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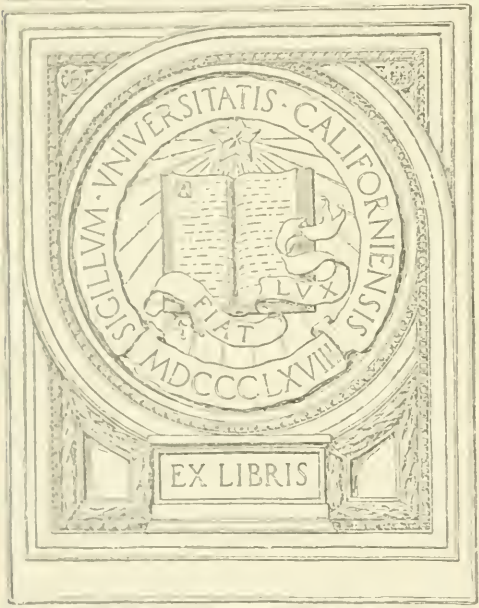

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ON

CIVIL LIBERTY

AND

SELF-GOVERNMENT.

BY FRANCIS LIEBER, LL.D.,

C. M. FRENCH INSTITUTE, ETC.

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IN TWO VOLUMES.

VOL. I.

PHILADELPHIA,
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Entered according to the Act of Congress, in the year 1853, by

FRANCIS LIEBER,

in the Office of the Clerk of the District Court of the United States in and for the Eastern District of Pennsylvania.

TO

HIS FORMER PUPILS

THESE VOLUMES

ARE

INSCRIBED,

IN KIND REMEMBRANCE,

BY THE AUTHOR.

TO MY FORMER PUPILS.

GENTLEMEN,

There are now in different portions of this country not far from a thousand citizens in the formation of whose minds I have had some share as a teacher. Many of you are in places of authority, and I consider myself more fortunate than the great founder of political science in this, that Aristotle taught a royal youth and future conqueror, and Athenians indeed, but at a period when the sun of Greece was setting, while my lot has been to instruct the future law-makers of a vast and growing commonwealth in the noblest branches that can be imparted to the minds of youths preparing themselves for the citizenship of a great republic. I have taught you in the early part of our history which God has destined to fill a fair page in the annals of man if we do our arduous duty. If not, our shame will be proportionate. He never holds out high rewards without corresponding penalties.

When you were members of this institution, I led you through the history of man, of rising and of ebb-

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ing civilization, of freedom, despotism, and anarchy. I have taught you how men are destined to be producers and exchangers, how wealth is gathered and lost; and how, without it, there can be no progress and no culture. I have studied, with many of you, the ethics of states and of political man. You can bear me witness that I have endeavored to convince you of man's inextinguishable individuality, and of the organic nature of society; that there is no right without a parallel duty, no liberty without the supremacy of the law, and no high destiny without earnest perseverance—that there can be no greatness without self-denial.*

Through you my life and name are linked to the republic, and it seems natural that I should dedicate to you a work intended to complete that part of my Political Ethics which touches more especially on liberty. You will take it as the gift of a friend, and will allow it kindly to remind you of that room where you were accustomed to sit before your teacher, with the busts of Washington, Socrates, Shakspeare, and other laborers in the vineyard of humanity, looking down upon us.

The suffrages of your fellow-citizens have carried

* For other readers it may be mentioned that the writer is Professor of History and of Political Philosophy and Economy in the State College of South Carolina.

many of you into the legislative halls of our confederated states; a few of you are clothed with their chief authority, or have risen to the bench; others have seats in our congress; some have become teachers of the young; some labor in the church. Many of you are at home, and near at hand; some are on the shores of the Pacific, or in foreign lands. Wherever this book may reach you, in whatever sphere of duty it may find you occupied, receive it as a work earnestly intended to draw increased attention to the great argument of our times.

Our age has added new and startling commentaries to many subjects discussed in the Political Ethics, and things there spoken of as probably passed all recurrence have since burst upon an amazed world. We would never have supposed that socialism and despotism, the fatal negations of freedom, could have been boldly proclaimed in this century as the defence and refuge of humanity. We could never have believed possible such a waste of national zeal within so short a period, as we have witnessed in Italy and Germany—countries that are endeared to every civilized man.

A large part of Europe is in a state of violence, either convulsive action or enforced repose, and one of the greatest nations has apparently once more

sought refuge in the reminiscences of the saddest times of Rome. History often reaches our shores from that portion of the globe by entire chapters. We are necessarily affected by new events and new ideas, as we in turn influence Europe; for we are of kindred blood, of one christian faith, of similar pursuits and civilization; we have one science and the same arts; we have one common treasure of knowledge and power; our alphabet and our numeric signs are the same; and we are members of one family of advanced nations. In such times it behooves us to keep a steady eye on all the signs of the times. Let us be attentive; let us understand. Goethe says truly that we must learn to read occasionally between the lines of books in order to understand them. It is a remark which applies with still greater force to the pages of history and those that record the changes of our own days.

You live in an energetic age. Men are intently bent on bold and comprehensive ends, and mischief is pursued with similar activity. The calling of our inter-oceanic country is a solemn one; the youngest nation shall bind the old to the oldest, and the Pacific shall unite, though the narrow Bosphorus has long divided. Your institutions come from the freest nation of ancient and venerable Europe—and your duties are proportionate to the blessings

you are enjoying. The period we live in, our country's position and youth, our abundance of land, our descent, and our freedom—all call upon us, and warn us.

If this work then aid, in ever so slight a degree, in the discharge of these high duties; if it help to show that the political and national Know Thyself is as important as the individual; if it impress more forcibly upon your minds the advice of Pliny: Habe ante oculos hanc esse terram quæ nobis miserit jura, and give it a meaning far wider than that which the Roman could give to it; if it prove an additional incentive to hold fast to our liberty and to cultivate it with fresh purity of purpose; if it increase our love of sterling action and disdain of self-praise; if it tend to confirm civil fortitude, that virtue which is acquired by the habit of at once obeying and insisting upon the laws of a free country, and shows itself most elevated when it resists alluring excitement; if, in some measure, it serve to restrain us from exaggeration and judging by plausibility—two faults that are rifer in our age than they have been almost at any other period; if it steady the reader against that enthusiasm which Wesley designates as "the looking to the end without the means;"* if it

* General Minutes, appended to his edition of the Book of Common Prayer, for the American Methodists.

deepen our abhorrence of all absolutism, whether it be individual or collective, and by whatever name it may be called; and if it strengthen our conviction of the dignity of man, too feeble to wield unlimited power and too noble to submit to it—then indeed I shall be richly rewarded, and shall not consider myself too bold if I point to you as Epaminondas, in his dying hour, pointed to Leuctra and Mantinea.*

L.

Columbia, S. C., July, 1853.

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* Diodor. Sic. L. xv. c. 87, 6.

CONTENTS.

VOLUME I.

CHAPTER I.

PAGE

INTRODUCTORY 25

CHAPTER II.

DEFINITIONS OF LIBERTY 32

CHAPTER III.

THE MEANING OF CIVIL LIBERTY 48

CHAPTER IV.

ANCIENT AND MODERN LIBERTY. ANCIENT, MEDIEVAL, AND MODERN STATES 58

CHAPTER V.

ANGLICAN LIBERTY 68

CHAPTER VI.

NATIONAL INDEPENDENCE. PERSONAL LIBERTY 73

CHAPTER VII.

BAIL. PENAL TRIAL 85

CHAPTER VIII.

PAGE

High treason 100

CHAPTER IX.

Communion. Locomotion, emigration 108

CHAPTER X.

Liberty of conscience. Property. Supremacy of the law 118

CHAPTER XI.

Quartering soldiers. The army 135

CHAPTER XII.

Petition. Association 144

CHAPTER XIII.

Publicity 149

CHAPTER XIV.

Supremacy of the law. Taxation. Division of power . 158

CHAPTER XV.

Responsible ministers. Courts declaring laws unconstitutional. Representative government . . 175

CHAPTER XVI.

Representative government continued. Basis of property. Direct and indirect elections . . . 188

CHAPTER XVII.

Parliamentary law and usage. The speaker. Two houses. The veto. 199

CHAPTER XVIII.

PAGE

INDEPENDENCE OF THE JUDICIARY, THE LAW, JUS, COMMON LAW 220

CHAPTER XIX.

INDEPENDENCE OF JUS, SELF-DEVELOPMENT OF LAW CONTINUED. ACCUSATORIAL AND INQUISITORIAL TRIALS. INDEPENDENCE OF THE JUDGE 234

CHAPTER XX.

INDEPENDENCE OF JUS, CONTINUED. TRIAL BY JURY. THE ADVOCATE 250

CHAPTER XXI.

SELF-GOVERNMENT 267

CHAPTER XXII.

AMERICAN LIBERTY 277

CHAPTER XXII.

IN WHAT CIVIL LIBERTY CONSISTS, PROVED BY CONTRARIES . 287

CHAPTER XXIII.

GALLICAN LIBERTY. SPREADING OF LIBERTY . . . 298

CHAPTER XXIV.

THE INSTITUTION. ITS DEFINITION. ITS POWER FOR GOOD AND EVIL 320

CHAPTER XXVI.

THE INSTITUTION CONTINUED. INSTITUTIONAL LIBERTY. INSTITUTIONAL LOCAL SELF-GOVERNMENT 345

VOLUME II.

CHAPTER XXVII.

PAGE

EFFECTS AND USES OF INSTITUTIONAL SELF-GOVERNMENT . 13

CHAPTER XXVIII.

DANGERS AND INCONVENIENCES OF INSTITUTIONAL SELF-GOVERNMENT 29

CHAPTER XXIX.

ADVANTAGES OF INSTITUTIONAL GOVERNMENT, FARTHER CONSIDERED 43

CHAPTER XXX.

INSTITUTIONAL GOVERNMENT THE ONLY GOVERNMENT WHICH PREVENTS THE GROWTH OF TOO MUCH POWER. LIBERTY, WEALTH AND LONGEVITY OF STATES 57

CHAPTER XXXI.

INSECURITY OF UNINSTITUTIONAL GOVERNMENTS. UNORGANIZED, INARTICULATED POPULAR POWER 64

CHAPTER XXXII.

IMPERATORIAL SOVEREIGNTY 77

CHAPTER XXXIII.

IMPERATORIAL SOVEREIGNTY CONTINUED. ITS ORIGIN AND CHARACTER EXAMINED 86

CHAPTER XXXIV.

PAGE
CENTRALIZATION. INFLUENCE OF CAPITAL CITIES . . 97

CHAPTER XXXV.

VOX POPULI VOX DEI 107

APPENDIX.

APPENDIX I.

A PAPER ON ELECTIONS, ELECTION STATISTICS AND GENERAL VOTES OF YES OR NO 123

APPENDIX II.

A PAPER ON THE ABUSE OF THE PARDONING POWER . . 144

APPENDIX III.

A PAPER ON SUBJECTS CONNECTED WITH THE INQUISITORIAL TRIAL AND THE LAWS OF EVIDENCE 169

APPENDIX IV.

MAGNA CHARTA OF KING JOHN 178

APPENDIX V.

THE PETITION OF RIGHTS 202

APPENDIX VI.

PAGE

An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas, commonly called "the habeas corpus act" . 209

APPENDIX VII.

Bill of rights, passed 1 William and Mary, sess. 2, ch. 2, 1689 221

APPENDIX VIII.

A declaration by the representatives of the United States of America, in congress assembled . . 228

APPENDIX IX.

Articles of confederation and perpetual union between the states 235

APPENDIX X.

Constitution of the United States of America . . 249

APPENDIX XI.

French charter of Louis XVIII. and that adopted in the year 1830 268

APPENDIX XII.

Constitution of the French republic 281

APPENDIX XIII.

The present constitution of France 301

APPENDIX XIV.

PAGE

Report of the French senatorial committee on the petitions to change the republic into an empire, in November, 1852, and the senatus consultum adopted in conformity with it 325

APPENDIX XV.

Letter of the French minister of the interior, Mr. De Morny, addressed to the prefects of the departments in the year 1852 347

CIVIL LIBERTY

AND

SELF-GOVERNMENT.

CHAPTER I.

INTRODUCTORY.

We live at a period when it is the duty of reflecting men to ponder conscientiously these important questions: In what does civil liberty consist? How is it maintained? What are its means of self-diffusion, and under what forms do its chief dangers present themselves?

Our age, marked by restless activity in almost all departments of knowledge, and by struggles and aspirations before unknown, is stamped by no characteristic more deeply than by a desire to establish or extend freedom among the political societies of mankind. At no previous period, ancient or modern, has this impulse been felt at once so strongly and by such extensive numbers. The love of civil liberty is so leading a motive in our times, that no man who does not understand what civil liberty is, has acquired that self-knowledge without which we do not know where we stand, and are supernumeraries, or merely instinctive followers rather than conscious, working members of our race, in our day and generation.

The first half of our century has produced more

than three hundred political constitutions, some few of substance and sterling worth, many transient like ephemeral beings, but all of them testifying to the endeavors of our age, and plainly pointing out the high problem that must be solved; many of them leaving roots in despite of their short existence, which some day will sprout and prosper. It is in history as in nature. Of all the seeds that germinate, but few grow up to be trees, and of all the millions of blossoms, but few ripen into fruit.

Changes, frequently far greater than are felt by those who stand in the midst of them, have taken place; violent convulsions have shaken large and small countries, and blood has been shed. Blood has always flowed before great ideas could settle into actual institutions, or before the yearnings of humanity could become realities. Every marked struggle in the progress of civilization has its period of convulsion. Our race is in that period now, and thus our times resemble the epoch of the reformation.

Many who unreservedly adhere to the past, or who fear its evils less than those of change, resist the present longings of our kind, and seem to forget that change is always going on, whether we will or not. States consist of living beings, and life is change. Others seem to claim a right of revolution for governments, denying it to the people, and large portions of the people have overleaped civil liberty itself. They daringly disavow it, and pretend to believe that they find the solution of the great problem of our times either in an annihilation of individuality, or

in an apotheosis of individual man, and preach communism, individual sovereignty, or the utmost concentration of all power and political action in one Cæsar. "Parliamentary liberty" is a term sneeringly used in whole countries to designate what they consider an obsolete encumbrance and decaying remnants of a political phase belonging to the past. The representative system is laughed at, and the idol of monarchical or popular absolutism is draped anew, and worshipped by thousands as if it were the latest avatar of their political god.

We must find our way through these mazes. This is one of our duties, because it has pleased Providence to cast our lot in the middle of the nineteenth century, and because an earnest man ought to know, above all social things, his own times.

Besides these general considerations, weighty as they are, there are others which press more immediately upon ourselves. Most of us descend in blood, and all of us politically, from that nation to which has been assigned in common with ourselves the high duty of developing modern civil liberty, and whose manliness and wisdom, combined with a certain historical good fortune, which enabled it to turn to advantage elements that proved sources of evil elsewhere, have saved it from the blight of absorbing centralization. England was the earliest country to put an end to feudal isolation, while still retaining independent institutions, and to unite the estates into a powerful general parliament, able to protect the nation against the crown. There, too,

centuries ago, trials for high treason were surrounded with peculiar safeguards, besides those known in common criminal trials, in favor of the accused, an exception the very reverse of which we observe in all other European countries down to the most recent times, and in most to this day. In England, we first see applied in practice and on a grand scale, the idea which came originally from the Netherlands, that liberty must not be a boon of the government, but that government must derive its rights from the people. Here, too, the people always clung to the right to tax themselves, and here, from the earliest times, the administration of justice has been separated from the other functions of government and devolved upon magistrates set apart for this end, a separation not yet found in all countries.[1] In England, power of all kind, even of the crown, has ever bowed, at least theoretically, to the supremacy of the law,[2] and that country may claim the imperish-

[1] I do not only allude to such bodies as the French parliaments, but to the fact that down to this century the continental courts of justice conducted, in innumerable cases, what is now frequently called the administrative business, such as collecting taxes, letting crown domains, superintending roads and bridges. The early separation of the English judge—I do not speak of his independence, which is of much later date—and the early, comparatively speaking, independent position of the English church, seem to me two of the most significant facts in English history.

[2] Even a Henry the Eighth took care to have first the law changed when it could not be bent to his tyrannical acts. Despots in other countries did not take this trouble, and I do not know whether the history of any other period impresses the student with that peculiar meaning which the English word Law has acquired, more forcibly than this very reign of tyranny and royal bloodshed.

able glory of having formed a national representative system of two houses, governed by a parliamentary law of their own, with that important element, at once conservative and progressive, of a lawful, loyal opposition. It is that country which alone saved judicial and political publicity, when secrecy prevailed everywhere else; which retained a self-developing common law and established the trial by jury. In England, the principles of self-government were not swept away, and all the chief principles and guarantees of her great charter and the petition of rights have passed over into our constitutions.

We belong to the Anglican tribe, which carries Anglican principles and liberty over the globe, because wherever it moves liberal institutions and a common law full of manly rights and instinct with the principle of an expansive life accompany it. We belong to that race whose obvious task it is among other proud and sacred tasks, to rear and spread civil liberty over vast regions in every part of the earth, on continent and isle. We belong to that tribe which alone has the word Self-Government. We belong to that nation whose great lot it is to be placed with the full inheritance of freedom on the freshest soil, in the noblest site, between Europe and Asia, a nation young, whose kindred countries, powerful in wealth, armies, and intellect, are old. It is a period when a peaceful migration of nations, similar in the weight of numbers to the warlike migration of the early middle ages, pours its crowd into the lap of our more favored land, there to try and at times to test to the utmost our institutions—

institutions which are our foundations and buttresses, as the law which they embody and organize is our sole and sovereign master.

These are the reasons why it is incumbent upon every American again and again to present to his mind what his own liberty is, how he must guard and maintain it, and why, if he neglect it, he resembles the missionary that should proceed to convert the world without bible or prayer-book. These are the reasons why I feel called upon to write this work in addition to what I have given long ago in another place on the subjects of Justice, Law, the State, Liberty and Right,[3] and to which, therefore, I must refer my reader for many preliminary particulars; and these, too, are the reasons why I ask for an attention, corresponding to the sense of responsibility with which I approach the great theme of political vitality—the leading subject of western history[4] and the characteristic stamp and feature of our tribe, our age, our own country and its calling.

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[3] In my Political Ethics.

[4] I ask permission to draw the attention of the scholar to a subject which appears to me important. I have used the term Western History, yet it is so indistinct that I must explain what is meant by it. It ought not to be so. I mean by western history, the history of all historically active, non-Asiatic nations and tribes —the history of the Europeans and their descendants in other parts of the world. In the grouping and division of comprehensive subjects, clearness depends in a great measure upon the distinctness of well-chosen terms. Many students of civilization have probably felt with me the desirableness of a concise term, which should comprehend within the bounds of one word, capable of furnishing us with an acceptable adjective, the whole of the

western Caucasian portion of mankind—the Europeans and all their descendants in whatever part of the world, in America, Australia, Africa, India, the Indian Archipelago and the Pacific Islands. It is an idea which constantly recurs, and makes the necessity of a proper and brief term daily felt. Bacon said that "the wise question is half the science," and may we not add that a wise division and apt terminology is its completion? In my private papers I use the term Occidental, in a sufficiently natural contradistinction to Oriental. But Occidental like Western, indicates geographical position; nor did I feel otherwise authorized to use it here. Europides, would not be readily accepted either. Japhethian would comprehend more tribes than we wish to designate. That some term or other must soon be adopted seems to me clear, and I am ready to accept any expressive name formed in the spirit and according to the taste of our language. The chemist and natural historian are not the only ones that stand in need of distinct names for their subjects, but they are less exacting than scholars.

CHAPTER II.

DEFINITIONS OF LIBERTY.

A DISTINGUISHED writer has said that every one desires liberty, but it is impossible to say what it is.[1] If he meant by liberty, civil liberty, and that it is impossible to give a definition of it, using the term definition in its strictest sense, he was right, but he was mistaken if he intended to say that we cannot state and explain what is meant by civil liberty in certain periods, by certain tribes, and that we cannot collect something general from these different views. Civil liberty does not fare worse in this respect than all other terms which designate the collective amount of different applications of the same principle, such as Fine Arts, Religion, Property, Republic. The definitions of all these terms imply the use of others variable in their nature. The time however is passed when, as in the age of the scholastic philosophy, it was believed that everything was strictly definable, and must be compressed within the narrow limits of an absolute definition before it could be entitled to

[1] I believe this is said by Mr. de Chateaubriand in his Etudes Historiques, but I quote from memory, and a hurried glance at the work has not brought again the passage under my eye.

the dignity of a thorough discussion. The hope of being able absolutely to define things that belong either to the commonest life or the highest regions, betrays inexperience and proves a misconception of human language, which itself is never absolute except in mathematics. It misleads. Bacon, so illustrious as a thinker, has two dicta which it will be well for us to remember throughout this discussion. He says: "Generalities are barren, and the multiplicity of single facts present nothing but confusion. The middle principles alone are solid, orderly, and fruitful;" and in another part of his immortal works he states that "civil knowledge is of all others the most immersed in matter and the hardliest reduced to axioms." We may safely add: "And expressed in definitions." It would be easy, indeed, and correct, as far as it would go, to say: Civil liberty is the idea of liberty, which is untrammelled action, applied to the sphere of politics; but although this definition might be called "orderly," it would certainly neither be "solid" nor "fruitful," unless a long discussion should follow on what it means in reality and practice.

This does by no means, however, affect the importance of investigating the subject of civil liberty and of clearly presenting to our minds what we mean by it, and of what elements it consists. Disorders of great public inconvenience, even bloodshed and political crimes have often arisen from the fact that the two sacred words, Liberty and People were freely and passionately used without a clear and definite meaning being attached to them. A people that loves liberty can do nothing better to

promote the object of its love than deeply to study it, and in order to be able to do this, it is necessary to analyze and to know the threads which compose the valued texture.

In a general way, it may here be stated as an explanation—not offered as a definition—that when the term Civil Liberty is used, there is now always meant a high degree of mutually guaranteed protection against interference with the interests and rights, held dear and important by large classes of civilized men or by all the members of a state, together with an effectual share in the making and administration of the laws as the best apparatus to secure that protection, and constituting the most dignified government of men who are conscious of their rights and of the destiny of humanity. But what are these guarantees? these interests and rights? Who are civilized men? In what does that share consist? Which are the men that are conscious of their rights? What is the destiny of humanity? Who are the large classes?

I mean by civil liberty that liberty which plainly results from the application of the general idea of freedom to the civil state of man, that is, to his relations as a political being—a being obliged by his nature and destined by his Creator to live in society. Civil liberty is the result of man's twofold character, as an individual and social being, so soon as both are equally respected.

All men desire freedom of action. We have this desire, in some degree, even in common with the animal, where it manifests itself at least as a desire for freedom of motion. The fiercest despot desires

liberty as much as the most ardent republican; indeed, the difficulty is that he desires it too much—selfishly, exclusively.[2] He wants it for himself alone. He has not elevated himself to that idea of granting to his fellows the same liberty which he claims for himself, and of desiring to be limited in his own power to trench on the same liberty of others. It is one of the greatest ideas to which man can rise. In this mutual grant and check lies the essence of civil liberty, as we shall presently see more fully, and in

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[2] I believe that this has never been shown with greater and more truculent naïveté, than by the present King of Dahomey in the letter he wrote to the Queen of England in 1852. Every case in which an idea, bad or good, is carried to a point of extreme consistency is worth being noted; I shall give therefore a part of it.

The British government had sent an agent to that king, with presents, and the direction to prevent him from further trade in slaves; and the king's answer contains the following passage:

"The king of Dahomey presents his compliments to the queen of England. The presents which she has sent him are very acceptable and are good to his face. When governor Winiett visited the king, the king told him that he must consult his people before he could give a final answer about the slave-trade. He cannot see that he and his people can do without it. It is from the slave-trade that he derives his principal revenue. This he has explained in a long palaver to Mr. Cruikshank. He begs the queen of England to put a stop to the slave-trade everywhere else, and allow him to continue it."

In another passage he says:

"The king begs the queen to make a law that no ships be allowed to trade at any place near his dominions lower down the coast than Whydah, as by means of trading vessels the people are getting rich and resisting his authority. He hopes the queen will send him some good tower guns and blunderbusses and plenty of them, to enable him to make war," (which means razzais, in order to carry off captives for the barracu, or slave market.)

it lies its dignity. It is a grave error to suppose that the best government is absolutism with a wise and noble despot at the head of the state. As to consequences it is even worse than absolutism with a tyrant at its head. The tyrant may lead to reflection and resistance; the wisdom and brilliancy, however, of the government of a great despot or dictator deceives and unfits the people for a better civil state. This is at least true with reference to all tribes not utterly lost in despotism as the Asiatics are. The periods succeeding those of great and brilliant despots have always been calamitous.[3] The noblest human work—nobler even than literature and science, is broad civil liberty, well secured and wisely handled. The highest ethical and social production of which man, with his inseparable moral, jural, æsthetic and religious attributes is capable, is the comprehensive and minutely organic self-government of a free people; and a people truly free at home, and dealing in fairness and justice with other nations, is the greatest, unfortunately also the rarest subject offered in all the breadth and length of history.

In the definitions of civil liberty, which philosophers or publicists have, nevertheless, endeavored to give, they seem to have fallen into one or more of the following errors. Some have confounded liberty, the status of the freeman, as opposed to slavery, with civil liberty. But every one is aware, that while we speak of freemen in Asia, meaning only non-slaves, we would be very unwilling to speak of civil liberty

[3] I have dwelt on this subject at length in my Political Ethics.

in that part of the globe. The ancients knew this distinction perfectly well. There were the Spartans, constituting the ruling body of citizens, and enjoying what they would have called, in modern language, civil liberty, a full share in the government of the polity; there were helots, and there were Lacedæmonian people, who were subject, indeed, to the sovereign body of the Spartans, but not slaves. They were freemen, compared to the helots; but subjects, as distinguished from the Spartans. This subject is very plain, but the confusion has not only frequently misled in times past, but is actually going on to this day in many countries.

Others have fallen into the error of substituting a different word for liberty, and believed that they had thus defined it, while others again have confounded the means by which liberty is secured by some, with liberty itself. Some, again, have been led, unawares, to define something wholly different from civil liberty, while imagining that they were giving the generics and specifics of the subject.

The Roman lawyers say that liberty is the power (authority) of doing that which is not forbidden by the law. That the supremacy of the law and exclusion of arbitrary interference is a necessary element of all liberty, every one will readily admit; but if no additional characteristics be given, we have, indeed, no more than a definition of the status of a non-slave. It does not state whence the laws ought to come, or what spirit ought to pervade them. The same lawyers say: Whatever may please the ruler has the

force of law.[4] They might have said with equal correctness: Freeman is he who is directly subject to the emperor; slave, he who is subject to the emperor through an individual master. It settles nothing as to what we call liberty, as little as the other dictum of the civil law, which divides all men into freemen and slaves. The meaning of freeman, in this case, is nothing more than non-slave, while our word freeman, when we use it in connection with civil liberty, means not merely a negation of slavery, but the enjoyment of positive and high civil privileges and rights.[5]

It is remarkable that an English writer of the last century, Dr. Price, makes the same simple division of slavery and liberty, although it leads him to very different results.[6] According to him, liberty is self-determination or self-government, and every interruption of self-determination is slavery. This is so extravagant, that it is hardly worth our while to dwell on it. Civil liberty is liberty in a state of society, that is in a state of union with equals, consequently limitation of self-determination is one of the necessary characteristics of civil liberty. If this author did not mean that the terms he employed should be taken strictly, it would have been better to use such terms as might have been taken strictly.

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[4] Quod principi placuerit legis habet vigorem.—L. i. lib. i. tit. 4 Dig.

[5] Summa divisio de jure personarum haec est, quod omnes homines aut liberi sunt aut servi.—Inst. i. 3.

[6] Observations on the Nature of Civil Liberty, &c., by Richard Price, D. D., 3d ed. Lond. 1776.

Cicero says: Liberty is the power of living as thou willest.[7] This does not apply to civil liberty. If it was meant for political liberty, it would have been necessary to add: "So far as the same liberty of others does not limit your own living as you choose." But we always live in society, so that this definition can have a value only as a most general one, to serve as a starting-point, in order to explain liberty if applied to different spheres. Whether this was the probable intention of a practical Roman, I need not decide.

Libertas came to signify in the course of time, and in republican Rome, simply republican government, abolition of royalty.

The Greeks likewise gave the meaning of a distinct form of government to their word for liberty. Eleutheria, they said, is that polity in which all are in turn rulers and ruled. It is plain that there is an inkling of what we now call self-government in this adaptation of the word, but it does not designate liberty as we understand it. For, it may happen, and, indeed, it has happened repeatedly, that although the rulers and ruled change, those that are rulers are arbitrary and oppressive whenever their turn arrives; and no political state of things is more efficient in preparing the people to pass over into despotism, by a sudden turn, than this alternation of arbitrary rule. If this definition really defined civil liberty, it would have been enjoyed in a high degree

[7] Quid est libertas? Potestas vivendi ut velis.—Cic. Parad. 5, 1, 34.

by those communities in the middle ages, in which constant changes of factions, and persecutions of the weaker parties were taking place. Athens, when she had sunk so low, that the lot decided the appointment to all important offices, would, at that very period, have been freest, while, in fact, her government had become plain democratic absolutism, one of the very worst of all governments, if, indeed, the term government can be properly used of that state of things which exhibits Athens after the times of Alexander, not like a bleeding and fallen hero, but rather like a dead body, on which birds and vermin make merry.

Not wholly dissimilar to this definition, is the one we find in the French Political Dictionary, a work published in 1848, by leading republicans, as this term was understood in France. It says, under the word liberty: "Liberty is equality, equality is liberty." If both were the same, it would be surprising that there should be two distinct words. Why were both terms used in the famous device, "Liberty, Equality, Fraternity," if the first two are synonymous, yet an epigrammatic brevity was evidently desired? Napoleon distinguished between the two very pointedly, when he said to Las Cases, that he gave to the Frenchmen all the circumstances allowed, namely, equality, and that his son, had he succeeded him, would have added liberty. The dictum of Napoleon is mentioned here merely to show, that he saw the difference between the two terms. Equality, of itself, without many other ele-

ments, has no intrinsic connection with liberty. All may be equally degraded, equally slavish, or equally tyrannical. Equality is one of the pervading features of eastern despotism. A Turkish barber may be made vizier, far more easily than an American hair-dresser can be made a commissioner of roads, in the United States, but there is not on that account more liberty in Turkey. Diversity is the law of life, absolute equality is that of stagnation and death.[8]

A German author of a meritorious work begins it with this sentence: "Liberty—or Justice, for where there is justice there is liberty, and liberty is nothing else than justice—has by no means been enjoyed by the ancients, in a higher degree than by the moderns."[9] Either the author means by justice something peculiar, which *ought* to be enjoyed by every one, and which is not generally understood by the term, in which case the whole sentence is nugatory, or it expresses a grave error, since it makes equivalents of two things which have received two different names, because they are distinct from one another. The two terms would not even be allowed to explain each other in a dictionary.

Liberty has not unfrequently been defined as consisting in the rule of the majority, or it has been said, where the people rule there is liberty. The rule of the majority, of itself, indicates the power of a cer-

[8] More has been said on this subject in Political Ethics, and we shall return to it at a later period.

[9] Descriptions of the Grecian Politics, by F. W. Tittman, Leipsig, 1822.

tain body, but power is not liberty. Suppose the majority bid you drink hemlock, is there liberty for you? Or suppose the majority give away liberty, and establish a despot? We might say with greater truth, that where the minority is protected although the majority rule, there, probably, liberty exists. But in this latter case it is the protection, or in other words, rights beyond the reach of the majority which constitute liberty, not the power of the majority. There can be no doubt that the majority ruled in the French massacres of the Protestants; was there liberty in France on that account? All despotism, without a standing army, must be supported or acquiesced in, by the majority. It could not stand otherwise. If the definition be urged, that where the people rule there is liberty, we must ask at once, what people, and how rule? These intended definitions, therefore, do not define.

Other writers have said: "Civil liberty consists in the responsibility of the rulers to the ruled." It is obvious that this is an element of all civil liberty, but the question what responsibility is meant is an essential one, nor does this responsibility alone suffice by any means to establish civil liberty. The dey of Algiers used to be elected by the soldiery, who deposed him if he did not suit, but there was no liberty in Algiers, not even for the electing soldiery. The idea of the best government, repeatedly urged by a distinguished French publicist, Mr. Girardin, is, that all power should be centered in an elective chief magistrate, who by frequent election should be made

responsible to the people—in fact, an elective despotism. Is there an American or Englishman living who would call such a political monstrosity freedom, even if the elected despot would allow himself to be voted upon a second time? This conception of civil liberty was the very one which Louis Napoleon published in his proclamation, issued after the coup d'état, and in which he tells the people that he leaves their fate in their own hands! Many Frenchmen voted for him and for these fundamental principles of a new government, but those who did so, voted for him for the very reason that they considered liberty dangerous and inadmissible. This definition then is peculiarly incorrect.

Again, it has been said, liberty is the power of doing all that we ought to be allowed to do. But, who allows? What *ought* to be allowed? Even if these questions were answered, it would not define liberty. Is the imprisoned homicide free, although we allow him to do all that which he ought to be allowed to do?

Montesquieu says:[10] "Philosophical liberty consists in the exercise of one's will, or at least (if we must speak of all systems) in the opinion according to which one exercises his will. Political liberty consists in the security, or at least in the opinion which one has of one's security." He continues: "This security is never more attacked than in public and private accusations. It is therefore upon the excel-

[10] Esprit des Lois XII. 2. "Of the Liberty of the Citizen."

lence of the criminal laws that chiefly the liberty of the citizen depends."[11]

That security is an element of liberty has been acknowledged; that just penal laws, and a carefully protected penal trial, are important ingredients of civil liberty, will be seen in the sequel; but it cannot be admitted that that great writer gives a definition of liberty in any way adequate to the subject. We ask at once what security? Nations frequently rush into the arms of despotism for the avowed reason of finding security against anarchy. What else made the Romans so docile under Augustus? Those French who insist upon the "necessity" of Louis Napoleon, do it on the avowal that anarchy was impending, but no one of us will say that Augustus was the harbinger of freedom, or that the French emperor allows the people any enjoyment of liberty. If, however, Montesquieu meant the security of those liberties which Algernon Sidney meant when he said: "The liberties of nations are from God and nature, not from kings"—in that case he has not advanced the discussion, for he does not say in what they consist.

If, on the other hand, the penal law, in which it must be supposed Montesquieu included the penal trial, be made the chief test of liberty, we cannot help observing that a decent penal trial is a discovery in the science of government of the most recent date. The criminal trials of the Greeks and Romans, and

[11] He goes on treating liberty in a similar manner; for instance, at the beginning of Chapter IV. of the same work.

of the middle ages were deficient both in protecting the accused and society, and without trespassing we may say that in most cases they were scandalous. Must we then say, according to Montesquieu, that liberty never dwelt in those states?[12]

To pass from a great writer to one much his inferior, I shall give Dr. Paley's definition of civil liberty. He says: "Civil liberty is the not being restrained by any law but what conduces in a greater degree to the public welfare."[13] I should hardly have mentioned this definition, but that the work from which it is taken is still in the hands of thousands, and that the author has obviously shaped and framed it with attention. Who decides on what public welfare demands? Is that no important item of civil liberty? Who makes the law? Suffice it to say that the definition may pass for one of a good government in general, that is, one which befits the given circumstances, but it does not define civil liberty. A Titus, a benevolent Russian czar, a wise

[12] That a writer of Montesquieu's sagacity and regard for liberty should have thus insufficiently defined so great a subject, is nothing more than what frequently happens. No man is always himself, and Bishop Berkeley on Tar Water represents a whole class of weak thoughts by strong minds. I do not only agree with what sir James Mackintosh says in praise of Montesquieu, in his Discourse on the Study of the Law of Nature and Nations; but I would add, that no person can obtain a correct view of the history through which political liberty has been led in Europe, or can possess a clear insight into many of its details, without making himself acquainted with the Spirit of Laws. His work has doubtless been of great influence.

[13] Beginning of the fifth chapter of Paley's Political Philosophy.

dictator, a conscientious sultan, a kind master of slaves, ordain no restraint but what they think is required by the general welfare; yet to say that the Romans under Titus, the Russian, the Asiatic, the slave is on that account in the enjoyment of civil liberty, is such a perversion of language that we need not dwell upon this definition, surprising even in one who does not generally distinguish himself by unexceptionable definitions. We almost feel tempted to close this list of definitions with the words with which Lord Russell begins his chapter on liberty. He curtly says: "Many definitions have been given of liberty. Most of these deserve no notice."[14]

Whatever the various definitions of civil liberty may be, we take the term in its usual adaptation among modern civilized nations, in which it always means liberty in the political sphere of man. We use it in that sense in which freemen, or those who strive to be free, love it, in which bureaucrats fear it and despots hate it, in a sense which comprehends what has been called public liberty, and personal liberty, and in conformity with which all those who cherish and those who disrelish it, distinctly feel that, whatever its details may be, it always means a high degree of untrammelled political action in the citizen, and an acknowledgment of his dignity and

[14] Lord John Russell's History of the English Government and Constitution, second ed., London, 1825. This prominent and long-tried statesman distinguishes, on page 15, between civil, personal, and political liberty; but even if he had been more successful in this distinction than he seems to me actually to have been, it would not be necessary to adopt it for our present purpose.

his important rights, by the government which is subject to his positive and organic, not only to his roundabout and vague influence.

This has always been felt; but more is necessary. We ought to know our subject. We must answer, then, this question: In what does civil liberty truly consist?

CHAPTER III.

THE MEANING OF CIVIL LIBERTY.

LIBERTY, in its absolute sense, means the faculty of willing and the power of doing what has been willed, without influence from any other source, or from without. It means self-determination; unrestrainedness of action.

In this absolute meaning, there is but one free being, because there is but one being whose will is absolutely independent upon any influence, but that which he wills himself, and whose power is adequate to his absolute will—who is almighty. Liberty, self-determination, unrestrainedness of action, ascribed to any other being, or applied to any other sphere of action, has necessarily a relative and limited, therefore an approximative sense only. With this modification, however, we may apply the idea of freedom to all spheres of action and reflection.[1]

[1] It will be observed that the terms Liberty and Freedom are used here as synonymes. Originally they meant the same. The German Freiheit (literally Freehood) is still the term for our Liberty and Freedom; but as it happened in so many cases in our language where a Saxon and Latin term existed for the same idea, each acquired in the course of time a different shade of the original

If we apply the idea of self-determination to the sphere of politics, or to the state, and the relations

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meaning, either permanently so, or at least under certain circumstances. Liberty and Freedom are still used in many cases as synonymous. We speak of the freedom as well as the liberty of human agency. It cannot be otherwise, since we have but one adjective, namely Free, although we have two nouns. When these are used as distinctive terms, freedom means the general, liberty, the specific. We say: The slave was restored to freedom; and we speak of the liberty of the press, of civil liberty. Still, no orator or poet would hesitate to say, freedom of the press if rhetorically or metrically it should suit better. As in almost all cases in which we have a Saxon and a Latin term for the same main idea, so in this, the first, because the older and original term, has a fuller, more compact, and more positive meaning; the latter, a more pointed, abstract or scientific sense. This appears still more in the verbs to free, and to liberate. The German language has but one word for our Freedom and Liberty, namely Freiheit; and Freithum (literally freedom) means in some portions of Germany an estate of a Freiherr (baron). In Dutch, the word Vryheid, (literally freehood) is freedom, liberty, while Vrydom (literally freedom) means a privilege, an exemption from burdens. This shows still more that these words meant originally the same.

The subject of liberty will occupy us throughout this work, and is of itself a subject of such magnitude, that we may well allow ourselves the time of reflecting for a moment on the terms which man has employed to designate this great concept.

The Greek word eleutheros, free, properly means, he who can walk where he likes. See Passow ad verbum, Ἐλεύθερος and Ἔρχομαι. The Latin liber is believed to be derived from the same root with the Gothic *Lib* (in German *Leib*, body, connected with the Gothic Liban, our *live*, the German *leben*), so that *liber* would have meant originally, he who has his own body, whose body does not belong to some one else. It is natural that freedom appeared to the ancients, first of all, as a contradistinction to slavery, or as its negation. This is not quite dissimilar to the fact that most languages designate the state of purity by an adjective, which indicates a negation of the state of guilt. We say innocent, the

which subsist between it and the individual, and between different states, we must remember that

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negation of nocent, guilty; as if we were calling light undarkness. The guilt, the crime strikes first, and from it are abstracted the negations unguilt, innocence. If all were free, and if freedom had never been violated, we would probably have no word for freedom.

That Body is taken in this instance to designate independence, with which the ideas of individuality and humanity are closely connected, is in conformity with the history of all terms of abstraction. The sensuous world furnishes man with the original term and idea, which the advancing intellect refines and distils. Nor can it surprise us who to this day say somebody, everybody, for some person, every man. Who does not think at once of Burns's lovely, "Gif a body meet a body," where body is used for human individual? At the time of writing this note, I met with this question, in a Scottish penal trial: Was that arsenic for a beast or a body?—*Burton's Criminal Trials*, vol. ii. page 59.

Here, then, body is taken so distinctly for man that it is contradistinguished to beast. In the same natural manner, it may come to signify man, not with reference to his intellect, but in connection with liberty, as contradistinguished to a man-thing, *i. e.* slave.

At a later period, the *soul* comes to designate individuals, as we say in statistical accounts, so many souls, for so many persons.

The word Free is one of the oldest words with which we are acquainted. We find free, fry, fryg, vry, in many languages, and Hesichius gives as a Lydian word βρύγα—τὸν ἐλεύθερόν, from which the name of the Phrygians was probably derived. It is probably connected with several prepositions and verbs which we find in many languages, but this is not the place to carry the etymological inquiry any farther. It may be added, however, that through all the ancient Teutonic languages there is running a root Fr and Pr, with words derived from it, which indicate protection, pax, fœdus. Frihals or Frijhals is the ancient High German for a protected man, a free-man, a non-slave man. How this root again is connected with the Gothic frijan, frion for loving, kissing (hence our word friend), and the Sanscrit pri, which means *exhilarare, amare*, cannot be settled here. I would refer the reader for more informa-

the following points are necessarily involved in the comprehensive idea of the State:

The state is a society, or union of men—a sovereign society and a society of human beings, with an indelible character of individuality. The state is moreover an institution which acts through government, a contrivance which holds the power of the whole, opposite to the individual. Since the state then implies a society which acknowledges no superior, the idea of self-determination applied to it means that, as a unit and opposite to other states, it be independent, not dictated to by foreign governments, nor dependent upon them any more than itself has freely assented to be, by treaty and upon the principles of common justice and morality, and that it be allowed to rule itself, or that it have what the Greeks chiefly meant by the word autonomy.[2] The term

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tion on this subject to L. Diefenbach's Comparative Dictionary of the Gothic Language, a German work, and to Grimm's German Dictionary, which, indeed, I have not yet been able to see; but the name of Grimm is so well known to the world as that of the undisputed highest authority on all questions of Teutonic etymology that the author does not hesitate to direct his reader to a work which he himself has not yet examined.

