruction for us<sup>1</sup>.

This argument, being directed to show that the study of the Civil Law will help to make English law more of a system and a science than it is now, and to train the individual

<sup>1</sup> Cases decided in the United States are more frequently cited in English Courts now (1901) than they were in 1871.

lawyer in more philosophical habits of mind, proceeds upon the assumption that law ought to be a science and lawyers philosophical. To prove the truth of this assumption would involve a discussion of the relations of theory and practice generally; and in a University, at least, no such proof will be demanded. Science, like wisdom, is justified of all her children; and those who, in the teeth of what we have seen during the last eight months<sup>1</sup>, persist in holding theory to be a hindrance to practice, would, quite consistently, refuse to be convinced by any such general considerations as those which determine academical opinion. Without entering, however, on this higher ground, I may be permitted to mention two practical reasons for desiring to see our law treated as an organic and harmonized system of rules. One of these is the direct gain which the whole community would derive from a simplification of its form. Owing to the way in which English statutes are drawn, nearly every amendment of the law makes it more complicated and obscure than it was before. A new Act seldom repeals a preceding Act or Acts on the same subject as a whole: it abolishes some of their provisions, incorporates others, and modifies the rest. In dealing with a rule of the common law, instead of expunging the rule altogether, or laying down a new principle by which it is to be controlled, it usually establishes a series of exceptions in a manner so seemingly arbitrary as to make it very difficult to determine, when a new case arises, whether or no it was within the contemplation of the Act. The Married Women's Property Act of last session is an instance in point<sup>2</sup>. Similarly, vast branches of our law, such as that which relates to public health and to the regulation of mines and manufactures, are suffered to remain in a state of hopeless confusion—Acts fringed with decisions piled upon other Acts and their decisions, till it becomes impossible, without a long and painful research, to say what is law and what is not<sup>3</sup>. This

<sup>1</sup> The reference was to the war, just ending when this lecture was delivered, between Germany and France.

<sup>2</sup> This Act caused so much trouble that it had to be amended and the law recast by the Married Women's Property Act of 1876.

<sup>3</sup> A marked improvement has, however, taken place since the establishment of

wretched state of things, which makes a resort to the Courts far more costly, and its issue far more uncertain than it need be, though partly due to existing parliamentary arrangements, is also in great measure due to the want of that feeling for the symmetry and simplicity of the law which a scientific conception of it would be certain to produce in the profession. The public, which feels the evil, is powerless to remedy it; while those members of the profession who have the power are deterred from the necessary efforts, not, as is commonly supposed, by the mean notion that it is their interest to keep their art a mystery, but partly by long habit, which has made them indifferent to the beauty of order, partly by the want of that scientific training on which the success of amending legislation depends.

The second benefit is the reflex effect upon the legal profession of a higher conception of the studies to which it devotes its labours. The complaint is often heard that men of literary culture and polished taste rise more seldom than formerly to the highest places at the bar and on the bench; that it is now private connexions rather than the finer gifts of intellect and character which open the path to professional success. If this be so, it is surely in great measure because our system of legal education gives too little scope to these nobler qualities, and turns them to no account in directing the studies of the aspirant. The life of a lawyer, tedious and distasteful in some of its details, would be more enjoyable if his occupation called out, as it ought to do, the highest faculties of his mind; and the tone of the profession, which will sooner or later be threatened here by the temptations which have begun to threaten it elsewhere<sup>1</sup>, will be best maintained in purity by a sense of the dignity of the subject it deals with as a department of philosophical inquiry. It is

the office of the Parliamentary Counsel a few years ago. Many Bills, however, including all those brought in by private members, do not pass through this office, and even those which come from it suffer in point of form in their passage through Parliament. Since 1871, much has been done in the way of consolidating the Statute law. See Essay XIV, *ante*.

<sup>1</sup> The reference was to the scandals which had recently arisen in some of the State Courts in the United States. These have now (1901) been almost entirely removed.

scarcely possible that a corrupt administration of justice can coexist with an enthusiasm for the abstract propriety and elegance of law as a science, such as existed among the great jurists of Rome.

I am sensible that in this enumeration of the advantages of the study we have been considering, I may probably be falling into the common error of those who having a theme allotted them, try to bring more out of it than there is in it. To correct such a mistake, let it be frankly admitted that Roman law, though indispensable to the philosophical jurist, is not so to the practitioner; and that no knowledge of it can make up to him for the neglect of his own law. Let it also be conceded that it is not a subject ever likely to hold a front rank among those which awaken the ardour of our academic youth. It wants that charm of incompleteness, of unexhausted possibilities of discovery, which fascinates us in the sciences of nature. It does not, like metaphysics, set us face to face with the most stimulating problems of thought and life; nor can it, like history, dazzle the imagination and stir the emotions, by leading us through a long gallery of striking scenes and characters. Yet the study is one which pleases and satisfies as well as instructs; for it is at once, and that in the healthiest way, theoretical and practical, excellently philosophical in its methods, yet never quitting the firm ground of reality. Its materials are contained in the writings of men, the purity and loftiness of whose ethical tone were scarcely surpassed by the brilliance of their constructive genius. It is perhaps the most perfect example which the range of human effort presents of the application of a body of abstract principles to the complex facts of life and society. To quote once more from the most famous of modern jurists: — ‘The study of Law,’ says Savigny, ‘is of its very nature exposed to a double danger: that of soaring through theory unto the empty abstractions of a fancied law of nature, and that of sinking through practice into a soulless unsatisfying handicraft. Roman law, if we use it aright, provides a certain remedy against both dangers. It holds us fast upon the ground of a living reality; it binds our juristic thought on

the one side to a magnificent past, on the other, to the legal life of existing foreign nations, with whom we are thereby brought into a connexion wholesome both for them and for ourselves<sup>1</sup>.'

Standing midway between those classical and historical studies which belong to a general liberal education, and those purely professional studies which form the first stage of active life, it is especially fitted to lead men from the one to the other, and show them how to turn to account in the latter the ideas and capacities which the former has given them. But although this is a strong reason why the University of Oxford should undertake to recognize and promote the study, it is not the only or the chief reason. Even more important than the function of an University in education, is the scarcely separable function of dealing with every department of human activity in the abstract, investigating its principles and developing its rules in their philosophical coherence. We are all too apt, in the hurry of life and the pressure of its trivial necessities, to lose sight of that which is universal and permanent—to forget that what we are pursuing as a trade is the subject of a science, and has, as such, its greatness and its perfectibility. The ideal is not far from us, but we catch only transient glimpses of it; and of those who continue in maturer life to cherish the belief in its worth, the most conceive of it in relation to their inner life only, and look on their action in the world without as something which belongs to another and a meaner sphere. The University is appointed to correct this failing—to link the present, in which things seem petty, to the past which clothes them with a mellow light—to ennoble practice by a constant recurrence to theory—to show that intellectually as well as ethically there is nothing common or vulgar, nothing which may not and ought not to be considered as within the domain of Philosophy, who, the more perfect she becomes, sees more clearly that which is great in that which is the least. In undertaking, therefore, not only to educate in the ordinary liberal studies, but also to deal in a broad and lofty spirit with such large

<sup>1</sup> Preface to vol. iii. of the *System des heutigen römischen Rechts*.

practical topics as this of law, the English Universities will in a new way justify their possession of that wealth and external splendour which they alone out of the great mediaeval sisterhood have been privileged to retain. They will associate themselves more closely with the life of the nation, and confirm the reverence with which it still regards them; nor is it idle to add that in thus enlarging the scope of their activity, they will be closely following and worthily maintaining the traditions of their glorious past.

## XVIII

### *VALEDICTORY LECTURE*<sup>1</sup>

## LEGAL STUDIES IN THE UNIVERSITY OF OXFORD

TWENTY-THREE years have passed since I entered on the duties of the Chair of Civil Law in this University: and to-day, in obedience to precedents of high authority, I come to say some parting words suggested by the experience of those years. They have been years full of experience for us all: and it may be not unprofitable that I should note the changes they have brought and endeavour to estimate the position which legal studies, and especially the study of the Civil Law, have now reached in the University and in the country.

Those changes have been many and momentous. Since 1870 the University has nearly doubled the number of its undergraduates and has greatly increased the number of its teachers. It draws students much more largely from the less wealthy classes of the people. A new college has been founded, and risen to prosperity: an old one has been re-founded and enlarged. Two colleges for women have sprung up and taken firm root. Theological tests have been abolished: persons not belonging to the Church of England as by law established have begun to resort freely to Oxford: two theological faculties belonging to unestablished religious bodies have come to dwell in her midst, and have received a courteous welcome. Nor have any of the unfortunate con-

<sup>1</sup> Delivered on resigning the Regius Professorship of Civil Law at Oxford, June 10, 1893.

sequences predicted as likely to follow from the admission of Nonconformists been actually experienced, for there has been a diminution of theological controversy, a growing sense of friendliness and sympathy among Christians; a more assured peace in the minds of our students.

The examination system has been remodelled, with a regrettable but perhaps inevitable increase of complexity, as well as enlarged by the inclusion of new studies. The University and the Colleges have been dealt with by Parliament and by an Executive Commission: and the serious consequent evils have been not wholly uncompensated by gains. Oxford has undertaken many new kinds of work. She provides University Examinations for Women, and sends zealous young lecturers everywhere through England to bring teaching of an academic type within the reach of the people.

As regards Law, while the degree of Doctor of Civil Law has become a true distinction by the requirement of a thesis of substantial merit instead of the former purely formal exercise, the B.C.L. examination (theretofore scarcely serious) was made by a statute of 1872 a reality: the standard both of honours and of the pass degree has steadily risen, and this rise has been accompanied by an increase of candidates. That examination is probably now, I do not say the most severe test of legal attainments, but the best arranged and most practically useful law examination in England. In the years preceding 1870 there were seldom more than two or three entrants for this examination, almost absurdly easy as it then was. There are now usually upwards of twenty and sometimes twenty-five. Similarly the number of candidates in the School of Jurisprudence, by which candidates can obtain the degree of B.A., has grown and the quality of the work has improved.