It is a curious fact that the Armenians use, for liberty, a compound of *ink'n*, self, and *ishkhanootzoon*, dominion, sovereignty. So that the Armenians actually have our noble word, self-government. My learned friend, the Rev. J. W. Miles, of Charleston, to whom I owe this contribution and much information on the Asiatic terms for liberty, adds, "I think a word of similar composition is used in the Georgian for liberty."

[2] Atonomeia is literally translated Self-Government, and undoubtedly suggested the English word to our early divines. Donaldson, in his Greek dictionary, gives Self-Government as the

state, at the same time, means a society of men, that is of beings with individual destinies and responsibilities from which arise individual rights,[3] that show themselves the clearer and become more important, as man advances in political civilization. Since, then, he is obliged and destined to live in society, it is necessary to prevent these rights from being encroached upon by his associates. Since, however, not only the individual rights of man become more distinctly developed with advancing civilization, but also his social character and all mutual dependence, this necessity of protecting each individual in his most important rights, or, which is the same, of checking each from interfering with each, becomes more important with every progress he makes.

Lastly, the idea of the state involving the idea of government, that is of a certain contrivance with coercing power superior to the power of the individual, the idea of self-determination necessarily im-

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English equivalent for the Greek Autonomy, but as it has been stated above, it meant in reality independence upon other states, a non-colonial, non-provincial state of things. I beg the reader to remember this fact; for it is significant that the term autonomy retained with the Greeks this meaning, facing as it were foreign states, and that Self-Government, the same word, has acquired with ourselves, chiefly, or exclusively a domestic meaning, facing the relations in which the individual and home institutions stand to the state which comprehends them.

[3] The fact that man is in his very essence at once a social being and an individual; that the two poles of sociality and individualism must forever determine his political being, and that he cannot give up either the one or the other, with the many relations flowing from this fundamental point, form the main subject of the first volume of my Political Ethics, to which I would refer the reader.

plies protection of the individual against encroaching power of the government, or checks against government interference. And again, society as a unit having its objects, ends, and duties, liberty includes a proper protection of government, as well as an efficient contrivance to coerce it to carry out the views of society, and to obtain its objects.

We come thus to the conclusion that liberty applied to political man, practically means, in the main, protection or checks against undue interference, whether this be from individuals, from masses, or from government. The highest amount of liberty comes to signify the safest guarantees of undisturbed legitimate action, and the most efficient checks against undue interference.[4] Men, however, do not occupy themselves with that which is unnecessary. Breathing is unquestionably a right of each individual,

[4] It is interesting with reference to the above subject, that the Teutonic *frei* and *free* comes from the same root *fr*, with *fridu* and *frida* (in modern German *Friede*), that is *peace*, to which allusion has been made in the preceding note. *Fridon* in old Saxon meant to protect, to make secure. The old Norse his *frido* (*fridho*) which the lexicographer renders by *tutus*, *fortis*, *mansuetus*, *formosas*. In some parts of Germany and Switzerland *Friede* (*peace*) still means *fence*, that is protection. In the middle ages *fredus* and *freda* meant the legal protection within a certain district. The word goes through the Franconian, Alemannian, Longobardian and other laws, and reminds us of the English term, the king's peace. Freiburg meant originally a town and district within which certain protection and security was to be found. Without multiplying the instances, which might be done ad infinitum, the fact that in the Teutonic languages the term freedom is of the same root with that for legal security and protection, or rather that the latter has passed over to that of liberty, is well established and full of meaning.

proved by his existence; but, since no power has yet interfered with the undoubted right of respiration, no one has ever thought it necessary to guarantee this elementary right. We advance then a step farther in practically considering civil liberty, and find that it chiefly consists in guarantees (and corresponding checks) of those rights which experience has proved to be most exposed to interference, and which men hold dearest and most important.

This latter consideration adds a new element. Freemen protect their most important rights, or those rights and those attributes of self-determination, which they hold to be most essential to their idea of humanity; and as this very idea of humanity comprehends partly some ideas common to men of all ages, when once conscious of their humanity, and partly other ideas which differ according to the view of humanity itself, which may prevail at different periods, we shall find, in examining the great subject of civil freedom, that there are certain permanent principles met with wherever we discover any aspiration to liberty; and that, on the other hand, it is rational to speak of ancient, medieval, or modern liberty, of Greek or Roman, Anglican and Gallican, pagan and christian, American and English liberty. Certain tribes or nations, moreover, may actually aim at the same objects of liberty, but may have been led, in the course of their history, and according to the variety of circumstances produced in its long course, to different means to obtain similar ends. So that this fact, likewise, would evolve different systems of civil liberty, either necessarily or

only incidentally so. Politics are like architecture, which is determined by the objects the builder has in view, the materials at his disposal, and the desire he feels of manifesting and revealing ideas and aspirations in the material before him. Civil liberty is the idea of liberty in connection with politics, and must necessarily partake of the character or intertwine itself with the whole system of politics of a given nation.

This view, however correct, has, nevertheless, misled many nations. It is true, that the system of politics must adapt itself to the materials and destinies of a nation; but this very truth is frequently perverted by rulers who wish to withhold liberty from the people, and do it on the plea that the destiny of the nation is conquest, or concentrated action in different spheres of civilization, with which liberty would interfere. In the same manner are, sometimes, whole portions of a people, or even large majorities misled. They seem to think that there is a fate written somewhere beyond the nation itself, and independent of its own morality, to which everything, even justice and liberty must be sacrificed. It is at least a very large portion of the French that thus believes the highest destiny of France to consist in ruling as the first power in Europe, and who openly say, that everything must bend to this great destiny. So are many among us, who seem to believe that the highest destiny of the United States, consists in the extension of her territory—a task in which, at best, we can only be imitators, while, on the contrary, our destiny is one of its own, and of a substantive character.

At the present stage of our inquiry, however, we have not time to occupy ourselves with these aberrations.

All that is necessary to vindicate at present is, that it is sound and logical to speak of eternal principles of liberty and at the same time of ancient and modern liberty, and that there may be, and often must be various systems of civil liberty, though they need not, on that account, differ as to the intensity of liberty which they guarantee.

That Civil Liberty, or simply Liberty, as it is often called, naturally comes to signify certain measures, institutions, guarantees or forms of government, by which people secure or hope to secure liberty, or an unimpeded action in those civil matters or those spheres of activity which they hold most important, appears even from ancient writers. When Aristotle, in his work on politics speaks of liberty, he means certain peculiar forms of government, and he uses these as tests, to decide whether liberty does or does not exist in a polity, which he contemplates at the time. In the Latin language Libertas came to signify what we call republic, or a non-regal government. Respublica did not necessarily mean our republic, as our term Commonwealth may mean a republic—a commonwealth man meant a republican in the English revolution[5]—but it does not necessa-

[5] The republic—if, indeed, we can say that an actual and bona fide republic ever existed in England—was called *the state* in contradistinction to the regal government. During the restoration under Charles the Second men would say: "In the times of the state," meaning the interval between the death of the first Charles

rily do so. When we find in Quintilian the expression: *Asserere libertatem reipublicæ*, we clearly see that respublica does not necessarily mean republic, but only when the commonwealth, the system of public affairs, was what we now call a republic. Since this, however, actually was the case during the best times of Roman history, it was natural that respublica received the meaning of our word republic in most cases.

The term liberty had the same meaning in the middle ages, wherever popular governments supplanted monarchical, often where they superseded aristocratic polities. Liberty and republic became in these cases synonymous.[6]

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and the resumption of government by the second. The term State acquired first this peculiar meaning under the Presbyterian government.

[6] It is in a similar sense that Freiligrath, a modern German poet, begins one of his most fervent songs with the line: "Die Freiheit ist die Republik," that is: Freedom is the Republic.

CHAPTER IV.

ANCIENT AND MODERN LIBERTY.—ANCIENT, MEDIEVAL, AND MODERN STATES.

THAT which the ancients understood by liberty differed essentially from what we moderns call civil liberty. Man appeared to the ancients in his highest and noblest character, when they considered him as a member of the state or as a political being. Man could rise no higher in their view. Citizenship was in their eyes the highest phase of humanity. Aristotle says in this sense, the state is before the individual. With us the state, and consequently the citizenship, remain means, all-important ones, indeed, but still means to obtain still higher objects, the fullest possible development of humanity in this world and for the world to come. There was no sacrifice of individuality to the state, too great for the ancients. The greatest political philosophers of antiquity unite in holding up Sparta as the best regulated commonwealth—a communism in which the individual was sacrificed in such a degree, that to the most brilliant pages of all history she has contributed little more than deeds of bravery and saliant anecdotes of stoic heroism. Greece has re-

kindled modern civilization, in the restoration of letters. The degenerate keepers of Greek literature and art, who fled from Constantinople when it was conquered by the Turks, and settled in Western Europe, were nevertheless the harbingers of a new era. So great was Grecian knowledge and civilization even in this weakened and crippled state! Yet in all that intellectuality of Greece which lighted our torch in the fifteenth and sixteenth centuries, there is not a single Lacedæmonian element.

Plato, when he endeavors to depict a model republic, ends with giving us a communism, in which even individual marriage is destroyed for his higher classes.[1]

We, on the other hand, acknowledge individual and primordial rights, and seek one of the highest aims of civil liberty in the most efficient protection of individual action, endeavor, and rights. I have dwelled upon this striking and instructive difference at length in my work on Political Ethics,[2] where I have endeavored to support the opinion here stated by historical facts and passages of the ancients. I must refer the reader, therefore, to that part of the work; but there is a passage which seems to me so important for the present inquiry, as well as for

[1] It is a striking fact that nearly all political writers who have indulged in creating Utopias—I believe all without exception—have followed so closely the ancient writers, that they rose no higher than to communism. It may be owing in part to the fact, that these writers composed their works soon after the restoration of letters, when the ancients naturally ruled the minds of men.

[2] Chapter XIII. of the second book.

another which will soon occupy our attention, that, unable to express myself better than I have done in the mentioned work, I must beg leave to insert it here. It is this:

"We consider the protection of the individual as one of the chief subjects of the whole science of politics. The πολιτικὴ ἐπιστήμη, or political science of the ancients, does not occupy itself with the rights of the individual. The ancient science of politics is what we would term the art of government, that is, "the art of regulating the state, and the means of preserving and directing it." The ancients set out from the idea of the state, and deduce every relation of the individual to it from this first position. The moderns acknowledge that the state, however important and indispensable to mankind, however natural, and though of absolute necessity, still is but a means to obtain certain objects, both for the individual and for society collectively, in which the individual is bound to live by his nature. The ancients had not that which the moderns understand by jus naturale, or the law which flows from the individual rights of man as man, and serves to ascertain how, by means of the state, those objects are obtained which justice demands for every one. On what supreme power rests, what the extent and limitation of supreme power ought to be, according to the fundamental idea of the state, these questions have never occupied the ancient votaries of political science.

"Aristotle, Plato, Cicero, do not begin with this question. Their works are mainly occupied with the discussion of the question, Who shall govern? The

safety of the state is their principal problem; the safety of the individual is one of our greatest. No ancient, therefore, doubted the extent of supreme power. If the people possessed it, no one ever hesitated in allowing to them absolute power over every one and everything. If it passed from the people to a few, or was usurped by one, they considered, in many cases, the acquisition of power unlawful, but never doubted its unlimited extent. Hence, in Greece and Rome the apparently inconsistent, yet, in reality, natural sudden transitions from entirely or partially popular governments to absolute monarchies; while, in modern states, even in the absolute monarchies, there exists a certain acknowledgment of a public law of individual rights, of the idea that the state, after all, is for the protection of the individual, however ill-conceived the means to obtain this object may be.

"The idea that the Roman people gave to themselves, or had a right to give to themselves, their emperors, was never entirely abandoned, though the soldiery arrogated to themselves the power of electing the masters. . . . Yet the moment that the emperor was established on his throne, no one doubted his right to the absolute supreme power, with whatever violence it was used.[3]

[3] This was written in the year 1837. Since then, events have occurred in France which may well cause the reader to reflect whether, after all, the author was entirely correct in drawing this peculiar line between antiquity and modern times. All I can say in this place is, that the political movements in France resemble the

"Liberty, with the ancients, consisted materially in the degree of participation in government, 'where all are in turn the ruled and the rulers.' Liberty, with the moderns, consists less in the forms of authority, which are with them but means to obtain the protection of the individual, and the undisturbed action of society in its minor and larger circles. Ἐλευθερία, indeed, frequently signifies with the Greek political writers, equality; that is absolute equality, and ἰσότης, equality as well as ἐλευθερία, are terms actually used for democracy,[4] by which was understood what we term democratic absolutism, or unlimited, despotic power in the demos, which, practically, can only mean the majority, without any guarantee of any rights. It was, therefore, perfectly consistent that the Greeks aimed at perfect liberty in perfect equality, as Aristotle states, not even allowing a difference on account of talent and virtue; so that they give the πάλος the lot, as the true characteristic of democracy. They were consistently led to the lot; in seeking for liberty, that is the highest enjoyment and manifestation of reason and will, or self-determination—they were led to its very negation and annihilation—to the lot, that is to chance.

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dire imperial times of Rome just so far as the French, or rather the Napoleonists among them, step out of the broad path of modern political civilization, actually courting a comparison with imperial Rome, and that this renewed imperial period will be nothing but a phase in the long chain of political revulsions and ruptures of France. The phase will not be of long duration; and, after it will have passed, it will serve as an additional proof of our position.

[4] Plato, Gorg. 39.

Not only were magistrates, but even generals and orators determined by lot."[5]

Had the ancients possessed other free states than city-states, they would have been forced out of this position, but there were no states in antiquity, if we take the term in the adaptation in which we use it, when we mean sovereign political societies spreading over extensive territories and forming an organic legal whole. Even the vast monarchies of ancient Asia were conglomerated conquests with much of what has just been called a city-state. Nineveh, Babylon, were mighty cities that swayed over vast dominions as mistresses, but did not form part of a general State in the modern term.

In the middle ages liberty appears in a different phase. The Teutonic spirit of individual independence was one of the causes which led to the feudal system, and frequently prospered under it in rank wilderness. There was no state proper in the middle ages; the feudal system is justly called a system. It was no state; and medieval liberty appears in the shape of liberties, of franchises, singly chartered, separately conquered, specifically arrogated—each society or party obtaining as much as possible, unmindful of others, and each denying to others as much as might be conveniently done. The term freedom, therefore, came distinctly to signify in the middle ages, not exactly the amount of free action allowed to the citizen or guaranteed to the person who enjoyed it, but the exemption from burdens and

[5] For the evidence and proof I must refer to the original.

duties imposed upon others, or exacted in former times. Liberty had not yet acquired a substantive meaning, although it need not be mentioned that then as well as in ancient times, the principle which made noble hearts throb for liberty and independence, was the same that has made the modern martyrs of liberty mount the scaffold with confidence and reliance on the truth of their cause.

I am here again obliged to refer to the Political Ethics, where I have treated of this peculiarity of the middle ages in the chapter on the duties of the modern representative contradistinguished to the medieval deputy.

The nearer we approach to modern times the more clearly we perceive two movements, which, at first glance, would appear to be destructive the one to the other. On the one hand states, in the present sense of the term, are formed. There is a distinct period in the history of our race, which may be aptly called the period of nationalization. Tribes, fragments, separate political societies are united into nations, and politically they appear more and more as states. It is one of the many fortunate occurrences which have fallen to England in the course of her history, that she became nationalized at a comparatively very early period. The feudal system was introduced at a late period, and as a royal measure. The king made the Norman-English nobility. The nobility did not make the king. The English nobility, therefore, could not resist the national movement and consolidation of the people into a nation, as it did on the continent, and, the crown

thus not being obliged to gather all possible strength, in order to be able to subdue the baronial power, had not the opportunity to pass over into the concentrated principate, which was one of the political phases in every other part of Europe.[6]

On the other hand, we observe that the priceless individual value which christianity gives to each human being, by making him an individually responsible being, with the highest duties and the highest privileges; together with advancing civilization, in a great measure produced by itself—the Teutonic spirit of personal independence, connected not a little with the less impressionable, and, therefore, more tenacious, and sometimes dogged character of the Teutonic—all these combinedly, developed more and more the idea of individual rights, and the desire of protecting them.

These two facts have materially influenced the

[6] The history of no nation reminds the student so frequently of the fact that His ways are not our ways, as that of England. Many events which have brought ruin elsewhere, served in the end to obtain greater liberty and a higher nationality. The fact that the Norman nobility in England was the creature of the king—for this, doubtless, it was, although they came as Norman noblemen to the field of Hastings—is one of these remarkable circumstances. The English civil wars, the fact that most of England's monarchs have been indifferent persons, and that but one truly great man has been among her kings, the inhospitable climate, which was treated by the people like a gauntlet thrown down by Nature, and they developed that whole world of domestic comfort and well-being, known nowhere else, and of such important influence upon all her political life; her limited territory; her repeated change of language; her early conquests—these are some items of a list which might easily be extended.

development of modern liberty, that liberty which we call our own. The progress we value so much was greatly retarded on the continent by an historical process which was universal among the nations of Europe, excepting those of Sclavonic origin, because they had not yet entered the lists of civilization.

The feudal system, of far greater power on the continent than in England, interfered with the process of nationalization and the formation of states proper. The people had risen to a higher position, a higher consciousness of rights, and the inhabitants of the cities had generally found the baronial element hostile to them. The consequence was, that the crowns and the people united to break the power of the baron. But in the same degree as the struggle was tenacious, and the crown had used stronger power to subdue the feudal lord, it found itself unshackled when the struggle was over, and easily domineered over both, the people and the lord. Then came the time of absorbing regal power, of centralization and monarchical absolutism, of government-states, as Niebuhr calls them. The liberties of the middle ages were gone; the principles of self-government were allowed to exist nowhere; and we find, at the present period only, the whole of the European continent, with the exception of Russia, as a matter of course, engaged in an arduous struggle to regain liberty, or rather to establish modern freedom. Everywhere the first ideas of the new liberty were taken from England, and, later, from the United States. The desire of possessing a well-guaranteed political liberty and enjoyment of free action, was

kindled on the European continent by the example of England. The course which we observe in France, from Montesquieu, who, in his brilliant work on the Spirit of Laws, has chiefly England in view as a model, to the question at the beginning of the first French revolution, whether the principles of British liberty should be adopted, was virtually repeated everywhere. The representative principle, the trial by jury, the liberty of the press, taxation and appropriations by the people's representatives, the division of power, the habeas corpus principle, publicity, and whatever else was prominent in that liberty peculiar to the Anglican race, whether it had originated with it, or had been retained by it when elsewhere it had been lost in the general shipwreck of freedom, was longed for by the continental people, insisted on, or struggled for.

It is well, then, to ask ourselves, in what does this Anglican liberty consist? The answer is important, in a general point of view, as well as because it is the broad foundation and framework of our own American liberty.

CHAPTER V.

ANGLICAN LIBERTY.

In order to ascertain in what this peculiar system of civil liberty consists, we must examine those charters of the whole Anglican tribe, which belong to "the times when governments chartered liberty," and to those "when the people charter governments." We must observe what principles, measures, and guarantees were most insisted upon in periods most distinguished by an active spirit of liberty, of opposition to encroaching power, or of a desire to prune public power so as to make it in future better harmonize with the claims of individual liberty. We must see what it is that the people of England and the people of America in solemn political periods have solemnly declared their rights and obligations. We must study the periods of a vigorous development of liberty, and we must weigh Magna Charta, the Petition of Right, and the Bill of Rights—the three statutes which Lord Chatham called the Bible of the English constitution. We must inquire into the public common law of England, and the common law as it has developed itself on this side of the Atlantic; and especially into the leading cases of

political and constitutional importance that have been decided in England and the United States.[1] We must ponder our great federal pact, with the contemporaneous writers on this constitution, and the debates which led to its adoption after the failure of the original articles of confederation, as well as the special charters which were considered peculiarly favorable to liberty, such as many of the colonies out of which the United States arose. We must attentively study the struggles in which the people waged their all to preserve their liberties, or to obtain new ones, and those periods which, with reference to civil liberty, may be called classical. We must analyze the British and our own revolutions, and compare them with the political revolutions of other nations, and we must study not only the outward events, or the ultimate measures, but we must probe their genesis, and ascertain how and why these things came about, and what the principles were for which the chief men engaged in the arduous task contended. We must mark what it is that those nations wish to introduce among themselves, that are longing for freedom similar to that which we enjoy. We must test which of the many institutions peculiar to our tribe, have proved in the

[1] A chronological table of the leading cases in England and the United States, by which great constitutional principles or essential individual rights have been settled and sown like a spreading, self-increasing plant, would be highly instructive, and show how much we owe to the growth of liberty, and how much this growth is owing to the husbanding of practical cases in the spirit of freedom.

course of time as real props of freedom, or most prolific in shooting forth new branches. We must read the best writers on law, history, and political philosophy with reference to these subjects, and observe the process of spreading liberty. We must note which are the most fruitful principles of Anglican self-government in the widening colonies, north and south of the equator; and examine our own lives as citizens of the freest land, as well as the great process of expansion of liberty with ourselves. We ought clearly to bring before our minds those guarantees, which invariably are the main points of assault when the attempt is made to batter the ramparts of civil liberty and bring the gallant garrison to surrender. And lastly, we ought to study the course of despotism; for the physiologist learns as much from pathology as from a body in vigorous health.

We call this liberty Anglican freedom, not because we think that it ought to be restricted to the Anglican tribe, or will or can be so; but simply, because it has been evolved first and chiefly by this tribe, and because we must contradistinguish it to Gallican liberty as the sequel will show.[2] Nor is it

[2] In the year 1848, I published, in an American Journal, a paper headed Anglican and Gallican Liberty, in which I indicated several views which have been farther developed in the present work. A distinguished German criminalist and publicist did me the honor of publishing a German translation of this paper; in which, however, he says that what I have called Anglican liberty is more generally called Germanic liberty. This is an error. I allow that the original Teutonic spirit of individual independence, and the anti-Celtic spirit of being swayed by masses, largely enters into

maintained that all that is included in Anglican liberty is of especial Anglican origin. Liberty is one of the wreaths of humanity, and in all liberty there must be a large fund of universal humanity, as all cultivated languages must agree in embodying the most important principles of intellectual analysis and combination; and as Grecian architecture does not contain exclusively what the Greeks originated, and is not, on account of its very humanity, restricted to Greece. Still, we call it Greek architecture, and we do so with propriety; for it was in Greece that that column and capital were developed which is found everywhere with civilized man, has passed over from a pagan world into christian civilization, and is seen wherever the bible is carried.

Now what we call Anglican liberty, are the guarantees which our tribe has elaborated, as guarantees of those rights which experience has shown to be most exposed to the danger of attack by the strongest power in the state, namely, the executive, or as

what I have termed Anglican liberty; but this is a system of civil liberty which has developed itself independent upon all other Teutonic nations, has been increasing while nearly all the other Teutonic nations lost their liberty, and of which unfortunately the Germans, who ought to be supposed the most Germanic of the Germanic tribes, have nothing, except what they may have left at present of the late attempts of engrafting anew principles or guarantees of liberty on their polities, which had become more and more a copy of French centralization. This is not the place to discuss the subject of so called Germanic liberty. All that is necessary here to state, is that, what is called Anglican liberty is, as was said before, a body of guarantees which, as an entire system, has been elaborated by the Anglican tribe, and is peculiar to this tribe, unless imitated by others.

most important to a frame of government which will be least liable to generate these dangers, and also most important to the essential yet weaker branches of government. It consists in the civil guarantees of those principles which are most favorable to a manly individual independence and ungrudged enjoyment of individual humanity; and, those guarantees which insure the people, meaning the totality of the individuals as a unit, or, the nation, against being driven from the pursuit of those high aims which have been assigned to it by Providence as a nation, or as a united people. Where the one or the other is omitted, or exclusively pursued, there is no full liberty. If the word people be taken as never meaning anything else than a unit, a widely extended and vigorous action of that unit may exist indeed—blinding ambition may be enjoyed, but it is no liberty; if, on the other hand, the term people is never taken in any other sense than a mere term of brevity, and for the impossible enumeration of all individuals, without inherent connection, the consequence must be a sejunctive egotism which loses the very power of protecting the individual rights and liberties.

These guarantees, then, as we acknowledge them in the period of civil development in which we live, and as far as they are common to the whole Anglican tribe, and, if of a more general character, are still inseparably interwoven with what is peculiar to the tribe, we call Anglican liberty. These guarantees and checks I now proceed to enumerate.

CHAPTER VI.

NATIONAL INDEPENDENCE. PERSONAL LIBERTY.

1. It is impossible to imagine liberty in its fulness, if the people as a totality, the country, the nation, whatever name may be preferred, or its government, is not independent on foreign interference. The country must have what the Greeks called autonomy. This implies, that the country must have the right, and, of course, the power, of establishing that government which it considers best, without interference from without or pressure from above. No foreigner must dictate; no extra-governmental principle, no divine right or "principle of legitimacy" must act in the choice and foundation of the government; no claim superior to that of the people's, that is, national sovereignty must be allowed.[1] This independence or national self-government farther implies that, the civil government of free choice or free acquiescence being established, no influence from without, besides that of freely acknowledged justice, fairness, and morality, must be admitted. There must then be the requisite strength to resist when necessary. While

[1] Political Ethics, chapter on Sovereignty.

the author is setting down these remarks, the news is reaching us of the manly declaration made in the British commons, by the minister of foreign affairs, lord Palmerston, that the united calls of all the continental powers would be utterly insufficient to give up or to drive from the British territory those political exiles who have sought an asylum on English soil, and of the ready support given by the press to the spokesman of the nation. Even the French, so far as they are allowed at the present untoward conjunction to express themselves, applaud this declaration as a proof of British freedom. The Helvetic cantons, on the other hand, are forced to yield to the demands even of an Austrian government; and the worried republic of Switzerland, so far as this goes, cannot be said to be free. The history of the nineteenth century, but especially that of our own age, is full of instances of the interference with the autonomy of nations or states. Italy, Germany, especially Hessia, Spain, Hungary, furnish numerous instances. Cases may occur, indeed, in which foreign interference becomes imperative. All we can then say is, that the people's liberty so far is gone, and must be recovered. No one will maintain that interference with Turkish affairs at the present time is wrong in those powers who resist Russian influence in that quarter, but no one will say either that Turkey enjoys full autonomy. The very existence of Turkey depends upon foreign sufferance.

On the other hand, it must be remembered that this unstinted autonomy is greatly endangered at home by interfering with the domestic affairs of foreigners.

The opinion, therefore, urged by Washington, that we should keep ourselves aloof from foreign politics, is of far greater weight than those believe who take it merely with reference to foreign alliances and ensuing wars. The interference need not necessarily proceed from government. Petitions, affecting foreign public measures or institutions, and coming from large bodies, or even committees sent to express the approval of a foreign government, of which we have had a recent and most remarkable instance,[2] are reprehensible on the same ground.

It is one of the reasons why a broadcast liberty and national development was so difficult in the middle ages, that the pope, in the times of his highest power, could interfere with the autonomy of states. I do not discuss here whether this was not salutary at times. Gregory the Seventh was a great, and, probably, a necessary man; but where civil liberty

[2] The address and declaration of four thousand British merchants, presented in the month of April, 1853, to the emperor of the French, will forever remain a striking proof of British liberty; for in every other European country the government would have imprisoned every signer, if indeed the police had not nipped the petition in the bud; and it will also forever remain a testimony how far people can forget themselves and their national character when funds are believed to be endangered or capital is desired to be placed advantageously. But I have alluded to it in the text, as an instance, only, of popular interference with foreign governments, doubtless the most remarkable instance of the kind on record. Whether the whole proceeding was "not far short of high treason," as lord Campbell stigmatized it in the house of lords, may be left undecided. It certainly would have been treated as such during some periods of English history, and must be treated by all right-minded men of the present period as a most unworthy procedure.

is the object, as it is now with civilized nations, this medieval interference of the pope would be an abridgment of it, just as much as the Austrian influence in the States of the Church is an abridgment of their independence at present.

It is a remarkable feature in the history of England, that even in her most catholic times the people were more jealous of papal interference by legates or other means, than any other nation, unless we except the Germans, when their emperors were in open war with the popes. This was, however, transitory, while in England intercourse with the papal see was legally restricted and actually made penal.

2. Civil liberty requires firm guarantees of individual liberty, and among these there is none more important than the guarantee of personal liberty, or the great habeas corpus principle, and the prohibition of "general warrants" of arrest of persons.

To protect the individual against the interference with personal liberty by the power-holder is one of the elementary requisites of all freedom, and one of the most difficult problems to be solved in practical politics. If any one could doubt the difficulty, history would soon convince him of the fact. The English and Americans safely guard themselves against illegal arrest; but a long and ardent struggle in England was necessary to obtain this simple element, and the ramparts around personal liberty, now happily existing, would soon be disregarded, should the people, by a real prava negligentia malorum, ever lose sight of this primary requisite.

The means by which Anglican liberty secures

personal liberty are threefold: the principle that every man's house is his castle, the prohibition of general warrants, and the habeas corpus act.

Every man's house is his castle. It is a principle evolved by the common law of the land itself, and is exhibited in a yet stronger light in the Latin version, which is, Domus sua enique est tutissimum refugium, and Nemo de domo sua extrahi debet, which led the great Chatham, when speaking on general warrants, to pronounce that passage with which now every English and American schoolboy has become familiar through his Reader. "Every man's house," he said, "is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut; the wind may whistle around it, the rain may enter it, but the king cannot."

Accordingly, no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon. It has been but recently decided in England, that although a house may have been unlawfully erected on a common, and every injured commoner may pull it down, he is nevertheless not justified in doing so if there are actually people in it.

There have been nations, indeed, enjoying a high degree of liberty, without this law maxim; but the question in this place is even less about the decided advantages, arising to freemen from the existence of

this principle, than about the sturdiness of the law and its independent development, that could evolve and establish this bold maxim. It must be a manly race of freedom-loving people, whose own common law could deposit such fruitful soil. For, it must be observed, that this sterling maxim was not established, and is not maintained, by a sejunctive or a law-defying race. The Mainots considered their Lacedæmonian mountain fastnesses as their castles too, during the whole Turkish reign in Greece; the feudal baron braved authority and law in his castle, but the English maxim was settled by a highly conjunctive, a nationalized people, and at the same time when law and general government extended more and more over the land. It is insisted on in the most crowded city the world has ever seen, with the same jealousy as in a lonely mountain dwelling; it is carried out, not by retainers and in a state of war made permanent, but by the law, which itself has given birth to it. The law itself says: Be a man, thou shalt be sovereign in thy house. It is this spirit which brought forth the maxim, and the spirit which it necessarily nourishes, that makes it important.

It is its direct antagonism to a mere police government, its bold acknowledgment of individual security opposite to government, it is its close relationship to self-government, which give so much dignity to this guarantee. To see its value, we need only throw a glance at the continental police, how it enters at night or in the day, any house or room, breaks open any drawer, seizes papers or anything

it deems fit, without any other warrant than the police hat, coat and button.

Nor must we believe that the maxim is preserved as a constitutional rarity, and not as a living principle. As late as the month of June, 1853, a bill was before the house of commons, proposing some guarantee against property of nuns and monks being too easily withdrawn from relations, and that certain officers should have the right to enter nunneries from eight, A. M. to eight o'clock, P. M., provided that they had strong suspicion that an inmate was retained against her will. The leading minister of the crown in the commons, lord John Russell, opposed the bill, and said: "Pass this bill and where will be the boasted safety of our houses. It would establish general tyranny."

The prohibition of "general warrants." The warrant is the paper which justifies the arresting person to commit so grave an act as depriving a citizen, or alien, of personal liberty. It is important, therefore, to know who has the right to issue such warrants, against whom it may be done, and how it must be done, in order to protect the individual against arbitrary police measures. The Anglican race has been so exact and minute regarding this subject, that the whole theory of the warrant may be said to be peculiarly Anglican, and a great self-grown institution. "A warrant," the books say, "to deprive a citizen of his personal liberty should be in writing, and ought to show the authority of the person who makes it, the act which is authorized to be done, the name or description of the party who is authorized to execute

it, and of the party against whom it is made; and, in criminal cases, the grounds upon which it is made." The warrant should name the person against whom it is directed; if it does not, it is called a general warrant, and Anglican liberty does not allow it.[3] Where it is allowed there is police government, but not the government of real freemen. It is necessary that the person who executes the warrant be named in it. Otherwise the injured citizen, in case of illegal arrest, would not know whom he should make responsible; but if the person be named, he is answerable, according to the Anglican principle that every officer remains answerable for the legality of all his acts, no matter who directed them to be done. Indeed, we may say the special warrant is a death blow to police government.

The constitution of the United States demands that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized, &c."[4]

The warrant is held to be so important an element of civil liberty, that a defective warrant is considered

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[3] A warrant to apprehend all persons suspected, or all persons guilty, &c., &c., is illegal. The person, against whom the warrant runs, ought to be pointed out. The law on this momentous subject was laid down by lord Mansfield in the case of Money *v.* Leach, 3 Bur. 1742, where the "general warrant" which had been in use since the revolution, directing the officers to apprehend the "authors, printers and publishers" of the famous No. 45 of the North Briton, was held to be illegal and void.

[4] The reader will find a copy of the Constitution of the United States in the appendix.

by the common law of England and America one of the reasons which reduce the killing of an officer from murder to manslaughter. The reader will see this from the following passage, which I copy from a work of high authority both here and in England. I give the passage entire, because it relates wholly to individual liberty, and I shall have to recur to it.[5] The learned jurist says:

"Though the killing of an officer of justice, while in the regular execution of his duty, knowing him to be an officer, and with intent to resist him in such exercise of duty, is murder; the law in that case implying malice; yet where the process is defective or illegal, or is executed in an illegal manner, the killing is only manslaughter, unless circumstances appear, to show express malice; and then it is murder. Thus, the killing will be reduced to manslaughter, if it be shown in evidence that it was done in the act of protecting the slayer against an arrest by an officer acting beyond the limits of his precinct; or, by an assistant, not in the presence of the officer; or, by virtue of a warrant essentially defective in describing either the person accused, or the offence; or, where the party had no notice, either expressly, or from the circumstances of the case, that a lawful arrest was intended; but, on the contrary, honestly believed that his liberty was assailed without any pretence of legal authority;

[5] This is § 123 of Vol. III. of Dr. Greenleaf on Evidence, which I have copied by the permission of my esteemed and distinguished friend. I have left out all the legal references. The professional lawyer is acquainted with the book, and the references would be important to him alone.

or, where the arrest attempted, though for a felony, was not only without warrant, but without hue and cry, or fresh pursuit; or, being for a misdemeanor only, was not made flagrante delicto; or, where the party was on any other ground, not legally liable to be arrested or imprisoned. So, if the arrest, though the party were legally liable, was made in violation of law, as, by breaking open the outer door or window of the party's dwelling-house, on civil process; for such process does not justify the breaking of the dwelling-house, to make an original arrest; or, by breaking the outer door or window, on criminal process, without previous notice given of his business, with demand of admission, or something equivalent thereto, and a refusal."

The Habeas Corpus Act. This famous act of parliament was passed under Charles the Second, and is intended to insure to an arrested person, whether by warrant or on the spot, that at his demand he be brought, by the person detaining him, before a judge, who may liberate him, bail him, or remand him, no matter at whose command or for what reasons the prisoner is detained. It allows of no "administrative arrests," as extra-judicial arrests are called in France, or imprisonment for reasons of state. The habeas corpus act farther insures a speedy trial, a trial by the law of the land and the lawful court—three points of the last importance. It moreover guarantees that the prisoner know for what he is arrested, and may properly prepare for trial. The habeas corpus act did by no means first establish all these principles, but numberless attempts to secure

them had failed, and the act may be considered as the ultimate result of a long struggle between law and individual on the one hand, and power on the other. The history of this act is interesting and symptomatic.[6]

The constitution of the United States prohibits the suspension of the habeas corpus act, "unless when, in cases of rebellion or invasion, the public safety may require it;" and Alexander Hamilton says, in the Federalist:[7] "The establishment of the writ of habeas corpus, the prohibition of ex post facto laws and of titles of nobility, to which we have no corresponding provisions in our constitution, are perhaps greater securities to liberty than any it contains;" and, with reference to the first two, he justly adds the words of "the judicious Blackstone."[8]

All our state constitutions have adopted these important principles. The very opposite of this guarantee was the "lettre de cachet," or is the arbitrary imprisonment at present, in France.

There was in England, until within a recent date, a remarkable deviation from the principles of personal liberty—the impressment. The crown assumed the right to force any able-bodied man on board a man-of-war, to serve there as sailor. There has always been a great deal of doubt about this arrogated privilege of the crown, and, generally, sailors only were taken, chiefly in times of war and when no hands would freely enlist. Every friend of liberty

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[6] The appendix contains the Habeas Corpus Act.

[7] Paper, No. LXXXIV.

[8] Blackstone's Commentaries, vol. i. page 136.—Note, in the Federalist.

will rejoice that the present administration has taken in hand a new plan of manning the navy, by which this blemish will be removed.[9]

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[9] The plan has not yet been published, but one of the ministers, sir James Graham, said in the commons, in April, 1853:

"The first point on which all the authorities consulted were agreed is, that whatever measures are taken must rely for success on the voluntary acceptance of them by the seamen, and that any attempt to introduce a coercive mode of enlistment would be followed by mischievous consequences and failure."

CHAPTER VII.

BAIL. PENAL TRIAL.

3. Connected with the guarantees of personal liberty, treated of in the foregoing chapter, is the bail.

The law of all nations not wholly depraved in a political point of view, adopts the principle that a man shall be held innocent until proved by process of law to be otherwise. In fact, the very idea of a trial implies as much. Theoretically, at least, this is acknowledged by all civilized nations, although often the way in which things are actually carried on, and in many countries the very mode of trying itself, are practical denials of the principle. But even in the freest country there is this painful yet unavoidable contradiction, that while we hold every person innocent until by lawful trial proved to be guilty, we must arrest a person in order to bring him to a penal trial; and, although by the law he is still considered innocent, he must be deprived of personal liberty until his trial can take place, which it is impossible to let always follow instantly upon the arrest. To mitigate this harshness as much as possible, free nations guarantee the principle of bailing

in all cases in which the loss of the bailed sum may be considered as a more serious evil than the possible punishment. The amount of bail must depend upon the seriousness of the charge, and also upon the means of the charged person. If judges were allowed to demand exorbitant bail, they might defeat the action of this principle in every practical case. It was enacted, therefore, in the first year of William and Mary,[1] and has been adopted in all our constitutions, that no "excessive bail" shall be required. The nature of the case admits of no more exact term; but, with an impeachment hanging over the judges, should the principle thus solemnly pronounced be disregarded, it has worked well. Indeed, there are frequent cases in the United States in which this principle is abused, and society is endangered, because persons are bailed who are under the heaviest charges, and have thus an opportunity of escape if they know themselves guilty. As this can take place only with persons who have large sums at their disposal, either in their own possession or in that of their friends, and as liberty demands first of all the foundation of justice, it is evident that this abuse of bail works as much against essential liberty as the proper use of bail guarantees it. We ought, everywhere, to return to the principle of distinguishing transgressions of the law into bailable offences and offences for the suspected commission of which the judge can take no bail. These are especially those offences for the punishment of which no equivalent in money can be

[1] William and Mary, stat. ii. c. 2.

imagined, for instance death or imprisonment for life, and those offences which put the offender into the possession of the sum required for the bail.

It has been objected to the bail that it works unjustly. It temporarily deals with so precious a thing as personal liberty according to possession of money; but it must be remembered that the whole arrest before trial is an evil of absolute necessity, and the more we can limit it the better.

Liberty requires bail, and that it be extended as far as possible; and it requires likewise that it be not extended to all offences, and that substantial bail only be accepted.

4. Another guarantee, of the last importance, is a well-secured penal trial, hedged in with an efficient protection of the indicted person, the certainty of his defence, a distinct indictment charging a distinct act, the duty of proving this act on the part of government, and not the duty of proving innocence on the part of the prisoner, the fairness of the trial by peers of the prisoner, the soundness of the rules of evidence, the publicity of the trial, the accusatorial (and not the inquisitorial) process, the certainty of the law to be applied, together with speed and utter impartiality, and an absolute verdict. It is moreover necessary that the preparatory process be as little vexatious as possible.

When a person is penally indicted, he individually forms one party, and society, the state, the government forms the other. It is evident that unless very strong and distinct guarantees of protection are given to the former, that he be subjected to a fair trial, and that

nothing be adjudged to him but what the law already existing demands and allows, there can be no security against oppression. For government is a power, and, like every power in existence, it is desirous of carrying its point—a desire which increases in intensity the greater the difficulties are which it finds in its way.

Hence it is that modern free nations ascribe so great an importance to well regulated and carefully elaborated penal trials. Montesquieu, after having given his definitions of what he calls philosophical liberty, and of political liberty, which, as we have seen, he says, consists in security, continues thus: "This security is never more attacked than in public and private accusations. It is, therefore, upon the excellence of the criminal laws that chiefly the liberty of the citizen depends."[2] Although we consider this opinion far too general, it nevertheless shows how great a value Montesquieu set on a well-guarded penal trial, and he bears us out in considering it an essential element of modern liberty. The concluding words of Mr. Mittermaier's work on the Penal Process of England, Scotland, and the United States, are: "It will be more and more acknowledged how true it is that the penal legislation is the keystone of a nation's public law."[3]

This passage of the German criminalist expresses the truth more accurately than the quoted dictum of

[2] Esprit des Lois, XII. 2, Of the Liberty of the Citizen.

[3] This comprehensive and excellent work was published in Germany, Erlangen, 1851.

Montesquieu. For, although we consider the penal trial and penal law in general intimately connected with civil liberty, it is nevertheless a fact that a sound penal trial is invariably one of the last fruits of political civilization, partly because it is one of the most difficult subjects to elaborate, and because it requires long experience to find the proper mean between a due protection of the indicted person and an equally due protection of society; partly because it is one of the most difficult things in all spheres of action to induce irritated power to limit itself as well as to give to an indicted person the full practical benefit of the theoretic sentence, easily pronounced like all theory, that the law holds every one innocent until proved not to be so. The Roman and Athenian penal trials were sadly deficient. The English have allowed counsel to the penally indicted person only within our memory, while they had been long allowed in the United States.[4] The penal

[4] It must not be forgotten, however, that, deficient as the penal trial of England, without counsel for the defendant, was, it contained many guarantees of protection, especially publicity, a fixed law of evidence, with the exclusion of hearsay evidence, the jury and the neutral position of the judge in consequence of the trial by jury, and the strictly accusatorial character of the trial, with the most rigid adhesion to the principle of trying a person upon the indictment alone, so that the judge could be, and in later times really had been, the protector of the prisoner. Had the trial been inquisitorial instead of accusatorial, the absence of counsel for defence would have been an enormity. To this enormity Austria has actually returned since the beginning of this century. The code promulgated by Joseph gave counsel, or a "defensor," to the prisoner; but, although the process remained inquisitorial, the defensor was again disallowed. The late revolution re-established him, but whether he

trial in the Netherlands was a poor one, when nevertheless, the Netherlanders are allowed on all hands to have enjoyed a high degree of civil liberty. It is one of the most common facts in history that a nation is more or less advancing in nearly all the branches of civilization, while the penal trial and the whole penal law remains almost stationary in its barbarous inconsistency. The penal trial of France, up to the first revolution, remained equally shocking to the feelings of humanity and to the laws of legal logic.

The reason of this apparent inconsistency is that, in most cases, penal trials affect personally individuals who do not belong to the classes which have the greatest influence upon legislation. This point is especially important in countries where the penal trial is not public. People never learn what is going on in the houses of justice. Another and great reason is that generally lawyers by profession are far less interested in the penal branch of the law than in the civil. This, again, arises from the double fact that the civil law is far more varied and complicated, consequently more attractive to a judicial mind, and that the civil cases are far more remunerative. How much the difficulty to be solved constitutes the attraction for the lawyer, we may see from the fact that very few professional lawyers take an interest in the punishment itself. A penal case has attraction for them so long as it is undecided, but

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has been disallowed again of late I don't know. Nor can it be of very great importance in a country in which the "state of siege" and martial law seem to be permanent.

what imprisonment follows, if imprisonment has been awarded, interests them little. Very few lawyers have taken a lead in the reform of criminal law and in prison discipline, the noble sir Samuel Romilly always excepted.

Among the points which characterize a fair and sound penal trial according to our advancement in political civilization, we would designate the following: No intimidation before the trial or attempts by artifice to induce the prisoner to confess; a contrivance which protects the citizen even against being placed too easily into a state of accusation; the fullest possible realization of the principle that every man is held innocent until proved to be otherwise, and bail; a total discarding of the principle that the more heinous the imputed crime is, the less ought to be the protection of the prisoner, but on the contrary the adoption of the reverse; a distinct indictment, and the acquaintance of the prisoner with it, sufficiently long before the trial, to give him time for preparing the defence; that no one be held to incriminate himself; the accusatorial process, with jury and publicity, therefore an oral trial and not a process in writing; counsel or defensors of the prisoner; a distinct theory or law of evidence, and no hearsay testimony; a verdict upon evidence alone and pronouncing guilty or not guilty; a punishment in proportion to the offence and in accordance with common sense and justice;[5] especially no punitory

[5] The idea expressed by Dr. Paley regarding this point is revolting. He says, in his Political Philosophy, that we may choose

imprisonment, which necessarily must make the prisoner worse than he was when he fell into the hands of government, nor cautionary imprisonment before trial, which by contamination must advance the prisoner in his criminality; and that the punishment adapt itself as much as possible to the crime and criminality of the offender;[6] that nothing but what the law demands or allows be inflicted,[7] and

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between two systems, the one with fair punishments always applied, the other with very severe punishments occasionally applied. He thus degrades penal law, from a law founded above all upon strict principles of justice, to a mere matter of prudential expediency, putting it on a level with military decimation.

[6] Lieber's Popular Essay on Subjects of Penal Law and on Uninterrupted Solitary Confinement at Labor, &c. Philadelphia, 1838. I have there treated of this all-important subject at some length.

[7] Tiberius Gracchus erected a temple in honor of Liberty, with a sum obtained for fines. If the fines were just, there was no inconsistency in thus making penal justice build a temple of freedom, for liberty demands security and order, and, therefore, penal justice.

On the other hand, what does a citizen reared in Anglican liberty feel when he reads in a simple newspaper article in a French provincial paper, in 1853, the following? "The minister of general police has just decided that Chapitel, sentenced by the court to six months' imprisonment for having been connected with a secret society, and Brayet, sentenced for the same offence to two months' imprisonment, shall be transported to Cayenne for ten years, after the expiration of their sentence!"

The decree of the 8th of December, 1851, not a law, but a mere dictatorial order, upon which ten years' transportation are added by way of "rider" to a few months' imprisonment adjudged by the courts of law, is this:

"Article 1. Every individual placed under the surveillance of the high police, who shall be found having broken his assigned limits of residence, may be transported, by way of general safety, to one of the penitentiary colonies, at Cayenne or in Algeria.

"The duration of transportation shall be five years or less, and

that all that the law demands be inflicted—no arbitrary injudicious pardoning, which is a direct interference with the government of law.

The subject of pardoning is so important, especially in our country, that I have deemed it advisable to add a paper on pardoning, which the reader will find in the appendix.

Perhaps there are no points so important in the penal trial in a free country, as the principle that no one shall be held to incriminate himself, that the indictment as well as the verdict must be definite and clear, and that no hearsay evidence be admitted. Certainly none are more essential.

A great lawyer and excellent man, sir Samuel Romilly, justly says, that if the ascertaining of truth

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ten years or more." (We translate literally and correctly, whatever the reader may think of this sentence, which would be very droll, were it not very sad.)

"Article 2. The same measure shall be applicable to individuals found to be guilty of having formed part of a secret society."

The French of the last sentence is: *individus reconnus coupable d'avoir fait partie d'une société secrête.* This *reconnus* (found, acknowledged) is of a sinister import. For the question is, Found by whom? Of course not only by the courts, for finding a man guilty by process of law is in French *convaincre.* The reconnoitre, therefore, was used to include the police, or any one. So that we arrive at this striking fact: The despot may add an enormous punishment to a legal sentence, as in the cited case, or he may award it, or rather the minister of police under him may do it, without trial, upon mere police information. Two hundred years ago, the English declared executive transportation beyond the seas, or deportation, to be an unwarranted grievance; and here we have it again, no doubt in imitation of the Roman imperial times (the saddest in all history), in the middle of the nineteenth century.

and meting out of justice is the object of the trial, no possible objection can be taken against it on principle. But there is this difficulty, that if judges themselves question, they become deeply interested in the success of their own cross-examinations, they become biased against the prisoner should he thwart them, or turn questions into ridicule. Romilly makes this remark after having actually seen this result in France, where it is always done (witness Mad. Lafarge's trial, or any French trial of importance), and certainly often with success.[8] Or let us observe the English some centuries back.

In the inquisitorial process, it is not only done, but the process depends upon it.

There are other dangers connected with it. An accused man cannot feel that perfect equanimity of mind which alone might secure his answers against suspicion. I know from personal experience how galling it is to see your most candid answers rewarded with suspicions and renewed questions, if the subject is such that you cannot possibly at once clear up all doubts. It ought never to be forgotten that the accused person labors under considerable disadvantages, merely by the fact that he is accused. Bullying and oppressive judges were common in England when the principle was not yet settled that no one shall be held to incriminate himself. The times of the Stuarts furnish us with many instances of

[8] Sir Samuel Romilly's Memoirs, vol. i. p. 315, 2d ed., London, 1840.

altercations in the court, between the judge and the prisoner, and of judicial browbeating to the detriment of all justice.

The trial of Elizabeth Grant, the aged and deaf baptist woman, who had given a night's rest under her roof to a soldier of Monmouth's dispersed army, under chief-justice Jones,[9] may serve as an instance.

It is among other reasons for this very fact of prisoners on trial being asked by the French judge about the fact at issue, his whereabouts at the time, his previous life, and a number of things which throw suspicion on the prisoner, although unconnected with the question at issue, that Mr. Béranger says, in a work of just repute: "We," that is the French, "have contented ourselves to place a magnificent frontispiece before the ruins of despotism; a deceiving monument, whose aspect seduces, but which makes one freeze with horror when entered. Under liberal appearances, with pompous words of juries, public debates, judicial independence, individual liberty, we are slowly led to the abuse of all these things, and the disregard of all rights; an iron rod is used with us, instead of the staff of justice."[10]

There are peculiar reasons against examining the prisoner in public trials, and many peculiar to the secret trial. Although it cannot be denied that often the questioning of the prisoner may shorten the trial and lead to condign conviction, which otherwise may

[9] Philipps's State Trials, vol. ii. 214 et seq., and, indeed, in many parts of this work.

[10] Béranger De la Justice Criminelle de France, Paris, 1818, page 2.

not be the result, it is nevertheless right that most, perhaps all our state constitutions have adopted this principle. It is just; it is dignified; and it is fair. The government prosecutes; then let it prove what it charges. So soon as this principle is discarded, we fall into the dire error of throwing the burden of proving innocence wholly or partially on the prisoner; while, on the contrary, all the burden ought to lie on the government, with all its power, to prove the charged facts. Proving an offence and fastening it on the offender, is one important point in the penal trial; but the method *how* it is done is of equal importance. The Turkish cadi acknowledges the first point only; yet what I have stated is not only true with reference to the jural society, it is even true in the family and the school.

It is an interesting fact for the political philosopher that, while the Anglican race thus insists on the principle of non-self-incrimination, the whole Chinese code for that people under a systematic mandarinism is pervaded even by the principle of self-accusation for all, but especially for the mandarins.

The principle that on government lies the burden of proving the guilt, leads consistently to the other principle that the verdict must be definite and absolute. Hence these two important facts: The verdict must be guilty or not guilty, and no absolutio ab instantia, as it is called in some countries of the European continent, that is to say, no verdict or decision which says, according to the present trial we cannot find you guilty, but there is strong suspi-

cion, and we may take you up another time;"[1] nor any "not proven," as the Scottish trial admits of, ought to be permitted. "Not proven," does not indeed allow a second trial, but it expresses: You are free, although we have very strong suspicion. Secondly, the main principle leads to the fact that no man ought to be tried twice for the same offence. This is logical, and is necessary for the security of the individual. A person might otherwise be harassed by the government until ruined. Repeated trials for charges, which the government knows very well to be unfounded, are a common means resorted to by despotic executives. Frequently such procedures have led the persecuted individual to compound with government rather than lose all his substance.

The Anglican race, therefore, justly makes it an elementary principle of its constitutional law, that "no man shall be tried twice for the same offence."

I have said that a fair trial for freemen requires that the preparatory steps for the trial be as little vexatious as possible. They must also acknowledge the principle of non-incrimination. This is disregarded on the whole of the European continent. The free range of police power, the mean tricks resorted to by the "instructing" judge or officer, before the trial, in order to bring the prisoner

[1] The reader will find in the appendix a paper on the subject of some continental trials, and the admission of half and quarter proof and proportional punishment.

to confession, are almost inconceivable,[12] and they are the worse, because applied before the trial, when, therefore, the prisoner is not surrounded by those protections which the trial itself grants. With reference to this point, and in order to modify what I have stated regarding Greek penal trials, I wish to mention the interesting fact that "the prosecutor, in Athens, who failed to make good his charge, incurred certain penalties, unless he obtained at least one-fifth of the votes in his favor. In public suits, he forfeited 1,000 drachmæ to the state, and could never again institute a similar suit. The same punishment was incurred if he declined to proceed with the case. In private suits, he paid the defendant one-sixth of the amount of the disputed property, as a compensation for the inconvenience he had suffered in person or character." [13]

Sir Samuel Romilly had the intention of proposing in a similar spirit, a bill by which an acquitted prisoner, having been prosecuted for felony, should be compensated by the county, at the discretion of the court, for loss of time and the many evils endured. Indeed, he thought that far more ought to be done.[14] Leave was given to bring in the compensa-

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[12] This may be amply seen in the reports on French trials, and, among other works, in Fenerbach's collection of German criminal trials.

[13] Herman, Political Antiquit. of Greece, Oxon. 1836, sect. 144, where more, and all the necessary authorities can be found.

[14] Memoirs of the Life of Sir Samuel Romilly, 2d edition, London, 1840, vol. ii., page 235. Strange enough; there is an English law, 25 George II., sec. 36, according to which prosecutors

tion bill, but it was afterwards withdrawn. It is evident that the great difficulty would lie in the fact that the discretion of the judge would establish at once a distinction between the verdicts, similar to that produced by the Scottish "not guilty" and "not proven." To compensate, however, all acquitted persons would be very mischievous if we consider how many persons are acquitted who nevertheless are guilty. Indeed, it might well be asked whether the fear of paying compensation would not in some cases induce the jury to find more easily a verdict of guilty.

The professional reader may think that I have not sufficiently dwelt upon some essential points of a sound penal trial, for instance, on publicity, or the independence of counsel. He will find, however, that these subjects are treated of in other parts of this work. The arrangement could not be made otherwise.

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are to have the expenses of their prosecution reimbursed, and a compensation afforded them for their trouble and loss of time. This is evidently to induce people freely to prosecute; but no guarantee is given on the other hand against undue prosecution, and a compensation for the trouble and loss of time of the acquitted person.

CHAPTER VIII.

HIGH TREASON.

5. That penal trial which is the most important with reference to civil liberty, and in which the accused individual stands most in need of peculiar protection by the law, is the trial for treason.

If a well-guarded penal trial in general forms an important element of our liberty, because the individual is placed opposite to public power, a carefully organized trial for treason is emphatically so. In the trial for treason the government is no longer theoretically the prosecuting party, as it may be said it is in the case of theft or assault, but government is the really offended, irritated party, endowed at the same time with all the force of the government, to annoy, persecute, and often to crush. Governments have, therefore, been most tenacious in retaining whatever power they could in the trial for treason; and, on the other hand, it is most important for the free citizen that, in the trial for treason, he should not only enjoy the common protection of a sound penal trial, but far greater protection. In despotic countries we always find that the little protection granted in common criminal trials, is withheld in trials for treason; in free countries, at least in

England and the United States, greater protection is granted, and more caution demanded, in trials for treason than in the common penal process. The trial for treason is a gauge of liberty. Tell us how they try people for treason, and we will tell you whether they are free. It redounds to the glory of England that attention was directed to this subject from early times, and that guarantees were granted to the prisoner indicted for treason, centuries before they were allowed to the person suspected of a common offence; and to that of the United States, that they plainly defined the crime of treason, and restricted it to narrow limits, in their very constitution. This great charter says, section III.:

1. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or confession in open court.

2. "Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Whether political societies, not so fortunately situated as ourselves, yet equally prizing civil liberty, might safely restrict the crime of treason to such narrow limits as the wise and bold framers of our constitution have done, is a subject which belongs to a branch of political science that does not occupy us here; but it may be asserted that several cases have actually occurred in the United States, in which all

nations except the American would have considered the provisions of our constitution insufficient, and in which nevertheless they have been found adequate.

We may consider the American law of high treason as the purest in existence, and it shows how closely the law of treason is connected with civil liberty. Chief-justice Marshall said: "As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether the inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both."[1]

All constitutions of the different American states, which mention treason, have the same provision. Those that say nothing special about it, have the same by law, and in conformity with the principles which the respective constitutions lay down regarding penal trials.[2] None admit of retrospective laws, of legislative condemnations of individuals, or of attainders.

The course which the law of treason takes is this: At first there exists no law of treason, because the crime is not yet separated from other offences, as

[1] The Writings of John Marshall, p. 42. Ex parte Bollman and Swartwout.

[2] Judge Story says: "A state cannot take cognizance, or punish the offence (i. e. treason against the United States); whatever it may do in relation to the offence of treason, committed exclusively against itself, if indeed any case can, under the constitution, exist, which is not at the same time treason against the United States." Chap. 28, vol. iii. of Commentaries on the Constitution of the United States.

indeed the penal and civil laws are not separated in the earliest periods. The Chinese code, so minute in many respects, mixes the two branches, and debtors are treated as criminal offenders, reminding us, in this particular, of the early Roman law. When first treason comes to be separated from the other offences, it is for the twofold purpose of inflicting more excruciating pains, and of withholding from the trial the poor protection which is granted to persons indicted for common offences. The dire idea of a crimen exceptum gains ground. The reasoning, or rather unreasoning, is that the crime is so enormous that the criminal ought not to have the same chances of escape, thus assuming that the accused, yet to be proved to be a criminal, is in fact a criminal, and forgetting, as has been indicated before, that the graver the accusation is, and the severer therefore the punishment, in case of established guilt, may be, the safer and more guarded ought to be the trial. It is a fearful inconsistency, very plain when thus stated, yet we find that people continually fall into the same error, even in our own days. How often is Lynch law resorted to on the very plea that the crime, still a suspected one, is so infamous that the regular course of law is too slow or too doubtful! The same error prevailed regarding witchcraft. The pope declared it a crimen exceptum—too abominable to be tried by common process. Protestant governments followed the example.

At the same time we find that, at the period of which we are now speaking, the law of treason is vastly extending, and all sorts of offences, either because considered peculiarly heinous, or because

peculiarly displeasing to the public power, are drawn within the meaning of treason. A list of all the offences which at some time or other have been considered to amount to treason, from the crime of "offended divine majesty," (crimen læsæ majestatis divinæ,) in which stealing from a church was included, to the most trivial common offences, and which I have made out for my own use, would astound the reader, if this were the place to exhibit it.

When political civilization advances, and people come to understand more clearly the object and use of government, as well as the dangers which threaten society and the individual, the very opposite course takes place. More protection is granted to the person indicted for treason, than in common penal trials, and the meaning of treason is more and more narrowed. The definition of treason is made clearer, and constructive treason is less and less allowed, until we arrive at our own bright law of treason.

It is thus that the law of treason becomes, as I stated before, a symptomatic fact, and is in politics what roads, the position of woman, public amusements, the tenure of land, architecture, habits of cleanliness, are in other spheres. They are gauges of social advancement. The more I studied this subject, the more I became convinced of the instruction to be derived from the history of the law of treason in ancient times, the middle ages, and modern periods, and it was my intention to append a paper to this work, which should give a survey of the whole. When, however, I came to arrange my long collected materials, I found, although firmly resolved to disregard an author's partiality for materials of

interest once collected, and to restrict the paper to the merest outlines, that it would be impossible to do any justice to the subject without allowing to that particular portion a disproportionally large place. I decided, therefore, to leave the subject for a separate work.

In conclusion I would repeat, experience proves that not only are all the guarantees of a fair penal trial peculiarly necessary for a fair trial for treason, but that it requires additional safeguards; and, of the one or the other, the following seem to me the most important:

The indictment must be clear as to facts and time, when the indicted act has been committed;

The prisoner must have the indictment a sufficient time before the trial, so as to be able to prepare for it;

He must have a list of the witnesses against him, an equal time beforehand;

A sufficient time for the trial must be allowed; and the prisoner must not be seized, tried, and executed, as Cornish was, in 1685, in a week;

Counsel must be allowed, as a matter of course;

The judges must be impartial and independent, and ample challenges must be allowed; peers must judge. Consequently, judges must not be asked by the executive, before the trial, what their judgment would be if such or such a case should be brought before them, as was repeatedly done by the Stuarts;

Of all trials, hearsay must be excluded from the trial for treason;

Facts, not tendencies; acts, not words or papers written by the indicted person, and never allowed to leave his desk, must be charged;

Perfect publicity must take place from beginning to end, and reporters must not be excluded; for it is no publicity in a populous country that allows only some twenty or forty bystanders;

The trial must be in presence of the prisoner;

Several witnesses must be required to testify to the same fact, and the witnesses for the prisoner must be as much upon oath as those for the government;

Confession, if unconditionally admitted at all, must at least be in open court;

There must be no physical nor psychical torture;

There must be good witnesses, not known villains or acknowledged liars, as Titus Oates, or lord Howard against lord Russell.

The judges must not depend upon the executive;

No evidence must be admitted which is not admitted in other trials.

There must be a fixed punishment;

There must be no constructive treason;

And the judges must not be political bodies.

These guarantees have been elaborated by statute and common law, through periods of freedom and tyranny, by the Anglican race. The English law grants these safeguards, except indeed the last to lords, because, according to the principle that every one must be tried by his peers, a lord is tried by the house of lords. It showed great wisdom that the framers of our constitution did not assign the trial for treason to the senate,[3] as the former French constitution appointed the house of peers to be the

[3] All the American trials for treason are collected in Francis Wharton's State Trials of the United States, Philadelphia, 1846.

court for high treason. American impeachments are tried indeed by the senate, but it will be observed that the American trial of impeachment is not a penal trial for offences, but a political institution, trying for political capacity. The senate, when sitting as a court to try impeachment, can only remove from office, whatever the crime may have been; and the impeached person can be penally tried after the senate has removed him from office. In its political character, then, but in no other point, the American impeachment resembles the Athenian ostracism, which was likewise a political and not a penal institution. The English impeachment is a penal trial.

The trials for treason going on in many countries of the European continent, especially in Naples and the Austrian dominions, are fair illustrations ex converso of what has been stated here.[4]

The trial for treason has been treated of in this place because naturally connected with the subject of the penal trial in general. Otherwise it would have been more properly enumerated among the guarantees connected more especially with the general government of a free country. We return, therefore, once more to the guarantees of individual rights.[5]

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[4] The reader is probably acquainted with the Right Hon. Mr. Gladstone's pamphlet on Neapolitan trials for treason, published in 1851. It is but a sample.

[5] I would mention for the younger student that when I study pervading institutions, or laws and principles which form running threads through the whole web of history, I find it useful to make chronological tables of their chief progresses and reverses. They are very suggestive, and strikingly show what we owe to the continuity of human society. None of these tables has been more instructive to me than that on the history of the law of treason.

CHAPTER IX.

COMMUNION. LOCOMOTION, EMIGRATION.

6. The freedom of communion is one of the most precious and necessary rights of the individual, and one of the indispensable elements of all advancing humanity—so much so, indeed, that it is one of those elements of liberty, which would have never been singled out, had not experience shown that it forms invariably one of the first objects of attack, when arbitrary power wishes to establish itself, and one of the first objects of conquest, when an unfree people declares itself free.

I have dwelled on the primordial right of communion in the Political Ethics at great length, and endeavored to show that the question is not whether free communion or a fettered press be conducive to more good, but that everything in the individual and in nations depends in a great measure upon communion, and that free communion is a pre-existing condition. The only question is, how to select the best government with it, and shielding it, unless, indeed, we were speaking of tribes in a state of tutelage, ruled over by some highly advanced nation.

In this place we only enumerate freedom of communion as one of the primary elements of civil liberty. It is an element of all civil liberty. No one can imagine himself free if his communion with his fellows is interrupted or submitted to surveillance; but it is the Anglican race which first established it on a large scale, broadly and nationally acknowledged.

Free nations demand and guarantee free communion of speech, the right of assembling and publicly speaking, for it is communion of speech in this form which is peculiarly exposed to abridgment or suppression by the public power; they guarantee the liberty of the press, and, lastly, the sacredness of epistolary communion.

It is a very striking fact that, although the constitution of the United States distinctly declares that the government of the United States shall only have the power and authority positively granted in that instrument, so that, in a certain respect, it was unnecessary to say what the government should not have the right to do, still, in the very first article of the Additions and Amendments of the Constitution, congress is forbidden to make any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The reader will keep in mind that the framers of our constitution went out of their way and preferred to appear inconsistent, rather than omit the enume-

ration of those important liberties, that of conscience, as it is generally called, that of communion, and of petitioning; and the reader will remember, moreover, that these rights were added as amendments. They must then have appeared very important to those who made our constitution, both on account of their intrinsic importance, and because so often attacked by the power-holders. Let the reader also remember that, if it be thus important to abridge the power of government to interfere with free communion, it is at least equally important that no person or number of men interfere, in any manner, with this sacred right. Oppression does not come from government or official bodies alone. The worst oppression is of a social character, or by a multitude.

The English have established the right of communion, as so many other precious rights by common law, by decisions, by struggles, by revolution. All the guarantee they have for the unstinted enjoyment of the right lies in the fact that the whole nation says with one accord, as it were: Let them try to take it away.

It is the same with our epistolary communion. The right of freely corresponding is unquestionably one of the dearest as well as most necessary of civilized man; yet, our forefathers were so little acquainted with a police government, that no one thought of enumerating the sacredness of letters along with the freedom of speech and the liberty of the press. The liberty of correspondence stands between the two: free word, free letter, free print. The framers did not think of it, as the first law-

makers of Rome are said to have omitted the punishment of parricide. Yet we, too, say: Let any one try to infringe the sacredness of letters.

In all the late struggles for liberty on the continent of Europe, the sacredness of letters was insisted upon, not from abstract notions, but for the very practical reason that governments had been in the habit of disregarding it. Of course, they now do so again. The English parliament took umbrage, a few years ago, at the liberty a minister had taken of ordering the opening of letters of certain political exiles residing in England, and although he stated that it had been the habit of all administrations to order it under certain circumstances, he promised to abstain in future. In the United States there is no process or means known to us, not even by writ of a court, we believe, by which a letter could be extracted from the post-office, except by him to whom it is addressed; and as to the executive unduly opening letters, it would be cause for instant impeachment.

Quite recently, in the month of April, 1853, it appeared in the prosecution of several persons of distinction at Paris, for giving wrong and injurious news to foreign papers, that their letters had not only been opened at the post-office, but that the originals had been kept back, and copies had been sent to the recipients, with a postscript, written by the government officer, for the purpose of fraudulently explaining the different handwriting. It stated that the correspondent had a sore hand. When the counsel for the accused said that the falsifying officer ought to be on the bench of the ac-

cused, the court justified the prefect of the police, on the ground of "reasons of state." No commentary is necessary on such self-vilification of governments; but this may be added, that these outrages were committed even without a formal warrant from any one, but on the sole command of the police. Are we, then, wrong in calling such governments police governments? It is not from a desire to stigmatize these governments. It is on account of the prevailing principle, and the stigma is a natural consequence of this principle.[1]

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[1] In the decision of the appellate court in the same case we find this to be the chief argument, that government establishes post-offices, and cannot be expected to lend its hand to the promotion of mischief, by carrying letters of evil doers. This is totally fallacious. Government does not establish post-offices, but society establishes them, though it may be through government.

If it did, it is not a benefit done by a second party, as when A makes a present to B, but government is simply and purely an agent; and, what is more, the right of establishing post-offices is not an inherent attribute of government, such as the administration of justice or making war. Government merely becomes the public carrier, for the sake of general convenience. There are many private posts, and governments without government post-offices, for instance, the republic of Hamburg.

The opening of letters without proper warrant is a frightful perversion of power, and though government should be able to get at secret machinations, the secret of letters is a primordial condition. Government might, undoubtedly, know many useful things, if the sacredness of catholic confession were broken into: but that is considered a primordial and ante-political condition. So, many codes do not force a son to testify against a father, the family affection is considered a primordial condition. The very state of society, for which it is worth living, is invaded, if the correspondence is exposed to this sort of government burglary.

The argument is simply this. Man is destined to live in society,

England, as may be supposed, has not always enjoyed liberty of the press. It is a conquest of high civilization.[2] It is, however, a remarkable fact, that England owed its transitory but most stringent law of a censorship to her republican government.

On Sept. 20, 1647,[3] it was decreed by the republican government in England that no book henceforth be printed without previously being read and permitted by the public censor, all privileges to the contrary notwithstanding. House searches for prohibited books and presses should be made, and the post-office would dispatch innocent books only. All places where printing-presses may exist should be indicated by authority. Printers, publishers and authors were obliged to give caution-money for their names. No one was permitted to harbor a printer without permission, and no one permitted to sell foreign books without permission. Book-itinerants and ballad-singers were imprisoned and whipped. We are all acquainted with Milton's beautiful and searching

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united by converse and intercommunion; this is a basis of humanity. If you open letters you seriously invade this primary condition. Men are individuals, and social, destined for civilization and united progress, and the question is not whether they may be dispensed with, but how to govern with them. Governments too frequently act as though the government were the primary condition, and the remaining question only was, how much may be spared by government, to be left for society or individuals. The opposite is the truth.

[2] See Lieber's Letter to Hon. W. C. Preston on International Copyright.

[3] The same year, therefore, in which Charles the First was executed.

essay on the liberty of the press against this censorship.

The reader who pays attention to the events of his own days, will remember the law against the press, issued immediately after the coup d'état of Louis Napoleon, which puts the sale of printing and lithographic presses, copying machines, as well as types, under police supervision, and which, in one word, intercepts all public communion.

I suppose it will be hardly necessary to treat, in connection with the liberty of communion, of the "liberty of silence," as a French paper headed an article, when, soon after the coup d'état, it was intimated to a Paris paper, by the police, that its total silence on political matters would not be looked upon by government with favor, should the paper insist on continuing it.

It would be, however, a great mistake to suppose that governments alone interfere with correspondence and free communion. Governments are bodies of men, and all bodies of men act similarly under similar circumstances, if the power is allowed them. All absolutism is the same. I have ever observed, in all countries in which I have lived, that if party struggle rises to factious passion, the different parties endeavor to get hold of the letters of their adversaries. It is therefore of the last importance, both that the secret of letters and the freedom of all communion be legally protected as much as possible, and that every true friend of liberty present the importance of this right in the clearest possible manner to his own mind.

7. The right of locomotion, or of free egress and regress, as well as free motion within the country, is another important individual right and element of liberty.

The strength of governments was generally considered, in the last century, to consist in a large population, large amount of money, that is, specie, within the country, and a large army founded upon both. It was consistent, therefore, that in countries in which individual rights went for little, and the people were considered the mere substratum upon which the state, that is, the government, was erected, emigration was considered with a jealous eye, or wholly prohibited. Nor can it be denied that emigration may present itself in a serious aspect. So many people are leaving Ireland, that it is now common, and not inappropriate, to speak of the Irish exodus; and it has been calculated, upon authentic data, both in Germany and the United States, that for the last few years the German emigrants have carried not far from fifteen millions of Prussian dollars annually into the United States.[4] The amount of emigrating capital will be much greater, if the German emigration should be so much larger than that of pre-

[4] On the other hand, an immense amount of capital is annually returned, from successful emigrants in the United States, to Ireland and Germany. Persons who have not paid attention to the subject, cannot have any conception how many hard yet gladly earned pounds and thalers are sent from our country to aged parents or toiling sisters and brothers in Europe. A wide-spread and blessed process of affection is thus all the time going on—silent, gladdening, and full of beauty, like the secret and beautifying process of spring.

vious years, as is indicated by many circumstances. But freemen believe that governments are for them, not they for governments, and that it is a precious right of every one to seek that spot on earth where he can best pursue the ends of life, physical and mental, religious, political, and cultural.

If, under peculiar circumstances, a country should find itself forced to prohibit emigration, it would, at any rate, so far as this right goes, be an abridgment of liberty. We can imagine many cases in which emigration should be stopped by changing those circumstances which cause it, but none in which it ought to be simply prohibited. The universal principle of adhesiveness, so strong in all spheres of action, thought and affection, and which forms one of the elementary principles of society and continuity of civilization, is sufficiently strong to keep people where they are, if they possibly can remain; and if they leave an overpeopled country, or one in which they cannot find work or a fair living, they become active producers, and consequently proportionate consumers in the new country, so that the old country will reap its proportionate benefit, provided free exchange be allowed by the latter.

The same applies to the capital removed along with emigration. It becomes more productive, and mankind at large are benefited by it.

Besides, it is but a part of the general question, shall or shall not governments prohibit the efflux of money? It was formerly considered one of the highest problems of statesmanship, even by rulers so wise as Frederic the Second, of Prussia, to prevent

money from flowing out of the country; for wealth was believed to consist in money. Experience has made us wiser. We know that the freest action in this, as in so many other cases, is also the most conducive to general prosperity. It was stated in the journals of the day that Miss Jenny Lind remitted five hundred thousand dollars from the United States to Europe. Suppose this to be true, would they have been benefited had she been forced to leave that sum in this country? Or would we, upon the whole, profit by preventing five million dollars, which, according to the statement of our secretary of state, are now annually sent by our Irish immigrants to Ireland, from leaving our shores? Unquestionably not. But this is not the place for farther pursuing a question of political economy.

The English provided for a free egress and regress as early as in Magna Charta.[5] As to the freest possible locomotion within the country, I am aware that many persons accustomed to Anglican liberty may consider my mentioning it as part of civil liberty somewhat over-minute. If they will direct their attention to countries in which this liberty is not enjoyed in its fullest extent, they will agree that I have good reason for enumerating it. Passports are odious things to Americans and Englishmen, and may they always be so.[6]

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[5] Hon. Edward Everett's dispatch to Mr. Crampton, on the Island of Cuba, December 1, 1852.

[6] The primordial right of locomotion has been discussed by me in Political Ethics, at considerable length.

CHAPTER X.

LIBERTY OF CONSCIENCE. PROPERTY. SUPREMACY OF THE LAW.

8. Liberty of conscience, or, as it ought to be called more properly,[1] the liberty of worship, is one of the primordial rights of man,[2] and no system of liberty can be considered comprehensive which does not include guarantees for the free exercise of this right. It belongs to American liberty to separate entirely the institution which has for its object the support and diffusion of religion from the political government. We have seen already what our constitution says on this point. All state constitutions have similar provisions. They prohibit government from founding or endowing churches, and from demanding a religious qualification for any office or the exercise of any right. They are not hostile to religion, for we see that all the state governments direct

[1] Conscience lies beyond the reach of government. "Thoughts are free," is an old German saw. The same must be said of feelings and conscience. That which government, even the most despotic, can alone interfere with, is the profession of religion, worship, and church government.

[2] See Primordial Rights in Political Ethics.

or allow the bible to be read in the public schools; but they adhere strictly to these two points: no worship shall be interfered with, either directly by persecution, or indirectly by disqualifying members of certain sects, or by favoring one sect above the others; and no church shall be declared the church of the state, or "established church;" nor shall the people be taxed by government to support the clergy of all the churches, as is the case in France.

In England there is an established church, and religious qualifications are required for certain offices and places, at least in an indirect way. A member of parliament cannot take his seat without taking a certain oath "upon the faith of a Christian;" which, of course, excludes Jews. There is no doubt, however, that this disqualification will soon be removed. Whether it will be done or not, we are nevertheless authorized to say that liberty of conscience forms one of the elements of Anglican liberty. It has not yet arrived at full maturity in some portions of the Anglican race, but we can easily discern it in the whole race, in whose history we find religious toleration at an earlier date than in that of any other large portion of mankind. Venice, and some minor states, found the economical and commercial benefit of toleration at an early period, but England was the earliest country of any magnitude where toleration, which precedes real religious liberty, was established. While Louis the Fourteenth, of France, called the Great, dragonaded the protestants on no other ground than that they would not become catholics, a greater king, William the Third, declared, in England, that "con-

science is God's province." The catholics were long severely treated in England, but it was more on a political ground, because the pope supported for a long time the opponents to the ruling dynasty, than on purely religious grounds.

There is a new religious zeal manifesting itself in all branches of the christian church. The catholic church seems to be animated by a renewed spirit of activity, not dissimilar to that which animated it in the seventeenth century, by which it regained much of the ground lost by the reformation, and which has been so well described by Mr. Ranke. The protestants are not idle; they study, probe, preach, and act with great zeal. May Providence grant that the Anglican tribe, and all the members of the civilized race, may more and more distinctly act upon the principle of religious liberty, and not swerve from it, even under the most galling circumstances. Calamitous consequences, of which very few may have any conception at this moment, might easily follow.

As to that unhappy and most remarkable sect called the mormons, who have sprung up and consolidated themselves within our country, and who doubtless may become troublesome when sufficiently numerous to call on us for admission into the Union, I take it that the political trouble they may give cannot arise from religious grounds. Whether they have fallen back into Buddhism, making their god a perfectible being, with parts and local dwelling, cannot become a direct political question, however it may indirectly affect society in all its parts. The potent questions which will offer great difficulty will be, whether a

Mormon state, with its "theo-democratic" government, as they term it, can be called a republic, in the sense in which our constitution guarantees it to every member of the Union. It will then, probably for the first time in history, become necessary legally to define what a republic is. The other difficulty will arise out of the question which every honest man will put to himself, can we admit as a state a society of men who deny the very first principle, not of our common law, not of christian politics, not of modern progress, but of our whole western civilization, as contradistinguished to oriental life—of that whole civilization in which we have our being, and which is the precious joint product of christianity and antiquity—who deny monogamy.

No one will now deny that the English parliament followed too tardily the advice of those great statesmen who urged it long ago to abolish test oaths, and other religious impediments; but to judge impartially, we must not forget that the removal of disqualifications in countries enjoying a high degree of liberty, is always more difficult than in despotic countries, where all beneath the despot live in one waste equality. Liberty implies the enjoyment of important rights and high privileges. To share them freely with others who until then have not enjoyed them appears like losing part of them. It is a universal psychologic law. Neither religion, nor color, constitutes half the difference in many Asiatic states, which they establish in far freer countries. It must likewise be remembered that liberty implies power, the authority of acting; consequently, an admission

to equality in a free country implies admission to power, and it is this which frequently creates, justly or unjustly, the difficulty of perfect religious equality in certain states of society.

The end, however, which is to be reached, and towards which all liberty and political civilization tends, is perfect liberty of conscience.

9. One of the staunchest principles of civil liberty is the firmest possible protection of individual property[3]—acquired or acquiring, produced and accumulated, or producing and accumulating. We include, therefore, unrestrained action in producing and exchanging, the prohibition of all unfair monopolies, commercial freedom, and the guarantee that no property shall be taken except in the course of law; and the principle that, in particular, the constant taking away of part of property, called taxation, shall not take place, except by the direct or indirect consent of the owner—the tax-payer—and, moreover, that the power of government to take part of the property, even with the consent of the payer, be granted for short periods only, so that the taxes must be renewed, and may be revised at brief

[3] It has been one of the main objects in my Essays on Labor and Property, to show the necessity and justice of individual property, and its direct connection with man's individuality, of which it is but the reflex in the material world around him. Man suffers in individuality, therefore in liberty, in the degree in which absolutism, which is always of a communistic nature, deprives him of the possession, enjoyment, production, and exchange of individual property. The Essays treat of property in a political, psychologic and economical point of view.

intervals. The true protection of individual property demands likewise the exclusion of confiscation. For, although confiscation as a punishment is to be rejected, on account of the undefined character of the punishment, depending not upon itself but upon the fact whether the punished person has any property, and how much, it is likewise inadmissible on the ground that individual property implies individual transmission,[4] which confiscation totally destroys. It would perhaps not be wholly unjust to deprive an individual of his property as a punishment for certain crimes, if we were to allow it to pass to his heirs. We do it in fact when we imprison a man for life, and submit him to the regular prison discipline, disallowing him any benefit of the property he may possess; but it is unjust to deprive his children or other heirs of the individual property, not to speak of the appetizing effect which confiscation of property has often produced upon governments.

The English attainder and corruption of blood, so far as it affects property, is hostile to this great principle of the utmost protection of individual property, and has come down to the present times from a period of semi-communism, when the king was considered the primary owner of all land. Corruption of blood is distinctly abolished by our constitution.

Individual property is coexistent with govern-

[4] The subject of individual inheritance has also been treated at length in the Essays mentioned in the preceding note.

ment. Indeed, if by government be understood not only the existence of any authority, but rather the more regular and clearly established governments of states, property exists long before government, and is not its creature; as values exist long before money, and money long before government coin. We find, therefore, that the rightful and peaceful enjoyment of individual property is not mentioned as a particular item of civil liberty, as little as the institution of the family, except when communistic[5] ideas have endangered it,[6] or, in particular cases, when private

[5] I shall not have room to give a whole chapter to the subject of communism, or, rather, a single chapter would be wholly insufficient on this interesting subject. I shall mention, therefore, this only, that I use in these pages the word communism in its common adaptation, meaning a state of society in which individual property is abolished, or in which it is the futile endeavor of the lawgiver to abolish it, such as hundreds of attempts in ancient times, in the middle ages, and in modern epochs, in Asia and in Europe have been made, among the Spartans, the anabaptists, and French communists. I do not take here the term communism in that philosophical sense, according to which every state, indeed every society whatever, necessarily consists of the two elements, of individualism and socialism. The grave error of the socialist is that he extends the principle of socialism, correct in itself, to the sphere where individualism or separatism, equally correct, ought to determine our actions. The socialist is as mistaken an enthusiast as the individualist would be, who, forgetting the element of socialism, should carry his principle to the extreme of sejunctive egotism, and insist upon a dissolution of government and a disavowal of the sovereignty of society in political matters. It is instructive to observe how also in this case the extremes meet; for works have been actually published by socialists which wind up with an entire denial of government, and an avowal of "individual sovereignty."

[6] See the Constitution of the French Republic of 1848, in the appendix. It contains a paragraph acknowledging private pro-

property must be given up for the public benefit, and laws or constitutions settle that it shall not be done except for equivalents given by the public through government.[7]

Our constitution goes farther. It distinctly enacts that "no state shall pass any law impairing the obligation of contracts," which includes contracts with governments, and not only common contracts, but rights conferred for equivalents.[8]

The right of self-taxation has been mentioned as a guarantee of private property, for, no matter what form taxation may assume, it must always consist in the appropriation of private property for public ends. Taxation has, however, another, purely political and highly important meaning, and we shall

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perty, the family, &c. It was right to insert it, under the circumstances. If the Spartans had ever reformed their government and passed from their socialism to individualism, they would have been justified in proclaiming the sanctity of the family and the acknowledgment of private cookery, however ludicrous this might be under other circumstances.