In 1868 there were only three Chairs in the Faculty of Law: those of Civil Law, Common Law, and International Law, besides the temporary Vinerian Readership; and of these that of Common Law was virtually in abeyance. In 1870 the work of the Corpus Professorship of Jurisprudence began with the lectures of an illustrious writer whose fame two Universi-

ties dispute, for if Cambridge reared him, Oxford gave him the occasion for teaching, Sir Henry Maine. In 1878 the Readership in Indian Law, and in 1881 that in Roman Law, was founded and the opportunity taken of placing in it the zeal and learning of a German civilian—Dr. Erwin Grueber—whose lectures have proved most helpful. In 1882 the Vinerian Chair of Common Law became (as we trust it will ever continue) a working chair by the choice of another distinguished man whose powers, always admired by his friends, are now recognized over the English-speaking world, and to whom belongs the rare honour of having devoted those powers to the service of his political allies in a great and burning controversy without impairing the respect which all parties feel for the depth and soundness of his constitutional lore.

Thus there are now seven working professorships: and to these we must add, in estimating the teaching force which the University possesses, the lectures of another distinguished writer who may be reckoned as virtually a law professor—the Warden of All Souls: and of more than ten College lecturers, who serve the University as well as their respective Colleges, with recognized efficiency.

Thus, upon a review of recent years, we may say that as the whole University has grown and expanded, so has also this side of her activity, and that which was once a dry river-bed, or presented, like a South African river, only a few scattered pools of stagnant water, has now become a wide and fertilizing stream.

That serious deficiencies exist I am well aware: I shall presently advert to them and to the steps that may be taken to remove them. For the moment, however, I am noting progress actually made and gains actually secured. Among these may be reckoned the assured position which the study of the Roman Law now enjoys.

Though this was the first subject recorded to have been taught in Oxford, for one of the earliest notices of the University is to be found in the sentence ‘Magister Vacarius in Oxenefordia legem (*sc.* Romanam) docuit,’ and though from his time (the reign of King Stephen) down till the seven-

teenth century it held a rank second only to that of theology, it had within the last hundred years virtually died out of the University, and this chair, founded by King Henry VIII in 1546, and occupied in the time of King James I by Alberico Gentili, had become a sinecure. A few law degrees no doubt continued to be given, but they carried no evidence of knowledge. The revival begins with the substitution in 1852 of an examination (albeit a very slight one) for the old formal exercises for the degree of B.C.L., and the creation in 1853 of the Law and Modern History School (in which the Institutes of Justinian were made a subject of examination). That School was in 1872 divided into the present two Schools of Modern History and of Law, in the latter of which Roman Law received a more important place. Till 1870, however, there was scarcely any teaching, and what little did exist in the colleges was confined to commenting upon the solitary book required for the examination. No one had lectured on the Digest; no one had treated the history of the subject. This was part of that remarkable isolation of England from the general current of European legal thought and practice which was due partly to the resistance to the encroachments of the Canon Law, first of the barons in the thirteenth century, and again of the Parliament under Richard II, partly to the great religious breach of the sixteenth century, an isolation once politically fortunate, for it helped to develop the free spirit of the common law, but in our days, when the old dangers have vanished, a circumstance to be regretted and removed. Among the modes of removing it, the study of the Civil Law is not the least important. That study may now be deemed to have struck here in Oxford deep and tenacious roots. Both in our examinations and in our teaching it holds a place equal in dignity to English Law, though doubtless of narrower compass. It attracts in fully as large a measure the interest of the more intelligent among our students, and it can hardly be doubted that the excellence of the Law School in the future will largely depend upon its maintenance as a main element in both teaching and examination.

Its practical utility to the English lawyer is one of the

points on which you may expect the results of my experience to be stated; for it is a point upon which attention must be constantly fixed, and I have had opportunities of studying it amid the din and dust of forensic practice in London no less than in the cloistered seclusion of Oxford.

In the Inaugural Lecture which I delivered here in 1871, an attempt was made to treat this subject. It was there pointed out that the utilities of the Civil Law to Englishmen might be reduced to three heads. One was its connexion with the main stream of the world's history from the time of Pyrrhus, the first formidable antagonist from non-Italian soil whom Rome overthrew, to that of Muhamad, by whose first successors the East was torn from her grasp; and its influence, less conspicuous, but still considerable, upon the growth of opinion and the development of institutions ever since. This is an aspect of the subject which, since it belongs rather to the historian than the lawyer, I shall not pursue further to-day, though subsequent reflection leads me to believe that its importance can hardly be overrated. The second utility was to be found in the fact that Roman Law is the substratum of some branches of English Law, directly of the law administered in the Probate and Admiralty Division of the High Court of Justice, and indirectly of a good deal administered in the Chancery Division, in the further fact that it is the actual law of some of our colonies from which appeals come to the Privy Council, as well as the foundation of the law of Scotland whence appeals come to the House of Lords, and in the command which it gives of the law of modern continental Europe, since it is the basis of the systems that prevail in all those countries, and its knowledge is a sort of master-key to each and every of them. These circumstances—so I then argued—make it practically serviceable to the practitioner, and justify a man bent on professional success in devoting some time to its study. The third utility was to be found in its educational value, as forming the mind and training the aptitudes of the student devoting himself either to the theory or the practice of English Law. On these latter two of the above-mentioned three points it is proper to say a few words.

An observation extending over twenty-two years leads me to lay less weight than I laid in 1871 on the direct professional gain, in the way of securing practice at the bar, to be expected from a knowledge of Roman Law. Sometimes no doubt a man may find such knowledge directly helpful in writing opinions (especially if points of Scotch or French or German or Roman Dutch law arise), or in arguing before a Court. Once in addressing the House of Lords in a Scotch Appeal I discovered a pretext for quoting the Digest, which that august body received with grave approval, as not unbecomingly the large survey they are wont to take of every matter that comes before them. But instances of this kind are rare in ordinary practice. It would be unbecoming to dilate upon this aspect of the question, for a University is the last place in which the worth of knowledge ought to be measured by its merely gainful utility, or where our studious youth ought to be led to set their hearts upon immediate practical success. Still, if one is asked to deal with the point upon a hard utilitarian basis, I cannot allege that the advantage to be expected from the possession of this acquirement does much more than counterbalance the impression which still prevails in the 'other branch of the profession,' that it is a little uncanny for a barrister to be known for anything except his knowledge of the English Law. Things might fall out differently for the young civilian to whom a judicious firm of solicitors vouchsafed a chance of getting into Canadian Appeal business or Admiralty business. But in such a world as the present, and more particularly at the bar, one cannot await chances or shape one's course with a view to them; one must seize those that come and float onwards with the tide. The ambitious junior may desire to be employed in subtle questions of insurance or company law, but if briefs are offered him at the Old Bailey or even in the Divorce Court, he will probably deem it wise to accept them, and to wait till his position is assured before he begins to pick and choose among the business which clients send. In the long run, no doubt, a man who knows Roman Law will find many cases in which, when he has attained a front rank in the profession, he can

profit by that knowledge. But the main thing for the practitioner is to get a start; and it is not certain that any one will get this start sooner by being as good a civilian as Oxford can make him.

This may be deemed a somewhat sordid aspect of the matter; so let me hasten to correct any possible misapprehension by adding that as respects the third head of utility—that of the benefit to a student's mind which training in Roman Law gives, I can dwell upon it with a confidence deepened by the experience of every year. Far be it from me to disparage the law of England as it was disparaged by the eager reformers of seventy or even of fifty years ago, impatient of the defects, many of them removed since their days, which then marred its noble proportions. It is a system worthy of all admiration for its humane spirit, for the sense of civic equality and personal freedom which pervades it, for its elastic power of adapting its provisions to the needs of the great communities that live by it, not here only but beyond the Atlantic and beneath the Southern Cross. Its faults lie not in its substance but in the form which the historical conditions of its growth have given to it. It is a system extremely hard to expound and hard to master. So vast is it and so complicated, so much are its leading principles obscured by the way in which they have been stated, scattered here and there through cases reported in a chronological order, which is the perfection of disorder, so much have many of its main doctrines been cut across and (so to speak) dislocated by modern Statutes, that it presents itself to the learner as a most arduous study, a study indeed which only a few carry so far as to make themselves masters of the whole body of our working rules. Roman Law, on the other hand, is not only simpler, since it wants those differences between real and personal property, and between legal and equitable rights to which so much of our English complexity is due, but more limited in its range, large modern departments, like those of company law and insurance law and negotiable instruments, being absent. It is therefore a subject the whole of which the student can more easily bring under his eye,

seeing the various parts in their relation to one another. What is of still higher import, the Roman Law is symmetrical and coherent. Each part not only has, but displays, its organic relation with every other part. The original sources in which we possess it are of moderate bulk, not larger than the English Law Reports of the last four or five years, and not a two-hundredth part of the total volume of our Reports.

Less than one-fourth of these writings is now of practical consequence, for the remainder, though interesting historically, deal with matters not significant to the modern lawyer. But the fraction which still concerns us is of the highest possible merit. In it one may find something of value upon almost every principle and general legal doctrine with which a jurist has to deal. The legal conceptions set forth are those upon which all subsequent law has been based; and nearly all of them find their place in our own system, which they have largely contributed to mould. Two of the Roman text-books deserve special mention. The *Institutes of Gaius* is a model of vigorous precision and lucidity, an elementary treatise to which we have nothing comparable. The *Digest of the Emperor Justinian*, containing short extracts from a number of the most eminent legal writers of earlier times, has excited the admiration of all succeeding generations by the concise, delicate, and philosophical way in which principles are set forth and points of detail investigated. Its contents are philosophical, not in the sense of being abstract, but in the firm grasp of principles, and the refined exactitude with which every principle is applied. No rules could better conform to the three canons of good law, that it should be definite, self-consistent, and delicately adapted to the practical needs of society. No study can be better fitted to put a fine edge upon the mind, or to form in it the habit of clear logical thinking.

In England we have nothing similar, and although the study of case law may be made, and has sometimes been made in the hands of a skilful teacher (such as Mr. C. C. Langdell, of the Harvard University Law School), as good

a training in subtlety and exactness as the Roman Law or indeed as the scholastic logic of the Middle Ages, the immense bulk of our cases makes it difficult to pursue such a method over the whole field which a learner ought to cover.

‘Nevertheless,’ some one may say, ‘even if the merits claimed for the Roman system be admitted, it is not our English system, and you are doubling the learner’s labour. Why should he add to the time and toil that the study of English Law needs, the time and toil, less though it be, needed for mastering the Roman? Why attempt both, when one alone is, on your own showing, so arduous?’