[7] Points belonging to this subject and its primordial character were pronounced with clearness in the late pleadings in the French courts, when it was endeavored to show, unfortunately in vain, that Louis Napoleon had no right, even as a dictator, to confiscate the private property of the Orleans family, and that the courts were competent to restore it to the lawful owners.

[8] See judge Story, in his Commentaries on the Constitution of the United States, and his Opinion, as well as chief-justice Marshall's in the celebrated Dartmouth College case, 4 Wheaton R. 518, and also Mr. Webster's Works for his argument in that case.

The English go much farther than ourselves, not indeed in principle, but because they consider many rights, places and privileges as vested property which we by no means consider as such.

consider it under this aspect in another part of this work.

Every single subject here mentioned, monopolies,[9] freedom of trading, freedom of home production, freedom of exchange, possession of property, taxation and confiscation—each one has a long history, full of struggle against error and government interference, running through many centuries and even a thousand years. On each a separate and instructive history might be written. Each shows the continued course of gradually, though very slowly, expanding freedom. Nor has this history of development reached its close, although it has attained to that period in which we acknowledge the highest protection of individual property as an element of our freedom.

That the so-called repudiation—it is always unfortunate and suspicious when offences that have long received their proper name, are stamped with a new and apparently innocent one; still worse it is when the error is elevated into a commendable act; and Bacon is right when he says Pessima enim res est errorum apotheosis—that repudiation is a violation of the sacred principle we treat of, no one now will have the hardihood to deny. Still, it is true that abroad it is almost universally treated erroneously, as well in regard to its causes as to its extent, the inferences drawn from it regarding republican

[9] An act of Parliament, under James the First (21 James I. i. 3) prohibited all monopolies granted by the crown, after the courts had repeatedly, even under Elizabeth, declared certain monopolies null and void.

government, and the supposed novelty of the case. We could give a long list of monarchical repudiation. But we do not claim this as an excuse. It was a serious wrong, yet we totally deny the correctness of the assumed facts and inferences drawn from them by sir A. Alison.[10]

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[10] Paragraph 59, chap. i. vol. i. of History of Europe from the Fall of Napoleon to the Accession of Louis Philippe. Possibly an opportunity may offer itself some day to treat of this melancholy subject at length and in all its details.

I cannot forbear however to copy a passage of sir A. Alison, viz., "The principal states of the Union have, by common consent, repudiated their state debts as soon as the storms of adversity blew; and they have in some instances resumed the payment of their interest only when the sale of lands they had wrested from the Indians afforded them the means of doing so, without recurring to the dreaded horrors of direct taxation"—and to add that there is not one fact in this whole passage. The principal states did not repudiate; the repudiation was not by common consent; no land has been wrested from the Indians and sold for the benefit of the states, and direct taxation exists in most states; perhaps in all the states to some extent. Many of those readers who have been my pupils will remember that for a number of years I was in the habit of delivering a course of lectures on repudiation, in which, I trust, I showed no disposition to mince matters; but to repudiate the representative principle as sir Archibald does when treating of repudiation; and to present the latter as a natural consequence of republicism, transcends the bounds of reason. What element in the English polity, we would ask, is it that makes English credit so firm? Is it the monarchical? This cannot well be, for many monarchs have more than loosely dealt with credit, public funds and even private property. I believe, on the contrary, that the credit of England mainly rests on her representative, her republican principle. I do not mean to say that people lend their money, just because she has a parliament. What I mean is that the reliance of the world on the good faith of England in money matters, has been built up by her parliamentary government and would not have been built up without it.

10. There can be no individual liberty where every citizen is not subject to the law, and where he is subject to aught else than the law—that is public opinion organically passed over into public will.[11] This we call the supremacy of the law.[12] All subjective arbitrariness is contrary to freedom. The law of a freeman is a general rule of action, having grown out of the custom of the people, or having been laid down by the authority empowered by the people to do so. A law must be a rule which does not violate a superior law or civil principle, it must be made before the case to which it is applied has occurred (without which it cannot be mens sine affectu, as the ancients called the law), and it must be truly as well as plainly published.

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[11] We shall presently say more on the all-important word Law; but for an extensive discussion of the subject I must refer the reader to the Political Ethics.

[12] It will hardly be necessary to state that the term supremacy of the law, has a meaning only when by law we understand general and pre-existing rules of action expressing public will. Whether the name of law be given to personal decrees and arbitrary decisions, is not of the smallest importance. Napoleon, at St. Helena, expressed his surprise at having been called a despot. "I," said he, "who have always acted by law!" This forcibly reminds us of a prominent French paper, the Univers, which lately stated that it was decidedly in favor of representative government, and that it was only necessary to know what is understood by representative government. The Univers—so said the paper itself—understands by this term a legislative corps, which represents the government. I have known, in an official capacity, a patient in a hospital for the insane, who always maintained that the difference between him and me was solely in the name. "Suppose," he used to say, "we patients vote that we are sane and the out-door party is crazy?" "Don't you see?" he would add with a knowing look.

The citizen, therefore, ought not to be subject to ex post facto laws,[13] to a "government by commissions," nor to extraordinary courts[14] of justice, to a dispensing power in the executive (so much insisted on by the Stuarts, and, indeed, by all rulers who claim to rule by a higher law than the law of the land), or to mere "proclamations" of the crown or executive, nor to the dictation of mobs, nor any people who claim to be *the* people; indeed, to no dictates of the people except in its political, that is, in its organized and organic capacity.

All the modern constitutions intended to transplant Anglican liberty, declare that the citizen shall be subject to his "natural courts" only. The charter of Louis the Eighteenth prohibited cours prêvolates.[15] It had become very necessary to point out in the charter that every one should be judged by his "natural court," because the extraordinary courts had been a great grievance in former times, and because Napoleon had introduced le jugement administratif, although lettres de cachêt remained abolished. An administrative or executive judgment simply meant imprisonment or other punishments, although the courts had absolved the prisoner, or without the action of any court. It is nothing less than plain police government.

The American Declaration of Independence has a

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[13] Our constitution prohibits them.

[14] By extra courts of justice are meant, in this connection, courts of an extraordinary composition, not those that are appointed to sit at an unusual time.

[15] See the French charter in the appendix.

passage referring to the subject of "natural courts." It enumerates as one of the grounds of justification for separating from England, that the government has "transported us beyond the seas to be tried for pretended offences."

All continental governments which were bent on defeating the action of the new constitutions, even while they existed, resorted to declaring large cities and entire districts in "a state of siege," thus subjecting them to martial law. All absolute governments, whether monarchical or democratic, have ever found the regular course of justice inconvenient, and made war upon the organic action of the law, which proves its necessity as a guarantee of liberty.

It is obvious that, whatever wise provisions a constitution may contain, nothing is gained if the power of declaring martial law be left in the hands of the executive; for declaring martial law, or proclaiming a place or district in a state of siege, simply means the suspension of the due course of law, of the right of habeas corpus, of the common law, and of the action of courts. The military commander places the prisoners whom he chooses to withdraw from the courts before courts-martial. There were a number of French departments in "a state of siege" before the coup-d'état. After it, all France may be said to have been so.

In England, when there is a rebellion or widespread disorder, threatening life and property, a regular act of parliament is passed, suspending the habeas corpus. The act states the necessity or reasons, and

the time of its duration. This last point is of great importance.[16]

We have seen already under what circumstances our constitution permits the suspension of the habeas corpus, and that this cannot be done by the president alone, but by congress only, need hardly be mentioned.

It has been necessary to mention here the supremacy of the law as a peculiar guarantee of personal liberty. We shall return to the subject, and consider it in its wider relations.

11. The preceding guarantee of the supremacy of the law leads to a principle, which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which nevertheless has been in our system of liberty the natural production of a thorough government of law, as contradistinguished to a government of functionaries. It is so natural to the Anglican tribe that few think of it as essentially important to civil liberty, and it is of such vital importance that none who have studied the acts of government elsewhere can help recognizing it as an indispensable element of civil liberty.

It is simply this, that, on the one hand, every officer, however high or low, remains personally answerable to the affected person for the legality of the act he executes, no matter whether his lawful superior has ordered it or not, and, even, whether the executive officer had it in his power to judge of the legality of

[16] The act by which martial law was declared in Ireland, during the rebellion in 1798, can be seen in Tytler's Essay on Military Law, appendix, No. 6. I copy this reference from an article, Martial Law, in Political Dictionary, London, 1846.

the act he is ordered to do or not; and that, on the other hand, every individual is authorized to resist an unlawful act, whether executed by an otherwise lawfully appointed officer or not. The resistance is made at the resister's peril. In all other countries, obedience to the officer is demanded in all cases, and redress can only take place after previous obedience.[17] Occasionally, this principle acts harshly upon the officer; but we prefer this inconvenience to the inroad which its abandonment would make in the government of law. We will not submit to individual men, but only to men who are, and when they are, the organs of the law.[18] A coup-d'état, such as we have lately seen in France, would not be feasible in a nation accustomed to this principle. All the answer which the police officers gave to men like general Cavaignac, who asked them whether they were aware that they committed a high crime in arresting a representative of the people, was, that they had orders from their superior, and had nothing to do with the question of legality.

Take as an instance of the opposite to the French principle of that huge institution called gensd'armerie, the following simple case:

A sheriff, provided with the proper warrant, has the right, after request and denial, to open the house-door, forcibly to open it, if a third party has taken refuge in it, or sent his goods there. "Every man's

[17] Extreme cases, as a matter of course, would be allowed to form exceptions.

[18] I must again refer to the Political Ethics, chapter on Obedience to the Law.

house is his castle," will not protect any one but the bona fide dweller in it. Nevertheless, the sheriff, provided with his legal warrant, does it at his own peril; for, if he break open the house, however well his suspicion may be grounded, and neither the party nor the goods sought for be there, the sheriff is a trespasser, and as such answerable to the inhabitant of the house before the courts of the land. This may be inconvenient in single cases. It may be that the maxim which has been quoted has "been carried as far as the true principles of political practice will warrant—perhaps beyond what in the scale of sound reason and good policy they will warrant."[19] I doubt it, whatever the inconvenience in single cases may be. All law is inconvenient in some cases; but even if this opinion were founded, how august, on the other hand, appears the law—I do not mean a single statute, but the whole self-evolving system of a common law of the land—that errs on the side of individual liberty against the public power and the united weight of government!

The reader has seen from the passage on warrants, which I gave in a preceding part of this work, how far this principle is carried in the case of resisting an officer, even to the killing him, if his warrant be not wholly correct. Another proof of the uniform acknowledgment of this principle and essential pillar of civil liberty, is this, that when a British minister obtains an act of indemnity, which is an act

[19] Sir M. Foster, Discourse of Homicide, p. 319. I quote from Broom's Legal Maxims.

of impunity for certain illegal acts, which, nevertheless, necessity demanded, the act of indemnity is never for him alone, but it expresses that the act shall also cover what the inferior officers have done by the direction of the minister in the premises.[20]

In conclusion, I would remark that it is wholly indifferent who gives the order. If it be illegal, the person who executes it remains responsible for the act, although the president or the king should have ordered it, or the offending person should be a soldier obeying his commander. It is a stern law, but it is a sacred principle, and it has worked well.

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[20] For instance, in the scarcity of grain in the year 1766, Chatham prohibited exportation of grain. When parliament met, he read a passage from Locke to show that what he had done was not legal yet right. Indemnity was passed for him and those who had acted under him. In 1818, ministers asked and obtained indemnity for the suspension of habeas corpus, for themselves and magistrates under them. Many other instances might be given. See Lieber's Legal and Political Hermeneutics, note to page 79. Acts of indemnity cannot be passed with us, because we have a constitution of which the legislature itself is but the creature, and we cannot pass ex post facto laws. All that remains for us to do in cases of absolute necessity or transcendent utility is to pass over the occurrence in silence; or congress may show its concurrence by aiding in the act. This was the case when Mr. Jefferson purchased the mouth of the Mississippi, i. e. the territory of Louisiana.

CHAPTER XI.

QUARTERING SOLDIERS. THE ARMY.

12. GOVERNMENTS, if not very closely hedged in, have it in their power to worry citizens into submission by many indirect methods. One of these, frequently resorted to since the introduction of standing armies, is that soldiers are billeted with the disaffected citizens. An insolent soldiery, supported by the executive, find a thousand ways of annoying, insulting, and ruining the family with whom they are quartered. It has been deemed necessary, therefore, specially to prohibit the quartering of soldiers with citizens, as an important guarantee of civil liberty. The English bill of rights, "declaring the rights and liberties of the subject," of 1688, enumerates in the preamble, as one of the proofs that James the Second "did endeavor to subvert and extirpate" . . . "the laws and liberties of this kingdom," his "raising and keeping a standing army within the kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law." It is, in England, therefore, a high offence to quarter soldiers without consent of parliament; and the constitution of the United States ordains that "no soldier shall

in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." The framers of the constitution, it will be observed, were very exact in drawing up this paragraph.

Persons not versed in the history of civil liberty and of progressive absolutism, might be surprised at this singling out of quartering soldiers in documents of such elevated character and condensed national demands as the Bill of Rights and the American constitution are; but the "dragonades" of Louis the Fourteenth, in France, of James the Second, in Scotland, and those of more recent and present date, furnish sufficient justification for this specific guarantee.

13. The preceding safeguard, although justly pointed out separately, is still only part of the general one that the forces must be strictly submitted to the law. The navy cannot be, in its nature, so formidable an instrument in the hands of the executive as the army. It cannot be brought to bear upon the people; it is not centralized in its character, and it cannot surround the ruler. There are many other reasons why the navy, the floating bulwarks of a nation, has an inherent affinity with the popular element, and why free nations only can have efficient navies or merchant fleets, as a distinguished statesman of the United States[1] has observed.

It is far different with the land forces. Ever since standing armies have been established, it has been necessary, in various ways, to prevent the army from

[1] Mr. Poinsett.

becoming independent upon the legislature. There is no liberty, for one who is bred in the Anglican school, where there is not a perfect submission of the army to the legislature of the people. We hold it to be necessary, therefore, to make but brief appropriations for the army. The king of England cannot raise an army, or any part of it, without act of parliament;[2] the army-estimates are passed for one year only, so that, were parliament to refuse appropriations, after a twelvemonth the army would be dissolved. The mutiny-bill, by which power is given to the king to hold courts-martial for certain offences in the army, is likewise passed for a year only; so that, without repassing it, the crown would have no power even to keep up military discipline.

The constitution of the United States makes the president, indeed, commander-in-chief, but he cannot enlist a man, or pay a dollar for his support, without the previous appropriation by congress, to which the constitution gives "power to make rules for the government and regulation of the land and naval forces," and to which it denies the authority of making any appropriation for the support of the national forces for a longer term than two years.

The importance of this dependence of the army

[2] The guards of Charles the Second were declared anti-constitutional, and the army of James the Second was one of the evidences by which he was presumed to have abdicated; that is, in other words, one of his breaches of the fundamental law of the land. A new sanction was given to this principle in the sixth article of the Bill of Rights, which runs thus: A standing army, without the consent of parliament, is against law.

upon the civil power has been felt by all parties. While the people are bent on submitting the army to the legislature, the governments, which in the late struggles were anxious to grant as little liberty as possible, always endeavored to exclude the army from the obligation of taking the constitutional oath. Constitutional oaths, like other political oaths, are indeed no firm guarantee in times of civil disturbances; but where circumstances are such that people must start in the career of freedom with an enacted constitution, it is natural and necessary that the army should take the oath of fidelity to the fundamental law, like any other persons employed in public service, especially where the oath of allegiance to the monarch continues. The oath, when taken, we have already admitted, does not furnish any great security; but in this, as in so many other cases, the negative assumes a very great and distinct importance, although the positive may be destitute of any direct weight. The refusal of this oath shows distinctly that the executive does not intend frankly to enter on the path of civil freedom. This was the case in Prussia, when, lately, there seemed to be some hope of seeing constitutional liberty commenced in that country.

The Declaration of Independence says: "He has kept among us in times of peace standing armies without the consent of our legislatures." It is enumerated as a radical grievance, plain and palpable to every Anglican mind. Immediately after, the declaration significantly adds: "He has affected to render the military independent of, and superior to,

the civil power." This "affected" is striking. The attempt of doing it, though the term affected indicates the want of success, is counted as a grievance sufficient to warrant among others an extinction of allegiance. Of the twenty-seven grievances enumerated in the declaration as justification for a revolution, three relate to the army.

Dr. Samuel Johnson, not biased, as the reader well knows, in favor of popular liberties, nevertheless showed that he was bred in England, when he speaks of "the greatest of political evils—the necessity of ruling by immediate force."[3] There is, however, a greater evil still—the ruling by immediate force when it is not necessary or against the people.

Standing armies are not only dangerous to civil liberty because directly depending upon the executive. They have the additional evil effect that they infuse into the whole nation—especially when they are national armies, so that the old soldiers return continually to the people—a spirit directly opposite to that which ought to be the general spirit of a free people devoted to self-government. A nation of freemen stands in need of a pervading spirit of obedience to the laws; an army teaches and must teach a spirit of prompt obedience to orders. Habits of disobedience and of contempt for the citizen are produced, and a view of government is induced which is contrary to liberty, self-reliance, self-government. Command ought to rule in an army; self-

[3] Considerations on the Corn Laws, by Dr. Samuel Johnson.

development of law and self-sustaining order ought to pervade a free people. A German king, in one of his throne speeches, when a liberal spirit had already shown itself in that country, said: "The will of one must ultimately rule in the government, even as it is in the camp." This shows exactly what we mean. The entire state, with its jural and civic character, is compared to a camp.

The officers of a large army are in the habit of contemptuously speaking of the "babbling lawyers." Les légistes have always been spoken of by the French officers in the same tone as "those lawyers" were talked of by Strafford and Laud. Where the people worship the army an opinion is engendered as if really courage in battle were the highest phase of humanity; and the army, in turn, more than aught else, leads to the worship of one man—so detrimental to liberty. All debate is in common times odious to the soldiers. They habitually ridicule parliamentary debates of long duration. Act, act, is their cry, which in that case means: Command and obey are the two poles round which public life ought to turn. A man who has been a soldier himself, and has seen the inspiring and rallying effect which a distinctive uniform may have in battle—the desire not to disgrace the coat, is not likely to fall in with the sweeping denunciations of the uniform, now frequently uttered by the "peace-men;" but it is true that the uniform, if constantly worn, and if the army is large, as on the continent of Europe, greatly aids in separating the army from the people and in increasing that alienating esprit

de corps which ought not to exist where the people value their liberty.

Standing armies, therefore, wherever necessary—and they are necessary at present, as well as far preferable to the medieval militia—ought to be as small as possible, and completely dependent on the legislature for their existence. Such standing armies as we see in the different countries of the European continent are wholly incompatible with civil liberty, by their spirit, number and cost.

A perfect dependence of the forces, however, not only requires short appropriations, and limited authority of the executive over them. It is farther necessary—because they are under strict discipline, and therefore under a strong influence of the executive—that these forces, and especially the army, be not allowed to become deliberative bodies, and that they be not allowed to vote as military bodies. Wherever these guarantees have been disregarded, liberty has fallen. These are rules of importance at all times, but especially in countries where unfortunately very large standing armies exist. In France, the army consists of half a million, yet universal suffrage gave it the right to vote, and the army as well as the navy did vote to justify the second of December, as well as to make Louis N. Bonaparte emperor. This may be in harmony with French "equality;" it may be democratic, if this term be taken in the sense in which it is wholly unconnected with liberty; all that we—people with whom liberty is more than a theory, or something æsthetically longed for, and who learn liberty as the

artisan learns his craft, by handling it—all that we know is, that it is not liberty; that it is directly destructive of it.

It was formerly the belief that standing armies were incompatible with liberty, and a very small one was granted to the king of England with much reluctance; and in France we have a gigantic standing army, itself incompatible with liberty, for whom in addition the right of voting is claimed.

The Bill of Rights, and our own Declaration of Independence, show how large a place the army occupied in the minds of the patriotic citizens and statesmen who drew up those historic documents, the reasons they had to mention it repeatedly, and of erecting fences against it.

Military bodies ought not to be allowed even the right of petitioning, as bodies. History fully proves the danger, that must be guarded against.[4] English

[4] I do not consider myself authorized to say that the Anglicans consider it an elementary guarantee of liberty not to be subjected to the obligation of serving in the standing army, but certain it is that as matters now stand, and as our feelings now are, we should not consider it compatible with individual liberty; indeed, it would be considered as intolerable oppression, if we were forced to spend part of our lives in the standing army. It would not be tolerated. The feeling would be as strong as against the French system of conscription, which drafts by lot a certain number of young men for the army, and permits those who have been drafted to furnish substitutes; as against the Prussian system, which obliges every one from the highest to the lowest, to serve a certain time in the standing army, with the exception only of a few "mediatized princes." The Anglicans, therefore, may be said to be unequivocally in favor of enlisted standing armies, where standing armies are necessary.

history, as well as that of other nations, furnishes us with instructive instances.

14. Akin to the last-mentioned guarantee, is that which secures to every citizen the right of possessing and bearing arms. Our constitution says: "The right of the people to keep and bear arms shall not be infringed upon;" and the Bill of Rights secured this right to every protestant. It extends now to every English subject.

Wherever attempts at establishing liberty have been made in recent times, on the continent of Europe, a general military organization of the people, or "national guards," has been deemed necessary, but we cannot point them out as characteristics of Anglican liberty.

CHAPTER XII.

PETITION. ASSOCIATION.

15. We pass over to the great right of petitioning, so jealously suppressed wherever absolute power rules or desires to establish itself, so distinctly contended for by the English in their revolution, and so positively acknowledged by our constitution.

An American statesman of great mark has spoken lightly of the right of petition in a country in which the citizens are so fully represented as with us;[1] but this is an error. It is a right which can be abused, like any other right, and which in the United States is so far abused as to deprive the petition of weight and importance. It is nevertheless a sacred right, which in difficult times shows itself in its full magnitude, frequently serves as a safety-valve, if judiciously treated by the recipients,[2]

[1] It was stated that the right of petition was of essential value only in a monarchy, against the encroachments of the crown. But this whole view was unquestionably a confined one, and caused by irritation against a peculiar class of persevering petitioners.

[2] There is no more striking instance on record, so far as our knowledge goes, than the formidable petition of the chartists in 1848, and the calm and respect with which this threatening docu-

and may give to the representatives or other bodies the most valuable information. It may right many a wrong, and the privation of it would at once be felt by every freeman as a degradation. The right of petitioning is indeed a necessary consequence of the right of free speech and deliberation, a simple, primitive and natural right. As a privilege it is not even denied the creature in addressing the deity. It is so natural a right, in all spheres where there are superiors and inferiors, that its special acknowledgment in charters or by laws, would be surprising, had not ample experience shown the necessity of expressing it.

16. Closely connected with the right just mentioned is the right of citizens peaceably to meet and to take public matters into consideration, and

17. To organize themselves into associations, whether for political, religious, social, scientific, industrial, commercial or cultural purposes. That this right can become dangerous, and that laws are frequently necessary to protect society against abuse, every one knows perfectly well who has the least knowledge of the French clubs in the first revolution. But it is with rights, in our political relations, as with the principles of our physical and mental organization—the more elementary and indispensable they are, the more dangerous they become, if not guided by reason. Attempts to suppress their action

ment was received by the commons, after a speech full of dignity and manly acknowledgment of the people by lord Morpeth, now earl of Carlisle.

lead to mischief and misery. What has been more abused than private and traditional judgment in all the spheres of thought and taste? Yet both are necessary. What principle of our nature has led and is daily leading to more vice and crime than that on which the propagation of our species and the formation of the family depend,[3] or that which indicates by thirst the necessity of refreshing the exhausted body? Shall the free sale of cutlery be interfered with, because murders are committed with knives and hatchets?

The associative principle is an element of progress, protection, and efficient activity. The freer a nation, the more developed we find it in larger or smaller spheres; and the more despotic a government is, the more actively it suppresses all associations. The Roman emperors did not even suffer the associations of handicrafts.* In modern times no instances of the power which associations may wield, and of the full extent which a free country may safely allow to their operations, seem to be more striking than those of the Anti-Corn-law League in England, which, by gigantic exertions, ultimately carried free trade in corn against the strongest and most privileged body of landowners that has probably ever existed, either in modern or ancient times;[4] and, in our own country, the Colo-

[3] The so-called Shakers endeavor to extirpate this principle, and furnish us with an illustration.

[4] A careful study of the whole history of this remarkable association, which in no state of the European continent would have been allowed to rise and expand, is recommended to every student of civil liberty. It is instructive as an instance of perseverance; of an

*. 32 associations, in time of Alexander Severus, with distinct privileges; collegia.

nization Society, a private society, planting a new state which will be of the vastest influence in the spreading cause of civilization—a society which, according to the Liberian declaration of independence, "has nobly and in perfect faith redeemed its pledges." In every country, except in the United States and in England, the cry would have been, Imperium in imperio, and both would have been speedily put down.

We may also mention our extensive churches, or the Law Reform Association in England. There is nothing that more forcibly strikes a person arriving for the first time from the European continent, either in the United States or in England, than the thousandfold evidences of an all-pervading associative spirit in all moral and practical spheres, from the almost universal commercial copartnerships and associations, the "exchanges" of artisans, and banks, to those unofficial yet national associations which rise to real grandeur. Strike out from England or America this feature and principle, and they are no longer the same self-relying, energetic, indomitably active people. The spirit of self-government would be gone. In France, an opposite spirit prevails. Not only does the government believe that it must control everything, but the people them-

activity the most multifarious, and organization the most extensive; of combined talent and shrewd adaptation of the means to the end; and, which is always of equal importance, of a proper conception of the end according to the means at our disposal, without which it is impossible to do that which Cicero so highly praised in Brutus, when he said: Quid vult valde vult.

selves seem hardly ever to believe in success until the government has made the undertaking its own.[5]

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[5] I cannot forbear mentioning here one of those occurrences, which, although apparently trivial, nevertheless show the constant action of a great principle, as the leaf of a tree reveals the operation of the vastest elements in nature to the philosopher. At a late meeting of the royal academy at London, at which the ministers were present, the premier, lord Aberdeen, said that "as a fact full of hope he remarked that for several years the public, in the appreciation of art, had outstripped the government and the parliament itself."

The chief executive officer considers it a fact full of hope that the people have outstripped, in interest and action, the government and parliament. How different would a similar case have presented itself in any of the continental countries!

CHAPTER XIII.

PUBLICITY.

18. We now approach those guarantees of liberty which relate more especially to the government of a free country, and the character of its polity. The first of all we have to mention under this head is publicity of public business. This implies the publicity of legislatures and judicial courts, as well as of all minor transactions that can in their nature be transacted publicly, and also the publication of all important documents and reports, treaties, and whatever else can interest the people at large. It farther implies the perfect freedom with which reporters may publish the transactions of public bodies. Without the latter, the admission of the public would hardly amount in our days to any publicity at all. We do not assemble in the markets as the people of antiquity did. The millions depending upon public information, in our national states, could not meet in the market, as was possible in the ancient city-states, even if we had not a representative government. The journals are to modern freemen what the agora was to the Athenian, the forum to the Roman.

Important as the printing of transactions, reports, and documents is, it is nevertheless true that oral discussions are a most important feature of Anglican publicity of legislative, judicial, and of many of the common administrative transactions. Modern centralized absolutism has developed a system of writing and secrecy, and consequent pedantry, abhorrent to free citizens who exist and feed upon the living word of liberty.[1] Bureaucracy is founded upon writing, liberty on the

[1] The following passage is given here for a twofold purpose. Everything in it applies to the government of the pen on the continent of Europe, and it shows how similar causes have produced similar results in India and under Englishmen, who at home are so adverse to government-writing and to bureaucracy. In the Notes on the North-western Provinces of India, by Charles Raikes, Magistrate and Collector of Mynpoorie, London, 1853, we find the following passage:

"Action, however, and energy, are what we now lay most stress upon, because in days of peace and outward tranquillity these qualities are not always valued at their true price, and their absence is not so palpably mischievous as in more stirring times. There is more danger now of men becoming plodding, methodical, mere office functionaries, than of their stepping with too hasty a zeal beyond the limits of the law. There is truth, too, in Jacquemont's sneer—India *is* governed by stationery, to a more than sufficient extent; and one of the commonest errors of our magistrates, which they imbibe from constant and early Indian associations, is to mistake *writing* for *action*, to fancy that *dictation* will supply the place of *exertion*. In no other country are so many written orders issued with so much confidence, received with such respect, and broken with such complacency. In fact, as for writing, we believe the infection of the 'cacoethes scribendi' must first have grown up in the East. It pervades everything, but is more rampant and more out of place in a police office than anywhere else. It was not the magistrates who originated this passion for scribbling; but they have never succeeded in repressing it, nor, whilst the law requires

breathing word. I do not hesitate to point out orality, especially in the administration of justice, in legislation and local self government, as an important element of our civil liberty. I do not believe that a high degree of liberty can be imagined without widely pervading orality; but oral transaction alone is no indication of liberty. The patriarchal and tribal governments of Asia, the chieftain government of our Indians, indeed all primitive governments are carried on by oral transaction without any civil liberty.

Publicus, originally Populicus, meant that which relates to the Populus, to the state, and it is significant that the term gradually acquired the meaning of public, as we take it—as significant, as it is that a great French philosopher, honored throughout our whole country, lately wrote to a friend: "Political matters here are no longer public matters."[2]

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that every discontented old woman's story shall be taken down in writing, is it to be expected they ever will. The Khayeths worship their pen and ink on certain festivals, and there is a sort of 'religio' attaching to written forms and statements, which is not confined to official life, but pervades the whole social polity of the writing tribes. An Indian scribe, whose domestic expenditure may average sixpence a day, will keep an account-book with as many columns, headings, and totals, as would serve for the budget of a chancellor of the exchequer. To Tudor Mul and such worthies we owe, no doubt, a great deal for the method and order which they infused into public records; but we have also to thank these knights of the pen for the plaguiest long-figured statements, and the greatest number of such statements, which the world ever saw." Well may the continental European, reading this, exclaim: C'est tout comme chez nous!

[2] This observation followed a request to write henceforth with caution, because, said he, choses politiques ne sont plus ici choses publiques.

In free countries political matters relate to the people, and therefore ought to be public. Publicity informs of public matters; it teaches, and educates, and it binds together. There is no patriotism without publicity, and though publicity cannot always prevent mischief, it is at all events an alarm bell, which calls the public attention to the spot of danger. In former times secrecy was considered indispensable in public matters; it is still so where cabinet policy is pursued, or monarchical absolutism sways; but even these governments have been obliged somewhat to yield to a better spirit, and even Russia publishes occasionally government reports.

That there are certain transactions which the public service requires to be withdrawn for a time from publicity, is evident. We need point only to diplomatic transactions when not yet brought to a close. But even with reference to these, it will be observed that a great change has been wrought in modern times, and comparatively a great degree of publicity now prevails even in the foreign intercourse of nations—a change of which the United States have set the example. A state secret was formerly a potent word, while one of our first statesmen wrote to the author, many years ago: I would not give a dime for all the secrets that people may imagine to be locked up in the United States archives.

It is a remarkable fact that no law insures the publicity of the courts of justice, either in England or the United States. Our constitution insures

neither the publicity of courts nor that of congress, and in England the admission of the public to the commons or the lords is merely by sufferance. The public may at any time be excluded merely by a member observing to the presiding officer that strangers are present, while we all know that the candid publication of the debates was not permitted in the times of Dr. Johnson. Yet so thoroughly is publicity now ingrained in the American and Englishman that a suppression of this precious principle cannot even be conceived of. If any serious attempt could be made to carry out the existing law in England, and the public were really excluded from the house of commons, a revolution would be unquestionably the consequence, and publicity would be added to the declaration of rights. We can no more imagine England or the United States without the reporting newspapers, than nature without the principle of vegetation.

The principle of publicity so pervaded all the American politics, that the framers of our constitution probably never thought of it, or if they did, they did not think it worth while to provide for it in the constitution, since no one had doubted it. It is part and parcel of our common law of political existence. They did not trouble themselves with unnecessaries, or things which would have had a value only as possibly completing a certain symmetry of theory.

It is, however, interesting to note that the first distinctly authorized publicity of a legislative body

in modern times, was that of the Massachusetts house of representatives, which adopted it in 1766.[3]

Publicity of speaking has its dangers, and occasionally exposes to grave inconveniences, as all guarantees do, and necessarily in a greater degree as they are of a more elementary character. It is the price at which we enjoy all excellence in this world. The science of politics and political ethics must point out the dangers as well as the formal and moral checks which may avert or mitigate the evils arising from publicity in general, and public oral transaction of business in particular. It is not our business here. We treat of it in this place as a guarantee of liberty, and have to show its indispensableness. Those who know liberty as a practical and traditional reality and as a true business of life, as we do, know that the question is not whether it be better to have publicity or not, but, being obliged to have it, how we can best manage to avoid its dangers while we

[3] I follow the opinion of Mr. Robert C. Winthrop, late speaker of the American house of representatives, and believe him to be correct, when, in an able Address before the Maine Historical Society (Boston, 1849), he says: "The earliest instance of authorized publicity being given to the deliberations of a legislative body in modern days, was in this same house of representatives of Massachusetts, on the 3d day of June, 1766, when, upon motion of James Otis, and during the debates which arose on the question of the repeal of the stamp act, and of compensation to the sufferers by the riots in Boston, to which that act had given occasion, a resolution was carried 'for opening a gallery for such as wished to hear the debates.' The influence of this measure in preparing the public mind for the great revolutionary events which were soon to follow, can hardly be exaggerated."

enjoy its fullest benefit and blessing. It is the same as with the air we breathe. The question is not whether we ought to dispense with a free respiration of all-surrounding air, but how, with free inhalation, we may best guard ourselves against colds and other distempers caused by the elementary requisite of physical life, that we must live in the atmosphere.[4]

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[4] Great as the inconvenience is which arises from the abuse of public speaking, and of that sort of prolixity which in our country is familiarly called by a term understood by every one, Speaking for Buncombe, yet it must be remembered that the freest possible, and, therefore, often abused latitude of speaking, is frequently a safety-valve, in times of public danger, for which nothing else can be substituted. The debates in congress, when lately the Union itself was in danger, lasted for entire months, and words seemed fairly to weary out the nation when every one called for action. There was no citizen capable of following closely all those lengthy and occasionally empty debates, with all their lateral issues. Still, now that the whole is over, it may well be asked whether there is a single attentive and experienced American who doubts that, had it not been for that flood of debate, we must have been exposed to civil disturbances, perhaps to the rending of the Union.

Nevertheless, it is a fact that the more popular an assembly is, the more liable it is to suffer from verbose discussions, and thus to see its action impeded. This is especially the case in a country in which, as in ours, a personal facility of public speaking is almost universal, and where an elocutional laxity coexists with a patient tenacity of hearing, and a love of listening which can never be surfeited. It has its ruinous effect upon oratory, literature, the standard of thought, upon vigorous action, on public business, and gives a wide field to dull mediocrity. This anti-Pythagorean evil has led to the adoption of the "one hour rule" in the house of representatives in congress, and (in 1847) in the supreme court of the United States. The one-hour rule was first proposed by Mr. Holmes, of Charleston, in imitation of the Athenian one hour clepsydra—yes, the prince of orators had that dropping monitor by

Liberty, I said, is coupled with the public word, and however frequently the public word may be abused, it is nevertheless true that out of it arises oratory—the æsthetics of liberty. What would Greece and Rome be to us without their Demosthenes

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his side!—and is now renewed by every new house. The English have begun to feel the same evil, and the adoption of the same rule was proposed in the commons, in February, 1849. But the debate concluded adversely to it, after sir Robert Peel had adverted to Burke's glorious eloquence. Our one-hour rule, however, is not entirely new in modern times. In the year 1562 (on the 21st July), the council of Trent adopted the rule that the fathers in delivering their opinions should be restricted to half an hour, which having elapsed, the master of ceremonies was to give them a sign to leave off. Yet, on the same day, an exception was made in favor of Salmeron, the pope's first divine, who occupied the whole sitting (History of the Life of Reginald Pole, by T. Phillips, Oxf. 1764, page 397), very much as, in February, 1849, the whole American house called "go on," when governor McDowel had spoken an hour. He continued for several hours.

Having mentioned the inconvenience of prolix speaking, it may not be improper to add another passage of the address of Mr. Winthrop, already mentioned. It will be recollected that this gentleman has been speaker. He knows, therefore, the inconvenience in its whole magnitude. "Doubtless," he says, "when debates were conducted with closed doors there were no speeches for Buncombe, no claptrap for the galleries, no flourishes for the ladies, and it required no hour rule perhaps to keep men within some bounds of relevancy. But one of the great sources of instruction and information, in regard both to the general measures of government and to the particular conduct of their own representatives, was then shut out from the people, and words which might have roused them to the vindication of justice or to the overthrow of tyranny were lost in the utterance. The perfect publicity of legislative proceedings is hardly second to the freedom of the press, in its influence upon the progress and perpetuity of human liberty, though, like the freedom of the press, it may be attended with inconveniences and abuses."

and Cicero? And what would their other writers have been, had not their languages been coined out by the orator? What would England be without her host of manly and masterly speakers? Who of us could wish for a moment to see the treasures of our own civilization robbed of the words contributed by our speakers, from Patrick Henry to Webster? The speeches of great orators are a fund of wealth for a free people, from which the school-boy begins to draw when he declaims from his Reader, and which enriches, elevates, and nourishes the souls of the old.

Publicity is indispensable to eloquence. Who can speak in secret before a few? Orators are in this respect like poets—their kin, of whom Goethe, "one of the craft," says that they cannot sing unless they are heard.

All governments hostile to liberty are hostile to publicity, and parliamentary eloquence is odious to them, because it is a great power which the executive can neither create nor control. Mr. de Morny, brother of Napoleon the Third, issued a circular to the prefects, when minister of the interior, in 1852, in which the publicity of parliamentary government is called theatricals. It is remarkable that this declaration should have come from a government which, above all others, seems, in a great measure, to rely on military and other shows.

CHAPTER XIV.

SUPREMACY OF THE LAW. TAXATION. DIVISION OF POWER.

19. The supremacy of the law, in the sense in which it has already been mentioned, or the protection against the absolutism of one, of several, or the people (which, practically, and for common transactions, means of course the majority), requires other guarantees or checks of great importance.

It is necessary that the public funds be under close and efficient popular control, chiefly, therefore, under the supervision of the popular branch of the legislature, which is likewise the most important branch in granting the supplies, and the one in which, according to the English and American fundamental laws, all money bills must originate. The English are so jealous of this principle, that the commons will not even allow the lords to propose amendments affecting money grants or taxation.

If the power over the public treasury, and that of imposing taxes, be left to the executive, there is an end to public liberty. Hampden knew it when he made the trifling sum of a pound of unlawfully im-

posed ship-money a great national issue, and our Declaration of Independence enumerates, as one of the gravest grievances against the mother country, that England "has imposed taxes without our consent."

One of the most serious mistakes of those who are not versed in liberty is to imagine that liberty consists in withholding the necessary power from government. Liberty is not of a negative character. It does not consist in merely denying power to government. Government must have power to perform its functions, and if no provision is made for an orderly and organic grant of power, it will in cases of necessity arrogate it. A liberty thus merely hedging in, would resemble embankments of our Mississippi, without an outlet for freshets. No one believes that there is time enough to repair the *crevasse*. This applies to all subjects of government, and especially to appropriations of money. Merely denying money to government, or, still worse, not creating a proper organism for granting it, must lead either to inanity or to executive plundering; but it is equally true that the strictest possible limitation and hedging in by law, of the money grants, are as requisite for the cause of liberty as the avoidance of the error I have just pointed out. This subject is well treated in our Federalist,[1] and the insufficiency of our ancient articles of confederation was one of the prominent causes which led our forefathers to the adoption of the federal constitution. Lord Nugent truly calls

[1] Federalist, No. XXX. and sequel, Concerning Taxation, and other parts of that sage book.

the power of granting or refusing supplies, vested in parliament, but especially in the house of commons, or, as he says, "the entire and independent control of parliament over the supplies," "the stoutest buttress of the English constitution."[2]

It is the Anglican principle to make but short appropriations, and that appropriations be made for distinct purposes. We insist still more on this principle than the English, and justly demand that appropriations be made as distinct and specific as possible, and that no transfer of appropriations by the executive take place; that is to say, that the executive be not authorized to use a certain appropriation, if not wholly spent, partially for purposes for which another appropriated sum has proved to be insufficient. It is not only necessary for vigorous civil liberty that the legislature, and chiefly the popular branch of it, keep the purse-strings of the public treasury; but also that the same principle be acted upon in all minor circles of the vast public fabric. The money of the people must be under the control of the people, and not at the disposal of officials unconnected with the people.

The history of the control over the public funds, in granting, specifying and spending them, may well be said to be a continuous and accurate index of the growth of English liberty. It is this principle which has essentially aided in establishing self-government in England; and which has made the house of commons the real seat of the national government as

[2] Memorials of John Hampden, London, 1832, vol. i. p. 212.

we now find it. Every one knows that the "supplies" are the means by which the English effect in a regular and easy way that which the Roman populus occasionally and not regularly effected against the senate by a refusal to enlist in the army, when war was at the gates of the city.[3]

The history of the British civil list, or the personal revenue granted to the monarch at the beginning of his reign, is also instructive in regard to this subject. In the middle ages the monarch was the chief nobleman, and had, like every other nobleman, his domains, from which he drew his revenue. Taxes were considered extraordinary gifts. As the monarch, however, wanted more money, either for just or unjust purposes, loans were made, which were never redeemed. Mr. Francis correctly observes, that it is absurd to charge William the Third with having created a public debt, as Hume and so many others have done. William the Third, on the contrary, was the first monarch who treated loans really as loans, and provided either for their repayment or the payment of interest.[4]

As civil liberty advanced, all revenue of the monarch, independent of the people, was more and more withdrawn from him, and crown domains

[3] Chatham, when minister of the crown in 1759, and while lord Clive was making his great conquests in the East, said that neither the East India Company nor the crown ought to have that immense revenue. If the latter had it, it would endanger all liberty.—Chatham's Correspondence, vol. i.

[4] Francis, Chronicles and Characters of the Stock Exchange.

were more and more made public domains, until we see George the Third giving up all extra-parliamentary revenue. The monarch was made dependent on the civil list exclusively.