The answer is that the learner will make quite as rapid progress with English Law if he has begun with Roman as if he proceeds to break his teeth from the first upon the hard nuts of our own system. Twenty-one years ago I ventured to say this here and I venture now to repeat it with fuller confidence. Two men of equal ability and diligence start together after taking their B.A. degree. One gives a year to Roman Law and the two next to English. The other devotes to English the whole three years. At the end of the three years the first will know as much English Law as the second. He may not have covered so much ground or got on his tongue the names of so many cases, but he will know what he does know—nor will it be much less in quantity—more thoroughly and rationally. The explanation is twofold. In learning Roman Law, one learns the elements of law in general, and therefore of English Law also, these elements being more easily learnt from Roman sources, than they could be in the form they have taken among ourselves. And, secondly, in learning Roman Law one obtains a means of testing one’s comprehension of the real meaning of English terms and the nature and compass of English rules, which deepens and strengthens the learner’s hold upon his knowledge. The main difficulty which besets students till they have had a good deal of actual practice is to turn into the concrete the rules they have learnt in the abstract, or as a Roman lawyer says, *Leges scire non est verba earum tenere sed vim atque potestatem*. The study of reported cases is a valuable aid in

grasping the practical application of rules, but cases are complicated by many details extraneous to the principle. When, however, a man has so mastered the main outlines of Roman Law as to be familiar with its conceptions and understand the application of its leading rules, he is naturally and almost necessarily led in his study of English Law to compare the conceptions and rules he finds there. His text-book tells him, for instance, that the English rule regarding the passing of the ownership of an object sold, is such and such. What is the Roman rule? If the two rules agree, he remembers the English better. If they vary, he is led to ask why; and he obtains a juster view of the origin, bearings, and range of the English rule from perceiving wherein it differs from the Roman. If any one thinks there is a risk of his confounding the two, and becoming muddled between them, I can only say that I have never known this happen, partly, perhaps, because in dealing with Roman Law one thinks in Latin—a good thing to do—and expresses in its technical terms the result one arrives at. On the contrary, the student gets a clearer and sharper view of the grounds of every doctrine, and of its precise compass, than he could get from studying either system by itself. It is as when in studying a foreign language one translates constantly backwards and forwards into one's own, and obtains thereby both a finer perception of the idioms of both, and a more exact comprehension of the substantial meaning of every sentence that is so translated.

I may be reminded that the advantage here claimed does not apply to all departments of Roman Law alike, but to those only which cover the same field as our own Law. The remark is true, and draws with it a practical lesson. The subject has two aspects. Besides its intrinsic scientific interest as a vast and harmonious system, it has a historical aspect for the scholar and the student of institutions: it has a practical or professional aspect for the lawyer. Different parts of it are especially interesting to one or other of these classes. Much of the law of persons, of crimes, and of procedure, while it engages the curiosity of the scholar or historian, is

too remote from modern conditions of life to attract, or to profit, the jurist of to-day. What he will chiefly value are the parts that deal with the law of Property, including Inheritance (though even in this there is a good deal whose interest is now merely historical) and of Obligations, together with some parts of the law of persons, such as marriage and guardianship. These are the parts on which the teacher should here in England expend his efforts, for it is in these that the comparison with English Law is chiefly instructive. He should lead the student along a path from which the parallel territories of English Law are in full view, and carry him constantly to and fro across the border. So if I may, at the risk of seeming to transgress a Roman rule, give a legacy to an uncertain person, I will bequeath to my successor, whoever he may be, this maxim as the best practical result of my experience—that Roman Law must always be so taught as to be brought into the closest and most constant relation with English Law, since it will thereby become not only more helpful but more enjoyable to both learner and teacher. It ought to be treated as a practical working system, full of life, not only because it is preserved to us in lifelike detail, but also because it is still actually in force as the operative law of some countries, full therefore of direct instruction and suggestion for ourselves, capable of being used to enlarge English conceptions or indicate useful modifications of English rules.

In discoursing on it, if I may in this expiring swan song refer to my own experience, I have usually passed by what may be called its antiquarian aspects, not from any want of interest in them, but because the object of quickening the interest and training the intellect of the *cupida legum iuventus* seemed more urgent. It has been rather in the public lectures delivered from time to time before the University, that I have endeavoured to develop and illustrate the wider historical relations of the law of Rome, and to connect it, sometimes in the letter, sometimes in the spirit, not only with the history of the Empire and the Church, but also with the problems of abstract jurisprudence, with political ideas and

constitutional forms, with the legal institutions of peoples remote in time, like the primitive Icelanders, or dissimilar in race and habits, like the Musulmans of the contemporary East, with current questions on which Roman experience sheds light, such as the law of Marriage and Divorce, with the enterprises of modern law-makers, like the Legislatures of the States of North America or the rulers of British India. Sometimes these lectures may seem to have strayed beyond the strict limits of the Chair. I have then fallen back on the ancient adage *Roma caput mundi regit orbis frena rotundi*, and have feigned for the Imperial law a continuance of its oecumenical authority. The Roman law is indeed still worldwide, for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence which it does not touch: there is scarcely a corner of political science on which its light has not fallen.

In the opportunities for such placing the two systems side by side lies the one great advantage which English and Anglo-American civilians enjoy as compared with their continental brethren. To the latter the Roman Law is the basis—in some countries it may almost be called the modified substance—of the current law. To us it is a parallel system with which comparisons can be made. These comparisons are eminently fertile in elucidation of the past condition of both systems, and in criticism of their present condition. To no scholars ought the early history of the Roman Law to be at once so easily comprehensible and so instructive as to us in England, because the history of our own law is full of beautiful analogies therewith. So no jurists are better able to estimate the value of Roman doctrines on many principles of contractual law, because our system has developed independently, and illustrates the Roman equally where it differs and where it agrees. We in England cannot pretend to rival the work which the great Germans of this century, men like Savigny and Vangerow, Ihering and Windscheid and Mommsen, have done for the investigation and exposition of Roman jurisprudence and legal history. But our detached position ought to give us a perspective and a freshness of

critical insight, perhaps even a means of comprehending things by reading our own experience into them, which continental scholars sometimes lack; and of that experience, we may trust, due use will some day be made. For I cannot doubt, looking not only to the progress of the study in England, but to its rapid and solid growth in the Universities of America, that the study of the Roman Law, once so nearly extinct among us, is now destined to shine with a steady light for generations to come.

I had intended to review, in connexion with the progress of our own law school, the changes which have passed on the aspects of legal science in England within the last thirty years. Two among them give cause for regret, the decline of interest in projects for simplifying and consolidating the law, and the growing despondency wherewith attempts to amend our legal procedure are now regarded, a despondency probably due to the imperfect success which has attended those Judicature Acts from which so much was hoped twenty years ago. There are few countries in which so small a proportion of the men engaged in professional work show an active interest in legal reforms. Against these grounds of disheartenment I should have set the increasing zest wherewith the comparative method is being historically applied to the investigation of the origin of law and of political institutions, and should have dwelt on the revived study of primitive custom as the foundation of those institutions, as well as on the more active discussion of constitutional questions generally, whether foreign, or American, or domestic, and the vigour which so many of our younger writers show in examining the ethical and economic bases and grounds of law, with views wider and more sympathetic, if also more suffused by the moist light of emotion, than were those which some among us drew from the Utilitarians of the last generation. But these topics would lead me too far afield; it is for the present enough to observe two happy changes which we have ourselves seen—one, the warmer interest which the two ancient Universities display in the problems that engage the attention of social reformers and the willingness they show

to aid practically in their solution ; the other the much larger share which the jurists and constitutional students, as well as the economists, of America and the British colonies have come to take in all these discussions. As our books are known and conned beyond the ocean, so here we read and prize the most eminent colonial writers ; and we find in an American magazine, the *Political Science Quarterly*, an excellently conducted organ, such as Britain has not yet been able to provide, for the discussion in a scientific spirit of a whole class of constitutional and quasi-political questions. As the isolation of England from Continental Europe is less marked than it was half a century ago, so still more conspicuously does the intellectual and moral unity of the English race dispersed throughout the world stand forth to-day in a clearer and fuller light.

Let us turn back to consider what still remains to be done to give this law school, now firmly established in the University, its due hold upon the legal profession and its due opportunities of promoting the progress of legal science. None of us can be blind to its present deficiencies. We have accomplished less than we hoped in raising up a band of young lawyers who would maintain, even in the midst of London practice, an interest in legal history and juristic speculation. The number of persons in England who care for either subject is undeniably small, probably smaller, in proportion to the size and influence of the profession, than in any other civilized country ; and it increases so slowly as to seem to discredit the efforts of the Universities. Of those who have undergone our law examinations comparatively few have either enriched these subjects by their writings, or have become teachers among us, or have taken any part in promoting legal studies elsewhere<sup>1</sup>.

How is this deficiency, which ought to be candidly confessed, to be explained ? No one will lay it at the door of the University and College teachers, whose eminent services have been already referred to. To me it seems chiefly due to

<sup>1</sup> A very few names occur to me of persons who have so written or taught, but I abstain from mentioning these lest I should omit others.

the following causes, causes which I mention because they may all be removed. One of them is the short-sighted and perhaps somewhat perverse unwillingness of the authorities who control admission to practice in both branches of the profession in London, to give full recognition to our Oxford Law Examinations and Degree. Were the tests we apply so recognized as to relieve one who had passed them from all examinations for admission either to the bar or to practice as a solicitor, except such examinations as turn upon those purely practical matters which can only be learnt in a barrister's chambers or a solicitor's office, a strong motive would be supplied to men destined for the profession to pursue their legal studies and take their legal examinations here, where we may without vanity say that both teaching and examining are understood much better than by the professional authorities in London. Needless to add that the University would be perfectly ready to allow those authorities every means of satisfying themselves of the character of her examinations, as the General Medical Council is accustomed to supervise the medical examinations of the various medical bodies.

A second cause lies with Oxford herself in her own examinations. Not only do they cramp the teacher, practically debarring him from some topics; but they are so arranged as to prevent the Law School from receiving, with some few exceptions, men of the first intellectual rank. The ablest and best prepared of the students naturally, and rightly, enter the classical school, and find themselves obliged, when they have obtained their degree in it at the age of twenty-three, to quit the University for the work of life. Do not suppose that I for a moment desire to draw such men away from the classical school. No one who has himself passed through the training of that school will doubt its superior value to even the best-arranged Law School, as a part of the education needed to make a good scholar, a good citizen, and a good Christian. What we want is such a revision of our arrangements as will bring men to the University somewhat younger, and will enable those who have obtained honours in the

school of *Literae Humaniores*, and intend to follow the legal profession, to pass into the Law School when they have taken their B.A. classical honours, and devote at least a year (though in the Law Schools of America two years at least are thought needful) to professional studies. At present Oxford is in the absurd position of practically excluding from the legal instruction which the University provides the most promising of her students, the very men who are best fitted to turn it to account in their subsequent career. They spend at school a year which they ought to spend at college, and they spin out their general studies so long that they are unable to obtain that scientific training in the future work of their life which the University has been at such pains to set before them. To find time and make provision in our curriculum for professional as well as general literary studies was one of the chief problems which the Commissioners of 1878-81 ought to have dealt with. Their failure throws back upon the University herself the duty of reform. Other, though less material, causes may be found in the undue prominence which examinations have been suffered to take in the system, and in the very unsatisfactory relations between the teaching provided by the University and that which the Colleges supply, relations which involve much overlapping and a serious waste of teaching power.

I need not pursue this topic into its details. Let it suffice to remark that it is not merely for the sake of the University that one would desire to see her influence upon legal studies extended. Over and above that general liberal education which it is her main business to give, and on which neither law nor any other special study must be suffered to infringe, it is her duty to handle professional studies in a wide and philosophic spirit, to raise them above mere gainful arts into the domain of science, to draw to herself the ablest of those who are entering these professions, the men from whom each profession receives its tone and temper. You all know how much the practical sciences, such as medicine, chemistry, and engineering, have gained by being closely associated with the pursuit of abstract science. No less true is it that men

who follow these occupations, and those who devote themselves to the bar or to the church, profit by their association with literary and scientific culture and its central home here, feeling themselves members of a great learned corporation, and carrying away with them the influence of the ideals it has taught them to cherish. It is upon the clergy that this influence has hitherto told most; nor has anything done more to keep the clergy of the Church of England from becoming a caste and to stimulate their activity in those fields of philosophic and historical research wherein they have won so much distinction. One would like to see the University lay the same hold on the other great professions likewise.

This, however, is only one of the points in which observers who have watched and studied Oxford from without as well as from within are disposed to think that she does not fully comprehend, does not at any rate fully use, her unrivalled opportunities. I touch upon a delicate point. Yet as Homer occasionally invests a dying warrior with prophetic gifts, one who is on the eve of departure may be permitted to give expression to some of the aspirations that have long filled his mind when he has thought of what Oxford might achieve. She seems at present to be too exclusively occupied not only with the giving of a general liberal education (to the disparagement of professional studies), but also with her regular curriculum and those who follow it, to the neglect of those others, now comparatively few, but capable of almost indefinite increase, who desire not so much to follow a regular course or secure a degree as to obtain special training in some department of learning. Have we not, in our English love of competition and our tendency to reduce everything to a palpable concrete result, allowed the examination system to grow too powerful, till it has become the master instead of the servant of teaching and has distracted our attention from the primary duty of a University? It is not any revolutionary change one would desire to see. Such changes are seldom either easy or salutary; while as regards the college system, I find something to regret in those inroads upon the social

life and corporate character of the colleges for which the last Commission is responsible. The reform chiefly needed is a reform that would neither injure the Colleges nor affect the character of the University as a seat of general liberal education. Rather let us return to the older conception of a University as a place to which every one who desired instruction might come, knowing that as Oxford took all knowledge for her province she would provide him with whatever instruction he required. The abundance and the cheapness of literature have not diminished, perhaps they have even stimulated, the demand for the best oral teaching, while the recent establishment of so many prosperous colleges in the great towns, the spread of University Extension lectures, the growth of Science schools, have immensely increased the number of young men who would come hither for a year or more to obtain such teaching were they sure of finding it. What is the present position? There are professors, many of whom, eminent as they are, cannot secure proper classes, because the undergraduates are occupied, under the guidance of the college teachers, in preparing for degree examinations. For the teaching of some important branches, especially in natural and in economic science, no adequate staff is provided. England has been outstripped not only by Germany but also by the United States, in the provision of what the Americans call Post-Graduate courses, a provision which even the present poverty of the University need not hinder her from making, were but a reasonable system of fees introduced and revenues husbanded that are now unprofitably spent. Both the new University teachers who might be created and the present professors to whom the existing system refuses hearers would be only too happy to give those courses, if the students could be found and the requisite arrangements made. The men who would attend the courses are to be found, some of them within, many more without the University. Those without do not come because the courses have not been offered: and to provide for both sets, existing arrangements must be remodelled, for these contemplate only the normal undergraduate who arrives at nineteen, is examined, and departs at

twenty-two or twenty-three, and take no account of those who desire neither examinations nor degrees, but simply to perfect themselves in some department of science or learning. Were such courses offered, and were those antiquated arrangements altered, you might soon expect a sensible afflux of students, not from England only, but from far beyond the bounds of England.

Perhaps those who dwell in Oxford have scarcely yet realized the magnificent position this University holds, as not only the oldest and the most externally beautiful and sumptuous place of education in the English-speaking world, but as a spot whose name and fame exert a wonderful power over the imagination of the English peoples beyond the sea, many of whose youth would gladly flock hither were they encouraged to do so by arrangements suited to their needs. For those among the studious youth of the United States and Canada who desire to follow out their special studies, I can safely say from what I have seen of Canada and the United States that did Oxford and Cambridge provide what the Universities of Germany provide, and were it as easy to enter here and choose the subject one seeks to study as it is in the Universities of Germany, it is to Oxford and Cambridge rather than to Germany that most of them would resort: nor could the value be overestimated of such a tie as their membership here would create between the ancient mother and the scattered children, soon to be stronger than their mother, but still looking to her as the hallowed well-spring of their life.

It is always sad to part from work with which the best years of one's life have been largely occupied: and to me this common regret is deepened by the associations, full of antique dignity, of the office I am resigning and by the nature of the work which has been a source of unfailling pleasure. And my regret at parting is the keener because I part from the place where I have known so many of those brilliant figures whom the last twenty years have taken from us, one of them happily still in the world, though long since lost to the University which his splendid powers adorned,—I mean Mr.

Goldwin Smith,—the rest now living only in our recollection. Vividly there come back to me as I stand by the open gate, the kindly wisdom of the late President of Corpus Christi<sup>1</sup>, most loveable of men; the luminous and fertile intellect of Sir Henry Maine<sup>2</sup>; the masculine force and high sense of public duty of Thomas Green<sup>3</sup>; the penetration and learning, not more wide than exact, of Mark Pattison<sup>4</sup>; the fine taste and golden lips of Henry Liddon; the warm heart and vehement discourse and noble love of truth of Edward Freeman<sup>5</sup>; the fire, the courage, the eagerness, the zeal in all good causes of one whose university lectures and sermons were so powerful a stimulus to many of us in our undergraduate days, Arthur Stanley<sup>6</sup>. These men had some sharp contests in their lives, but they are all alike enshrined in our memory as men of whom the Oxford of those days may well be proud.

Nor must a word of grateful farewell be omitted to those colleagues in the Faculty of Law—among whom I will venture to reckon the Warden of All Souls—whose thoughts and plans it has been a constant pleasure to share, and with whom I have lived these many years in a friendship which no cloud of personal disagreement, nor any divergence of political opinions, has ever for a moment darkened. With the regret of parting I carry away the delightful recollection of those years, and a sense which time will not diminish of the honour it has been to be permitted so long to serve this great University, the oldest and most venerated of the dwellings of learning in Britain, dear to us not only because our brightest years were spent among her towers and groves, but still more because in her, as now in maturer life we scan a sometimes troubled horizon to watch for signs of storm, we see an institution which has stood unshaken while dynasties have fallen and constitutions have been changed, and which still and

<sup>1</sup> Dr. John Matthias Wilson, formerly Professor of Moral Philosophy.

<sup>2</sup> Formerly Corpus Professor of Jurisprudence.

<sup>3</sup> Formerly Professor of Moral Philosophy.

<sup>4</sup> Formerly Rector of Lincoln College.

<sup>5</sup> Formerly Regius Professor of Modern History.

<sup>6</sup> Formerly Regius Professor of Ecclesiastical History, afterwards Dean of Westminster.

always, placed above the shock of party conflicts and renewing her youth in fresh activities from age to age, embodies in visible and stately form the unbroken continuity of the intellectual life of our country, and still commands, as fully as ever in the past, the loving devotion of her children.



## INDEX

- Abolitionists, in America, 346.  
Aborigines, in Australia, 459.  
Achaean League, 173.  
Adoption, by Indian princes, 31 ;  
in Indian law, 106 ; by Ro-  
man emperors, 866.  
Adultery, a crime in Indian  
Penal Code, 108 ; in Roman  
law, 800.  
Aeschylus, quoted, 142.  
Afghanistan, 17.  
Agricola, 13, 802.  
Alabama case, 348.  
Alarich, II, laws of, 760, 868.  
Algeria, 248.  
Alsace, annexation of, 258.  
Althing, or general assembly,  
in Iceland, 272-280, 291, 298.  
Althusius, on sovereignty, 533.  
Amendment of constitution, 130,  
174-184 ; in Australia, 437,  
438.  
America. *See* United States.  
*American Commonwealth*, re-  
ferred to, 170, 179, 316, 496.  
Analytic school of jurispru-  
dence, 612-617.  
Anarchism, 485, 605.  
Areopagus, 79.  
Argentina, constitution of, 180,  
214.  
Aristocracy and flexible consti-  
tutions, 152-157.  
Aristotle, 132, 359, 464, 567, 728,  
869.  
Armenia, 17.  
Army of Rome and India, 15, 37.  
Asiatic peoples, 476, 477.  
Augustus, 483, 513, 518, 677,  
704, 801, 802.  
Austin criticized, 536-543, 569,  
613-617.  
Australia : constitution of the  
Commonwealth, 391-462 ;  
movement for federation, 394-  
403 ; conditions favouring fe-  
deration, 403-408 ; character  
of federation, 408-410 ; dis-  
tribution of powers between  
Commonwealth and States,  
410-412 ; position of States  
under constitution, 413-415 ;  
differences from United States  
and Canada, 416-418 ; few  
restrictions on powers of  
Commonwealth, 419-421 ; the  
legislature, 421-424 ; the exe-  
cutive, 424 ; the judiciary,  
425-428 ; dependence of exe-  
cutive upon legislature, 428-  
431 ; provisions against dead-  
locks, 431, 432 ; relations of  
the two Houses, 432-435 ;  
miscellaneous provisions, 436,  
437 ; amendment of constitu-  
tion, 437, 438 ; relations of