20. It is farther necessary that the power of making war essentially reside with the people, and not with the executive. In England, it is true, the privilege of making war and concluding peace is called a royal prerogative, but as no war can be carried on without the nervus rerum gerendarum, it is the commons who decide whether the war shall be carried on or not. They can grant or decline the authority of enlisting men, and the money to support them and to provide for the war. The constitution of the United States decrees that congress shall have power to make war,[5] and an American declaration of war must be passed by congress like any other law. A declaration of war by the United States is a law.

Where the executive has not only the nominal, but the real power of declaring war, we cannot speak of civil liberty or of self-government; for that which most essentially affects the people in all their rela-

[5] It may as well be observed here that congress means the senate and house of representatives. The president is not included in the term. Parliament, on the other hand, means commons, lords and king. Practically speaking, the difference is not great; for, the president has the veto power, of which he makes occasional use, while the king of England has not made any use of it for about a century. The English administration would resign before it would become necessary in their eyes to veto a bill. But the king of England has the greatest of all veto powers—he can dissolve parliament, which our executive cannot do.

tions, is in that case beyond their control. Even with the best contrived safe-guards, and a deeply rooted tradition, it seems impossible to guard against occasional high-handed assumption of power by the executive in this particular. Whatever our late Mexican war ultimately became in its character, there is probably now no person who will deny that, in its beginning, it was what is called a cabinet war. It was commenced by the cabinet, which, after hostilities had begun, called on government to ratify its measures.

It has already been stated (paragraph 13) that a perfect dependence of the forces upon the civil power is an indispensable requisite and element of civil liberty.

21. The supremacy of the law and that unstinted protection of the individual as well as of society, in which civil liberty essentially consists, require on the one hand the fullest possible protection of the minority, and, on the other hand, the security of the majority that no factious minority or cabal shall rule over it.

The protection of the minority leads to that great institution, as it has been boldly but not inappropriately called—the opposition. A well organized and fully protected opposition, in and out of the legislature—a loyal opposition, by which is meant a party which opposes, on principle, the administration or the set of men who have, for the time being, the government in their hands, but does so under and within the common fundamental law, is so important an element of civil liberty, whether con-

sidered as a protecting fence or as a creative power, that it would be impossible here to give to the subject that space which its full treatment would require. I have attempted to do so, and to sketch its history, in my Political Ethics.

The elaboration of that which we call an opposition, is an honor which belongs to the English, and seems to me as great and as noble a contribution to the treasures of civil freedom, as the development of the power of our supreme courts (of the United States and of the different states) to declare, upon trial of specific cases, a law passed by the legislature unconstitutional and void. They are two of the noblest acquisitions in the cause of liberty, order and civilization.

22. The majority, and through it the people at large, are protected by the principle that the administration is founded upon party principles, or, as it has been called, by a government by party, if by party we mean men who agree on certain "leading general principles in government"[6] in opposition to others, and act in unison accordingly. If by party be understood a despicable union of men, to turn out a certain set of office-holders merely to obtain the lucrative places, and, when they are obtained, a union to keep them, it becomes an odious faction of placemen or office-hunters, the last of those citizens to whom the government ought to be intrusted. The ruinous and rapidly degrading effect of such a

[6] Burke.

state of things is directly contrary to sound liberty, and serves as a fearful encouragement to those, who, politically speaking, are the most worthless. But freedom of thought and action produces contention in all spheres, and, where great tasks are to be performed and where important interests are at stake, those who agree on the most important principles, will unite and must do so in order to be sufficiently strong to do their work. Without party administration, and party action, it is impossible that the majority should rule, or that a vigorous opposition can rise to a majority and rule in turn. Liberty requires a parliamentary government, and no truly parliamentary government can be conceived of without the principle of party administration. It became fully developed under George the First, or we should rather say under sir Robert Walpole. Under the previous governments mixed cabinets of whigs and tories were common, when court intrigues and individual royal likings and dislikes had necessarily often a greater effect than national views and interests, to which it is the object of party administration to give the sway. We have to deal with parties, in this place, only as connected with civil liberty.

For their dangers, their affinity to faction as well as their existence in the arts, sciences, religion and even in trades—in fact, wherever free action is allowed; for the public inconvenience and indeed danger in having more than two parties; the necessity that political parties should be founded upon broad comprehensive and political principles, and for other important

matters connected with the subject of parties, I must refer to other places.[7]

23. A principle and guarantee of liberty, so acknowledged and common with the Anglican people that few think of its magnitude, yet of really organic and fundamental importance, is the division of government into three distinct functions, or rather the keeping of these functions clearly apart.

It is, as has been mentioned, one of the greatest political blessings of England, that from a very early period her courts of justice were not occupied with "administrative business," for instance, the collection of taxes, and that her parliament became the exclusive legislature, while the parliaments of France united a judicial, legislative, and administrative character. The union of these functions is absolutism, despotism on the one hand, and slavery on the other, no matter in whom they are united, whether in one despot or in many, or in the multitude, as in Athens after the time of Cleon, the tanner. The English political philosophers have pointed out the necessity of keeping the three powers separate in a "constitutional" government, long ago.[8] Those, however, who have no other definition of liberty

[7] These subjects have been considered at length in the Political Ethics. The reader will peruse with advantage the chapter on Party in lord John Russell's Essay on the History of the English Government and Constitution, 2d edit. London, 1823.

[8] For instance, Locke. Montesquieu, at a later period, is generally considered the political philosopher who first distinctly conceived the necessity of the division of power. The English practised it earliest and established it most clearly; and the French have again given it up, for a time at least, ever since the revolution of 1848.

than that it is equality, discard this division, except indeed so far as the mere convenience of transacting business would require.

We have seen already that a distinguished French publicist, Mr. Girardin, declares himself for an undivided public power.[9] Unité du pouvoir is the watchword of the French republicans, and it is the very principle with which Louis Napoleon checkmated them. It belongs to what may well be called Rousseauism. Rousseau is distinctly against division of power. His Social Contract became the political bible of the convention-men, and it has ever since kept a firm hold on the mind of a very large part of the French people, probably of the largest portion. Indeed, we may say that the two great types of government now existing among the civilized and striving portion of mankind are representative (or, as the French choose to call it, parliamentary) government, which is essentially of a co-operative character—it is the government of Anglican liberty; and unity of power, the Gallican type. The French people themselves are divided according to these two types. Mr. Guizot may perhaps be considered as the French representative of the first type. A pamphlet, on the other hand, on government, and generally ascribed to Louis Napoleon, published not long before the explosion of the republic, for which it was evi-

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nor has it ever been properly carried out by them, their principle of centralization preventing it. See Pol. Ethics, book ii. c. xxiii.

[9] He has repeatedly given his views, but especially in an elaborate and brilliantly written, but, according to our opinion, superficial paper on the question, why the republic (of 1848) came to a fall.

dently intended to prepare the public mind, advocates the unity of power in the last extreme, and as a truly French principle.

We believe that the so-called unity of power is unvarnished absolutism. It is indifferent who wields it. We insist upon the supremacy, not the absolutism, of the legislature. We require the harmonious union of the co-operative whole, but abhor the unity of power.

What the French republicans demand in the name of the democracy, kings insist upon in the name of divine right. Both loudly protest against the "division of sovereignty," which can only mean a clear division of power; for what in a philosophical sense can truly be called sovereignty, can never be divided, and its division need not, therefore, be guarded against. Sovereignty is the self-sufficient source of all power, from which all specific powers are derived. It can dwell, therefore, according to the views of freemen, with society, the nation only; but sovereignty is not absolutism. It is remarkable how all absolutists, monarchical or democratic, agree on the unity of power.[10]

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[10] Innumerable official instances might be cited. The king of Prussia, when, in May, 1847, he delivered his first throne speech to the united committees of the provincial estates, which were to serve as a substitute for the expected estates general, "appealed in advance to his people," against everything we are accustomed to call constitutional. "My people does not want a participation of representatives in ruling, ... nor the division of sovereignty, nor the breaking up of the plenitude of royal power," &c. General Bonaparte wrote to the Directory, May 14, 1796: "One bad general is even better than two good ones. War is like govern-

Power, according to its inherent nature, goes on increasing, until checked. The reason is not that power is necessarily of an evil tendency, but because without it, it would not be power.[11] Montesquieu says: "It is a lasting experience that every man who has power is brought to the abuse of it. He goes on until he finds its limits."[12] And it is so with "every man," because it lies in the very nature of power itself. The reader is invited to re-peruse the Federalist on this weighty subject.[13]

The unity of power doubtless dazzles, and thus is the more dangerous. The French ought to listen to their own great countryman. He says: "A despotic government (and all unity of power is despotic) strikes the eye (saute pour ainsi dire aux yeux); it is uniform throughout: as it requires nothing but passions to establish it, all sorts of people are sufficiently good for it."[14]

Our own Webster, in his speech on the presidential protest, delivered the following admirable passage on the subject of which we treat, and on liberty in general—a passage which I give entire, in spite of its length, because I cannot find the courage

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ment, it is a matter of tact"—words which Mr. Girardin quotes with approval, and as an authority for his theory of the best government, consisting in a succession of perfectly absolute single rulers to be appointed, and at pleasure recalled by universal suffrage.

[11] This I have endeavored plainly to show in the Political Ethics.

[12] Esprit des Loix, xi. 5.

[13] Mr. Madison's paper on The Meaning of the Maxim, which requires a Separation of the Departments of Power, examined and ascertained. Federalist, No. XLVII. and sequ.

[14] Esprit des Loix, book vc. 14.

to mutilate it. I have tried to select some sentences, but it seemed to me like attempting to break off some limbs of a master work of sculpture which has happily come down to us entire.[15]

Mr. Webster said: "The first object of a free people is the preservation of their liberty, and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretence of a desire to simplify government. The simplest governments are despotisms; the next simplest limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions.

"The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cau-

[15] The speech was delivered in the Senate of the United States on the 7th of May, 1834. If I might place myself by the side of these men I would refer the reader to the Political Ethics, where I stated that despotism is simple and coarse. It is like a block of granite, and may last in its unchanging coarseness a long time; but liberty is organic with all the delicate vitality of organic bodies, with development, growth and expansion. Despotism may have accretion, but liberty widens by its own vital power, and gains in intensity as it expands. The long duration of some despotisms decides nothing. Longevity of states is indeed a requisite of modern civilization, but if we must choose, who would not prefer a few hundred years of Roman liberty, to the thousands of Chinese dreary mandarinism and despotism? Besides, we must not forget that a shoe once trodden down to a slipper, will always serve longer in the slip-shod capacity of a slipper than it did as a decent shoe.

tious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to its legal authority. Far otherwise. It seeks for duration and permanence. It looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is *our* liberty, if we will rightly understand and preserve it. Every free government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our con-

stitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries."[16]

Unity of power, if sought for in a wide-spread democracy, must always lead to monarchical absolutism. Virtually it is such; for it is indifferent what the appearance or name may be, the democracy is not a unit in reality; yet actual absolutism existing, it must be wielded by one man. All absolutism is therefore essentially a one-man government. The ruler may not immediately take the crown; the pear may not yet be ripe, as Napoleon[17] said to Sieyes; but it soon ripens, and then the avowed absolute ruler has far more power than the king whose absolute power is traditional, because the tradition itself brings along with it some limitations by popular opinion. Of all absolute monarchs, however, it is true that "it is the vice of a pure (absolute) monarchy to raise the power so high and to surround it with so much grandeur that the head is turned of him who possesses it, and that those who are beneath him scarcely dare to look at him. The sovereign believes himself a god, the people fall into idolatry. People may then write on the duties of kings and the rights of subjects; they may even constantly

[16] Page 122, vol. iv. of the Works of Daniel Webster. I have not transcribed this long passage without the permission of those who have the right to give it.

To my mind it appears the most Demosthenian passage of that orator. Perhaps I am biased, because the extract maintains what I have always asserted on the nature of liberty, and what has shown itself with such remarkable clearness and undraped nakedness in the late French affairs.

[17] I mean Napoleon the Real.

preach upon them, but the situations have greater power than the words, and when the inequality is immense, the one easily forgets his duties, the others their rights.[18]" Change the terms, and nearly every word applies to absolute democracies with equal truth.

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[18] Guizot, Essais sur l'Histoire de France, p. 359.

General Rapp, first aid of Napoleon, gives a good picture of the false position of an absolute monarch, in his Memoirs, Paris, 1832, ch. 2. He says that "whenever Napoleon was angry, his confidants, far from appeasing him, increased his anger by their representations. 'Your majesty is right,' they would say: 'such a person has merited to be shot, or disgraced, or discarded. . . . I have long known him to be your enemy. Examples are necessary; they are necessary for the maintenance of tranquillity.' When it was required to levy contributions from the enemies' country and Napoleon would perhaps ask for twenty thousand, he was advised to demand ten more. If it was the question to levy two hundred thousand men, he was persuaded to ask for three hundred thousand; in liquidating a debt which was indisputable, they would insinuate doubts on its legitimacy, and would often cause him to reduce to a half, or a third, and sometimes entirely the amount of the demand. If he spoke of making war, they would applaud the noble resolution: war alone would enrich France; it was necessary to astonish the world in a manner suitable to the power of the great nation. Thus it was that in provoking and encouraging expectations, and uncertain enterprises, he was precipitated into continual wars. Thus it is that they succeeded in giving to his reign a character of violence which did not belong to him. His disposition and habits were altogether good-natured. Never a man was more inclined to indulgence and more awake to the voice of humanity. I could cite thousands of examples."

Whether Napoleon was good-natured or not need not be discussed here, nor is it important to state that he was not so weak as represented by Rapp, but it is instructive to see how a man like Rapp, an uncompromising absolutist, unawares lays bare his own opinion of the character of an absolute monarch, because he is absolute.

Absolute monarchs, indeed, often allow free words. The philosopher Kant uttered remarkable political sentiments under Frederic the Great, and Montesquieu published his Spirit of Laws under the auspices of Madam de Tincin, the chanoiness mistress of the duke of Orleans, regent of France, and successively of many others. Montesquieu was favored by these persons, for very frequently people have a sentimental love for the theory of liberty. But neither Kant nor Montesquieu would have been suffered to utter their sentiments had there been any fear whatever that they might pass into reality. There is an immense difference between admiring liberty as a philosophical speculation, loving her like an imaginary beauty by sonnet and madrigal, and uniting with her in real wedlock for better and worse.

CHAPTER XV.

RESPONSIBLE MINISTERS. COURTS DECLARING LAWS UNCONSTITUTIONAL. REPRESENTATIVE GOVERNMENT.

24. It is not only necessary that every officer remain individually answerable for his acts, but it is equally important that no act be done for which some one is not responsible. This applies in particular, so far as liberty is to be protected, to that branch of government which directs the military. It is important, therefore, that no decree of government go forth without the name of a responsible person; and that the officers, or single acts of theirs, shall be tried by regular action at law, or by impeachment; and that no positive order by the supreme executive, even though this be a king, as in England, be allowed as a plea for impunity. A long time elapsed before this principle came clearly to be established in England. Charles the First reproved the commons for proffering their loyalty to his own person, while they opposed his ministers and measures which he had personally ordered. England in this, as in almost all else that relates to constitutional liberty, had the start of the continent by two hundred years and more. The same complaints were heard on the continent of Europe when lately attempts were made to

establish liberty in monarchies; and more will be heard when the time of new attempts shall have arrived. Responsible ministers, and a cabinet dependent upon a parliamentary majority, were the objects of peculiar distaste to the present emperor of the French, as they have been to all absolute monarchs. His own proclamations distinctly express it, and his newspapers continue to decry the servile position of government when ministers are in the service of a house of representatives.

In unfree countries, the principle prevails that complaints against the act of an officer, relating to his public duty, must be laid before his own superiors. An overcharge of duty on imported goods cannot there be tried before a common court, as is the case with us.

25. As a general rule, it may be said that the principle prevails in Anglican liberty, that the executive may do that which is positively allowed either by the fundamental or other law, and not all that which is not prohibited. The royal prerogatives of the English crown doubtless made the evolution of this principle difficult, and may occasionally make clear action upon it still so; but the modern development of liberty has unquestionably tended more and more distinctly to establish the principle that for everything the executive does there must be the warrant of the law. The principle is of high importance, and it need hardly to be added that it forms one of the prominent elements of American liberty. Our presidents, indeed, have done that for which many citizens believed they had no warrant in the law, for

instance when general Jackson removed the public deposits from the bank of the United States, but the doubt consisted in the question whether the law warranted the measure or not. It was not claimed that he could do it because it was nowhere prohibited. The constitution of the United States declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" and the principle which I have mentioned may be considered as involved in it; but in the different states, where the legislature certainly has the right, as a general rule, to do all that seems necessary for the common welfare and is not specifically prohibited, the mentioned principle prevails regarding the executive.[1]

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[1] I have already mentioned the judgment given by the French court, with reference to the opening of letters by the police, in order to find out the traces of offences. I now give an extract, and shall Italicize those passages which bear upon the subject above:

"Considering that if, by the terms of existing legislation, and particularly by art. 187 of the penal code, functionaries and agents of the government, and of the post-office administration, are forbidden either to suppress or to open letters confided to the said administration, this disposition cannot reach the prefect of police, acting by virtue of powers conferred upon him by art. 10 of the Code of Criminal Instruction:

"Considering that the law, in giving to him the mission to investigate offences, to collect evidence in support of them, and to hand their authors over to the tribunals charged with punishing them, *has not limited the means placed at his disposition for attaining that end:*

"That, in fact, the right of perquisition in aid of judicial instructions is solemnly affirmed by numerous legal dispositions, and that it is of common law in this matter:

26. The supremacy of the law requires that where enacted constitutions[2] form the fundamental law there

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"That the seizure in question *was made in order to follow the trace of an offence; that it resulted in the discovery of useful and important facts*; that, finally, the authors of the said letters have been prosecuted in a court of justice:

"Considering, moreover, that the court *is not called upon to inquire into the origin of documents submitted to its appreciation; that its mission is merely to establish their authenticity* or their sincerity; that, in fact, the letters in question are not denied by their authors:

"For these reasons the letters are declared admissible as evidence," &c.

It is refreshing to read by the side of this remarkable judgment so simple a passage as the following, which was contained in an English paper at the same time that the French judgment was given. It relates to a London police regulation concerning cabmen:

"Now, we have no wish to palliate the bad conduct of a class who at least furnish amusing topics to contemporaries. By all means let the evils be remedied; but let the remedy come within the limits of law. It will be an evil day for England when irresponsible legislation and police law, even for cabmen, are recognized and applauded by a certain public because in a given example it happens to be convenient to them. If the ordinary law is not sufficient, let it be reformed; but do not leave the making of penal laws to the police, and the execution of those laws to the correctional tribunal of the same authority."—Spectator, April 2, 1853.

[2] They are generally called written constitutions; but it is evident that the essential distinction of constitutions, derived from their origin, is not whether they are written or unwritten, which is incidental, but whether they are enacted or cumulative. The English constitution, that is the aggregate of those laws and rules which are considered of fundamental importance and essential in giving to the state and its government those features which characterize them, or those laws and institutions which give to England her peculiar political organic being, consist in cumulated usages and branches of the common law, in decisions of fundamental importance, in self-grown and in enacted institutions, in compacts, and in statutes embodying principles of political magnitude. From these we have

be some authority which can pronounce whether the legislature itself has or has not transgressed it in the passing of some law, or whether a specific law conflicts with the superior law, the constitution. If a separate body of men were established to pronounce upon the constitutionality of a law, nothing would be gained. It would be as much the creature of the constitution as the legislature, and might err as much as the latter. Quis custodet custodes? Tribunes or ephori? They are as apt to transgress their powers as other mortals. But there exists a body of men in all well-organized polities, who, in the regular course of business assigned to them, must decide upon clashing interests, and do so exclusively by the force of reason, according to law, without the power of armies, the weight of patronage or imposing pomp, and who, moreover, do not decide upon principles in the abstract, but upon practical cases which involve them—the middle-men between the pure philosophers

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extracted what has appeared important or applicable to our circumstances, we have added, expanded and systemized, and then enacted this aggregate as a whole, calling it a constitution—enacted not by the legislature, which is a creature of this very constitution, but by the people. Whether the constitution is written, printed, carved in stone, or remembered only, as laws were of old, is not the distinctive feature. It is the positive enactment of the whole at one time, and by distinct authority, which marks the difference between the origin of our constitutions and those of England or ancient Rome. Although the term written constitution does not express the distinctive principle, it was nevertheless natural that it should have been adopted, for it is analogous to the term lex scripta, by which the enacted or statute law is distinguished from the unenacted, grown and cumulative common law.

and the pure men of government. These are the judges—courts of law.

When laws conflict in actual cases, they must decide which is the superior law and which must yield; and, as we have seen that according to our principles every officer remains answerable for what he officially does, a citizen, believing that the law he enforces is incompatible with the superior law, the constitution, simply sues the officer before the proper court as having unlawfully aggrieved him in the particular case. The court, bound to do justice to every one, is bound also to decide this case as a simple case of conflicting laws. The court does not decide directly upon the doings of the legislature. It simply decides, for the case in hand, whether there actually are conflicting laws, and if so, which is the higher law that demands obedience, when both may not be obeyed at the same time. As, however, this decision becomes the leading decision for all future cases of the same import, until indeed proper and legitimate authority should reverse it, the question of constitutionality is virtually decided, and it is decided in a natural, easy, legitimate and safe manner, according to the principle of the supremacy of the law and the independence of justice. It is one of the most interesting and important evolutions of the government of law, and one of the greatest protections of the citizen. It may well be called a very jewel of Anglican liberty, one of the best fruits of our political civilization.[3]

[3] The ancient justicia of Arragon had the power of declaring

27. Of all the guarantees of liberty there is none more important, and none which in its ample and manifold development is more peculiarly Anglican, than the representative government. Every one who possesses a slight acquaintance with history, knows that a government by assembled estates was common to all nations arising out of the conquests of the Teutonic race; but the members of the estates were deputies or attorneys sent with specific powers of attorney to remedy specific grievances. They became nowhere, out of England and her colonies, general representatives—that is, representatives for the state at large and with the general power of legislation. This constitutes one of the most essential differences between the deputative medieval estates, and the modern representative legislatures—a government prized by us as one of the highest political blessings, and sneered at by the enemies of liberty on the continent, at this moment, as "the unwieldy parliamentary government." I have endeavored thoroughly to treat of this important difference; of the fact that the representative is not a substitute for something which would be better were it practicable, but has its own substantive value; of political instruction and mandates to the representatives, and of the duties of the representative, in the

laws unlawful or unconstitutional, as we call it, against the king and estates, but it was done without the trial of a specific case and specific persons. He was therefore simply in these cases above king and estates, that is, king himself, and it became necessary in course of time to suppress this feature. See Pol. Ethics, vol. ii. p. 281.

Political Ethics, to which I must necessarily refer the reader.

With reference to the great subject of civil liberty, and as one of the main guarantees of freedom, the representative government has its value as an institution by which public opinion organically passes over into public will, that is law; as one of the chief bars against absolutism of the executive on the one, and of the masses on the other hand; as the only contrivance by which it is possible to induce at the same time an essentially popular government and the supremacy of the law, or the union of liberty and order; as an invaluable high school to teach the handling and the protection, and to instil the love, of liberty; as the organism by which the average justice, on which all fair laws must be based, can be ascertained; as that sun which throws the rays of publicity on the whole government with a more penetrating light the more perfect it becomes; and as one of the most efficacious preventives of the growth of centralization and a bureaucratic[4] govern-

[4] The term bureaucracy is called by many barbarous, nor has it, so far as I know, been introduced into dictionaries of any authority. Be it so; but while we have innumerable words, compounded of elements which belong to different languages, a term for that distinct idea which is designated by the word Bureaucracy has become indispensable in the progress of political science, because the thing which must be named has distinctly developed itself in the progress of centralization combined with writing. In spite, therefore, of the want of texical authority, it is almost universally used; for necessity presses. I am under this necessity, and shall use it until a better and more acceptable term be proposed. Mandarinism would not be preferable. Mandarinism would express indeed a government by mandarins, by officials, but it would not designate

ment—as that institution without which no clear division of the functions of government can exist.

Before we consider the most prominent points of a representative government, so far as it is a guarantee of liberty, it may be proper to revert to two subjects just mentioned.

There was a time when, it seems, it was universally believed, and many persons believe still, that a representative government is indeed a very acceptable substitute, yet only a substitute, for a state of things which would be the perfect one, but which it is physically impossible to obtain at present, namely, the meeting of the people themselves, instead of an assembly of their representatives only. A secondary value only is thus allowed to the representative system. This is a grave error. Even were it physically and locally possible to assemble the entire American people, and rule by the Athenian pebble or procheironia (their show of hands), we must still cling to the representative system as a substantive institution. The market government belongs to antiquity—the period of city-states—not to our period of national states; and national states have not only a meaning relating to physical extent of country.

It has been observed that the period of nationalization of tribes toward the close of the middle ages, is

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one characteristic which it is intended to point out by the term bureaucracy, namely, a government carried on, not only by a hierarchy of officials, but also by scribbling bureaus. All bureaucracies must be mandarinisms, I take it; but every mandarinism need not be a bureaucracy. I observe that the French, from whom indeed the term has been received, freely use it, even in their best writings.

one of the most important in the progress of civilization and modern political development, as a period of medieval disintegration and division would be the necessary effect of denationalization. Rome perished of a political bankruptcy, because the ancient city-state was incompatible with an extensive empire. A representative government could alone have saved it; for its recollections and forms of liberty prevented a full blown centralization, the only other form which could have given to it a Russian stability. Constantine indeed established a centralized court government; but it was then too late. The decree had gone forth that the vessel should part amidst the breakers.

The market democracy is irreconcilable with liberty as we love it. It is absolutism which exists wherever power, unmitigated, undivided and unchecked, is in the hands of any one or of any body of men. It is the opposite of liberty. The people, which means nothing more than an aggregate of men, require fundamental laws of restraint, as much as each component individual does. Unless we divide the power into two parts—into the electing power, which periodically appoints and recalls, and into the power of elected trustees appointed to legislate and, as trustees, are limited in their power, absolutism is unavoidable. Absolutism is the negation of protection; protection in its highest sense is an essential element of liberty.[5] It is the trusteeship, that gives

[5] To refer to books on such a subject is very difficult; for it almost comprehends the whole history of modern liberty.

I have treated on many points connected with the representative

so high a value to the representative government. When the Athenians, trying the unfortunate generals after the battle of Argenusæ, were reminded that they acted in direct contradiction to the laws, they exclaimed that they were the people; they made the laws, why should they not have the privilege of disregarding them?

Every one feels his responsibility far more distinctly as trustee than otherwise. Let a man in an excited crowd be suddenly singled out, and made a member of a committee to reflect and resolve for that crowd, and he will feel the difference in an instant. How easy it would be to receive the most lavish and most dangerous money grants from an undivided and absolute multitude! Is it necessary to remind the reader that liberty has been lost quite as often from false gratitude toward a personally popular man as from any other reason? Trustees, carefully looking around them, and conscious that they have to give an account of themselves, are not so easily swayed by ravishing gratitude. The trusteeship in the representative government is the only means yet discovered to temper the rashness of the democracy and overcome the obstinacy of monarchs.

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system in the Political Ethics. The reader will peruse with interest M. Guizot's Histoire des Origines du Gouvernement Representatif en Europe, Paris, 1851. It is interesting to learn the views of a Frenchman of such celebrity on a subject of vital interest to us. Regarding the deputative principle, the Histoire de la Formation et des Progres du Tiers Etat by Augustin Thierry, Paris, 1853, is instructive. I am sorry that I have not been able to read Mr. George Harris's True Theory of Representation in a State, London, 1852.

How necessary for liberty a national[6] representative government is—a representative system comprehending the whole state, and throwing liberty over it broadcast—will appear at once, if we remember that local self-government exists in a very high degree in many Asiatic countries, where, however, there is no union of these many insulated self-governments and no state self-government, and therefore no liberty. We shall also presently see that where there is only a national representative government without local self-government there is no liberty, as we understand it.

Nor must we forget two facts, which furnish us with an important lesson on this subject. Wherever estates or other bodies have existed, no matter how great their privileges were or how zealously they defended their liberties, civil liberty has not been firmly established; on the contrary it has been lost in the course of time, unless the estates have become united into some national or state representative system. Where are the liberties of Arragon, and where is the freedom of the many Germanic polities? It was one of the greatest political blessings of England that favorable circumstances promoted an early national fusion of the estates into two houses. On the other hand, we find that those governments which can no longer resist the demand of liberty by the people, yet are bent on yielding as little as possible, always have tried as long as possible to grant pro-

[6] I take here the term National in the sense of relating to an entire society spread over the territory of an extensive state; and as contradistinguished from what belongs to a city-state.

vincial estates only. Some monarchs of this century have shown a real horror of national representation, and would rather have periled their crown than granted it; yet some of these monarchs have readily granted an urban self-government of considerable extent. Their ministers and servants have frequently gone so far as to extol local self-government and to proclaim the idea that liberty consists far more in the "administration" being left to the people, than in any general representative government. In doing so, they pointed to countries in which the latter, existing alone, had brought no real liberty. Asia, as was before stated, furnishes us with innumerable instances of local self-government, which are there neither a source nor a test of liberty.[7] True liberty stands in need of both, and of a bona fide representative government largely and minutely carried out.

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[7] A curious picture of Asiatic local self-government, without any liberty, has lately been given to the public, in lieutenant-colonel C. G. Dixon's Sketch of Maiwara, giving a brief Account of the Origin and Habits of the Mairs, &c., London, 1851.

CHAPTER XVI.

REPRESENTATIVE GOVERNMENT CONTINUED. BASIS OF PROPERTY. DIRECT AND INDIRECT ELECTIONS.

28. The prominent points of a national representative government, considered as a guarantee of liberty, consist in the representative principle, that is the basis of representation and the right of voting for the representative, in the election laws, and in the organization of the representative legislature, with its own protection and liberties.

All that we can say Anglican liberty requires regarding the principle of representation is that it be a broad or popular one. Universal suffrage cannot be said to be an Anglican principle, whatever the American view, of which we shall treat by and by, may be. The principle of a wide popular representation, however, or an extensive right of voting, has constantly though slowly expanded in England, and continues to be expanding.[1]

The English, not allowing universal suffrage or indeed a representation based upon numbers alone, require some limit beyond which the right of voting

[1] For the historic development of the English representative government it will hardly be necessary to refer the reader to Hallam's History of the English Constitution.

shall not go. This limit is, as a general rule, which has however its exceptions, indicated either by property or by a certain annual expense which usually indicates the amount of income over which man may dispose, namely house-rent. Hence it is often said that property is the basis of representation in England. This is not correct. Property, or the enjoyment of a certain revenue either from acquired property or from an industrial occupation, gives the right of voting, but it is not the basis of representation.

When it is maintained in modern times that property ought to be the basis of representation, or it is asserted that the English constitution is founded on property, an inappropriate term is used, which carries along with it erroneous associations, in almost all discussions on this subject. When we say that population is the basis of representation, we mean indeed that one representative is chosen for a distinct number of represented citizens, and that therefore a large population should have more representatives than a small one; but when it is said that property is or ought to be the basis of representation, we mean in almost all cases nothing more than that a certain amount of property or revenue is required to entitle a man to vote. The Roman constitution ascribed to Servius Tullius was really founded upon property, because the six classes of citizens actually took a share in the government of the state in proportion to the property they held. Thus likewise there is a partial representation of property prescribed by the constitution of South Carolina, for the composition of the state senate, inasmuch as the

small but wealthy divisions of the lower part of the state elect a number of senators disproportionately large compared to the number of senators sent from the upper districts of the state, which are very populous and possessed of proportionately less property. This was at least the case when the constitution was adopted.

What is really meant when it is said that a constitution ought to be founded on property, is this: that a minimum amount of property ought to be adopted as the last line beyond which no suffrage ought to be granted, but not that a capital of a million or the possession of a thousand acres of land ought to be entitled to a greater share in government than the possession of a few thousand dollars. It is meant that we seek for a criterion which will enable us to distinguish those who have a fair stake in the welfare of the state from those who have not. But here occurs at once the question: Is this criterion in our age any longer safe, just, and natural, which it may be supposed to have been in former ages? Are there not thousands of men without property who have quite as great a stake in the public welfare as those who may possess a house or enjoy a certain amount of revenue? This criterion becomes an actual absurdity when by property, landed property only is understood. It was indeed in the middle ages almost the exclusive property of lasting and extensive value; but nothing has since changed its character more than property itself. This whole question is one of the vastest extent, and emphatically belongs to the science of politics and

real statesmanship. In regard to the subject immediately in hand, we have only to repeat that an extensive basis of representation is doubtless a characteristic element of Anglican liberty.

29. As important as the basis of representation—indeed, in many cases more important—is the question whether there shall be direct elections by the people, or whether there shall be double elections; that is to say, elections of electors by the constituents, which electors elect the representative. It may be safely asserted that the Anglican people are distinctly in favor of simple elections. Elections by electing middle men deprive the representation of its directness in responsibility and temper; the first electors love their interest, because they do not know what their action may end in; no distinct candidates can be before the constituents, and be canvassed by them, and, inasmuch as the number of electors is a small one, intrigue is made easy.

The fact that a double or mediate election foils in a great degree the very object of a representative government, is so well known by the enemies of liberty, that despotic governments, unable to hold their absolute power any longer, have frequently struggled hard to establish universal suffrage with double election. An intention to deceive, or a want of acquaintance with the operation of the principle must explain the measure. I believe that neither American nor Englishman would think the franchise worth having were double elections introduced, and so decidedly is the simple election ingrained in the Anglican character, that in the only notable case in

which a mediate election is prescribed in America, namely the election of the president of the United States, the whole has naturally and of itself become a direct election. The constitution is obeyed, and electors are elected, but it is well known for which candidate the elector is going to vote, before the people elect him. There is but one case of old date in which an elector, elected to vote for a certain candidate for the presidency, voted for another, and his political character was gone for life.

It is curious to observe by what circuitous ways and multiplied elections it was frequently attempted in the middle ages, to insure an impartial or pure election. The master of the knights of Malta was elected by no less than seventeen consecutive elections of electors, each connected with oaths;[2] and the doge of Venice was elected by nine different acts, namely five elections alternating with four acts of drawing lots,[3] with the addition of collateral votings.

30. The representative principle farther requires that the management of the elections be in the hands of the voters, or of a popular character; that especially the government do not interfere with them, either in the election bureau itself, or by indecently proposing and urging certain candidates; that the house for which the candidates are elected be the sole judge of the validity of the election, and

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[2] Vertot's History of the Knights of Malta, folio edition, London, 1728; vol. ii. Old and New Statutes.

[3] Daru, Histoire de Venise, Paris, 1821, vol. i.

that the opening of the poll do not depend upon the executive, which by mere omission might prevent the entire election in order to exclude a distasteful citizen from the house.

The beginning of an election, the appointment of managers, the protection of the minority in this matter, and the conscientious counting of votes, where the ballot exists, are always matters of much interest and of great practical difficulty, to all those who have not traditionally learned it. Collections of election laws are therefore very instructive; and the labor of giving birth to an election with nations unaccustomed to liberty is very great. Mr. Dupont gives some instructive and amusing anecdotes, relating to the first French elections, in his Memoirs of Mirabeau.

The English law is that all the military must leave the place where an election is going on, and can only enter it when called in by the town authorities or the justices of the peace, in case of riot.

The British house of commons is the sole judge of the validity of elections, and the same is declared for the house of representatives by the American constitution.[4]

One of the gravest charges against the duke of Polignac and his fellow members of the cabinet,

[4] A full statement of all the laws relating to these guarantees in England will be found in Stephens's De Lolme, Rise and Progress of the British Constitution; and Story's Commentaries on the Constitution of the United States gives our constitutional law on these subjects.

when they were tried for their lives after the revolution of 1830, was that they had allowed or induced Charles the Tenth to influence certain electors, by letter, to elect government candidates; while the government under the late so-called republic openly supported certain persons as government candidates, and bishops wrote then and have since sent solemn pastoral letters, calling on their flocks to elect men of certain political color. It is wholly indifferent to decide here whether peculiar circumstances made this interference necessary. I simply maintain that it is not liberty.

31. Representative legislatures cannot be truly the organisms through which public opinion passes into public will, nor can they be really considered representative bodies, if the members, or at least the members of the popular branch, be not elected for a moderately short period only; if the legislature does not sit frequently; if the elections for the popular branch are not for an entire renewal of the house; and if the member is made answerable for what he says in the house, to any one or any power besides the house to which he belongs.

What a moderately short period, or the frequency of sessions means, cannot, as a matter of course, be absolutely stated. Fairness and practice, as well as the character of the times, must necessarily settle these points. It was enacted under Charles the Second, the unworthy king under whom parliament established many of the best supports of liberty, that new parliaments should be held at least once in three years, and the commons be elected for

that time. In 1716, sir Robert Walpole, the whig premier, carried the septennial bill, forced to do it by the intrigues of the tories, who were for bringing back the Stuarts. This law has ever since prevailed, but even Pitt called it, in 1783, one of the greatest defects in the system of popular representation. Chatham, his father, had expressed himself against it[5] before him, and it would really seem that England will return, at no distant period, to a shorter period of parliaments.[6]

When count Villèle, in 1824, was desirous of diminishing the liberal spirit of the French charter, he introduced and carried a septennial bill, which was, however, abolished in 1830 by the "July Revolution." Parliaments for too short a period would lead to a discontinuous action of government, and unsettle instead of settling; hence, they would be as much against liberty as too long ones. In America, two years has become a pretty generally adopted time for the duration of legislatures. It is a remarkable fact that the people in America feel so perfectly safe from attacks of the executive that, in several states, where the constitutions have been revised, a fundamental law has been enacted that the legislature shall not meet more often than every two years. This is to avoid expense and over-legislation. The general principle remains true that "parliaments

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[5] Volume 14, page 174, of Correspondence of William Pitt, Earl of Chatham.

[6] I have given a sufficiently long account of the Septennial Bill, under this head, in the Encyclopædia Americana.

ought to be held frequently," as the British Declaration of Rights and Liberties enacts it. The constitution of the United States makes the meeting and dissolution of congress entirely independent of the executive, and enacts that congress shall meet at least once in every year, on the first Monday of December, and that the house of representatives shall be entirely renewed every second year.

As to the irresponsibility of members for their remarks in parliament, the declaration of rights enacts "that the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." This was adopted by the framers of our constitution, in the words that "for any speech or debate in either house, they (senators and representatives) shall not be questioned in any other place."

32. A farther and peculiar protection is granted to the members of the legislature, both in the United States and in England, by protecting them against arrest during session, except for certain specified crimes. The English house of commons "for the first time took upon themselves to avenge their own injury, in 1543,"[7] when they ordered George Ferrers, a burgess who had been arrested in going to parliament, to be released, and carried their point. "But the first legislative recognition of the privilege was under James the First."[8] The constitution of the

[7] Hallam, Hist. of English Constitution, 5th edit. vol. i. p. 268.
[8] Ibidem, vol. i. p. 303.

United States enacts that senators and representatives shall "in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

33. It is farther necessary that every member possess the initiative, or right to propose any measure or resolution. This is universally acknowledged and established where Anglican liberty exists, not by enactment, but by absence of prohibition, and as arising out of the character of a member of the legislature itself. In most countries, not under the ægis of Anglican liberty, this right of the initiative has been denied the members, and government, that is the executive, has reserved it to itself. So has the so-called legislative corps of the present French empire no initiative. It has indeed not even the privilege of amendment; it has not even the right of voting on the ministerial estimates, except on the whole estimate of one ministry at once.[9] In some countries, as in France under the charter of the July revolution, the initiative is vested in the houses and in government; that is to say, the government, as government, can propose a measure through a minister, who is not a member of the house. In England no bill can be proposed by the executive as such, but as every cabinet minister is either a peer or must contrive to be elected into the commons, the ministers

[9] Why, indeed, it is called legislative corps does not appear. Legislative corpse would be intelligible.

have of course the right of the initiative as members of their respective houses. The constitution of the United States prohibits any officer of the United States from being a member of either house, and the law does not allow the members of the administration a seat and the right to speak in the houses, as some think that a law to that effect ought to be passed. The representatives of our territories are in this position; they have a seat in the house of representatives, and may speak, but have no vote. A minister had the right to speak in either house, under the former French charters, in his capacity of cabinet minister, whether he was a member of the house or not. Whenever the executive of the United States is desirous to have a law passed, the bill must be proposed by some friend of the administration who is a member of one or the other house.

It has been mentioned already that the initiative of money bills belongs exclusively to the popular branch of the legislature, both in the United States and in England, by the constitution in the one, and by ancient usage, which has become a fundamental principle, in the other.

CHAPTER XVII.

PARLIAMENTARY LAW AND USAGE. THE SPEAKER. TWO HOUSES. THE VETO.

34. It is not only necessary that the legislature be the sole judge of the right each member may have to his seat, but that the whole internal management and the rules of proceeding with the business belong to itself. It is indispensable that the legislature possess that power and those privileges which are necessary to protect itself and its own dignity, taking care however that this power may not, in turn, become an aggressive one.

In this respect are peculiarly important the presiding officer of the popular branch or speaker, the parliamentary law, and the rules of the houses.

The speaker of the English commons was in former times very dependent on the crown. Since the revolution of 1688, his election may be said to have become wholly independent. It is true that the form of obtaining the consent of the monarch is still gone through, but it is a form only, and a change of the administration would unquestionably take place, were the ministers to advise the crown to withhold its consent.

Were the refusal insisted on, disturbances would doubtless follow, which would end in a positive declaration and distinct acknowledgment on all hands, that the choice of the speaker "belongs, and of right ought to belong" to the house of commons. There is no danger on that score in England, so long as a parliamentary government exists there at all. The growth of the commons' independence in this respect is as interesting a study as it is historically to trace step by step any other expanding branch of British liberty.

The constitution of the United States says that "the house of representatives shall choose their speaker and other officers," and so chosen, he is speaker, without any other sanction.

The charter granted by Louis the Eighteenth, of France, prescribed that "the president of the chamber of deputies is nominated by the king from a list of five members presented by the chamber." This was altered by the revolution of 1830, and the charter then adopted decreed that "the president of the chamber of deputies is to be elected by the chamber itself at the opening of each session." It need not be added that, according to the "constitution of the empire," the emperor of the French simply appoints the president of the "legislative corps." In all the states of the Union the speakers are within the exclusive appointment of the houses. In the British colonial legislatures, the speaker must be confirmed by the governor, but, as was observed of the speaker of the commons, if consent be refused it would be a case of disagreement between the

administration and the legislature, which must be remedied either by a new administration or a new house—that is new elections.