- Commonwealth to British crown, 438-440; comparison with United States and Canada, 440-443; general observations, 443-447; democratic character, 447-450; political parties, 450-452; future political issues, 452-456; possible entrance of new States, 457-460; future relations to Britain, 460-462.
- Austro-Hungary, constitution of, 172, 240, 393, 538, 539; divorce in, 840.
- Bacon, 221, 542, 865.
- Baker, Newton D., 836.
- Banns, publication of, 812.
- Basilica*, of Leo, 748, 779.
- Belgium, divorce in, 840.
- Bentham, criticized, 465, 499-502, 536-543, 569, 613-617.
- Bernier, on Mogul empire, 9.
- Betrothal, in Roman law, 792.
- Beyrut, law school of, 684, 730.
- Bills, in House of Commons, 734, 883.
- Bishops, in Iceland, 275.
- Bismarck, 483.
- Blackstone, 101, 526, 601, 615, 684, 820, 823, 875.
- Blood feuds, 270, 640.
- Bodin, on sovereignty, 532, 533.
- Bologna, law school of, 90, 646, 656.
- Bosnia, 548.
- Boss system in America, 349, 487.
- Bowen, Lord, 630, 685.
- Bracton, 681, 740.
- Brand, President, 387.
- Breach of promise, action for, 793.
- Brehon law, 95, 621.
- Bulgaria, constitution of, 178, 179, 548.
- Cabinet government, in England, 151; under the Australian constitution, 429-431.
- Cairns, Lord, 630, 685.
- Cairo, university of, 646-656.
- Calhoun, 330, 550.
- Canada, constitution, 168, 172; compared with Australian, 393, 399, 407, 411-414, 415, 416-418, 440-443; law of divorce, 834.
- Canning, Lord, 31.
- Canon Law, growth of, 89, 90, 668; regulation of marriage and divorce by, 809, 811-814, 825-827.
- Cape Colony, 360.
- Capital of United States, 339; of Australian Commonwealth, 436.
- Caracalla, edict of, 40, 85, 585, 758.
- Case law, compared with praetorian edict, 698-708.
- Caste, 57.
- Catullus, 23, 44, 792.
- Caucus, the, 151.
- Celibacy, discouragement of, at Rome, 798, 806; of clergy, 809.
- Centripetal and centrifugal forces, their action on political constitutions, 216-262; interest and sympathy, 222-224; race and religion, 224-226; how constitutions may utilize centripetal forces, 229-237;

- and how modify centrifugal forces, 237-249; illustrations from United States, 250, 251; probable results in the future, 254-262; effect of conquest and family succession, 256-258.
- Chancellor, the Lord, as builder of equity, 599-601; as law-maker, 689, 690, 695-697.
- Character, of conquering races, 49-51.
- Chartism, 149, 201.
- Chastisement of wife by husband, 819.
- Christianity, unifying influence of, 2; persecution of, 44; in India, 57; introduction into Iceland, 294, 295; as affecting growth of law, 665-668, 757; influence on Roman law of divorce, 803-805.
- Church, identified with State, 663, 664.
- Cicero, against Verres, 22, 76, 80, 692; on the Law of Nature, 574-577, 608; on the Twelve Tables, 752, 877; divorced his wife, 801.
- Citizenship under Roman empire, 40, 76.
- Clarendon, Constitutions of, 763.
- Claudian, quoted, 63.
- Claudius, Emperor, 807.
- Climate, effect of, on Roman and Indian empires, 53.
- Clive, 8, 11, 24, 50.
- Codicilli*, 704.
- Codification, of Roman law, 89; of French law, 91, 325, 777; of German law, 92, 778, 864; of Indian law, 103-113; of Icelandic law, 286-288.
- Coemptio*, Roman marriage by, 788-790.
- Coke, Lord, 629, 680.
- Collectivism, 261.
- Colonies, of England, 4.
- Colour of Race, effect of, in Roman and Indian empires, 53-56, 245-248.
- Comitia*, 711-716.
- Commands, laws as, 280, 465, 499-502, 625.
- Committee stage, in English legislation, 736.
- Commonwealth. *See* Australia.
- Comparative method of jurisprudence, 604, 619-622.
- Concubinage, 808.
- Confarreatio*, Roman marriage by, 788-790.
- Congress, as a legislative body, 733-735.
- Conquest, formation of empire by, 7-13; extension of Roman law by, 75, 527; effect of, as a centripetal force, 256-259.
- Consistorium*, 725.
- Consolidation: of law in India, 111; of law in America, 735; of English law, 738, 883.
- Constantinople, law school of, 684, 730.
- Constitututa*, of Roman emperors, 84, 722.
- Constitutions: of Rome and England, 124-128; proposed new classification, 128-136; origin of flexible, 136-139; strength and weakness of flexible, 139-152; aristocracies, 152-157; influence on the

- mind of a nation, 158-164 ; capacity for territorial expansion, 164-167 ; origin of rigid, 167-174 ; enactment and amendment of rigid, 174-184 ; definiteness of rigid, 184-187 ; stability of rigid, 187-193 ; interpretation of rigid, 193-198 ; democracies, 198-204 ; future of flexible and rigid, 205-210 ; possibility of new types, 210-213 ; classes of governments, 214, 215.
- Contract code, in India, 110, 111.
- Contractualists, the, 463-466, 599.
- Convention, for amendment of constitution, 179, 181, 183, 398.
- Cousins, intermarriage of, 807.
- Criminal law, 78, 741.
- Croatia, 227.
- Cromwell, Oliver, 7, 170, 512, 519.
- Crown colonies, 4.
- Custom : source of Icelandic law, 280-283 ; of law generally, 640, 672, 673, 687, 741.
- Customs duties, in Australian constitution, 436.
- Dacoity, 21.
- Dante, 317 ; quoted, 529, 594, 722.
- Dartmouth college case, 414.
- Darwin, 307, 588.
- Deadlocks, provisions against, in Australian constitution, 431-435.
- Deceased wife's sister, marriage with, under Roman law, 807.
- Decemviral legislation, at Rome, 747.
- Declaration of Independence, 491, 579, 599.
- Deference, as ground of political obedience, 469, 470, 474.
- Delegations, in Austro-Hungary, 539.
- Democracy and rigid constitutions, 198-204.
- Democratic character of Australian constitution, 447-450.
- Demosthenes, quoted, 568, 594.
- Denmark, acquisition of Iceland by, 300 ; constitution of, 513, 515 ; divorce in, 839.
- Dicey, Prof. E., 134, 686, 889.
- Dictator, 145, 508.
- Diet, of empire, 272, 298, 315.
- Diocletian, 729, 748, 756.
- Divorce : in Ireland, 772, 783, 830 ; in Scotland, 783, 827-829 ; in Roman law, 799-802 ; influence of Christianity on Roman law, 803-805 ; under canon law, 825-827 ; later law in England and Scotland, 827-830 ; laws in United States, 830-833 ; American statistics, 834-839 ; in modern European countries, 839-842 ; connexion with conjugal infidelity, 848-851 ; does English law need amendment? 852-856.
- Donatio propter nuptias*, 796, 804, 824.
- Dos*, in Roman law, 795, 803, 824.
- Dower, 814, 820, 824.
- Drayton, quoted, 588.
- Droit Naturel*, 604, 608-612.
- Duck, Arthur, 596, 862.
- Dutch law, in South Africa, 73, 93, 367.

- Dutch republics, in South Africa, 359-390.
- Ecclesia, of Greek cities, 156, 611.
- Ecclesiastical courts, 815, 816, 827.
- Edict of the praetor, 78, 692, 693, 698-701, 706.
- Edictum perpetuum*, 703.
- Education, in Roman and Indian empires, 47, 61.
- Edward I, legislation of, 763.
- Egypt, political position of, 29, 59, 87, 226, 239, 513, 548.
- El Azhar, mosque and university, 646-656.
- Elegance, in Roman law, 629, 879.
- Emancipation of women, 799, 846-848, 857.
- Empedocles, quoted, 567.
- Emperor : as sovereign in middle ages, 529 ; as source of law at Rome, 720-730.
- England : Roman empire compared with British empire in India, 1-71 ; extension of English law throughout the world, 72-123 ; the constitution, 124-126, 130, 132-135, 141, 143, 146, 147, 148, 155, 163, 165, 175, 195, 206-210, 230 ; sovereignty of Parliament, 510, 513, 519, 538, 553 ; conception of equity as affected by law of nature, 599-602 ; analytic school of jurisprudence, 612-617 ; want of elegance in English law, 630 ; legal writers as sources of law, 680-688 ; judges as sources of law, 688-690, 695-698 ; case law, 698-706 ; legislation by Parliament, 731-739 ; five epochs of legal change, 749 ; outline of progress of legal changes, 762-769 ; comparison with Roman law, 769-776 ; private law least affected, 778-781 ; law of marriage, 814-818 ; property relations of consorts, 818-820 ; gradual amendment of law, 817-820, 854, 882 ; law of divorce, 826-830 ; does law of divorce need amendment ? 852-856.
- English language in India, 62.
- Ennius, quoted, 615.
- Epicurus, 568.
- Equality theory of marriage, 823-825, 856.
- Equity, in Roman law, 581, 582 ; in English law, 599, 600 ; in Indian law, 601 ; as amending law of wife's property, 821.
- Erastianism, 639.
- Eurasians, in India, 55, 58, 116.
- Euripides, quoted, 784.
- European influence over rest of world, 1.
- Evidence Code, in India, 109.
- Executive, the : at Rome, 162, 163 ; in Australian constitution, 424, 429.
- Executive Council, the : in the Orange Free State, 366, 382, 384, 387 ; in the South African Republic, 372, 382, 384.
- Family, its influence on Roman law, 770 ; as religious organism, 640.