The presiding officer of the upper house is not made thus dependent upon it. In England, the chief officer of the law, the lord chancellor or keeper of the seals,[1] presides over the house of peers. There seems to be a growing desire in England wholly to separate the lord chancellor from the cabinet and politics. At present he is always a member of the administration, and, of course, leaves his office when the cabinet to which he belongs goes out. It will be an interesting subject to determine who shall preside over the lords, if the change thus desired by many should take place.

The United States senate is presided over by the vice-president of the United States, who is elected by

[1] A keeper of the seals, whom usage does not require to be a peer, is now appointed as the chief officer of the law, only when for some reason or other no lord chancellor is appointed. The keeper of the seals nevertheless presides in the house of lords, or "sits on the woolsack." The chancellor is now always made a peer if he is not already a member of the house of lords, and he is always a member of the cabinet. This mixture of a judicial and political character is inadmissible according to American views; yet it ought to be remembered as an honorable fact, that no complaint of partiality has been made in modern times against any lord chancellor in his judicial capacity, although he is so deeply mixed up with politics. Lord Eldon was probably as uncompromising, and, perhaps, as bigoted a politician as has ever been connected with public affairs, but I am not aware that any suspicion has existed on this ground against his judicial impartiality. There is at present a traditional fund of uncompromising judicial rectitude in England which has never been so great at any other period of her own history, or excelled in any other country.

the Union at large, as the president is. It must be observed, however, that neither the chancellor on the woolsack, nor the vice-president of the United States, as president of the senate, exercises any influence over their respective legislative bodies, that can in any degree be compared to that of the speakers over their houses. The American senate and the British house of lords allow but very little power in regulating and appointing, to the presiding officer, who interferes only when called upon to do so.[2]

The power of the houses of parliament over persons that are not members, or the privileges of parliament, or of either house, so far as they affect the liberty of individuals and the support of their own power, constitute what is called parliamentary law —an important branch of the common law. Like all common law, it consists in usage and decisions; there are doubtful points as well as many firmly settled ones. It must be learned from works such as Hatsell's Precedents, &c., Townsend's History of the House of Commons, and others.

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[2] This difference in the position of the presiding officers appears among other things from the fact that the members of the house of lords address: "My lords," and not the chancellor, while usage and positive rules demand that the member of the other house who wishes to speak shall address "Mr. Speaker," and receive "the floor" from him. The chancellor would only give the floor if appealed to in case of doubt. In the United States senate, the president of the senate is, indeed, directly addressed, although occasionally "senators" have been addressed in the course of a speech. That body, however, appoints its committees, and leaves little influence to the presiding officer, who, it will be remembered, is not a member of the senate, and has a casting vote only.

As a general remark it may be stated that, with the rise of liberty in England, the jealousy of the house of commons also rose, and continued during the period of its struggle with the executive; and that, as the power of the house has become confirmed and acknowledged, the jealousy of the house has naturally abated. I very much doubt whether at any earlier period the committee of privileges would have made the same declaration which it made after lord Cochrane, in 1815, had been arrested by the marshal of the king's bench, while sitting on the privy councillors' bench in the house of commons, prayers not yet having been read. The committee declared that "the privileges of parliament did not appear to have been violated so as to call for the interposition of the house."[3]

The two American houses naturally claim the "power of sending for persons and papers and of examining upon oath," and they have also exercised the power of punishing disturbances of their debates by intruders, and libellers of members or whole houses. But no power to do so is explicitly conferred by the constitution of the United States.[4]

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[3] I would refer the general reader, on this and kindred subjects, to the article Parliament, in the Political Dictionary, Lond. 1846.

[4] This is not the place for discussing the doubts which some have entertained regarding the power of the houses of congress to do that which is possessed by every court of justice, though the lowest, namely to arrest and punish disturbers. The doubt is simply on the ground that it has not been conferred. But there are certain rights which flow directly from the existence of a thing itself, and some that are the necessary consequence of action and life, and without which neither can manifest itself. A legislative body

Of far greater importance is the body of the rules of procedure and that usage which has gradually grown up as a part of common law, by which the dispatch of parliamentary business and its protection against impassioned hurry are secured, and by which the order and freedom of debate, fairness, and an organic gestation of the laws are intended to be obtained. The development of parliamentary practice, or rules of proceeding and debate, such as it has been developed by England, independently of the executive, and like the rest of the common law been carried over to our soil, forms a most essential part of our Anglican constitutional, parliamentary liberty. This practice, as we will call it for brevity's sake, is not only of the highest importance for legislatures themselves, but serves as an element of freedom all over the country, in every meeting, small or large, primary or not. It is an important guarantee of liberty, because it serves like the well worn and banked bed of a river, which receives the waters that without it would either lose their force and

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without the power of sending for persons to be examined by committees, would be forced to legislate, in many cases, in the dark. It is true that legislative bodies have become tyrannical; but it must not be forgotten that wherever, in the wide range of history, any struggle for liberty has taken place, we find that a struggle to establish the habeas corpus principle has always accompanied it, and that this struggle for securing personal liberty is always against the executive. I do not remember a single case of an established and separate guarantee of personal liberty against parliamentary violence.

The reader is referred to Mr. Justice Story's Comm. on the Const. U. S. chap. xii., and to Chancellor Kent's Commentaries.

use, by spreading over plains, or become ruinous by their impetuosity when meeting with obstacles. Every other nation of antiquity and modern times has severely suffered from not having a parliamentary practice such as the Anglican tribe possesses, and no one familiar with history and the many attempts to establish liberty on the continent of Europe or in South America, can help observing how essentially important that practice is to us, and how it serves to ease liberty, if we may say so.

It is not a French "reglement," prescribed by the executive with but little room for self-action; nor does it permit legislative disorder or internal anarchy. It has been often observed that the want of parliamentary practice created infinite mischief in the first French revolution. Dumont observes that there was not even always a distinct proposition before the convention; and the stormiest sessions, which frequently ended by the worst decrees — the *decrés d'acclamation* — were those in which there were speeches and harangues without propositions. Sir Samuel Romilly[5] says: "If one single rule had been adopted, namely that every motion should be reduced into writing in the form of a proposition before it was put from the chair, instead of proceeding, as was their constant course, by first resolving the principle as they called it (décreter le principe), and leaving the drawing up of what they had so resolved (or, as they called it, la redaction) for a subsequent operation,

[5] He was himself of unmixed French descent, as lord Brougham observes, although his family had resided for generations in England.

it is astonishing how great an influence it would have had in their debates and on their measures."[6]

The great importance of the subject and the general superiority of the English parliamentary practice have been acknowledged by French writers, practically acquainted with the subject, and especially in a work the full title of which I shall give in a note, because it shows its interesting contents.[7]

Foreigners frequently express their surprise at the ease with which in our country meetings, societies, bodies, communities, and even territories[8] self-constitute and organize themselves, and transact business without violence, and without any force in the hands of the majority to coerce the minority, or in the hands of the minority to protect itself against

[6] Memoirs of the Life of Sir Samuel Romilly, &c. 2d edit. vol. i. p. 103.

[7] A Treatise on the Formation of Laws (Traité de la Confection des Lois), or an Inquiry into the Rules (Règlements) of the French Legislative Assemblies, compared with the Parliamentary Forms of England, the United States, of Belgium, Spain, Switzerland, &c., by Ph. Vallette, Advocate, &c., and Secretary of the Presidency of the Chamber of Deputies, and by Benat Saint-Martin, Advocate, &c., 2d edit. Paris, 1839; with the words of Mr. Dupin, who long presided over the chamber, as motto: "The excellence of laws depends especially upon the care taken with the elaboration of the bills. The drawing up of laws constitutes a large share of their efficiency."

[8] As a striking instance may be mentioned the whole procedure of the people of Oregon when congress omitted to organize the territory, and ultimately "Organic Laws" were adopted "until such time as the United States of America extend their jurisdiction over us." They were printed by the senate, May 21, 1846, and form a document of great interest to the political philosopher in more than one respect.

the majority. One of the chief reasons of this phenomenon is the universal familiarity of our people with parliamentary practice, which may be observed on board of any steamboat where a number of persons, entire strangers to one another, proceed to pass some resolution or other, and which they learn even as children. There are few schools the members of which have not formed some debating society, in which parliamentary forms are strictly observed, and in which the rigorously enforced fine impresses upon the boy of ten or eleven years the rules which the man of forty follows as naturally as he bows to an acquaintance.[9]

The U. S. Constitution says that "each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." If, however, the parliamentary practice had not already been spread all over the colonies, like the common law itself, this power, justly and necessarily conferred on each house, would have been of comparatively little advantage. Parliamentary practice—that *ars obstetrix animarum*, as Mr. Bentham calls it, but it ought to be called the obstetric art of united bodies of men, for in this lies the difficulty—is not a thing to be invented nor to be decreed, but must be developed.[10]

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[9] An excellent book of its kind is the small work of judge L. S. Cushing, Rules of Proceeding and Debate in Deliberative Assemblies, Boston, Mass. It has gone through many editions. The author is engaged in a large work on parliamentary law, and we hope he will be able to give it to the public at no distant period.

[10] Mr. Jeremy Bentham's Tactique des Assemblées Législative,

It is not only a guarantee of the free share of every representative in the legislation of his country, but it is also, as has been indicated, a guarantee for the people that its legislature remain in its proper bounds, and that laws be not decreed as the effects of mere impulse and passion.

It is a psychological fact that whatever excites a number of separate individuals will excite them still more when brought together, by mutual countenance and that psychical reduplication which, for bad or good, has a powerful effect wherever individuals of the same mind or acting under the same impulse come in close contact. Parliamentary practice, as we possess it, is as efficient a means to calm and to regulate these excitements, as the laws of evidence and the procedure of courts are in tempering exciting trials and impassioned pleadings, and in preventing the mischief they would otherwise produce.

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edited by E. Dumont, Geneva, 1816, is no pure invention, and could have been written by an Englishman or American only.

See also Mr. Jefferson's Manual of Parliamentary Practice for the use of the Senate of the United States.

There is a very curious book, Parliamentary Logic, &c., by Right Hon. W. Gerard Hamilton (called in his time single-speech Hamilton), with considerations on the Corn Laws by Dr. Samuel Johnson, London, 1808. The copy which I own belonged to Dr. Thomas Cooper. That distinguished man has written the following remark on the fly-leaf: "This book contains the theory of deception in parliamentary debate; how to get the better of your opponent, and how to make the *worse* appear the *better* reason. It is the well written work of a hackneyed politician. . . . . The counterpart to it is the admirable tract of Mr. Jeremy Bentham on Parliamentary Logic, the book of *Fallacies*. No politician ought to be ignorant of the one book or the other. They are *well* worth (not perusing, but) studying." "T. C."

These remarks may fitly conclude with the words of judge Story, which he uttered when he left the speaker's chair of the Massachusetts house of representatives, to take his seat on the bench of the supreme court of the United States. They ought to be remembered by every one on both sides of the Atlantic that prizes practical and practicable liberty:

"Cheered, indeed, by your kindness, I have been able, in controversies, marked with peculiar political zeal, to appreciate the excellence of those established rules which invite liberal discussions, but define the boundary of right, and check the intemperance of debate. I have learned that the rigid enforcement of these rules, while it enables the majority to mature their measures with wisdom and dignity, is the only barrier of the rights of the minority against the encroachments of power and ambition. If anything can restrain the impetuosity of triumph, or the vehemence of opposition—if anything can awaken the glow of oratory, and the spirit of virtue—if anything can preserve the courtesy of generous minds amidst the rivalries and jealousies of contending parties, it will be found in the protection with which these rules encircle and shield every member of the legislative body. Permit me, therefore, with the sincerity of a parting friend, earnestly to recommend to your attention a steady adherence to these venerable usages."[11]

35. If parliamentary practice is a guarantee of

[11] Life and Letters of Joseph Story, Boston, Mass. 1851, vol. i. p. 203.

liberty by excluding, in a high degree, impassioned legislation, and aiding in embodying in the law the collective mind of the legislature, the principle of two houses, or the bicameral system, as Mr. Bentham has called it, is another and no less efficient guarantee.

Practical knowledge alone can show the whole advantage of this Anglican principle, according to which we equally discard the idea of three and four estates and of one house only. Both are equally and essentially un-Anglican. Although, however, practice alone can show the whole advantage that may be derived from the system of two houses, it must be, nevertheless, a striking fact to every inquirer in distant countries, that not only has the system of two houses historically developed itself in England, but it has been adopted by the United States, and all the thirty-one states as well as the six now existing territories, and by all the British colonies, where local legislatures exist. We may mention even the African state of Liberia. The bicameral system accompanies the Anglican race like the common law,[12] and everywhere it succeeds; while no one attempt at introducing the unicameral system, in larger countries, has so far succeeded. France, Spain, Naples, Portugal—in all these coun-

[12] No instance illustrating this fact is perhaps more striking than the meeting of settlers in Oregon Territory, when congress had neglected to provide for them, as has been mentioned in a previous note. The people met for the purpose of establishing some legislature for themselves, and at once adopted the principle of two houses. It is to us as natural as the jury.

tries it has been tried, and everywhere it has failed. The idea of one house flows from that of the unity of power, so popular in France. The bicameral system is called by the advocates of democratic unity of power an aristocratic institution. This is an utter mistake. In reality it is a truly popular principle to insist on the protection of a legislature divided into two houses; and as to the historical view of the question, it is sufficient to state that two houses have been insisted upon and rejected by all parties, aristocratic and popular, according to the circumstances of the times. In this the principle resembles the instruction of the representative by his constituents. This too has been insisted on and rejected by all parties.

A few attempts were made in our earlier times to establish a single house, for instance in Pennsylvania,[13] but the practical and sober sense of the Anglican people soon led them back to the two houses. Mr. de Lamartine pronounced the true reason why we ought to hold fast to the bicameral system, although he spoke against it. When in the last French constituent assembly Mr. Odillon Barrot had urged with ability the adoption of two houses, Mr. de Lamartine replied that the great principle of unity (he meant, no doubt, of centralization) required the establishment of one house, and that, unless the legis-

[13] It was at the period when Dr. Franklin asked why people would put horses not only before but also behind the wagon, pulling in opposite directions? The true answer would have been, that whenever a vehicle is pulled down an inclined plane we actually do employ an impeding force to prevent its being dashed to pieces.

lature was vested in one house alone, it would be too difficult to make it pass over from a simple legislature to an assembly with dictatorial power. This is precisely the danger to be avoided.[14] Parliamentary practice and the two-house system are subjects of such magnitude that it is impossible here, where

[14] The speech was delivered on the 27th September, 1848. Mr. de Lamartine speaks of a division of the sovereignty into two parts, by two houses! Poor sovereignty! What strange things have been imagined under that word! If the reader can find access to that speech, I advise him to peruse it, for it is curious from beginning to end, especially as coming from one who for a time was one of the rulers of France. His exact words are these. Speaking of domestic dangers, he says: "To such a danger you must not think of opposing two or three powers. That which ought to oppose it is a direct dictatorship, uniting within its hand all the powers of the state." He adds more of the kind, but this extract will suffice.

Mr. Lamartine committed another grave error. He said that two houses in the United States were natural, because we are a confederacy, and the senate was established to represent the states as such. But he seems not to have been aware that all our states, in their unitary character, have established the same system, and that it is as natural to the men on the shores of the Pacific as to those in Maine, or to the settlers on the Swan River.

I ought in justice to add, however, that in 1850 Mr. de Lamartine said, in his Counsellor of the People, that he was now for two houses, and that he had been for one house in 1848 because he wanted a dictatorial power; and, added he, La dictature ne se divise pas. But how can a dictatorship be called undivided, when it belongs to a house composed of eight hundred members? And must not, in the nature of things, a division of execution always take place? It is surprising that something temporarily desired for a dictatorship should have been insisted upon by Mr. Lamartine with so much vehemence as an integral part of the fundamental law, or was peradventure the constitution of 1848 intended not to last?

they are mentioned as guarantees, to enter upon details; but I cannot dismiss them without recommending them to the serious and repeated attention of every one who may have looked upon them as accidents rather than essentials.

To have a measure discussed entirely de novo by a different set of men, with equal powers, and combined upon a different basis—this, and the three readings, with notice and leave of bringing in, and the going into committee before the third reading, have a wonderful effect in sifting, moderating, discovering, and in enlightening the country. Take the history of any great act of parliament or congress, and test what has been asserted. This effect of two houses, and the rules of procedure just mentioned, are alone like so many pillars to the fabric of liberty.

The question has indeed been asked, why should there be two chambers? What philosophical principle is there enshrined in this number? All we would answer is, that it has been found that more than one house is necessary, and more than two is too many. Three and even four houses belong to the mediæval estates and to the deputative, not to the modern national representative system. The mischief of three houses is as great as that of three parties. The weakest becomes the deciding one by a casting vote. And one house only belongs to centralization. It is incompatible with a government of a co-operative character, which we hold to be the government of freedom.

I cannot agree with the opinion expressed by lord Brougham in his work on Political Philosophy, that

it is essentially necessary that the composition of the two houses should be based upon entirely different principles, meaning that the one ought not to be elective, and that it ought to represent entirely different interests. A thorough discussion of this subject belongs to the province of politics proper, but I ask the reader's indulgence for a few moments.

If the two houses were elected for the same period and by the same electors, they would amount in practice to little more than two committees of the same house; but we want two bona fide different houses, representing the impulse as well as the continuity, the progress and the conservatism, the onward zeal and the retentive element, which must ever form integral elements of all civilization. One house, therefore, ought to be large; the other, comparatively small and elected or appointed for a longer time. Now as to the right of sitting in the smaller or upper house, of longer duration, there are different modes of bestowing it. It may be hereditary, as the English peers proper are hereditary; or the members may have seats for life and in their personal capacity, as the French peers had under the charter. This is probably the worst of all these methods. It gives great power to the crown and keeps the house of peers in a state of submission, which hereditary peers do not know. Or, again, the members may be elected for life by a class, as Scottish representative peers are elected by the Scottish nobility for the British house of peers; or the members may be similarly elected for one parliament alone, as the Irish peers are that sit in parliament; or the people

may elect senators for life, or for a shorter time, as the senators of Belgium, and all the senators in our states, are; or, lastly, the members of the house we are speaking of may be elected, not by the people in their primary capacity, but by different bodies, such as our senators are. The senators of the United States are elected by the states, as states, consequently an equal number of representing senators is given to each state irrespective of its size or population.

It would be very difficult to pronounce the one or the other principle absolutely the best, without reference to circumstances, and we are sure that lord Brougham would be the last man that would maintain the absolute necessity of having a hereditary peerage wherever two houses exist. As to the classes, or interests, however, which ought to be represented, I would only state that the idea belongs to the middle ages, and, if adopted, would lead at once to several estates again. It is hostile to the idea of two houses. Why represent the interests of the nation in two houses? Are there not more broad national interests? It would be difficult indeed to understand why the landowner in present England should have his house and not the manufacturer, the merchant, the wide educational interest, the sanitary interest, the artisan, the literary interest with the journalism. The excellence of the bicameral system in our representative (and not deputative) government does not rest on the representation of different interests, but on the different modes of composing the houses and their different duration.

On the other hand we may observe that, when in 1848 the French established a legislature of one house, they found themselves obliged to establish, by the constitution, a council of state, as the Athenians established the council (boulc) to aid the general assembly (ecclesia). The French knew, instinctively if not otherwise, that a single house of French representatives would be exposed to the rashest legislation. The council of state, however, is not public, the members are appointed by the executive; in one word, what was gained? Much indeed was lost.

Whether the representative is the representative of his immediate constituents or of the nation at large, whether he ought to obey instructions sent him by his constituents—on these and other subjects connected with them I have treated at great length in my Political Ethics. I shall simply mention here the fact that civil liberty distinctly requires that the representative be the representative of his political society at large, and not of his election district. The idea that he merely represents his immediate constituents is an idea which belongs to the middle ages and their deputative system,—not to our far nobler representative system.

36. I hesitate whether I ought to enumerate the Veto as an Anglican guarantee of liberty. I hold it to be in our political system a check upon the legislature, and therefore a protection to the citizen; one that can be abused and probably has been abused, but everything intrusted to the hands of

man may be abused. The question concerns its probable average operation.

Although the veto is thus acknowledged to be an important part of our polity, it may be said no longer to exist in England. It has been mentioned before that, should parliament pass a bill from which the ministers believe the royal assent should be withheld, they would not, according to present usage, expose the king to an open disagreement with the lords and commons, but they would resign, upon which an administration would be formed which would agree with parliament.

Yet we have received the veto from England, and it is all these considerations which make me hesitate, as I said before, to call the veto an Anglican guarantee.

The use of the veto can become very galling, and at such times we often find the party whose favorite measure has been vetoed vehemently attacking the principle itself. It was thus the whigs in the United States earnestly spoke and wrote against the principle, when general Jackson declined giving his assent to some measures they considered of great importance, and the democrats were loud in favor of the veto power because it had been used by a president of their own party.

A great deal of confusion in treating this whole subject has arisen from the ill-chosen word veto, after the term used by the Roman tribune. The veto of the Roman tribune and the so-called modern veto have nothing in common. The tribune could veto

indeed. When a law was passed he could wholly or partially stop its operation. The dispensatory power claimed by the Stuarts would have been a real veto. The chief of the state in the United States or England, however, has no such power. The law, so soon as it is law, says to every one: Hands off. What we call the veto power, is in reality a power of an abnuent character, and ought to have been called the declinative. But this declinative is possessed in a much greater degree by each house against the other. To make a bill a law the concurrence of three parties is required—that of the two houses and the executive, and this concurrence may be withheld, otherwise it would not be concurrence.

It is a wise provision in our constitution which directs that a bill not having received the president's approval nevertheless passes into a law if two-thirds of congress adhere to the bill. Many of our state institutions do not require the concurrence of the executive. This is not felt in many cases as an evil because the action of the states is limited, but in my opinion it would be an evil day when the veto should be taken from the president of the United States. It would be the beginning of a state of things such as we daily observe with our South American neighbors. The American conditional veto is in a great measure a conciliatory principle with us, as the refusal of supplies is of an eminently conciliatory character in the British polity.

The only case in which our executives have a real vetitive power, is the case of pardon, and most unfortunately it is used in an alarming degree, against

the supremacy of the law and the stability of right —both essential to civil liberty. I consider the indiscriminate pardoning, so frequent in many parts of the United States, one of the most hostile things, now at work in our country, to a perfect government of law. In the only case, therefore, in which we have a real veto power, we ought greatly to modify it.[15]

[15] I shall append a paper on the subject of pardoning—a subject which has become all-important in the United States.

CHAPTER XVIII.

INDEPENDENCE OF THE JUDICIARY, THE LAW, JUS, COMMON LAW.

37. One of the main stays of civil liberty, and quite as important as the representative principle, is that of which the independence of the judiciary forms a part, and which we shall call the independence or the freedom of the law—of jus and justice.[1] It is a great element of civil liberty and part of a real government of law, which in its totality has been developed by the Anglican tribe alone. It is this portion of freemen only, on the face of the earth, which enjoys it in its entirety.

In the present case I do not take the term Law in the sense in which it was used when we treated of the supremacy of the law. I apply it now to everything that may be said to belong to the wide department of justice. I use it in the sense in which the Angli-

[1] The lack of a proper word for *jus*, in the English language, induced me to use it on a few occasions in the Political Ethics. The Rev. Dr. W. Whewell seems to have felt the same want, and uses it to designate a whole division of his work on the Elements of Morality, including Polity, London, 1845, as he also adopted the word *jural* first used in the Political Ethics.

can lawyer takes it when he says that an opinion, or decision, or act is or is not law, or good law—an adaptation of the word peculiar to the English language. It is not the author's fault that Law must be taken in one and the same essay, in which philosophical accuracy may be expected, in two different meanings.

The word Law has obtained this peculiar meaning in our language, otherwise so discriminating in terms appertaining to politics and public matters, chiefly from two reasons. The first is the serious inconvenience, arising from the fact that our tongue has not two terms for the two very distinct ideas which in Latin are designated by Lex and Jus, in French by Lois and Droit, in German by Gesez and Recht; the second is the fact, of which every Anglican may be proud, that the English jus has developed itself as an independent organism, and continues to do so with undiminished vitality. It is based upon a common law, acknowledged to be above the crown in England, and to be the broad basis of all our own constitutions—a body of law and "practice," in the administration of justice, which has never been deadened by the superinduction of a foreign and closed law, as was the case with the common law of those nations that received the civil law in a body as authority for all unsettled cases. The superinduction of the Latin language extinguished the living common languages of many tribes, or dried up the sources of expansive and formative life contained in them.

The independence of the judges is a term hap-

pily of old standing with all political philosophers who have written in our language; but it will be seen that the independence of the judiciary, by which is meant generally a position of the judge independent of the executive or legislative, and chiefly, his appointment for life or immovability by the executive, and frequently, the prohibition of a decrease or increase of his salary after his appointment has taken place—that this independence of the judiciary forms but a part of what I have been obliged to call the far more comprehensive Independence of the Law.[2]

The independence of the law, or the freedom of jus, in the fullest and widest sense, requires a living common law, a clear division of the judiciary from other powers, the public accusatorial process, the independence of the judge, the trial by jury, and an independent position of the advocate. These subjects will be treated in the order in which they have been enumerated here.

A living common law is, as has been indicated, like a living common language, like a living common architecture, like a living common literature. It has the principle of its own organic vitality, and of formative as well as assimilative expansion within itself. It consists in the customs and usages of the

[2] When therefore I published a small work on this subject, during my visit to Germany, in 1848, I called it *Die Unabhängigkeit der Justiz oder die Freiheit des Rechts*, Heidelberg, 1848. Literally translated this would be The Independence of Justice and Freedom of the Law. *Justiz* in German, however, does not mean the virtue justice, but the administration of justice; and *Recht* means, in this connection, *jus*, not a single *jus*, but the body of rights and usages, laws and legal practice of a people.

people, the decisions which have been made accordingly in the course of administering justice itself, the principles which reason demands and practice applies to ever varying circumstances, and the administration of justice which has developed itself gradually and steadily. It requires, therefore, self-interpretation or interpretation by the judiciary itself, the principle of the precedent and "practice" acknowledged as of an authoritative character, and not merely winked at; and, in general, it requires the non-interference of other branches of the government or any dictating power. The Roman law itself consisted of these elements and was developed in this manner so long as it was a living thing.

The common law acknowledges statute or enacted law in the broadest sense, but it retains its own vitality even with reference to the lex scripta in this, that it decides by its own organism and upon its own principles, on the interpretation of the statute when applied to concrete and complex cases. All that is pronounced in human language requires constant interpretation, except mathematics.[3] Even if the English law should be codified, as at this moment the question of codification has been brought before parliament, the living common law would lose as little of its own inherent vigor and expansiveness, as it has lost in Massachusetts or New York by

[3] Hence their own peculiar power and their peculiar narrowness. I have treated of this subject and the unceasing necessity of interpretation at the beginning of my Principles of Interpretation and Construction in Law and Politics, Boston, 1839.

the "Revised Statutes" of those states. The difference between such a code in England and the codes which have been promulgated on the continent of Europe, would always consist in this, that the English digest would have a retrospective character. It would be the garnering of a crop; but the living orchard is expected to bear new fruits, while it was the pronounced intention of the promulgators of continental codices to estop all interpretation, for which end it was ordained, analogously to the rule of the civil law, that recourse should be had in all doubtful cases to the legislator, that is to the emperor or king, or to the officer appointed by the monarch for that purpose.[4]

[4] I cannot avoid referring again to my work on Hermeneutics or Principles of Interpretation and Construction, where this subject is repeatedly treated of, as it forms one of vital importance in all law, liberty, politics and self-government. I have given there instances of prohibited commenting and even lecturing, in the universities, on the codes. This is the pervading spirit of the civil law as it was adopted by modern nations. It is a necessary and combined consequence of the principle contained in the Justinian code itself, namely, that the emperor is the executive, legislator and all; that, therefore, no self-development of the law, such as had indeed produced the Roman jus, could any longer be allowed; and of the fact that the Roman law was adopted as a finished system from abroad. The principle of non-interpretation by the courts prevails for the same reasons in the canon law. I give the following as an interesting instance.

The bull of pope Pius IV., 26 January, 1564, sanctioning and proclaiming the canons and decrees of the council of Trent, contains also the prohibition to publish interpretations and dissertations on these canons and decrees. The words of the bull, which correspond exactly to the authority reserved by government concerning the understanding of the law, where codes have been intro-

Judge Story has very clearly expressed what a code, with reference to the English law, ought to be. He says: "Notwithstanding all that is said to the contrary, I am a decided friend to codification, so as to fix in a text the law as it is, and ought to be, as far as it has gone, and leave new cases to furnish new doctrines as they arise and reduce these again at distant intervals into the text."[5]

Locke on the other hand expresses the view which is almost always taken by philosophers who stop short with theory and do not add the necessary considerations of the statesman and friend of practical liberty, when he proposed the following passage in the constitution he drew up for South Carolina: "Since multiplicity of comments as well as of laws have great inconvenience, and serve only to obscure and perplex; all manner of comments and expositions, on any part of these fundamental constitutions,

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duced, and the common law principle is not acknowledged, are these:

"Ad vitandam præterea perversionem et confusionem, quæ oriri posset, si unicuique liceret, prout ei liberet, in decreta Concilii commentarios et interpretationes suas edere, Apostolica auctoritate inhibemus omnibus—ne quis sine auctoritate nostra audeat ullos commentarios, glossas, admonitiones, scholia, ullumve interpretationis genus super ipsius Concilii decretis, quocunque modo, edere, aut quidquam quocunque nomine, etiam sub prætexta majoris decretorum corroborationis, aut executionis, aliove quæstio colere, statuere."

The papal bull goes on declaring that if there be any obscurity in the decrees the doubter shall ascend to the place which the Lord has appointed, viz. the apostolic see, and that the pope will solve the doubts.

[5] Life and Letters of Judge Story, vol. i. p. 448.

or on any part of the common or statute laws of Carolina, are absolutely prohibited."[6]

This is quite as strong as the Bavarian code or the pope's decree, mentioned in a previous note. The fact is simply this: on the one hand analyzing and systematizing is one of the very parts of humanity, and development, growth, assimilation and adaptation are the very elements of life. Man has to lay out his road between the two, and of course will incline more to the one or the other according to the bias of his mind or the general course of reasoning common to his peculiar science or profession.

If interpretation, which takes place when the general rule is applied to a concrete case, is not left to the law itself, the law ceases to have its own life, and the citizen ceases strictly to live under the law. He lives under the dictating or interfering power, because each practical case, that is each time that the rule passes over from an abstraction into a reality, is subject to that power, be it, as it generally is, the executive, or the legislative. This does not exclude what is called authentic interpretation, or interpretation by the legislature itself, for future cases. Accurately speaking, authentic interpretation is no interpretation, but rather additional legislation. We would distinctly exclude, however, retrospective authentic interpretation; for this amounts, indeed, to an application of the law by the legislature, and is incompatible with a true government of law. It is obvious that the same holds with reference to all

[6] Locke's Constitution for South Carolina, 1669, paragraph 80.

power, whether monarchical or popular. The law must be the lord and our "earthly god," and not a man, a set of men, or the multitude.

As to the principle of the precedent, it is one of the elements of all development, contradistinguished to dictation and mere command. Everything that is a progressive continuum requires the precedent. A precedent in law is an ascertained principle applied to a new class of cases, which in the variety of practical life has offered itself. It rests on law and reason, which is law itself. It is not absolute. It does not possess binding power merely as a fact, or as an occurrence. If that were the case, Anaximander would have been right when he said that Themis was standing by the throne of Alexander to stamp with right and justice whatever he did. Nor is it unchangeable. A precedent can be overruled. But again, it must be done by the law itself, and that which upsets the precedent cannot otherwise than become, in the independent life of the law, precedent in turn.[7]

The continental lawyers have a great fear of the precedent, but they forget that their almost worshipped Roman law itself was built up by precedent. Indeed they do not comprehend the nature of the precedent, its origin and its power, as an element of

[7] Dr. Greenleaf published, in Portland, Maine, 1821, A Collection of Cases overruled, doubted, or limited in their Application, taken from American and English Reports. Several subsequent editions have been published, with additions, for which Dr. Greenleaf however has declared himself irresponsible.

a free jus. They frequently point to the fact that the most tyrannical acts of the Stuarts were founded upon real or presumed precedents, and that crown lawyers helped in the nefarious work; but they forget that British liberty was also rescued from despotism in a great measure by lawyers footing on the common law. Nothing gave to the popular party more strength than the precedent. On this particular subject, and on the nature of the precedent and the distinction of the legal from the executive precedent, as well as the eminent danger of regarding a mere fact as a precedent, I have fully treated in two other works.[8] The present work does not permit me to enter more fully on the subject, or to repeat what I have there said. A truth of the weightiest importance it remains, that liberty and steady progression require the principle of the precedent in all spheres. It is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. It is the weapon by which interference is warded off. The principle of the precedent is eminently philosophical.

Every great idea has its caricature, and the more unfailingly so, the more actively and practically the idea is working in real life. It is, therefore, natural that we should meet with caricatures of the precedent especially in England, as the English have been obliged to build up slowly and gradually that system

[8] In my Ethics, and especially in my Principles of Legal and Political Interpretation and Construction.

of liberty and the independence of the law, which we have carried over to this country in a body, and which we have farther developed. When we read that at every opening of a new parliament a committee of the commons proceeds—lantern in hand—to the cellar under the house, to see no modern Guy Fawkes has collected combustibles there for the purpose of exploding parliament, because the thing had been done under James the First, we must acknowledge the procedure more pitiful, though far more innocent, than Alexander's dragging the body of the gallant Betis at the wheels of his chariot round the walls of Gaza, in order to follow the precedent of his progenitor Achilles. But this *is* caricature, and it is unphilosophical to point at the case, in order to prove the futility or mischief of the precedent. It is a proper subject for Punch to exterminate such farces, not for us to discuss them, any more than seriously treating the French publicist who, speaking of the intrigues of the legitimists, lately said that the elder Bourbons should remember that Louis Napoleon had *created for himself* a formidable precedent, in the spoliation of the Orleans branch. Nero's fiddle might at this rate legalize the sentimental burning of any capital.

The precedent has been called judge-made law, and as such deprecated. A more correct term would be court-evolved law. If the precedent is bad, let it be overruled by all means, or let the legislature regulate the matter by statute. Bacon's dictum, already quoted, that the worst of things is the apotheosis of error, applies to the bad precedent as

forcibly as to any other error, but the difficulty is not avoided by simply disavowing the precedent. Some one must decide. Now is it better that government or a "minister of justice" shall lay down a rule in the style of the civil law, or that the principle shall be decided in court by the whole organism established to give reality and practical life to justice, and in the natural course of things?

Continental jurists, when they compare the civil law with the common law, always commit this error, that they merely compare the contents of the two great systems of law on which I shall presently say a few words; whilst they invariably forget to add to the comparison this difference, that the civil law, where it now exists, has been introduced as a dead and foreign law; it is a matter of learned study, of antiquity; while common law is a living, vigorous law of a living people. It is this that constitutes more than half its excellence; and though we should have brought from England all else, our liberty, had we adopted the civil law, would have had a very precarious existence. Judge Story relates, "as perfectly well authenticated, that president (John) Adams, when he was vice-president of the United States, and Blount's conspiracy was before the senate, and the question whether the common law was to be adopted was discussed before that body, emphatically exclaimed, when all looked at him for his opinion as that of a great lawyer, that if he had ever imagined that the common law had not by the revolution become the law of the United States under the new government, he never would

have drawn his sword in the contest. So dear to him were the great privileges which that law recognized and enforced."[9]

The civil law excels the common law in some points. Where the relations of property are concerned, it reasons clearly and its language is admirable, but as to personal rights, the freedom of the citizen, the trial, the independence of the law, the principles of self-government, and the supremacy of the law, the common law is incomparably superior.[10]

Nor has the civil law remained without its influence, but it never superseded the common law. The common law remained a living system, and it assimilated to itself parts of the civil law as it assimilates any other thing. For instance, judge Story, in one of his essays, says: The doctrine of bailments, too, was almost struck out at a single beat by lord Holt,[11] who had the good sense to incorporate into the English code that system which the text and the commentaries of the civil law had already built up on the continent of Europe.[12]

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[9] Page 299, vol. i. Life and Letters of Joseph Story.

[10] The civil law, a law of wisdom but of servitude; the law of a great commercial empire, digested in the days of Justinian, and containing all the principles of justice and equity suited to the relations of men in society with each other; but a law under which the head of government was "Imperator Augustus, legibus solutus."—John Quincy Adams, seventh president of the United States, in a letter to Judge Story, page 20, vol. ii. Life and Letters of Judge Story.

[11] The case of Coggs v. Bernard, 2 ed. Raym. R. 909—note by judge Story.

[12] Story's Miscellaneous Writings, p. 224.

The common law is all the time expanding and improving. I have given a very interesting instance of this fact, in the law of whalers, which has developed itself among the hardy hunters of the Pacific,[13] and has been acknowledged, when the proper occasion offered itself, in the courts of Massachusetts.[14]

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[13] In a similar, though in a far less interesting way, I observe that a whole code has established itself for the extensive sale of books at auction in London. It is a real specimen of the genius of one part of common law.

[14] See Article Common Law, in the Encyclopædia Americana. It was written, as many others on subjects of law, by my lamented friend, judge Story. An opportunity has never offered itself to me publicly to acknowledge the great obligation under which I am to that distinguished jurist, for the assistance he most readily and cheerfully gave me in editing the Americana. I shall never forget the offer he made to contribute some articles when I complained of my embarrassment as to getting proper articles on the main subjects of law, for my work intended for the general reader. Many of them were sent from Washington, while he was fully occupied with the important business of the supreme court. He himself made out the list of articles to be contributed by him, and I do not remember ever having been obliged to wait for one. The only condition this kind-hearted man made was that I should not publish the fact that he had contributed the articles in the work until some period subsequent to their appearance. They have met with much approbation, and I hope I am not guilty of indiscretion, if I state here that another friend, a distinguished orator and lawyer, the Hon. William C. Preston, has repeatedly expressed his admiration of them.

The contributions of judge Story to the Americana "comprise more than 120 pages, closely printed in double columns. But a higher interest than that growing out of their intrinsic worth belongs to them. They were labors dedicated purely to friendship, and illustrate a generosity which is as beautiful as it is rare." To these words, copied from p. 27, vol. ii. of Life and Letters of

Joseph Story, where a list of all his contributions may be found, I may add that judge Story made his offer at a time when he to whom it was made was known to very few persons in this country, and had but lately arrived here; and that he took at once the liveliest and most active interest in the whole enterprise, and contributed much to cheer on the stranger in his arduous task. I may be permitted to add that the friendship then commenced steadily grew until death removed the excellent man.

CHAPTER XIX.

INDEPENDENCE OF JUS, SELF-DEVELOPMENT OF LAW CONTINUED. ACCUSATORIAL AND INQUISITORIAL TRIALS. INDEPENDENCE OF THE JUDGE.

38. The practice or usage of the administration of justice belongs of right to the development of that administration itself, avowedly so, and not merely by connivance.[1]

In countries in which this important principle is not acknowledged, certain changes, produced by "practice," were and are, nevertheless, winked at, and happily so, because legislation has neglected to make the necessary changes, and humanity will not be outraged. Thus, in German countries, practice had abolished the application of the torture and fearful punishments, demanded by positive law, long before they were abolished by law. But it was an exception only demanded by common sense and by a general feeling of humanity.

[1] Lord Mansfield, in a note to a Scottish judge, who had asked his advice as to the introduction of trial by jury in civil cases into Scotland, has this remark: "Great alterations in the course of the administration of justice ought to be sparingly made and by degrees, and rather by the court than by the legislature." Lord Campbell's Ch. Justices of England, vol. ii. p. 554.

The common law of the Anglican tribe, however, assigns the right of development to the courts. It is part and parcel of the common law. Innumerable instances and of almost daily occurrence might be given.

The following instance is given here simply because the writer happens to think first of it, and because it seems to be an apt illustration.

When a court is directed to sit two weeks, and a jury, being summoned to act for the first week of the term, and having retired to consider of their verdict before midnight of Saturday, in the first week, return into court after midnight, and before daylight of Sunday; shall or shall not their verdict be received and published? Shall it be rejected on the ground that Sunday is a dies nonjuridicas? This question was lately decided in South Carolina, not by applying for information to a "minister of justice," or "the emperor," as the civil law directs, but by itself, upon the principle of vital self-sufficiency, by inquiry into its own principles, and an examination of precedents in the whole range of English law, and of statute laws, if there were any exactly applying to the case under consideration.[2]

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[2] The learned "opinion" of the court of errors was delivered by judge Wardlaw, Hiller *v.* English, 4 Strokhart's Reports, Columbia, S. C. 1850. While I was writing this, the supreme court of Massachusetts decided that the "squeeze of the hand" of a dying person, unable to speak, but having been made aware of the fact that the pressure would be taken as an affirmative, may be taken as "a dying declaration," though with caution.—National Intelligencer, Washington, May 21, 1853.