- Family succession : effect of, as a centripetal force, 256-258.
- Fathers of the Church, 666, 869.
- Fathers of the Republic, 306, 319.
- Fear, as ground of political obedience, 463-467, 472-474, 478.
- Federal courts : in the United States, 34, 350, 351 ; in Australia, 424-427.
- Federalist, The*, 302, 307-313.
- Federation : types of, 392, 393, 408-410 ; sovereignty in, 549-552 ; of British empire, 207-210, 462.
- Fetwa, 664.
- Finance : in Roman and Indian empires, 31-35 ; in Australian constitution, 399, 436.
- Finland, autonomy of, 243.
- Flag, the, in the United States, 251, 349.
- Flexible and rigid constitutions, 124-213 ; is the Transvaal constitution flexible ? 375, 376.
- Folk Mot, 138, 267, 296, 362, 711.
- Formulae*, 741.
- France : constitution of the republic, 130, 172 ; legal history, 776-778 ; divorce in, 839, 840.
- Franks, the, 480.
- Free State. *See* Orange Free State.
- Free Trade, 483.
- French law, codification of, 91.
- French Republic, constitution of, 130, 181.
- Frontiers, of Roman and Indian empires, 12-16.
- Fundamental statutes, 175.
- Fusion : of races in Roman empire, 52, 62 ; of Roman and provincial law, 82, 83.
- Future life, belief in, 847.
- Fylki, in Norway, 296.
- Gaius, 581, 583, 590, 680, 684, 710, 717, 759, 789, 791, 894.
- Gardiner, S. R., 170.
- Gens*, meaning of, 572.
- Gentili, Alberico, 602, 890.
- German empire, constitution of, 167, 174, 182, 393 ; divorce in, 839.
- German law, codification of, 92 ; history of, 776-778.
- Ghosts, legal ejection of, in Iceland, 290, 291.
- Gierke, Prof. Otto, 533, 595.
- Gilman, President, 320.
- Glanvill, 680, 740.
- Goethe, quoted, 596.
- Goði, or priest-chieftain, in Iceland, 267-271, 274, 275, 279, 289, 295-297.
- Gortyn, laws of, 76.
- Grace, opposed to law, 638.
- Graduation, at El Azhar, 651.
- Grammar, in Musulman university, 651.
- Gratian, 594.
- Greece, constitution of, 177.
- Greek Civilization, spread of, in ancient world, 2.
- Greek law, 76, 87, 584, 632.
- Greenland, colonized from Iceland, 280.
- Grondwet, the : of the South African Republic, 369-373 ; was it a rigid constitution ? 375-380.
- Grotius, 602, 603.

- Group, defined, 218; parliamentary, 452.
- Growth, phenomena of, 558.
- Grueber, Dr. E., 889.
- Gunnlaug's Saga, 292, 293.
- Habit, as governing action, 473, 500, 517.
- Haiti, constitution of, 179.
- Hamilton, Alexander, chief writer in *The Federalist*, 302, 306, 307, 309-319, 357, 550.
- Hand power, in Roman marriage law, 787-791.
- Hannen, Lord, 852.
- Harrison, Frederic, on Austin, 554, 555.
- Harvard University, 655.
- Hastings, Warren, 24, 65, 384.
- Hatts, promulgated by the Sultan, 674.
- Hawaiian Islands, 2, 246, 348.
- Hegel, 552, 611.
- Henry II, influence on English law, 762-764.
- Heraclitus, 566.
- Herodotus, 563.
- High Court: in India, 38; in Australia, 424-427.
- Hindu Law, administered in India, 97-101.
- Hindustani language, 60.
- Historical school of jurisprudence, 617-619.
- Hobbes, criticized, 533-535, 551, 598.
- Holland, constitution of, 178, 181; divorce in, 839, 840.
- Holland, Dr., 608.
- Holmes, Chief Justice, 624, 684.
- Home Rule, for Ireland, 176.
- Homer, 137, 268, 501, 566, 640, 903.
- Homicide, penalty for, in Iceland, 270, 289.
- Horace, 55; quoted, 755.
- House of Representatives, the: its position in the United States, 309, 311, 314, 316, 335, 352; in the Australian Commonwealth, 421-423, 429-435, 448.
- Hungary, constitution of, 132.
- Husband and wife, identity of, in English law, 818, 819. *See also* Marriage.
- Hustings, 267.
- Iceland, 263-300: discovery and settlement, 263-266; beginnings of a polity, 266; the priest-chieftain, 267-269; first political constitution, 269-271; organization and powers of the Althing, 271-275; the speaker of the law, 275; Thingvellir, 276-278; character of the republic, 279, 280; character and growth of the law, 281-286; sources of our knowledge of the law, 287, 288; illustrations of the law, 288-293; introduction of Christianity, 294, 295; reflections on early history, 296-298; fall of the republic, 299; union with Denmark, 300; independence, 240, 483.
- Ihering, Rudolf von, 619, 898.
- Ilbert, Sir C. P., 24, 56, 73, 101, 602, 731, 735.
- Imperium*, of praetor, 694.
- Inaugural lecture, 860-886.

- India: British conquest, 4-6; military character of empire, 11, 12; natural frontiers, 14, 15; roads and railways, 17, 18; internal peace, 20, 21; character of administration, 23-28; protected states, 31; fiscal system, 31-34; native army, 38; native civil service, 38; private civil rights, 41; legislative councils, 42; religious usages, 47; education, 48; influence of climate, 53; influence of colour, 54-56; influence of religion, 56, 57; influence of language and literature, 60-62; no fusion of races, 63; little influence on England, 64-66; probable future of British power, 69-71; legal systems found by the English, 96-99; English continued existing systems of law, 99-103, 573; codification, 103-105; merits and working of the codes, 108-112; probable future of legal development, 118-121; as governed by Englishmen, 475.
- Indian tribes, in United States, 316, 341, 475.
- Individualism, 492, 850.
- Indolence, as ground of political obedience, 467-469, 473, 474.
- International law: sovereignty in, 546-549; natural law in, 602-604.
- Interpretation of rigid constitutions, 193-198.
- Inter-state commission, 425.
- Ireland, law of, 94; political forces in, 224, 241; little influence on English law, 771; no divorce in, 830.
- Irish, in Iceland, 264, 266.
- Irrigation, in Australia, 396, 400, 436, 456.
- Isidore of Seville, 593.
- Islam, law of, 72, 74; administered in India, 96-102; characteristics of, 646, 658-665.
- Italy, constitution of, 133, 167, 171, 176.
- Iudex*, in Roman law, 678.
- Ius*, contrasted with *lex*, 128, 709.
- Ius gentium*, in Roman law, 82, 569-575, 583-586, 753.
- Ius honorarium*, 574.
- Ius non scriptum*, 126.
- Ius respondendi*, in Roman law, 678-680.
- Jackson, President, 330, 339, 344.
- Japan, constitution of, 167, 214, 520; divorce in, 834.
- Jay, Chief Justice, 302, 306.
- Jefferson, 305, 306, 307, 312, 544.
- Jewish law, 644, 665; of divorce, 828.
- Joint stock companies, law of, 743, 768, 878.
- Jointure, in lieu of dower, 820.
- Judges, the, as makers of law, 687-698.
- Judicature Act, 864, 873, 899.
- Judiciary, the: its position in the United States, 334, 350, 351; in the Orange Free State, 366; in the South African Republic, 372, 378, 386; in the Australian Commonwealth, 425-428; as makers of law, 687-698.

- Julian, jurist, 185, 526, 634, 671, 703.
- Julius Caesar, 150.
- Jurists, as makers of law, 591, 592, 676-681; difference between the action of Roman and English, 681-687, 880.
- Justinian, his codification of Roman law, 759, 760; change in law of divorce, 804.
- Kadi, Muhammadan judge, 652, 663, 674.
- Kant, 552, 611.
- Kent, Chancellor, 684.
- Khalifs, the, 514, 664.
- King's Proctor, 829.
- Kissing, as test of prohibited degrees, 807.
- Koran, the, 511, 649, 652, 656, 659, 661, 674.
- Kotzé, J. G., 369.
- Kovalevsky, 819.
- Kruger, President, 389.
- Labeo, 578, 680, 683.
- Labour Party, in the United States, 349; in Australia, 452.
- Laissez-faire*, 485, 492.
- Land, its influence on English law, 771.
- Land Revenue, in Roman and Indian empires, 31-33.
- Landesgemeinde, 137, 362.
- Langdell, Prof. C. C., 95, 894.
- Language, effect of, in Roman and Indian empires, 59-62.
- Laos States, in Siam, 233.
- Law Reports, compared with Roman treatises, 685-687.
- Law Speaker, in Iceland, 275, 276, 278, 280, 283.
- Lawyers, power of, in America, 339.
- Legal development at Rome and in England, 745-781: five chief epochs of legal change at Rome, 747-749; five epochs of legal change in England, 749-751; outline of legal changes at Rome, 751-761; outline of legal changes in England, 762-769; differences between development of Roman and English law, 769-776; observations on France and Germany, 776-778; private law least affected, 778-781.
- Legal profession, as a maker of law, 687-698.
- Legislation. *See* Methods of law-making.
- Legislative Councils, in India, 42.
- Legitimation, of children born before marriage, 809.
- Leibnitz, on Mogul empire, 9.
- Leo, Emperor-Philosopher: *Basilica* of, 748, 779; abolishes divorce by consent, 805, 809.
- Lex*, meaning of, 709, 710, 714, 715.
- Libel, punishment for, in Iceland, 289.
- Liberty, love of, 482, 483.
- Liberty of the press, in South African republics, 367, 370.
- Limitation of sovereignty, 521, 522.
- Literature, effect of, in Roman and Indian empires, 59-62.
- Lithuania, Roman law in, 93.
- Littleton, 681.

Livy, quoted, 572, 676, 752.

Liwan, or hall of prayer, 650.

Locke, 598.

Lögberg, or Hill of Laws, in Iceland, 278.

Lögsögumaðr, or Law Speaker, in Iceland, 275, 276, 278, 280, 283.

Lords, House of, 731-734, 737.

Louis Napoleon, 180, 483, 516.

Lyll, Sir A. C., 31, 46.

Macaulay, codification of Indian law by, 103, 109, 705.

Madison, President, 302, 306, 307, 314, 315, 550.

Magistrates, as makers of law, 687-698.

Maine, Sir H. S., 142, 554, 580, 584, 643, 878, 889, 906.

Maitland, Prof., 731, 814, 815, 818, 820, 826.

Manipur, 21.

Mansfield, Lord, 573, 615, 630, 685, 693, 696, 862, 863.

Mantle children, 810.

*Manus*, in Roman marriage, 787-790.

Maoris, the, in New Zealand, 248, 459.

Marcian, 563, 581, 594.

Marquardt, 27.