This principle of self-development is important likewise with reference to a clear division of the judiciary from other branches of the public power. The law is not independent, and consequently the citizen not free, where aught else than the administration of justice belongs to the court, and where anything that belongs to the administration of justice is decided by any one but the courts; where things are decided by aught else than the natural course of law, and where, as has been stated, interpretation or application belongs to any one else than to the judiciary.[3] Hence there ought to be no pressure from without, either by a Stuart sending for the judges to tamper with them, or to ask them how they would decide a certain case if brought before them, or by a multitude assuming the name of the people. No judge ought to give his opinion before the practical case has come on and been discussed according to law, either to monarch, political party, or suitor. He is an integral part of the Law, but only a part, which must not be disconnected from the Law. There must not be what are called in France *jugements administratifs*, nor any extraordinary or exceptional courts, as has been mentioned; no judgments by extraordinary com-

[3] Even the Constitution of the French Republic of 1848 said, article 89:

"Conflicts of privileges and duties between the administrative and judicial authority shall be regulated by a special tribunal composed of members of the court of cassation and of counsellors of state, to be appointed, every three years, in equal number, by the respective bodies to which they belong. This tribunal shall be presided over by the minister of justice."

missions, nor any decisions by the executive about the application of the law. The following instance is here given, not because the case is of itself important, but because it exhibits the principle with perfect clearness, and because it refers to a royal proclamation—an executive act. The English government had published in 1852 a proclamation against the public appearance of Roman catholics in their religious vestments; and the well-known father Newman asked the secretary for the home department whether this royal proclamation must be considered as directed also against the appearing in "cassocks and cloaks" in the streets of Birmingham, where the Roman catholics had thus been in the habit of appearing "under legal advice" for full four years. The answer of secretary Walpole, one of the ministers, was this:

"I am to inform you, that her majesty's proclamation is directed against all violations of the 26th section of the statute 10th George IV. c. 7, and that if you feel any difficulty in the construction of the enactment, your proper course will be to consult your legal adviser. The secretary of state would not be justified in pronouncing an opinion on the question submitted to him; for if any doubt exists on the point, the decision of it must rest with the courts of law, and not with the government."[4]

There is no country except ours and England where a similar answer would, or indeed could, have been given. Everywhere else it would have been

[4] The letter is dated June 24, 1852. London Spectator, July 3, 1852.

called a destruction of the principle of unity in the government. We call it a small but choice cabinet specimen of a most noble principle, forming an element of our very polities. Nor must it be forgotten that it was a tory government which made this exclusively Anglican reply. The reader will remember the directly opposite principle declared in the bull of pope Pius IV., quoted before, as well as Locke's provision in his constitution for South Carolina.

39. The public accusatorial trial is another element of the independence of the Law, as it is one of the efficient protections of the citizen. By accusatorial process is understood here, not what is generally understood by the term of trial by accusation (that is, individual accusation),[5] but that penal trial which places the court wholly above the two parties in criminal matters, as the judge is everywhere placed, at least theoretically so, in civil cases; although the two parties be the prosecuting state or government on the one hand, and the indicted person on the other. The accusatorial trial is thus contradistinguished from the inquisitorial trial, which came into use through the canon law, and especially through the unhallowed witch trials. In it, the judge inquires, investigates, in one word, is the prosecuting party as well as the judging, and in some cases he is even expected to be likewise the protecting party of the indicted prisoner, thus uniting a triad of functions

[5] There was no public prosecutor in Rome. An individual appeared as accuser, and formed throughout the trial the prosecuting party. See article Criminal Law, in the Encyclop. Americ.

within himself which amounts to a psychological incongruity.[6]

It may be said that the public accusatorial trial has prevailed or been aimed at by all free nations, modern and ancient. We, the English, the Netherlanders, the Norwegians, the Swedes, the French, since the first revolution,[7] the Germans, in the earlier times the Greeks and Romans—all have or had it, but it has nowhere been carried out with that consistency which we find in the Anglican penal trial.

The penal trial or procedure is quite as important as the criminal law itself, and with reference to protection, to liberty, to a pervading consciousness of manly rights, it is even more so. This is the chief reason which explains why the English, the freest nation of Europe, endured so long one of the worst and most unphilosophical body of criminal laws—so sanguinary in its character that the monstrosity came to pass, of calling all punishments not capital, secondary punishments, as if death were the current penal coin, and the rest of punishments merely the copper to make small "change." The English public accusatorial process, since the expulsion of the Stuarts, contained great guarantees of public security, even while those deficiencies yet existed which have

[6] See Feuerbach on the Jury.

[7] Under the present absolutism, the trial is of course at the mercy of the executive, if the government has any interest in the matter; that is, punishments are inflicted without trial, and certain offences are punished summarily, although punished with severe visitation of the law.

been remedied of late, thanks to sir Samuel Romilly and sir Robert Peel.

We consider that the accusatorial procedure, carried out with consistency and good faith, requires that the accusation itself be not made by the executive, but upon information, by whomsoever made, through an act, which itself includes a guarantee against frivolous or oppressive accusation; for, as has been stated, trial itself, though followed by acquittal, is a hardship. Hence the importance of a grand jury, and the constitution of the United States ordains that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." The French penal trial contains no such guarantee. It has passed over into the fundamental laws of all our states. It is further necessary that the whole trial be bona fide public and remain bona fide accusatorial. Hence no secret examinations of the prisoner by the public prosecutor before the trial, the results of which are to be used at the trial, ought to take place, as this actually forms part of the French penal trial. On the other hand, the judge should remain, during the trial, mere judge, and never become inquirer or part of the prosecution, as this is likewise the case in France. Nor must the prisoner be asked to incriminate himself. All this belongs to the inquisitorial trial. The indictment must be clear, and the prosecuting officer must not state his whole case before the witnesses are examined, nor be allowed to bring in irrelevant matter. Lastly, full scope must be given to counsel for prisoner. In all these details most of the accusa-

torial trials except the Anglican are more or less, and some sadly deficient.

40. The independence of the law or administration of justice requires the independence of the judge. All the guarantees we have mentioned support the judge in his independence, and are requisite for it. He cannot be so without a distinct separation of the judiciary from the other branches of the government, without a living self-sustaining jus, or without the accusatorial procedure. But more is necessary.

The appointment, the duration in office and the removal must be so that the judge feels no dependence upon any one or anything, except the law itself. This ought to be the case at least in as high a degree as it is possible for human wisdom to make it, or for human frailty to carry out.[8] Where there is a pervading publicity in the political life, an independent bar and self-sustaining jus and administration of justice, with responsible ministers of the executive or a responsible chief magistrate, carefully limited in his power, there is probably as little danger of having bad judges, in giving the appointing power to the executive, especially if, as is the case with us, the senate must confirm the appointment, as in any other mode of appointing—indeed, far less danger than in those other modes which so far have been adopted in many of our states. Where peculiar fitness, peculiar skill and learning and peculiar aptitude are requisite, it is for many psychological

[8] See Federalist, No. lxxviii. and sequ.

reasons the best to throw the responsibility of appointing on a few or one, so that it be concentrated, provided these few or the one are made to feel by a proper organization that they are responsible to the public. It is unwise to give such appointments to irresponsible bodies, or to numerous bodies, which, according to the universal deception of a divided responsibility, are not apt to feel the requisite pressure of responsibility, and necessarily must act by groups or parties.

Laws ought to be the result of mutually modifying compromise; many appointments ought not. Election in such cases, by a large body, would lead to few efficient and truly serviceable ambassadors, and it has long been settled by that nation, which probably knows most about the most efficient appointment of university professors, the Germans, that their appointment by election, either by a numerous corporation or by the professors of a university themselves, is to be discarded.[9]

These remarks apply to the appointment of judges by legislatures. As to the election of judges by the people themselves, which has now been established in many of the United States, it is founded, in my opinion, on a radical error—the confusion of mistaking popular power alone for liberty, and the idea that the more the one is increased, in so much a higher degree will the other be enjoyed. As if all

[9] The remarks of that wise philosopher, sir William Hamilton, on the election of professors, in his minor works, apply, so far as I remember them now, with equal force, and probably with greater strength, to the election of judges.

power, no matter what name be given to it, if it sways as power alone, were not absolutism, and had not the inherent tendency, natural to all power, to increase in absorbing strength! All despotic governments, whether the absolutism rests with an individual or the people (meaning of course the majority), strive to make the judiciary dependent upon themselves. Louis the Fourteenth did it, and every absolute democracy has done it. All essential, practical liberty, like all sterling law itself, loves the light of common sense and plain experience. All absolutism, if indeed we except the mere brutal despotism of the sword, which despises every question of right, loves mysticism—the mysticism of some divine right. The monarchical absolutists do it, and the popular absolutists do the same. But there is no mystery about the word People. People means an aggregate of individuals to each of whom we deny any divine right, and to each of whom,—I, you, and every one included,—we justly ascribe frailties, failings, and the possibility of subordinating judgment and virtue to passion and vice. Each one of them separately stands in need of moderating and protecting laws and constitutions, and all of them unitedly as much so. Where the people are the first and chiefest source of all power, as is the case with us, the electing of judges, and especially their election for a limited time, is nothing less than an invasion of the necessary division of power, and a bringing of the judiciary within the influence of the power-holder. It is therefore a diminution of liberty, for it is of the last importance to place the judge between the

chief power and the party, and to protect him as the independent, not the absolute, organ of the law.

Those of our states, which have of late given the appointment of judges to popular elections, labor under a surprising inconsistency; for all those states, I believe, exclude judges from the legislature. They fear "political judges," yet make them elective. Now, everything electional within the state is necessarily political. If the physician of a hospital, the captain of a vessel, or the watchmaker to repair our timepieces, were elective by the people, they would, to a certainty, in most cases, be elected, not according to their medical, nautical, or horological skill and trustworthiness, but on political grounds. There is nothing reproachful in this, to the people at large. It is the natural course of things. Even the members of the French Academy have been elected on political grounds, when the government took a deep interest in the election.

The question whether judges ought to sit in the house of commons was recently before parliament.[10] There are many English authorities on the American side of the question, at least so far as the house of commons is concerned. Lords Brougham and Langdale, sir Samuel Romilly and Mr. Curran may be mentioned as such. On the other hand, Mr. Bentham was of opinion that there was so little legislative

[10] See Mr. Macaulay's speech in the commons, June 1, 1853, on a bill to exclude judges from the house of commons. The chief question was to exclude the vice-chancellor from a seat in the commons. Mr. Macaulay is decidedly in favor of letting judges sit in the commons.

talent in the world that no place fits so well for legislative business as the bench, and that it was suicidal to exclude the judges. The questions we have to answer are these: Does experience teach us that judges, having a seat in the legislature, where they needs must belong to one or the other party, allow themselves to be influenced on the bench? In England, there are striking instances that, in modern times, they may resist their own political bias, in Eldon, Thurlow, Mansfield, and Hardwicke. But this remark extends to common cases only. Were they, or would they have been utterly unbiased in all those trials that may be called political? The pervading character of self-government and independence of law has certainly given to the bench a traditional independence. But how long has this existed, and what times may not possibly recur? It appears, throughout the Life and Correspondence of justice Story, that so soon as he was elevated to the bench he not only avoided being mixed up with politics in any degree whatsoever, but even the mere semblance of it. He seems to have been peculiarly scrupulous on this point.

The second question we must answer is this: How does the judge get into the legislature? Can he do so without electioneering? The more popular a representative government is, the more necessary the immediate contact between the candidate and the constituents becomes. And who wishes to see the judge, that ought to be the independent oracle of the law, in this position?

Mr. Bentham's observation regarding the general

unfitness of the world at large for legislative business, and the peculiar fitness of judges for it, requires also some modification. How is it with sanitary laws? Few physicians sit in legislatures, and those that have a seat are not placed there because they are at the head of their profession. We must necessarily trust to the general influence under which a legislature legislates. As to the fitting of the bench for legislative business, it is undoubtedly true in regard of a large class of that business; but we must not forget that the judge is and ought to be a peculiar representative of conservatism; which nevertheless unfits him, in a measure, for all that business which is of a peculiarly progressive character. Almost all law reforms have originally been resisted by the bench. It is not in all cases to be regretted. They are the breaks, which prevent the vehicle from descending too fast on an inclined plane; but the retarding force must certainly be overcome in many cases, however serviceable it may be that the action of overcoming them may have been modified by them in its very process.

I cannot help believing, then, that upon the whole judges ought to be excluded from the legislature; they certainly ought to be so with us. To allow them a seat in concentrated governments as in France would be calamitous. But this very reason is, à fortiori, one why judges ought not to be elected by the people.

We are frequently asked whether the elective judiciary works badly? The answer is, that a ball rolls a while from the first impulse given to it. So

far old judges have generally been elected under the new system; and we would ask on the other hand: Has the former system worked badly? I believe, then, that elective judges are a departure from substantial civil liberty, because it is a departure from the all-important independence of the law.

It is necessary to appoint judges for a long period, and the best is probably for life, with a proper provision which prevents incapacity from old age.[11] The experience which is required and the authority he must have, although unsupported by any material power, make this equally desirable, as well as the fact, that the best legal talents cannot be obtained for the bench, if the tenure amounts to a mere interruption of the business of the lawyer.[12] The constitution of the French republic of 1848, so democratic in its character, decrees the tenure of judicial office to be for life.[13]

It is for a similar reason of public importance that the salary of the judges be liberal, which means that, combined with the honor attached to a seat on the bench, it be capable of commanding the fairest legal talents, and of inciting the ambition of the bench. The judge must enjoy, as has been stated, proper independence; but he is dependent, and in the worst degree so, if he is conscious that the best lawyers before him

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[11] See Political Ethics, under the heads of *Judge*, *Independence of the Judiciary*.

[12] I would refer the reader, on all these subjects, to judge Chambers's speech on the Judicial Tenure, in the Maryland Convention, Baltimore, 1851.

[13] This constitution will be found in the appendix.

are superior to him in talent, experience, learning and character. None but such inferior men can be obtained for an illiberal salary, according to the universal law that the laborer is worthy of his hire, and that he will seek to obtain this hire in the great market of labor and talent. Even the common consideration that every private individual expects that his affairs will be served best by an efficient clerk for a liberal hire, and not by a poorly paid hireling whose incapacity can command no higher wages, should induce us to pay judges, as indeed every one who must be paid, and is worthy of being paid at all, with a liberality which equally avoids lavishness and penury. Liberal salaries are essential to a popular government.

To make judges independent or remove from them the possible suspicion of dependence, it has been ordered in the constitution of the United States that the "judges of the supreme and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." This principle has been adopted in most, if not all our constitutions; many have added that it shall not be increased either, during continuance in office.[14] But what is the possible dependence feared from an increase or decrease of salary compared to that unavoidable dependence

[14] When it has become necessary to increase the salary of judges, the difficulty has sometimes been avoided by the judges resigning, upon the understanding that, after the legislature shall have increased the salary, they should be reappointed.

which must be the consequence of short terms of office, and of appointment by election? It will hardly be necessary to mention that a fixed salary, independent of fees and fines, is indispensable for the independence of the judge and the protection of the citizen. Even common decency requires it. Don Miguel of Portugal made the judges, who tried political offenders, depend upon part of the fines and confiscations they decreed, and we know what was done under James the Second and lord Jeffreys. The hounds, receiving part of the hunted game, suggest themselves at once.

With a view of making the judiciary independent, the removal of judges from office has been justly taken out of the hands of the executive. The immovability of judges is an essential element of civil liberty. Neither the executive nor the sovereign himself ought to have the power of removing a judge. He can therefore be removed by impeachment only, and this requires, according to the constitution of the United States, two-thirds of the votes of the senate. In some states they can be removed by two-thirds of the whole legislature.[15]

[15] It seems to me a strange anomaly that, as it would seem by a late resolution of the United States senate, the president has authority to remove judges in the "territories."

CHAPTER XX.

INDEPENDENCE OF JUS, CONTINUED. TRIAL BY JURY. THE ADVOCATE.

41. The judge cannot occupy a sufficiently independent position between the parties by the accusatorial proceeding alone. If there is not what may be called a division of the judicial labor, separating the finding of guilt or innocence, or of the facts from the presiding over the whole trial and the application as well as the pronouncing and expounding of the law, the judge must still be exposed to taking sides in the trial. This division of judicial labor is obtained by the institution of the jury. This, it seems to me, is one of the most essential advantages of this comprehensive, self-grown institution. It is likewise a guarantee of liberty in giving the people a participation in the administration of justice, without the ruin and horrors of an administration of justice by a multitude, as at Athens. The jury is moreover the best school of the citizen, both in teaching him his rights and to protect them, and of practically teaching him the necessity of law and government. The jury, in this respect, is eminently conservative. In this, as in many other respects, it is necessary

that the institution of the jury exist for the civil trial as well as for the penal, and not, as in many other countries, for the latter only. The necessity of the jury does not militate against the arbitration courts, which have proved a great blessing in all countries in which they have been properly established, or against certain courts of minor importance which may be advantageously conducted without a jury.[1]

The results of trial by jury have occasionally been such that even in England and here, voices have been raised against it, not indeed very loud or by weighty authorities. Men feel the existing evil only; not those that would result a hundredfold from an opposite state of things. Nor are those, who feel irritated at some results of the trial by jury, acquainted with the operation of trials without jury. So is occasionally the publicity of trials highly inconvenient; yet should we desire secret trials? Liberty, as we conceive it, can no more exist without the trial by jury—that "buttress of liberty," as Chatham called it,[2] and our ancestors worshipped it—than without the representative system.

The Declaration of Independence specifies, as one of the reasons why this country was justified in severing itself from the mother country, that Americans have been "deprived in many cases of the benefits of trial by jury."

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[1] For the history of this institution in general, the reader is referred to William Forsyth, History of the Trial by Jury, London, 1852.

[2] Lord Erskine, when he was raised to the peerage, adopted the words Trial by Jury, as the scroll of his coat of arms.

It may not be improper here to enumerate briefly all the advantages of so great an institution, whether they are directly connected with liberty or not.

The trial by jury, then, divides the labor of the administration of justice, and permits each part quietly to find the truth in the sphere assigned to it;

It allows the judge to stand, as the independent organ of the law, not only above the parties, hostilely arraigned against each other, but also above the whole concrete case before the court;

It enables plain common and practical sense properly to admix itself with keen professional and scientific distinction, in each single case, and thus prevents the effect of that disposition to sacrifice reality to attenuated theory, to which every individual is liable in his own profession and peculiar pursuit—the worship of the means, forgetting the end;[3]

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[3] And this is the reason that nearly all great reforms have worked their way from without, and from the non-professional to the professional, or from below upward.

I beg to arrest the reader's attention for a moment on this subject.

In all civilized countries it is acknowledged that there are some important cases, which on the one hand it is necessary to decide, for Mine and Thine are involved, and which, on the other hand, are not of a character that the lines of demarcation can be drawn with absolute distinctness, in a manner which would make it easy to apply the law; e. g. the cases which relate to the imitation of a part of a work of art, of a pattern, or the question of a bona fide extract from an author's work, which, according to the Prussian copyright law, were to be decided by a jury of "experts," long before the general introduction of the jury in that country. A similar case

It makes a participation of the people in the administration of justice possible without having the

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is presented when an officer is accused of unofficer-like and ungentlemanly conduct. Now the question becomes: Are not these cases far more frequent than it is supposed in the countries where the trial by jury does not exist? Are not almost all complex cases, such as require in a high degree good strong common sense, the tact of practical life, together with the law, to be justly decided? Are not, perhaps, the greater part of civil cases such? The English and Americans seem to believe they are. They believe that close logical reasoning is indeed necessary in the application of the law, and they assign this to the law-officers, but they believe also that a high degree of plain good common sense, unshackled by technicalities, is necessary to decide whether, "upon the whole," "taken all in all," the individual case in hand is such as to bring it within the province of the specific law, with reference to which it is brought before the court, and they assign this part of the trial to the jury, that is to non-professional citizens. The English, and the people of some American states, do not only follow this view in the first stage of a case, but, in order to avoid the evil of letting technicalities get the better of essential justice, of letting the minds of professional lawyers, whose very duty it is to train themselves in strict, uncompromising logic, decide complicated and important cases in the last resort, they allow an appeal from all the judges to the house of lords, or to the senate. I do not mention this last fact as one to be imitated, but merely as corroborating what I have stated before.

It appears to me an important fact, which ought always to be remembered when the subject of the trial by jury in general is discussed, that by the trial by jury, the Anglican race endeavors, among other things, to insure the continuous and necessary admixture of common sense, in the decision of cases; and who can deny that in all practical cases, in all controversies, in all disputes, and in all cases which require the application of general rules or principles to concrete cases, whatsoever common sense is indispensable, is that sound judgment which avoids the Nimium? Who will deny that every one is liable to have this tact and plain soundness of judgment impaired in that very line or sphere in which his calling has made it his duty to settle general principles, to find general

serious evil of courts, consisting of multitudes or mobs, or the confusion of the branches of the administration of justice, of judges and triers;

It obtains the great advantage of a mean of views of facts, regarding which Aristotle said that many are more just than one, although each one were less so than the one; without incurring the disadvantages and the injustice of vague multitudes;

It brings, in most cases, a degree of personal acquaintance with the parties, and frequently with the witnesses, to aid in deciding;

It gives the people opportunities to ward off the inadmissible and strained demands of the government;[4]

It is necessary for a complete accusatorial procedure;

It makes the administration of justice a matter of the people, and awakens confidence;

It binds the citizen with increased public spirit to the government of his commonwealth, and gives him a constant and renewed share in one of the highest

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rules, to defend general points? The grammarian, by profession, frequently, perhaps, generally, writes pedantically and stiffly; the religious controversialist goes to extremes; the philosopher, by profession, is apt to divide, distinguish, and classify beyond what reality warrants; the soldier, by profession, is apt to sacrifice advantages to his science. Dr. Sangrado is the caricature of the truth here maintained.

The denial of the necessity of profound study and professional occupation would be as fanatical as the disregard of common sense would be supercilious and unphilosophical. Truth stands, in all spheres, emphatically in need of both.

[4] The whole history of the libel down to Charles Fox's immortal bill may serve as an illustration.

public affairs, the application of the abstract law to the reality of life—the administration of justice;

It teaches law and liberty, order and rights, justice and government, and carries this knowledge over the land;[5]

It throws a great part of the responsibility upon the people, and thus elevates the citizen while it legitimately strengthens the government;

It does not only elevate the judge, but makes him a popular magistrate, looked up to with confidence and favor; which is nowhere else the case in the same degree, and yet is of great importance, especially for liberty;

It is the great bulwark of liberty in monarchies against the crown, and a safety-valve in republics;

It alone makes it possible to decide to the satisfaction of the public those cases which must be decided, and which nevertheless do not lie within the strict limits of the positive law;

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[5] Lord Chancellor Cranworth said, in February, 1853, in the house of lords:

"There were many other subjects to be considered. Trial by judge instead of by jury had been eminently successful in the county courts; but in attempting to extend this to cases tried in other courts, we must not lose sight of the fact that we should be taking a step towards unfitting for their duties those who are to send representatives to the other house of parliament, who are to perform municipal functions in towns, and who are to exercise a variety of those local jurisdictions which constitute in some sort in this country a system of self-government. It may be very dangerous to withdraw from them that duty of assisting in the administration of justice. Mechanics' schools may afford valuable instruction, but I doubt if there is any school that reads such practical lessons of wisdom, and tends so much to strengthen the mind, as assisting as jurymen in the administration of justice."

It alone makes it possible to reconcile, in some degree, old and cruel laws, if the legislature omits to abolish them, with a spirit of humanity, which the judge could never do without undermining the ground on which alone he can have a firm footing;

It is hardly possible to imagine a living, vigorous and expanding common law without it;

It is with the representative system one of the greatest institutions which develop the love of the law, and without this love there can be no sovereignty of the law in the true sense;

It is part and parcel of the Anglican self-government;

It gives to the advocate that independent and honored position which the accusatorial process as well as liberty requires, and it is a school for those great advocates without which broad popular liberty does not exist.

Mr. Hallam, speaking in his work on the Middle Ages of "the grand principle of the Saxon polity, the trial of facts by the country," says, "from this principle (except as to that preposterous relic of barbarism, the requirement of unanimity) may we never swerve—may we never be compelled in wish to swerve—by a contempt of their oaths in jurors, a disregard of the just limits of their trusts." To these latter words I shall only add, that the fact of the jury's being called by the law the country, and of the indicted person's saying that he will be tried by God and his country, are facts full of meaning, and expressive of a great part of the beauty and the ad-

vantages of the trial by jury.[6] There is, however, no mysterious efficacy inherent in this or any other institution, nor any peculiar property in the name. Juries must be well organized, and must conscientiously do their duty. They become, like all other guarantees of liberty, very dangerous in the hands of the government, when nothing but the form is left, and the spirit of loyalty and of liberty is gone. A corrupt or facile jury is the most convenient thing for despotism and anarchy.

The jury trial has been mentioned here as one of the guarantees of liberty, and it might not be improper to add some remarks on the question whether the unanimous verdict ought to be retained, or whether a verdict as the result of two-thirds, or a simple majority of jurors agreeing, ought to be adopted. This is an important subject, occupying the serious attention of many persons. But, however important the subject may be, and connected as I believe it to be with the very continuance of the trial by jury as a wholesome institution, and with the supremacy of the law, it is one still so much debated that a proper discussion would far exceed the limits to which this work is restricted; and the mere avowal that it is my firm conviction, after long observation and study, that the unanimity principle ought to be given up, would be of no value. I beg, however, to add as a fact, at all events of interest to the student, that Locke was against the unanimity principle. His

[6] On all these subjects connected with the jury I must refer to the Political Ethics.

constitution for South Carolina has this provision: "Every jury shall consist of twelve men; and it shall not be necessary they should all agree, but the verdict shall be according to the consent of the majority."

It is besides a well-known fact that our number of twelve jurymen, and the principle of their unanimity, arose out of the fact that in ancient times *at least* twelve of the compurgators were obliged to agree before a verdict could be given, and that compurgators were added until twelve of them agreed one way or the other.[7]

I conclude here my remarks on the institution of the jury, and pass over to the last element of the independence of the law—the independent position of the advocate.

42. Where the inquisitorial trial exists, where the judiciary in general is not independent, and where the judges more or less feel themselves, and are universally considered, as government officers, it is in vain to look for independent advocates, as a class of men. Their whole position, especially where the trial is not public, prevents the development of this independence, and the consideration they have to take of their future career would soon check it where it might occasionally happen to spring forth.[8]

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[7] Forsyth, History of the Trial by Jury.

[8] Feuerbach, in his Manual of the Common German Penal Law, 10th edition, § 623, says that in the inquisitorial proceeding we have to represent the judge to our minds as the representative of the offended state, inasmuch as it is his duty to see justice done for it according to the penal law; as representative of the accused, inasmuch as he is bound at the same time to find out everything on which the innocence or a less degree of criminality can be founded;

The independence of the advocate is important in many respects. The prisoner, in penal trials, ought to have counsel. Even lord Jeffrey, who, among judges, is what Alexander the Sixth was among popes, declared it, as far back as the seventeenth century, a cruel anomaly that counsel were permitted in a case of a few shillings, but not in a case of life and death. But counsel of the prisoner can be of no avail, if they do not feel themselves independent in a very high degree. This independence is necessary for the daily protection of the citizen's rights. It is important for a proper and sound development of the law; for it is not only the decisions of the judges which frequently settle the most weighty points and

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and finally, as judge, inasmuch as he must decide upon the given facts. Why not add to this fearful triad, the jailer, the executioner?

Although a "defensor" is appointed, it is difficult for him to do his work properly; for in the German inquisitorial process the defence begins when the inquiring judge has finished, or the "acta" are closed, that, is when the report of the judge is made. Now, a lawyer does not feel very free to attack the writing of a judge, upon whom his advancement probably depends, even if any latitude were given to the advocate. Mr. Mittermaier, note d, § 14, of his Art of Defending, 2d edition, speaks openly of the great difficulty encountered by the "defensor," in unveiling the imperfections of the *acta* which have been sent him, because he thereby offends his superior, upon whom his whole career may depend; and Mr. Voget, the defensor of the woman Gottfried, in Bremen, who had poisoned some thirty persons, fully indorses these remarks of Mr. Mittermaier, in his work, The Poisoner, G. M. Gottfried, Bremen, 1830 (first division, pp. 17 and 18). He concludes his remarks with these words: "Who does not occasionally think of the passage 1 Sam. 29: 6—Non inveni in te quidquam mali, sed satrapis non places," (or, as our version of the bible has it: Nevertheless, the lords favor thee not.)

rights, but also the masterly arguments of the advocates; and lastly it is important in all so-called political trials.

May we never have reason to wish it otherwise! The limits of the advocate, especially as counsel in criminal cases, and which doubtless form a subject connected with liberty itself, nevertheless belong more properly to political and especially to legal ethics. As such I have treated of them in the Political Ethics. I own, however, that, when writing the work, the subject had not acquired in my mind all the importance and distinctness which its farther pursuit, and the perusal of works on this important chapter of practical ethics, have produced. I am sorry to say that very few of these works or essays seem manfully to grapple with it, and to put it upon solid ground. It is desirable that this should be done thoroughly and philosophically. This is the more necessary, as the loosest and vaguest notions on the rights of the advocate are entertained by many respectable men, and the most untenable opinions have been uttered by high authorities.[9]

In this work, however, all that I am permitted to do is to indicate the true position of the advocate in our Anglican system of justice, and to allude to the duties flowing from it.

Most writers discuss "the time-honored usage of

[9] For instance, lord Brougham's well-known dictum uttered at the trial of queen Caroline—often commented upon, but never taken back or modified by the speaker; p. 91, Legal and Political Hermeneutics. See also an article on License of Counsel in the January number 1841 of Westminster Review.

the profession in advocating one side," and of saying all that can be said in defence of the prisoner. No one at all conversant with the subject has ever had any doubt upon this subject. It is a necessary effect of the accusatorial procedure. Indeed, it forms an essential part of it. But the writers go on maintaining that therefore the advocate may, and indeed must, do and say for his client all that he himself would do and say for himself, had he the requisite talent and knowledge. And here lies the error, moral as well as legal.

No man is allowed to do wrong, for instance to tell an untruth, or to asperse the character of an innocent person, either in his own behalf or for another. The prisoner would do wrong in lying, and no one has a right to do it for him. The lawyer is no more freed from the moral law or the obligation of truth than any other mortal, nor can he divest himself of his individuality any more than other men. If, as lord Brougham stated it, the only object of counsel is to free the prisoner, at whatever risk, why, then, not also do certain things for the prisoner which he would do, were he free? Many an indicted murderer would make away with a dangerous witness, if the prison did not prevent him. Why, then, ought not the lawyer to do this for him? Because it would be murder? And why not? If the advocate is to say and do all the prisoner would do and say for himself, irrespective of morality, the supposed case is more glaring, indeed, but in principle the same with many actual ones. The fact is, the rights of the advocate, or the defence of their speaking on one side, cannot be

put on a worse foundation than by thus making him a part of the prisoner's individuality, or a substitute. Nor would there be a more degrading position than that of letting one's talent or knowledge for hire, no matter whether for just or unjust, moral or immoral purposes. Indeed, why should this knowledge for hire begin its appropriate operation during the trial only, if escape is the only object? Why not try to foil the endeavors of the detective police? Is it only because the retaining fee has not yet been paid, and that, so soon as it is in his hand, he has a right to say with the ancient poet: I deem no speaking evil that results in gain?[10] This cannot be. All of us have learned to venerate Socrates, whom lord Mansfield calls the greatest of lawyers, for having made victorious war on the sophists, and established ethics on pure and dignified principles; and now we are called upon to sanction everything, without reference to morality and truth, in an entire and highly privileged class, and in the performance of the most sacred business of which political man has any knowledge. If lawyers insist upon this revolting exemption from the eternal laws of truth and rectitude, they ought to consider that this will serve in the end as a suggestion to the people of returning to the Athenian court of the people.

The true position of the advocate in the Anglican accusatorial trial, and in a free and orderly country, is not one which would almost assimilate him to the "receiver." It is a far different one. Nearly in all

[10] Δοκῶ μὲν οὐδὲν ῥῆμα σὺν κερδει κάκον.

free countries, but especially in all modern free countries, has the advocate assumed a prominent position. He is an important person as advocate, and as belonging to that profession from which the people necessarily must always take many of their most efficient law-makers, from which arise many of the greatest statesmen, whatever the English prejudice, even of such men as Chatham, to the contrary, may long have been, and which has formed in every free people many of their immortal orators.

The advocate is part and parcel of the whole machinery of administering justice, as much so as the jury, the judge, or the prosecutor. He forms an integral part of the whole contrivance called the trial; and the only object of the trial is to find out legal truth, so that justice may be administered. In this trial, it has been found most desirable to place the judge beyond the parties, to let both parties appear before him and to let both parties say all they can say in their favor, so that the truth may be ascertained without the judge's taking part in the inquiry, and thus becoming personally interested in the conviction, or in either party. The advocate is essentially an amicus curiæ; he helps to find the truth, and for this purpose it is necessary that all that can be said in favor of his client or in mitigation of the law, be stated; because the opposite party does the opposite, and because the case as well as the law ought to be viewed from all sides, before a decision be made. The advocate ought not only to say all that his client might say, had he the necessary skill and knowledge, but even more; but the client or prisoner has no

right to speak the untruth in his own behalf, nor has the lawyer the right to do it for him.

Chief-Justice Hale severely reproves the misstating authorities and thus misleading the court, but why should this be wrong, and the misstating of facts not? Many prisoners would certainly misstate authorities if they could. Trials are not established for lawyers to show their skill or to get their fees, nor for arraigned persons to escape. They are established as a means of ascertaining truth and dispensing justice; but not to promote or aid injustice or immorality. The advocate's duty is, then, to say everything that possibly can be said in favor of his case or client, even if he does not feel any strong reliance on his argument, because what appears to himself weak may not appear as such to other minds or may contain some truth which will modify the result of the whole. But he is not allowed to use falsehood, nor to injure others. Allowing this to him would not be independence, but an arbitrarily privileged position, tyrannical toward the rest of society.[11] To allow tricks to a whole profession, or to claim them by law, seems monstrous. Is there a separate decalogue for lawyers?

[11] The famous case of Mr. Philips, now on the bench, when defending Courvoisier, is treated at considerable length in Townsend's modern State Trials, under the trial of Courvoisier. It must be allowed that the defence is not successful, though ingenious. On page 312 of vol. i. of that work the reader will also find the titles of numerous writings bearing on the moral obligations of the advocate, to which may be added those I have mentioned in the notes appended to my remarks on the advocate in the 2d vol. of the Political Ethics. I also refer to pp. 59 and sequ. in my Character of the Gentleman, Charleston, S. C. 1847.

The lawyer is obliged, as was stated before, to find out everything that can be found in favor of the person who has intrusted himself to his protecting care, because the opposite will be done by the opposite party. He has no right to decline the defence of a person, which means the finding out for him all that fairly can be said in his favor, except indeed in very peculiar cases. Declining the defence beforehand would amount to a prejudging of the case, and in the division of judicial labor every one ought to be defended.[12] The defence of possible innocence, not the defeat of justice, is the aim of counsel.

Great advocates themselves, such as Romilly,[13] have very distinctly pronounced themselves against that view which seems at present the prevailing one among the lawyers; and Dr. Thomas Arnold was so

[12] At the very moment that these pages are passing through the press, a case has occurred in an English court, of a young man indicted for burglariously entering the room of some young woman. His counsel in the defence suggested that probably the young lady had given an appointment to the prisoner. "That is not in the brief," cried the prisoner himself, and the court justly reprimanded the barrister. It ought to be added that in this case the barrister wrote a letter of submission to the court. This has not been done in other cases quite as bad in principle. Thus, another publicly reproved barrister insisted that he had done what the profession required, when he had resorted to the following trick. He had subpœnaed the chief witness against his client, so that he could not appear, and then argued that the prosecutor must know his client to be innocent, else he would certainly have produced his witness, &c.

[13] There is a very excellent passage on this subject in the reflections of sir Samuel Romilly, on himself and the good he might do, should he be appointed Lord Chancellor, page 381 and seqn. of vol. iii. of his Memoirs, 2d ed. London, 1840.

deeply impressed with the moral danger to which the profession of the law, at present, exposes its votary, that he used to persuade his pupils not to become lawyers, while Mr. Bentham openly declared that no person could escape, and that even Romilly had not remained wholly untainted.

It ought to be observed, however, that a more correct opinion on the obligations of the advocate seems to be fast gaining ground in England. At present it seems to be restricted to the public, but the time will come when this opinion will reach the profession itself. Like almost all reforms, it comes from without, and will ultimately force an entrance into the courts and the inns. We are thus earnest in our desire of seeing correct views on this subject prevail, because we have so high an opinion of the importance of the advocate in a modern free polity.

CHAPTER XXI.

SELF-GOVERNMENT.

43. THE last constituent of our liberty that I shall mention is local and institutional self-government.[1]

[1] The history of this proud word is this: It was doubtless made in imitation of the Greek autonomy, and seems originally to have been used in a moral sense only. It is of frequent occurrence in the works of the divines who flourished in the sixteenth and seventeenth centuries. After that period it appears to have been dropped for a time. We find it in none of the English dictionaries, although a long list of words is given compounded with self, and among them many which are now wholly out of use; for instance, Shakspeare's Self-sovereignty. In Dr. Worcester's Universal and Crit. Dictionary the word is marked with a star, which denotes that he has added it to Dr. Johnson's, and the authority given is Paley, who to my certain knowledge does not use it in his Political Philosophy, nor have several of my friends succeeded in finding it in any other part of his works, although diligent search has been made.

Whether the term was first used for political self-government in England or America I have not been able to ascertain. Richard Price, D. D., used it in a political sense in his Observations on the Nature of Civil Liberty, &c. 3d edition, London, 1776, although it does not clearly appear whether he means what we now designate by independence, or internal (domestic) self-government. Jefferson said in 1798 that "the residuary rights are reserved to their (the American States) own *self-government*." The term is now freely used both in England and America. In the former country we find a book on Local Self-government; in ours, Daniel Webster said, on May the 22d, 1852, in his Faneuil Hall speech: "But I say to you

Many of the guarantees of individual liberty which have been mentioned receive their true import in a pervading system of self-government, and on the

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and to our whole country, and to all the crowned heads and aristocratic powers and feudal systems that exist, that it is to self-government, the great principle of popular representation and administration—the system that lets in all to participate in the counsels that are to assign the good or evil to all—that we may owe what we are and what we hope to be."

Earl Derby, when lately premier, said, in the house of lords, that the officers sent from abroad to assist in the funeral of the duke of Wellington would "bear witness back to their own country how safely and to what extent a people might be relied upon in whom the strongest hold of their government was their own reverence and respect for the free institutions of their country, and the principles of popular self-government controlled and modified by constitutional monarchy."

In one word, self-government is now largely used on both sides of the Atlantic, in a political sense.

This modern use of the word is no innovation, as it was no innovation when St. Paul used the old Greek word πίστις in the vastly expanded sense of christian faith. Ideas must be designated. The innovation was christianity itself, not the use of the word to designate an idea greater than Pistis could have signified before.

That self-government in politics is always applied by the English speaking race for the self-government of the people or of an institution, in other words that *self* has in this sense a reflective meaning, is as natural as the fact itself that the word has come, in course of time, to be applied to political government, simply because we must express the idea of a people or a part of a people who govern themselves and are not governed by some one else. It is as natural as that in Russia the word self should be used in the term autocrat (self-ruler) not in its reflective, but in its exclusive sense, and should mean him that himself rules.

Self-government belongs to the Anglican race, and the English word is used even by foreigners. A German and a French statesman, both distinguished in literature and politics, used not long ago the English word in conversations in their own languages with me.

other hand are its refreshing springs. Individual liberty consists, in a great measure, in politically acknowledged self-reliance, and self-government is the sanction of self-reliance and self-determination in the various minor and larger circles in which government acts and of which it consists. Without local self-government, in other words self-government consistently carried out and applied to the realities of life, and not remaining a mere general theory, there is no real self-government according to Anglican views and feelings. Self-government is founded on the willingness of the people to take care of their own affairs, and the absence of that disposition which looks to the general government for everything; as well as on the willingness in each to let others take care of their own affairs. It cannot exist where the general principle of interference prevails, that is, the general disposition in what is commonly called the government, to do all it possibly can do and to substitute its action for individual or minor activity and for self-reliance. Self-government is the corollary of liberty. So far we have chiefly spoken of that part of liberty which consists in checks, except indeed when we treated of representative legislatures; self-government may be said to be liberty in action. It requires a pervading conviction throughout the whole community that government, and especially the executive and administrative branch, should do nothing but what it necessarily must do, and which cannot, or ought not, or will not be done by self-action; and that, moreover, it should allow matters to grow and develop themselves. Self-government implies self-

institution, not only at the first setting out of government, but as a permanent principle of political life. In a pervading self-government, the formative action of the citizens is the rule; the general action of the government is the exception, and only an aid. The common action of government in this system is not originative, but regulative and moderative, or conciliative and adjusting. Self-government, therefore, transacts by far the greater bulk of all public business through citizens, who, even while clad with authority, remain essentially and strictly citizens, and parts of the people. It does not create nor tolerate a vast hierarchy of officers, forming a class of mandarins for themselves, and acting as though they formed and were the state, and the people only the substratum on which the state is founded, similar to the former view that the church consists of the hierarchy of priests and that the laity are only the ground on which it stands.

A pervading self-government, in the Anglican sense, is organic. It does not consist in the mere negation of power, which would be absurd, for all government implies power, authority on the one hand and obedience on the other; nor does it consist in mere absence of action, as little as the mere absence of censorship in China is liberty of the press. It consists in organs of combined self-action, in institutions, and in a systematic connection of these institutions. It is therefore the opposite at once of a disintegration of society into individual, dismembered and sejunctive independencies, and of despotism, whether this consist in the satrapic despotism of the

east (in which the pacha or satrap embodies indeed the general principle of unfreedom in relation to his superior, but is a miniature despot or sultan to all below him), or whether it consist in the centralized despotism resting on a compact and thoroughly systemized hierarchy of officials, as in China, or in the European despotic countries. Anglican self-government differs in principle from the sejunction into which ultimately the government of the Netherlands lapsed; and it is equally far from popular absolutism, in which the majority is the absolute despot. The majority may shift, indeed, in popular absolutism, but the principle does not, and the whole can only be called a mutual tyrannizing society, not a self-government. An American orator of note has lately called self-government, a people sitting in committee of the whole. It is a happy expression of what he conceives self-government to be. We understand at once what he means; but what he means is the Athenian market democracy, in its worst time, or as a French writer has expressed it, Le peuple-empereur, the people-despot. It is, in fact, one of the opposites of self-government, as much so as Napoleon the First expressed another opposite in his favorite dictum: "Everything for the people, nothing by the people." Self-government means: Everything for the people, and by the people, considered as the totality of organic institutions, constantly evolving in their character, as all organic life is, but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality. But liberty, as we have seen, consists in a great measure in protection of individuality.