Marriage and divorce under Roman and English law, 782-859: diversity of law of marriage in different countries, 782-784; character of marriage in early law, 784-786; early form of Roman marriage law, 786-789; change to later system, 789-791; personal re-

lations of consorts, 791-794; pecuniary relations of consorts, 794-798; Roman conception of marriage, 798, 799; divorce in Roman law, 799-802; influence of Christianity on divorce, 803-805; encouragement of marriage, 806; discouragement of second marriage, 806; prohibited degrees, 806-808; natural marriage, 808; concubinage, 808-810; marriage under canon law, 811-814; English law of marriage, 814-818; property relations of consorts, 818-820; gradual amendment of English matrimonial law, 821-825; divorce under canon law, 825-827; later law of divorce in England and Scotland, 827-830; divorce laws of United States, 830-833; statistics of divorce in America, 834; divorce in modern European countries, 839-842; comparison of change at Rome with modern world, 842-845; tendencies affecting permanence of marriage tie, 846-851; influence of church and law, 851; does English law need amendment? 852-856; changes in theory and sentiment regarding marriage, 856-859.

Martial, quoted, 802.

Martyrs, the Christian, 482.

Mastery theory of marriage, 824, 825.

Maurer, Konrad, writer on Iceland, 269.

Mellish, Lord Justice, 630.

- Mensa et torus*, divorce from, 827, 828.
- Merriam, C. E., jun., 555.
- Merwing kings, 480.
- Metaphysical basis of law, 604, 609-612.
- Methods of law-making in Rome and in England, 669-744: law-making authorities in general, 670-675; jurists as makers of law, 676-681; difference between action of Roman and English jurists, 681-687; magistrates and judges as makers of law, 687-698; praetorian edicts compared with English case law, 698-708; direct legislation at Rome (*a*) the popular assembly, 708-716; (*b*) the senate, 716-720; (*c*) the emperor, 720-730; direct legislation in England—Parliament, 731-739; reflections suggested by the history of legislation, 739-744.
- Methods of legal science, 607-637: metaphysical or *a priori*, 609-612; analytic, 612-617; historical, 617-619; comparative, 619-622; value of each, 622-624; utility for legal study, 624-628.
- Mexico, constitution of, 168, 173.
- Military Character of Roman and Indian empires, 11, 12.
- Milton, quoted, 492, 766; on divorce, 828.
- Mitteis, Dr. L., 85, 87, 585.
- Modestinus, 679, 759, 798, 867.
- Mogul emperors, 5, 9, 476, 514.
- Mommsen, 793, 898.
- Money bills, 135, 148, 432.
- Monroe Doctrine, the, 346, 401.
- Montenegro, an autocracy, 132, 212, 214, 215.
- Montesquieu, 124, 318.
- Mormons, 785.
- Mosaic law, 645, 665.
- Mosque of El Azhar, 646-656.
- Mufti, 652, 674.
- Muhammadan law, administered in India, 97-102; characteristics of, 646, 658-665.
- Muirhead, 585, 678.
- Municipalities, in India, 28.
- Musulman law, administered in India, 97-102; characteristics of, 646, 658-665.
- Napoleon, codes of, 91, 92.
- Natal, 361, 362.
- National sentiment, as a political force, 238-242, 490, 491.
- Nations, in academical usage, 653, 711.
- Natural marriage, 808, 812.
- Nature, Law of, 556-606: origin of idea of Nature as a ruling force, 556-562; origin of conception of Natural Law, 562-569; Roman *ius gentium* or Law of the Nations, 570-575; connexion of law of Nature with Law of the Nations, 575-582; relation of Law of Nature to general customary law, 583-586; meaning attached by Roman jurists to Nature, 586-593; Law of Nature in middle ages, 593-597; in modern times, 597-606.
- Naturrecht*, 604, 607-612.
- Negotiable instruments, law of, 742, 767; in Germany, 778.

- Negro question in United States, 247, 305, 313, 328, 329, 341, 348, 356.
- Nettleship, Prof. H., 572.
- Newman, W. L., 583.
- New Testament, law in, 528, 638, 644, 666, 826, 867.
- New Zealand, outside Australian Commonwealth, 458, 459.
- Non-regulation provinces, in India, 30.
- Norman feudalism, influence on British constitution, 163.
- Norway, constitution of, 177; relations with Sweden, 240; settlement of Iceland from, 264-267; subjection of Iceland to, 299, 300; divorce in, 839, 840.
- Novels of Justinian*, 730.
- Nuncomar, execution of, 102.
- Obedience, political, 463-502: theories regarding, 463-467; grounds of, 467-484; future of, 484-498; theory of, applied to jurisprudence, 499-502.
- Obiter dicta*, 686, 698.
- Ohio, divorce in, 836.
- Old Age Pensions, specifically mentioned in Australian constitution, 400, 412, 448.
- Olympian games, as unifying influence, 237.
- Oppressed nationalities, 491.
- Orange Free State, 359-390; early history, 361-364; constitution of the republic, 364-368; observations on its working, 380-387; recent history, 387, 389, 390.
- Orders in Council, 147, 688.
- Organs of law-making, 670-675.
- Orthodox Church, in Russia, 236.
- Outlawry, 642.
- Oxford, 646, 653, 655, 656, 905-907.
- Papinian, 634, 685, 693, 715, 725, 759.
- Parke, Baron, 286.
- Parliament, as source of law in England, 130, 731-739; sovereignty of, 130, 510, 538; marriages dissolved by, 828.
- Parsis, in Parliament, 42.
- Partnership theory of marriage, 824.
- Party organization, in the United States, 310, 313, 329, 331, 345, 349, 351, 451, 452; in Australia, 450-452.
- Patagonia, 211.
- Patria Potestas*, 86, 628, 643, 866.
- Paul, jurist, 759, 792.
- Penal Code, in India, 104, 109, 705, 742.
- Pension system, in United States, 315, 353.
- People, the, as a source of law, 670-672; at Rome, 708-716.
- Peregrini*, aliens, in Roman law, 76, 79, 114, 570, 753.
- Persia, 10, 549, 659, 660.
- Philippine Islands, occupation of, by United States, 2, 28, 66, 348, 491.
- Philosophy of law, 604, 608-612, 624-627.
- Pilgrim's Progress, The*, 639.
- Pitso, of Kafirs, 137, 267, 711.
- Plato, 321, 331, 463, 567.

- Plebiscite, amendment of constitution by, 131, 180.
- Pliny, the elder, 588.
- Plutarch, 807.
- Poland, partition of, 240; Roman law in, 93, 94.
- Political Science Quarterly*, *The*, 900.
- Pollock, Sir F., 553, 555, 569, 601, 731, 810, 814, 815, 818, 820, 826.
- Polyandry, in ancient times, 784.
- Polybius, 7, 124.
- Polygamy, among Eastern peoples, 119, 784, 855.
- Pontifices*, oversight over marriage, 814.
- Pope, the, as sovereign, 529; jurisdiction over marriage, 814, 826.
- Popular assembly, as source of law at Rome, 130, 708-716.
- Population, growth of, 493.
- Portuguese empire, 46, 248.
- Possession, in Roman and English law, 624, 626, 866.
- Post-graduate studies, 904.
- Praetorian edict compared with case law, 698-708.
- Praetorian prefect, 725.
- Praetors, the, 574, 619, 631, 691-695, 698-701, 706-708, 753.
- Pre-contract, impediment to marriage, 816, 827.
- President, the: his position in the constitution of the United States, 308, 312, 316, 334, 344, 350, 508; in the Orange Free State, 366, 368, 382, 384, 385, 387; in the South African Republic, 371, 372, 382, 384, 385, 389.
- Press, influence of the, 156, 335, 349, 493.
- Priests, in Iceland, 267.
- Primary assemblies, 137, 267, 362, 711.
- Privy Council, appeal to, 96, 100, 106, 147, 234, 768; under Australian constitution, 426, 427.
- Procedure Codes, in India, 104, 108.
- Procedure, law made through, 697.
- Procopius, 50.
- Profession of law, at Rome and in England, 682, 683.
- Prohibited degrees of marriage, 806-808, 815.
- Protected states, in Roman and Indian empires, 5, 30, 31, 547.
- Protective tariff, in the United States, 329, 343; in Australia, 450.
- Protectorate, the, in England, 139, 150, 170, 512, 519.
- Protestantism, 474, 488.
- Province, meaning of the word, 30; in Canada, 411.
- Provincial government, under Roman empire, 22, 23, 25, 27, 77, 78.
- Prussia, constitution of, 171, 483.
- Public schools, 479.
- Puerto Rico, acquisition of, by United States, 197, 348.
- Puritanism of New England, 305, 329.
- Quaestiones perpetuae*, 741.
- Queensland, 224.
- Quorum, for amendment of constitution, 178.

- Rabbis, the, 645.
- Racial feeling, as political force, 224, 225.
- Railways, in India, 12, 18; in United States, 347; in Australian constitution, 436, 458.
- Rajputs, 54.
- Ratio decidendi*, 698.
- Reason, as ground of political obedience, 463-466, 472-474; of the Stoics, 568.
- Referendum, the, 130, 180, 349, 397, 438, 521.
- Reformation, influence on law, 764; on marriage law, 813, 826, 839.
- Regular marriage, 812.
- Religion, relations of law to, 638-668: apparent antagonism, 638, 639; close connexion in early times, 639-643; differences between different peoples, 643; Jews in Roman times, 644; primitive Christianity, 645; illustrations from El Azhar, 646-655; mediæval universities, 655-657; arrested development of Muslim universities, 658-665; differences in Christianity, 665-668.
- Religious feeling: in ancient and modern world, 44-47; effect of, in Roman and Indian empires, 56-59; no obstacle to spread of Roman law, 87; as political force, 225, 226, 234-236, 239, 340.
- Reports, in English law, 685-687.
- Representative Government: no place in the ancient world, 27; or in India, 42.
- Rescripts of Roman emperors, 722.
- Resolutions (*besluit*) of Transvaal Volksraad, 377-380.
- Responsa*, in Roman law, 678, 682.
- Restitution of conjugal rights, 823.
- Rhodesia, Southern, 605.
- Rights of Man, 243, 599.
- Rigid and flexible constitutions, 124-213.
- Ritchie, D. G., 555, 569.
- Rivers, importance of, in Australia, 400, 436.
- Riwaks*, at El Azhar, 653, 654.
- Road builders, Roman and English, 17-20.
- Romano-Germanic empire, 90-91, 166, 226, 239, 254, 443, 510, 529, 530, 598.
- Rome: Roman empire compared with Indian empire, 5-65; diffusion of Roman law by conquest, 75-84; establishment of one law for the empire, 84-89; extension of Roman law after fall of western empire, 89-94; Roman law compared with Indian law, 114-117; present position of Roman and English law, 121-123; constitution of, 124, 125, 133-135, 140, 144-146, 148, 154, 161, 162; political religion, 235, 481; few national revolts, 239; no race prejudices, 246, 248; empire established by conquest, 258; succession of emperors, 518;

- Roman views of sovereignty, 524-528 ; Roman conception of *ius gentium*, 570-586 ; meaning of Nature in Roman jurists, 586-593 ; philosophical treatment of Roman law, 628-637 ; jurists as makers of law, 676-687 ; magistrates as makers of law, 687-708 ; legislation by popular assembly, 708-716 ; legislation by senate, 716-720 ; legislation by emperor, 720-730 ; chief epochs of legal change, 747-749 ; outline of legal changes, 751-761 ; legal development compared with England, 769-776 ; early form of marriage law, 786-789 ; change from earlier to later system, 789-791 ; later marriage law, 791.
- Romilly, 103, 864.
- Rousseau, criticized, 464-466, 599.
- Rules, by delegated authority, 688.
- Russia : extension of dominion by, 2, 7, 48, 49, 66 ; adoption of Roman law by, 73, 93 ; fundamental laws of the empire, 137 ; influence of Orthodox Church, 236 ; sovereignty in, 506, 674 ; marital right of chastisement, 819 ; divorce, 840.
- Sacrament of marriage, 808, 812, 826.
- Sagas, 286, 287, 295.
- Sale of wife by husband, 787, 819.
- Sallust, 572.
- Salt tax, in Roman and Indian empires, 33, 34.
- Sand River Convention, 362.
- Sassanid kings of Persia, 10, 17, 44, 239, 785.
- Savigny, 112, 633, 879, 884, 898.
- Scaevola, Q. Mucius, 286, 576, 683.
- Scandinavia, extension of Roman law to, 94.
- Scientific frontiers, 15-17.
- Scotland : has adopted Roman law, 73, 91 ; national life, 243 ; little influence on English law, 772 ; marriage law, 817 ; law of divorce, 827, 829, 841.
- Scribes, the, 644.
- Second marriage, discouraged by early Christianity, 806.
- Second Volksraad, in Transvaal, 374.
- Self-help, 492.
- Senate, the : its position in Rome, 154, 155, 525 ; in the United States, 308, 314, 336, 352, 421, 433, 435 ; in Australian Commonwealth, 421-423, 430-435, 448 ; assource of law at Rome, 716-720.
- Senatus consulta*, 719-721.
- Seneca, quoted, 802.
- Separate property, of wife, 821-823.
- Separation of husband and wife, 828.
- Septennial Act, 538.
- Servia, constitution of, 178, 179.
- Settlement, prenuptial, 821.
- Sheik ul Islam, the, 511, 648, 664, 724.
- Siam, 16, 233.
- Sidgwick, H., 555.

- Sigismund, laws of, 760.
- Signore, of Italian city, 145, 502.
- Sikkim, 21.
- Slavery: in Iceland, 288; in the United States, 189, 305, 313, 328, 329, 342, 348, 356; forbidden by Transvaal constitution, 370; in Roman law, 583, 628.
- Slavonic law, 93.
- Smith, Goldwin, 170, 906.
- Smith, John William, 630, 686.
- Smith, Sir Thomas, 553.
- Social contract, 464-466, 599.
- Social Democrats, 604.
- Socrates, 566.
- Sonderbund, war of the, 239, 399.
- Sophocles, quoted, 213, 565.
- South Africa, constitution of the two Dutch Republics, 133, 168, 359-390, 548.
- South American republics, 168, 179, 211, 214, 502, 513, 518, 519.
- South Carolina, no divorce, 831.
- Sovereignty, 503-555: - confusions regarding the term, 503-505; legal or *de iure* sovereignty, 505-511; practical or *de facto* sovereignty, 511-515; relations of legal to practical sovereignty, 515-523; Roman and mediæval views, 523-530; modern theories, 531-541; questions liable to be confounded, 541-546; in international relations, 546-549; in a federation, 549-552; recent discussions, 554, 555.
- Spain, constitution of, 176, 511.
- Spanish Empire, in America, 5, 7, 34, 46, 48, 248, 356.
- Spinoza, 598.
- Spoils system, in United States, 313, 317, 349.
- Sponsalia*, 792.
- St. Augustine, 594.
- St. Chrysostom, quoted, 594.
- St. German, Christopher, 600.
- St. Leonards, Lord, 629, 680.
- St. Paul, quoted, 58, 528, 594, 638.
- St. Peter, quoted, 528.
- St. Thomas Aquinas, 529, 594.
- Statistics of divorce in America, 834-839.
- Statute *de donis*, 764.
- Statute of Frauds, 766.
- Statute of Uses, 96, 704, 765.
- Statute of Wills, 765.
- Statute *quia emptores*, 764, 770.
- Stephen, Sir J. F., codification of Indian law by, 110.
- Stephen, Leslie, 615.
- Stoics, the, 568.
- Story, Justice, 684.
- Stowell, Lord, 685, 812, 817.
- Stubbs, Bishop, 498.
- Suetonius, 44, 718, 785, 801.
- Sulla, 139.
- Sultan of Turkey, 511, 514.
- Suzerainty of England over Transvaal, 388.
- Swiss Confederation, constitution of, 130, 195, 252, 393, 418, 420, 438; divorce in, 839, 840.
- Sympathy, as ground of political obedience, 470.
- Tacitus, quoted, 264, 268, 784, 807.

- Tacking of bills, prohibited in Australian constitution, 433.
- Teaching of law : at Rome, 682; at Oxford, 860-907.
- Ten Commandments, 501.
- Territorial expansion, capacity of constitutions for, 164-167.
- Teutonic law, 94, 288, 621, 776, 814.
- Theal, Dr., 361, 363.
- Theodorich, *edictum* of, 760.
- Theodosius II, code of, 88, 586, 758, 759.
- Theology, identified with law, 640-646, 660.
- Thing, or assembly, in Iceland, 267-271, 711.
- Thingvellir, in Iceland, 271, 276-278.
- Thucydides, 512.
- Thuggi, 21.
- Thule, 264.
- Tocquëville, Alexis de : his *Democracy in America*, 319-358; his insufficient knowledge of England, 323; his preoccupation with France, 324; his description of the United States, 332-347; examination of his views, 347-355.
- Torts, law of, in India, 98, 101, 105.
- Trade, as a consolidating influence, 222, 346, 400.
- Trade Unions, in America, 487, 492.
- Trajan, 9, 25, 721.
- Transvaal, the, 168, 359-390; constitution of the South African Republic, 369-374; observations, 374, 375; is it a rigid or a flexible constitution? 375-380; observations on its working, 380-388; recent history, 388-390.
- Transylvania, 246.
- Trebatius, 704.
- Trent, Council of, 812.
- Tribonian, 526, 684, 759-761.
- Tribute, in Roman, but not in Indian empire, 34, 35.
- Trusts, commercial, 203, 487.
- Trusts, in law, 106, 704.
- Tunis, 548.
- Twelve Tables, the, 154, 284, 714, 747, 751-753, 755.
- Tyrant, in Greece, 502, 537, 544.
- Ukase, 722.
- Ulfjot, founder of the Althing in Iceland, 271, 287.
- Ulpian, quoted, 135, 581, 583, 588, 590, 634, 692, 759, 782.
- Ulster custom, 673.
- United States : law of, 95; constitution of, 126, 168, 172, 177, 179, 180, 181, 183, 187, 188, 189, 192, 195, 199, 202, 232, 241, 244, 247, 250-252; constitution as seen in the past, 301-358; constitution as seen in *The Federalist*, 302-307; predictions of the opponents of the constitution, 307-309; views of the supporters of the constitution, 309-313; criticism of both opinions, 314-319; the *Democracy in America* of Tocquëville, 319-328; his views and impressions, 328-347; examination of them, 347-355; subsequent history, 357; constitution compared with South African republics,

- 368, 384; compared with Australian Commonwealth, 398, 406, 411, 413, 414, 417, 419, 421-423, 428, 431, 433, 440-443, 445; boss system, trade unions, trusts, 47; growth of population and wealth, 493, 494; divided sovereignty, 506, 508, 510, 511, 540, 549-552; legislation by Congress, 732-735; marriage law, 783; varying laws of divorce, 830-833; statistics of divorce, 834-839.
- Universities, Musulman and mediaeval, 654-658; in India, 48, 61, 62; in Germany, 236, 237, 646; in America, 348.
- Urbs* became *orbis*, 114, 749.
- Utility, 568, 613, 614.
- Vacarius, at Oxford, 861, 889.
- Valedictory lecture, 887-907.
- Vangerow, Dr. K. A. von, 633, 870, 898.
- Verres, 22, 24, 80.
- Veto: none in South African republics, 368, 381; under Australian constitution, 440, 449; of crown in parliament, 526, 715.
- Vigfússon, Guðbrand, 278.
- Vikingry, 270.
- Village Councils, in India, 27, 28.
- Villiers, Melius de, 364.
- Vinerian professorship at Oxford, 684, 863, 875, 888.
- Vinculum matrimonii*, divorce from, 826, 828.
- Virgil, 60; quoted, 265, 527, 584.
- Voigt, Moriz, 569.
- Volksraad, the: of the original Dutch emigrants, 362; of the Orange Free State, 364, 366; of the South African Republic, 370-372; the Second Volksraad, 374; predominance of the Volksraad in the constitution, 381, 385.
- Wages, rise of, 494.
- Wakf* (= endowments), at El Azhar, 97, 654.
- Wapentake, in Iceland, 291.
- Washington city, 343.
- Washington, George, 303, 306, 450.
- West Indies, under English law, 73.
- Whig party, in United States, 346, 351.
- Wife. *See* Marriage.
- Will, as a political force, 474, 475.
- Willcox, W. F., 834, 838.
- Wills, in Musulman law, 648; Hindu law of, 106.
- Women's suffrage, in Australia, 423, 448, 454, 455.
- Wordsworth, quoted, 562.
- Written constitutions, 126, 127.
- Xenophon, quoted, 567.
- Yelverton, 601.
- Zollverein, 223, 232, 233.