While Napoleon the First thus epigrammatically expressed the essence of French centralization,[2] his chief antagonist, William Pitt, even the tory premier, could not help becoming the organ of Anglican self-government, as appears from the anecdote, which I relate in full as it was lately given to the public, because the indorsement by the uncompromising soldier gives it additional meaning:

"A day or two before the death of the duke of Wellington, referring to the subject of civic feasts, he told an incident in the life of Pitt which is worth recording. The last public dinner which Pitt attended was at the Mansion house; when his health was proposed as the savior of his country. The duke expressed his admiration of Pitt's speech in reply; which was in substance, that the country had saved herself by her own exertions, and that every other country might do the same by following her example."[3]

Self-government is in its nature the opposite to political apathy and that moral torpidity or social indifference which is sure to give free play to abso-

[2] As to the first part of this imperial dictum—tout pour le peuple—we know very well how difficult it is to know what is for the people, without institutional indexes of public opinion, and how easy it is, even for the wisest and the best, to mistake and substitute individual, family and class interests and passions for the wants of the people. This indeed constitutes one of the inherent and greatest difficulties of monarchical despotism. A benevolent eastern despot could not have said it, for there is no people, politically speaking, in Asia; and for a European ruler it was either hypocritical, or showing that Napoleon was ignorant of the drift of modern civilization, of which political development forms so large a portion.

[3] London Spectator, of September 18, 1852.

lutism, or else to dissolve the whole polity. We have a fearful instance in the later Roman empire. It draws its strength from self-reliance, as has been stated, and it promotes it in turn; it cannot exist where there is not in each a disposition, ability and manliness of character, willing and able to acknowledge it in others. Nothing strikes an observer, accustomed to Anglican self-government, more strongly in France than the constant desire and tendency even in the French democracy to interfere with all things and actions, and to leave nothing to self-development. Self-government requires politically, in bodies, that self-rule which moral self-government requires of the individual—the readiness of resigning the use of power which we may possess, quite as often as using it. Yet it would be a great mistake to suppose that self-government implies weakness. Absolutism is weak, which indeed can summon great strength upon certain occasions, as all concentration can; but it is no school of strength or character; nor is a certain concentration by any means foreign to self-government, but it is not left in the hands of the executive, to use it arbitrarily. Nor is it maintained that self-government necessarily leads in each single case soonest and most directly to a desired end, especially when this belongs to the physical welfare of the people, nor that absolute and centralized governments may not occasionally perform brilliant deeds, or carry out sudden improvements on a vast scale which it may not be in the power of self-governments so rapidly to execute. But the main question for the freeman is which is the most befitting to man

in his nobler state; which produces the best and most lasting results upon the whole and in the long run; which effects the greatest stability and continuity of development; in which is more action of sound and healthful life and not of feverish paroxysms? Is it the brilliant exploits which constitute the grandeur of nations if surveyed in history, and are there not many brilliant actions peculiar to self-government and denied to centralized absolutism?

Where self-government does not exist, the people are always exposed to the danger that the end of government is lost sight of, and that governments assume themselves as their own ends, sometimes under the name of the country, sometimes under the name of the ruling house. Where self-government exists, a somewhat similar danger presents itself in political parties. They, too, frequently assume themselves as the end and object, and forget that they can have a right meaning only if they are in the service of the country. Man is always exposed to the danger of substituting the means for the ends. The variations we might make on the ancient Propter vitam vivendi perdere causas, with perfect justice, are indeed endless.[4]

Napoleon the First, who well knew the character of absolute government and pursued it as the great end of his life, nevertheless speaks of the impuissance de la force—the impotency of power. He

[4] Would not all the following, and many more find their daily applications: Propter imperium imperandi perdere causas; Propter ecclesiam ecclesiæ perdere causas; Propter legem legis perdere causas; Propter argumentationem argumenti perdere causas; Propter dictionem dicendi perdere causas?

felt, on his imperial throne, which on another and public occasion he called wood and velvet unless occupied by him, and which was but another wording of Louis the Fourteenth's l'état c'est moi, that which all sultans have felt when their janizaries deposed them —he felt, that of all governments the czar-government is the most precarious. He felt what, with other important truths, Mr. de Tocqueville had the boldness to tell the national assembly, in a carefully considered report of a committee, in 1851, when he said:

"That people, of all nations in the whole world, which has indeed overthrown its government more frequently than any other, has, nevertheless, the habit, and feels more than any other the necessity of being ruled.

"The nations which have a federal existence, even those which, without having divided the sovereignty, possess an aristocracy, or who enjoy provincial liberties deeply rooted in their traditions—these nations are able to exist a long time with a feeble government, and even to support, for a certain period, the complete absence of a government. Each part of the people has its own life, which permits society to support itself for some time when the general life is suspended. But are we one of those nations? Have we not centralized all matters, and thus created of all governments that which, indeed, it is easiest to upset, but with which it is at the same time the most difficult to dispense for a moment?"[5]

[5] Mr. de Tocqueville made this report on the 8th of July, in the name of the majority of that committee, to which had been

With this extract I conclude, for the present, my remarks on self-government, and with them the enumeration of the guarantees and institutions which characterize, and in their aggregate constitute Anglican liberty.

They prevail more or less developed wherever the Anglican tribe has spread and formed governments, or established distinct politics. Yet, as each of them may be carried out with peculiar consistency, or is subject to be developed under the influence of additional circumstances, or as a peculiar character may be given to the expansion of the one or the other, it is a natural consequence that the system of guarantees which we have called Anglican presents itself in various forms. All the broad Anglican principles, as they have been stated, are necessary to us, but there is, nevertheless, that which we can call American liberty—a development of Anglican liberty peculiar to ourselves. Those features which may, perhaps, be called the most characteristic, are given in the following chapter.

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referred several propositions relating to a revision of the constitution. It was the time when the constitutional term of the president drew to its end, and the desire of annulling the ineligibility for a second term became manifest. It was the feverish time that preceded the second of December, destined to become another of the many commentaries on the facility with which governments founded upon centralization are upset, by able conspiracies or terror-striking surprises, and how easy it is in such states to obtain an acquiescent majority or its semblance, as previously the revolution of February had been, when the Orleans dynasty was expelled.

CHAPTER XXII.

AMERICAN LIBERTY.

American liberty belongs to the great division of Anglican liberty. It is founded upon the checks, guarantees and self-government of the Anglican tribe. The trial by jury, the representative government, the common law, self-taxation, the supremacy of the law, publicity, the submission of the army to the legislature, and whatever else has been enumerated, form part and parcel of our liberty. There are, however, features and guarantees, which are peculiar to ourselves, and which, therefore, we may say constitute American liberty. They may be summed up, perhaps, under these heads: republican federalism, strict separation of the state from the church, greater equality and acknowledgment of abstract rights in the citizen, and a more popular or democratic cast of the whole polity.

The Americans do not say that there can be no liberty without republicanism, nor do they, indeed, believe that wherever a republican or king-less government exists, there is liberty. The founders of our own independence acknowledged that freedom can exist under a monarchical government, in the very act of their declaration of independence.

Throughout that instrument the Americans are spoken of as freemen whose rights and liberties England had unwarrantably invaded. It rests all its assertions and all the claimed rights on the liberty that had been enjoyed, and after a long recital of deeds of misrule ascribed to the king, it says: "A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people." It broadly admits, therefore, that a free people may have a monarch, and that the Americans were, and considered themselves a free people before they claimed to form a separate nation.

Nevertheless, it will be denied by no one that the Americans believe that to be the happiest political state of things in which a republican government is the fittest; nor that republicanism has thoroughly infused itself into all their institutions and views. This republicanism, though pronounced at the time of the revolution only, had been long, and historically prepared, by nearly all the institutions and the peculiarly fortunate situation of the colonies, or, it may be said, that the republican elements of British self-government found a peculiarly favorable soil in America from the first settlements.

But it is not only republicanism that forms one of the prominent features of American liberty, it is representative republicanism and the principle of confederation or federalism,[1] which must be added, in

[1] Federalism is taken here of course in its philosophical, and not in its party sense.

order to express this principle correctly. We do not only consider the representative principle necessary in all our states in their unitary character, but the framers of our constitution boldly conceived a federal republic, or the application of the representative principle with its two houses to a confederacy. It was the first instance in history. The Netherlands, which served our forefathers as models in many respects, even in the name bestowed on our confederacy, furnished them with no example for this great conception. It is the chief American contribution to the common treasures of political civilization. It is that by which America will chiefly influence other parts of the world. Already are voices heard in Australia for a representative federal republic like ours. Switzerland, so far as she has of late reformed her federal constitution, has done so in avowed imitation of the federal pact of our Union. I consider the mixture of wisdom and daring, shown in the framing of our constitution, as one of the most remarkable, and one of the rarest in all history.

Of the strict separation of the church from the state, in all the federated states, I have spoken already. The Americans consider it as a legitimate fruit of the liberty of conscience. They believe that the contrary would lead to disastrous consequences with reference to religion itself, and it is undeniable that another state of things could not by possibility have been established here. We believe, moreover, that the great mission which this country has to perform, with reference to Europe, requires this total

divorce of state and church (not religion).[2] Doubtless this unstinted liberty leads to occasional inconvenience; even the multiplicity of sects itself is not free from some evils; but how would it be if this divorce did not exist? The Americans cling with peculiar fervor to this very principle. We carry the principle of political equality much farther than any free nation. We had no colonial nobility, although some idea of establishing it was entertained in England when the revolution broke out, and the framers of the constitution took care to forbid every state and the United States collectively, from establishing any nobility. Even the establishment of the innocent Cincinnati Society gave umbrage to many.[3]

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[2] I lately saw a pamphlet written by an American minister in which the constitution of the United States was called atheistical —an expression I have seen before. I do not pretend exactly to understand its meaning. I suppose, however, that the word atheistical is taken in this case as purely negative and as equivalent to non-mentioning God, not, of course, as equivalent to reviling the deity. Even in this more moderate sense, however, the expression seems to me surprising. There was a time when every treaty, nay every bill of lading began with the words, In the name of the Holy Trinity, and every physician put the alpha and omega at the top of his recipe. Whatever the sources may have been from which these usages sprang, I believe it will be admitted that the modern usage is preferable, and that it does not necessarily indicate a diminished zeal. The most religious among the framers may not have thought of placing the name of God at the head of our constitution for the very reason that God was before their eyes, and that this occasion did not suggest to them the idea of specially expressing their belief. Nec deus intersit nisi dignus vindice nodus.

[3] In Europe, where an accurate knowledge of the American state of things did not exist, it was, I believe, universally considered as the beginning of a new nobility, and pointed out as a glaring inconsistency.

We have no right of primogeniture.[4] This equality has more and more developed itself, and all states I believe have adopted the principle of universal suffrage. Property qualification for voting or for being elected does not exist any longer.

But here it must be observed that, however unqualifiedly the principle of political equality is adopted throughout the whole country with reference to the white population, it stops short with the race. Property is not allowed to establish any difference, but color is. Socially the colored man is denied equality in all states, and politically he is so in those states in which the free colored man is denied the right of voting, and where slavery exists. I believe I may state as a fact that the stanchest abolitionist, who insists upon immediate manumission of all slaves, does not likewise insist upon an immediate admission of all the manumitted population to a perfect political equality. In this, however, I may be mistaken.

Two elements constitute all human progress, historical development and abstract reasoning. It results from the very nature of man, whom God has made an individual and a social being. His historical development results from the continuity of society.[5]

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[4] We can do entirely without it as to property in land. Our abundance of land does not require it; but there are countries in which the constant parcelling of land led to such a ruinous subdivision that the governments were obliged to establish a minimum beyond which land shall not be allowed to be divided, and which, thus undivided, goes either to the oldest or the youngest of the sons.

[5] This is treated more fully in the Political Ethics.

Without it, without traditional knowledge and institutions, without education, man would no longer be man; without individual reasoning, without bold abstraction, there would be no advancement either. Now, single men, entire societies, whole periods will incline more to the one or to the other element, and both present themselves occasionally in individuals and entire epochs as caricatures. One-sidedness is to be shunned in this as in all other cases; perfection, wisdom, results from the well-balanced conjunction of both, and I do not know any nobler instance of this wisdom than that which is presented by the men of our revolution. They were bold men, as I have stated already; they went fearlessly to work, and launched upon a sea that had as yet been little navigated, when they proposed to themselves the establishment of a republic for a large country. Yet they changed only what imperatively required change; what they retained constituted an infinitely greater part than what they changed. It does not require an extraordinary power of abstraction, nor very profound knowledge, to imagine what must have been the consequence, had they upset the whole system in which they lived, and allowed their ill-will toward England, or a puerile vanity, to induce them to invent an entirely new state of things.

They, on the contrary, adopted every principle and institution of liberty that had been elaborated by the English. They acted like the legislators of antiquity. Had they done otherwise, their constitution must have proved a still-born child, as so many other constitutions proclaimed since their days. Their absence

of all conceit, and their manly calmness, will forever redound to their honor.

It seems to me that while the English incline occasionally too much to the historical element, we, in turn, incline occasionally too much toward abstraction.

However this may be, it is certain that we conceive of the rights of the citizen more in the abstract and more as attributes of his humanity. From this fact several features characteristic of our liberty naturally flow.

I have also stated that our whole government has a more popular cast than that of England, and with reference to this fact, as well as to the one mentioned immediately before it, I would point out the following farther characteristics of American liberty.

We have established everywhere voting by ballot. There is an annually increasing number of members voting in the English commons for the ballot. It is desired there to prevent intimidation. Probably it would have that effect in England, but certainly not in such a degree as they expect it. The ballot does not necessarily prevent the vote of a person from being known.[6] Although the ballot is so strongly insisted

[6] There is an instructive article on voting in the Edinburgh Review, of October, 1852, on Representative Reform. The writer, who justly thinks it all-important that every one who has the right to vote for a member of parliament should vote, proposes written votes to be left at the house of every voter, the blanks to be filled by him, as is now actually done for parish elections. There existed written votes in the early times of New England, and people were fined for not sending them. It was not necessary to carry it personally to

upon in America, it is occasionally entirely lost sight of. "Tickets" printed on paper whose color indicates the party which has issued it, are the most common things; and, in the place of my residence, it happened some years ago that party feeling ran to an unusual height, so much so that, in order to prevent melancholy consequences, the leaders came to an agreement. It consisted in this: that alternate hours should be assigned to the two parties, during which the citizens of one party only should vote. This open defeat of the ballot was carried out readily and in good faith.

The constitution of the United States, and those of all the states, provide that the houses of the legislatures shall keep their journals, and that on the demand of a certain, not very large, number of members, the ayes and noes shall be recorded. The ayes and noes have sometimes a remarkable effect. It is recorded of Philip the Fourth, of Spain,[7] that he asked the opinion of his council on a certain subject. The opinion was unanimously adverse, whereupon the monarch ordered every counsellor to send in his vote signed with his name, and every vote turned out to be in favor of the proposed measure. The ayes and noes have unfortunately sometimes a similar effect with us. Still, this peculiar voting may operate upon the fearful as often beneficially as otherwise; at any

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the poll. These written votes prevailed in the middle ages. For this and other subjects connected with elections, see the paper on the subject in the appendix.

[7] Coxe's Memoirs of the Bourbons in Spain.

rate, the Americans believe that it is proper thus to oblige members to make their vote known to the people.

We never give the executive the right of dissolving the legislature.

We have never closed the list of the states composing the Union, in which we differ from most other confederacies, ancient or modern; we admit freely those who are foreigners by birth to our citizenship, and we do not believe in inalienable allegiance.[8]

We allow, as it has been seen already, no attainder of blood.

We allow no ex post facto laws.

American liberty contains as one of its characteristic elements the enacted or written constitution. This feature distinguishes it especially from the English polity with its accumulative constitution.

We do not allow our legislatures to be politically "omnipotent," as, theoretically at least, the British parliament is.[9]

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[8] The character of the English, and of our allegiance, is treated at length in the Political Ethics. I there took the ground that even English allegiance is a national one, whatever the language of the law books may be to the contrary. The following may serve as a farther proof that English allegiance, after all, *is* dissoluble. It appears from the New England charter, granted by James I., that he claimed, or had, the right "to put a person out of his allegiance and protection." Page 16, Compact, with the Charter and Laws of the Colony of New Plymouth, &c., Boston, 1836.

[9] For the English reader I would add that the following works ought to be studied, or consulted on this subject: The Constitution of the United States, and the constitutions of the different states, which are published from time to time, collected in one volume;

I may add perhaps, as a feature of American liberty, that the American impeachment is, as I have stated before, a political, and not a penal institution. It seems to me that I am borne out in this view by the Federalist.[10]

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the Debates on the Federal Constitution; The Federalist, by Hamilton, Madison, and Jay; the Writings of Chief Justice Marshall, Boston, 1839; Mr. Justice Story's Commentaries on the Constitution of the United States; Mr. Calhoun's and Mr. Webster's Works; Mr. Rawle's work on the Constitution, and Mr. Frederic Grimke's Considerations upon the Nature and Tendency of Free Institutions, Cincinnati, 1848.

[10] No. LXV.

CHAPTER XXII.

IN WHAT CIVIL LIBERTY CONSISTS, PROVED BY CONTRARIES.

I HAVE endeavored to give a sketch of Anglican liberty. It is the liberty we prize and love for a hundred reasons, and which we would love if there were no other reason than that it *is* liberty. We know that it is the political state most befitting to conscious man, and history as well as our own pregnant times proves to us the value of those guarantees; their necessity, if we wish to see our political dignity secure, and their effect upon the stability of government as well as on the energies of the people. We are proud of our self-government and our love of the law as our master, and we cling the faster to all these ancient and modern guarantees, the more we observe that, wherever the task which men have proposed to themselves is the suppression of liberty, these guarantees are sure to be the first objects of determined and persevering attack. It is instructive for the friend of freedom to observe how uniformly and instinctively the despots of all ages and countries have been in their attacks upon the different guarantees enumerated in the preceding pages. We can

learn much in all practical matters by the rule of contraries. As the arithmetician proves his multiplication by division, and his subtraction by addition, so may we learn what those who love liberty ought to prize, by observing what those who hate freedom suppress or war against. This process is made peculiarly easy as well as interesting at this very period, when the government of a large nation is avowedly engaged in suppressing all liberty and in establishing the most uncompromising monarchical absolutism.

I do not know a single guarantee contained in the foregoing pages, which might not be accompanied by a long historical commentary showing how necessary it is, from the fact that it has been attacked by those who are plainly and universally acknowledged as having oppressed liberty or as having been, at least, guilty of the inchoate crime. It is a useful way to turn the study of history to account, especially for the youth of free nations. It turns their general ardor to distinct realities, and furnishes the student with confirmations by facts. We ought always to remember that one of the most efficient modes of learning the healthful state of our body and the salutary operation of its various organs, is the study of their diseased states and abnormal conditions. The pathologic method is an indispensable one in all philosophy and in politics. The imperial time of Rome is as replete with pathetic lessons for the statesman as the republican epoch.

It would lead me far beyond the proper limits of this work, were I to select all the most noted periods

of usurpation, or those times in which absolutism, whether monarchical or democratic, has assumed the sway over liberty, and thus to try the gage of our guarantees. It may be well, however, to select a few instances.

In doing so I shall restrict myself to instances taken from the transactions of modern nations of our own race; but the student will do well to compare the bulk of our liberty with the characteristics of ancient and modern despotism in Asia, and see how the absence of our safeguards has there always prevented the development of humanity which we prize so highly. He ought then to compare this our own modern liberty with what is more particularly called antiquity, and see in what we excel the ancients or fall behind them, and in what that which they revered as liberty differed from ours. He ought to keep in mind our guarantees in reading the history of former free states and of the processes by which they lost their liberty, or of the means to which the enemies of liberty have resorted, from those so masterly delineated by Aristotle down to Dr. Francia and those of our own times, and he ought again to compare our broadcast national liberty to the liberties of the feudal age. He ought lastly to present clearly to his mind the psychologic processes by which liberty has been lost—by gratitude, hero-worship, indolence, permitting great personal popularity to overshadow institutions and laws, hatred against opposite parties or classes, denial of proper power to government, the arrogation of more and more power, and the gradual transition into abso-

lutism; by local jealousies, by love of glory and conquest, by passing unwise laws against a magnified and irritating evil, which afterwards serve to oppress all, by recoiling oppression of a part, by poverty and by worthless use of wealth, by sensuality and want of general virtue.

It may not be amiss to single out the following cases.

Liberty of communion is one of the first requisites of freedom. Wherever, therefore, a government struggles against liberty, this communion forms a subject of peculiar attention. Not only is liberty of the press abolished, but all communion is watched over by the power-holder, or suppressed as far as possible. The spy, the mouchard, the dilater, the informer, the sycophant, are sure accompaniments of absolutism.[1] The British administration under Charles the Second and James the Second looked with a jealous eye on the "coffee-houses," and occasionally suppressed them, and one of the first things done by the French minister of police, after the second of December, was to close a number of "cabarets" at Paris, and to put all throughout France under surveillance. This may become necessary under pressing circumstances, which may place a government in the position of a general in a beleaguered city. All that is necessary to state here is that it is not liberty, but the contrary, and that if the measure is adopted as a permanent one, it is

[1] Much that relates to the history of the spy and informer, in ancient and modern times, may be found in the second volume of Political Ethics, where the citizen's duty of informing is discussed.

sheer despotism. So soon as Louis Napoleon had placed himself at the head of an absolute government, he not only abolished the liberty of the press; he went much farther, as we have seen; he placed the printing presses themselves and the sale of type under the police, and ordered that no press with the necessary printing materials should be sold or change hands without previous information being given to the police.

While it is a characteristic of our liberty that the public funds are under the peculiar guardianship of the popular house of the legislature, and that short appropriations are made for distinct purposes, especially for the army and navy, all governments hostile to liberty endeavor to rule without appropriations, or, if this is not feasible, by having the appropriations made for a long term, and not for detailed purposes. The last decree of Napoleon the Third, relating to this subject, is that the legislative corps must vote the budget of each ministry *en bloc*, that is in a lump, and either wholly reject or adopt it, without amendment. English history furnishes a long commentary on this point of appropriations. Charles the First lost his head in his struggle for a government without parliament, which then meant, in a great measure, without regular appropriations, or the assumption of ruling by taxation on royal authority. Wherever on the European continent an endeavor has been shown to establish a constitutional government, the absolutists have complained of the "indecency" of making a government annually "beg" for supplies.

Liberty requires the supremacy of the law; the supremacy of the law requires the subordination of the army to the legislature and the whole civil government. The Declaration of Rights enumerates, as one of the proofs that James the Second had endeavored "to subvert and extirpate the laws and liberties" of England, his raising and keeping a standing army without consent of parliament, while all governments reluctantly yielding to the demands of liberty have struggled to prevent at least the obligation of the army to take the oath of fidelity to the constitution. The army is studiously separated from the people and courted as peculiarly allied to the prince. Napoleon the First treated the army as the church was often treated in the middle ages—the main body in the state; and Napoleon the Third lately said in a solemn speech that he desired to present the new empress to the people and the army, as if it formed at least one-half of the state and were separate from the people. When he gave eagles to the whole army at what is called the fête of the eagles, in 1852, he said: "The history of nations is in great part the history of armies," and continued in a strain sounding as if it belonged to the times of the migration of nations.[2]

[2] I quote the whole passage of this stupendous allocution, which no historian or political philosopher, had he discovered it, as Cuvier found and construed remains of animals, would have assigned to the middle of the nineteenth century. What becomes of England and the United States if the essence of history does not lie in the development of the nation and especially of its institutions? The following are the exact words:

The supremacy of the law is an elementary requisite of liberty. All absolutism spurns the idea, and has a peculiar dislike of the idea of fundamental laws. Aristotle enumerates as the fourth species of government that in which the law is not the supreme master, but the multitude; James the Second claimed and acted on the dispensing power, and Louis Napoleon declared, when yet president under the republican constitution, which prohibited his re-election, that if the people wanted him to continue in office, he should do it, and all his adherents declared that the people being the masters could do as they liked, which reminds us of the Athenians who impatiently exclaimed: "Can we not do what we list?" when reminded that there was a law against what they were going to do.

The division of power, which was already observed as an important point in all government by "the master of all that know," is invariably broken down as far as possible by the absolutists. The judiciary is interfered with whenever its slow procedure or its probable results irritate the power-holder. The history of all nations from the earliest times to Napo-

"Soldiers, the history of nations is in great part the history of armies. On their success, or on their reverses, depends the fate of civilization and of country. When they are vanquished, there is either invasion or anarchy; when victorious, glory or order.

"In consequence, nations, like armies, pay a religious veneration to the emblems of military honor, which sum up in themselves a whole past existence of struggles and of triumphs.

"The Roman eagle, adopted by the Emperor Napoleon at the commencement of the present century, was the most striking signification of the regeneration and grandeur of France;" and so on.

leon the Third's taking the trial on the legality of the Orleans' spoliation out of the hands of the judiciary, proves it on every page.

Self-government, general as well as local, is indispensable to our liberty, but interference and dictation are the essence of absolutism. Monarchical absolutisms presume to do everything and to provide for everything, and Robespierre, in his "great speech" for the restoration of the supreme being, said: The function of government is to direct the moral and physical forces of the nation. For this purpose the aim of a constitutional government is the republic.[3]

Liberty requires that every one should be judged by his common court. All despots insist on extraordinary courts, courts of commission, and an easy application of martial law.

Forcible expatriation or deportation "beyond the seas" by the executive is looked upon with peculiar horror by all freemen. The English were roused by it to resistance; Napoleon the Third began his absolute reign with exile and deportation. So did the Greek factions, because no "opposition" was known, invariably banish their opponents when they had the power of doing so. With them it was the bungling business of factions; moderns know better, and if they return to it, it is because despotism is a thing full of fear and love of show.

How great an offence it is to deprive a man of his

[3] The words of Robespierre are perfectly clear as an illustration of what has been stated in the text; otherwise, I own, the sense is not perfectly apparent.

lawful court and to judge him by aught else than by the laws of the land, now in the middle of the nineteenth century, will appear the more forcibly, if the reader will bring to his mind that passage of Magna Charta which appeared to Chatham worth all the classics, and if he will remember the year when the Great Charter was carried. The passage, so pregnant to the mind of Chatham, is this:

"No freeman shall be taken, or imprisoned, or be dissesed of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we (the king) pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, justice or right."

Publicity is a condition without which liberty cannot live. The moment it had been concluded by the present government of France to root out civil freedom, it was ordained that neither the remarks of the members of the legislative corps, nor the pleadings in the courts of justice, should be reported in the papers. Modern political publicity, however, consists chiefly in publication through the papers. We acknowledge this practically by the fact that, although our courts are never closed,[4] yet, for particular reasons arising out of the case under consideration, the publication of the proceedings is sometimes prohibited by the judge until the close of the trial, but never beyond it.

[4] Very scandalous judicial cases, offensive to public morals, are, in France, conducted with closed doors.

Liberty stands in need of the legal precedent, and Charles the First pursued Cotton because he furnished Pym and other patriots with precedents, while the present French government has excluded instruction in history from the plan of general education. History, in a certain point of view, may be called the great precedent. History is of all branches the most nourishing for public life and liberty. It furnishes a strong pabulum and incites by great examples removed beyond all party or selfish views. The favorite book of Chatham was Plutarch, and his son educated himself upon Thucydides.[5] The best historians have been produced by liberty, and the despot is consistent when he wishes to shackle the noble muse.

Sincere civil liberty requires that the legislature should have the initiative. All governments reluctant to grant full liberty have withheld it, and one of the first things decreed by Louis Napoleon after the second of December was that the "legislative corps" should discuss such propositions of laws only as the council of state should send to it. The council of state, however, is a mere body of officers appointed and discharged at the will of the ruler.

Liberty requires that government do not form a body permanently and essentially separated from the people; all modern absolute rulers have resorted to a number of distinctions—titles, ribbons, orders, peacock feathers and buttons, uniforms, or whatever other

[5] So bishop Tomlinson tells us in the Life of his pupil.

means of separating individuals from the people at large may seem expedient.

Liberty requires the trial by jury. Consequently one of the first attacks which arbitrary power makes upon freedom is regularly directed against that trial. There is now a law in preparation in France, of which the outlines have been published, and which will place the jurors under the almost exclusive influence of the government.

Liberty requires, as we have seen, a candid and well-guaranteed trial for treason; all despotic governments, on the contrary, endeavor to break down these guarantees in particular, and either to arrogate the power of condemning political offenders without trial, or at least to strip the trial for treason of its best guarantees.

But we might go through the whole list of safeguards and principles of liberty, and find that in each case absolutism does the opposite.

If the American peruses the Declaration of Independence, he will find there, in the complaints of our forefathers, almost a complete list of those rights, privileges and guarantees which they held dearest and most essential to liberty; for they believed that nearly every guarantee had been assailed.

CHAPTER XXIII.

GALLICAN LIBERTY. SPREADING OF LIBERTY.

HAVING considered Anglican liberty, it will be proper for us to examine the French type of civil freedom, or Gallican liberty.

In speaking here of Gallican liberty, we mean, of course, that liberty which, either in reality, if we shall find that at any period it has taken actual root, or in theory, if it have remained such, and never practically developed itself, is characteristically French. Liberty has sprouted in France as in other countries. People have felt there, as all over Europe, that the administration of justice ought to be independent of the other branches of government. The separation of the three great functions of government was proclaimed by the first constituent assembly. But the question here is, whether any of these or other endeavors to establish liberty have been consolidated into permanent institutions, whether they have been allowed to develop themselves, and whether they were or are peculiar to the Gallican tribe, or were adopted from another system of developed civil liberty, as we adopt the whole or parts of an order of architecture or a philosophical system; and

if we find no such institutions or guarantees peculiar to the French, whether there be a general idea and conception of liberty which pervades all France and is peculiar to that country.

In viewing the French institutions, which have been intended for the protection of individual rights or the preservation of liberty, I can discover none which has had a permanent existence, except the court of cassation or quashing. It is the highest court of France, possessing the power of annulling or breaking[1] the judgments of all other courts of justice, whether in civil or criminal matters, on account of faults and flaws in the judicial forms and procedure, or of misapplications of the existing law. It has no power to examine the verdict. It resembles, therefore, the court of Westminster, in England, when the assembled judges hear questions of law, or our supreme court of the United States on similar occasions, and the supreme courts or courts of appeal or error in the different states. The court of cassation must necessarily sometimes judge of certain procedures of the government against individuals, and declare whether individual rights, publicly guaranteed, have been invaded. Thus it showed its power to some extent when Paris was declared in a state of siege, and the whole city was under martial law. But the high attribute of pronouncing upon the constitutionality of the laws themselves, which we revere in our supreme courts, does not belong to it, nor can its power be vigorously and broadly

[1] Casser is the French for breaking; hence the name of the court.

exercised in a conflict with the supreme power, since this power bears down everything in a country so vast and yet so centralized as France is, and in which the principle of development, independent of the executive or central power, is not acknowledged in the different institutions. The court of cassation has at the same time a supervisory authority over the judges of other courts, and can send them before the keeper of the seals (the minister of justice), to give an account of their conduct. It is likewise an object of the court of cassation to keep the application of the law uniform in the different parts of the country. This is a necessary effect of its power to quash judgments.

The institution of the justice of the peace ought to be mentioned here, although it can only be considered as indirectly connected with liberty. The French justice of the peace differs from the English officer of the same name in this, that his function is exclusively of a conciliatory character. Courts of conciliation have existed in many countries, and long before the present justices of the peace were established in France by the first constituent assembly; but as we see them now there, they must be called a French institution. It has proved itself in France, as well as in other countries, of the highest value in preventing litigation, with all the evils which necessarily attach themselves to it.[2]

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[2] Courts of conciliation have attracted renewed attention in England since lord Brougham's proposition of an act for the Farther Cheapening of Justice, in May, 1851. An instructive article on this important subject, and the excellent effects these courts have pro-

No one, I suppose, would expect the senate, first established by Napoleon the First, and then called conservative senate, that is the senate whose nominal duty it was to conserve the constitution, and now re-established by Napoleon the Third, to be enumerated as an institution for the support of liberty. It has no more connection with liberty than the Roman senate had under the later emperors. Its very origin would lead no one to expect in it a guarantee of liberty. On the contrary, the French senate has been a great aid to imperial absolutism, by giving to comprehensive measures of monarchical despotism the semblance of not having originated with the absolute monarch, or of having received the countenance of a high and numerous political body. In this respect the French senate seems to me worse than that of Russia. The Russian senate is nothing but a council, leaving all power and responsibility with the czar, in appearance as well as in reality.

That which after careful examination must be pronounced to be Gallican liberty, is, I take it, the idea of equality founded upon or acting through universal suffrage, or, as it is frequently called by the French, "the undivided sovereignty of the people" with an uncompromising centralism. As it is necessarily felt by many, that the rule of universal suffrage cannot practically mean anything else than the rule of the majority, liberty is believed in France, as has been said, to consist in the absolute rule of the majority.[3]

duced in many countries, shown by official statistics, can be found in the German Staats-Lexicon, ad verbum Friedensgericht.

[3] I have given my views on the subject of the nature of sove

Every one who has steadily followed the discussions of the late constituent and national assemblies, who has resolutely gone through the discussions of the first *constituente*, and studied the history of the revolution, and who is fairly acquainted with French literature, will agree, I trust, that the idea of Gallican liberty has been correctly stated. There are many Frenchmen indeed who know that this is not liberty, that at most it can only be a means to obtain it, but we now speak of the conception of liberty peculiar to the French school.

Institutions, such as we conceive their necessary character to be, that is establishments with the important element of self-government, and of a system of guarantees beyond the reach of daily change, do not enter as necessary elements into the idea of Gallican liberty. Self-government is sought for in the least impeded rule of the majority. It has been seen, however, that, according to the Anglican view, the question who shall rule is an important question of liberty indeed, but only one about the means; for if the ruler, whoever he be, deprives the ruled of liberty, there is of course no liberty. A suicide does not the less cease to live because he kills himself, and two game fowls, nearly matched, as the parties in a nation may be, do not symbolize liberty, because at one time the one may be uppermost, and at another time the other.

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reignty and the way it acts, at great length in the first volume of the Political Ethics. If I have not succeeded there in mastering the subject, I should not be able to do it here; if I have succeeded, I cannot in fairness repeat a long discussion.

There seems to be in France a constant confusion of equality and democracy on the one hand, and of democracy and liberty on the other; now, although equality largely enters as an element in all liberty, and no liberty can be imagined without a democratic element, equality and democracy of themselves are far from constituting liberty. They may be the worst of despotisms: the one by annihilating individuality, as the communist strives to do; the other —if it means democratic absolutism—by being real sweeping power itself—not power lent, as that of the monarch always must be—power without personal responsibility. It acts; but where is the actor, who is responsible, who can be made responsible, who will judge?

It is with reference to this rule, and this mistaken view of liberty, that one of their wisest, best, and most liberty-loving men, Mr. Royer Collard, has said:[4] "It is nothing but a sovereignty of brute force, and a most absolute form of absolute power. Before this sovereignty, without rule, without limit, without duty and without conscience, there is neither constitution nor law, neither good nor evil, nor past nor future. The will of to-day annuls that of yesterday, without engaging that of to-morrow. The pretensions of the most capricious and most extravagant tyranny do not go so far, because they are not in the same degree disengaged from all responsibility."

Where any one, or any two, or any three, or any thousand, or any million can do what they have the power to do, there is no liberty. Arbitrary power

[4] Royer Collard's Opinion of October 4, 1831.

does not become less arbitrary because it is the united power of many.

Napoleon said: "The French love equality; they care little for liberty."[5] Napoleon certainly mistook the French, and mankind in general, very seriously in some points, as all men of his kind do; there are some entire instincts wanting in them; but we fear that he was right in this saying with reference to a large part of the French. Present events seem to prove it.

This equality is again very generally mistaken for uniformity, so that it would naturally lead of itself to centralization, even if the French had not contracted a real passion for centralization ever since the reigns of Richelieu and Louis the Fourteenth. It has increased with almost every change of government. It is the love of power carried into every detail, and therefore the opposite of what we call self-government;[6] it is the exceeding partiality of the French for logical neatness and consistency of

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[5] Words spoken to lord Ebrington in his exile on the island of Elba.

[6] I have given some remarkable instances of interference on the part of modern absolute governments, in the Political Ethics. I shall add the following recent instance: I am sure that no one accustomed to Anglican self-government imagines such details as trivial, however well he may be acquainted with the fact in general, that government in those countries tries to guide, direct, manage, initiate and complete everything that seems of any importance to it. Some years ago a German king ironically called, in a throne speech, constitutions Paper Providences. The expression was every way most unfortunate. It seems to me that it is these very governments of centralized mandarinism that play at providence, in which

form, strikingly manifested in the fact that the word logical is now universally used in French for consistency of action or natural sequence of changes—it is this mathematical enthusiasm, if the expression be permitted, applied to the vast field of political practice.

It seems that we can explain the cry of République democratique et sociale, so often repeated by the most advanced of the democrats during the late government without a king, only on the ground of equality being considered the foundation of all liberty. Indeed it is considered by many a requisite

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they closely resemble the communists, as indeed all absolutism contains a strong element of communism.

The following is taken from the Paris Moniteur, the French official paper, or organ of government, in October, 1852. I do not give the entire decree, but the principal articles:

There will be published, under the care of the minister of public instruction, a general collection of the popular poetry of France, either to be found in manuscript in the libraries or transmitted by the successive memories of generations.

The collection of the popular poetry of France will consist of:

Religious and warlike songs.

Festive songs and ballads.

Historical recitals, legends, tales, satirical songs.

The committee of language, history and the arts of France connected with the ministry of public instruction is charged with the selection of all pieces sent for inspection, and to determine which are to be received, to regulate them, and give the necessary commentaries.

A medal is to be given to those persons who by their discoveries and researches particularly contribute to enrich the collection, which will be called Récueil des Poésies Populaires.

It is unnecessary to remind the reader that if this undertaking has been dictated by any desire of promoting literature, a political motive has been at least equally strong, according to the old saying: Give me the ballad making, and I will rule the people

which lies beyond liberty, and the banners of socialists bore the motto Equality and Fraternity, or Equality, Fraternity, Industry, the word Liberty having been altogether dropped from that once worshipped legend: Liberty, Fraternity, Equality. I have never been able to find an explanation of the watchword, Democratic and Social Republic, given by those who used it, but it seems to bear no other interpretation than this: Democratic republic signifies that republic which is founded upon the total political equality of its members, carried to its last degree, and social republic must mean a republic based on equality of social condition. Whether this be possible, or desirable if it were possible, cannot occupy us at present. The frequent use of this term by a very large part of the French nation has been mentioned here as one of the evidences showing the prevailing love of mere equality among the French.

Still, it is not easy to say what the French exactly mean by equality, or what Napoleon meant by it, when, at St. Helena, he said that he had given equality to the French, and that this was all he could give them, but that his son would have given them liberty. How he knew that his son would have done it, we certainly do not know; but how did he give them equality, when it was he who re-established the ancient orders of nobility? So there are, in spite of all the love of equality, no people who more universally love uniforms and an order with a ribbon, than the French. This inconsistency is a political misfortune. In theory, equality and

democracy, carried to the utmost, are demanded, while the habits, tendencies, and desires of the people have a different bent. There is in this respect, it seems, an intellectual and psychical dualism with antagonistic elements in France, similar to that which we frequently observe in individuals in regard to liberty and despotism.[7]

It is evident how nearly allied this desired equality and uniformity, together with universal but uninstitutional suffrage, and that kind of sovereignty which is in addition confounded with absolute power, are to those political extravagances which strike our eyes in present France.

They are the natural effects of the one or the other, strictly carried out, however inconsistent they may appear with one another. Equality absolutely carried out leads to communism; the idea of undivided sovereignty leads to Mr. Girardin's conception of having no legislature, no division of power—nothing but a succession of popular sultans; the idea of

[7] Nothing is more common than men with a decided intellectual bent towards freedom and an equally decided psychical inclination towards absolutism. Their intellect admires the grandeur of liberty, their reason acknowledges the principles of justice: their desires are for free action, and yet their souls resent every opposition. They appear, therefore, often as hypocrites, without being such in reality. There is a dualism within them whose two elements are at war, very similar to that which, without hypocrisy, makes many persons sincerely preach peace and charity abroad, but act at home as domestic tyrants.

History is full of such characters, and we have had an exhibition of it in one of our presidents. Happily our institutional system did not allow a very wide play of such a disposition.

seeking all liberty in universal suffrage alone leads with the greatest ease to a Napoleon—a transfer of everything to one man, and of all future generations to his descendants, thus actually realizing the fearful theory of Hobbes; and the absence of a love of institutions leads to a remarkable tendency to worship one man, to centralization, or, in some cases, to the very opposite—a desire to abolish all government, and establish the "sovereignty of the individual." All extremes in politics meet.

There is no greater error than the idea of making the vote or election the sole basis of liberty—of believing that, with the establishment of an extensive or universal suffrage, we found liberty, however true it is that liberty stands in need of election. Absolutism may rest on this as on any other basis. The deys of Algiers were elective, but once elected they were unbounded masters, in the Oriental sense of the term. The generals of nearly all, I believe of all, the monastic orders are elective, but, once elected, the vow of obedience of every monk, and the distinct renunciation of liberty, make him master. No order, no human association has carried the doctrine of absolute obedience to a more frightful extent than the Jesuits, whose founder demands that the inferior shall be in the hands of the superior ut baculum, like a mere staff, and whose distinctly expressed principle it is that every command of the superior shall be like a commandment from on high, even though sin be commanded. Yet the government of the order is founded on election. Mr. Guizot, in

speaking of the monastic orders,[8] says: "As regards the political code of the monasteries, the rule of St. Benedict offers a singular mixture of despotism and liberty. Passive obedience is its fundamental principle; at the same time the government is elective; the abbot is always chosen by the brothers. When once the choice is made, they lose all liberty, they fall under the absolute domination of their superior. Moreover, in imposing obedience on the monks, the rule orders that the abbot consult them. Chap. III. expressly says, 'Whenever anything of importance is to take place in the monastery, let the abbot convoke the whole congregation, and say what the question is; and after having heard the advice of the brothers, he shall think of it apart, and shall do as appears to him most suitable.' Thus, in this singular government, election, deliberation, and absolute power, were coexistent." The pope is an elective monarch over the States of the Church. No one has ever maintained that on this account liberty had a home in that country. Nor would the case be altered if the pope were elected, not by the college of cardinals, but by a more numerous body of electors, or by all male adults, or even by the whole population, male and female. The high priest or president in the polity of that stupendous outrage called Mormonism, is elective, and the Mormons themselves call their government a theo-democracy;[9] yet a greater absolutism has never ex-

[8] History of Civilization, chapter XIV.

[9] Theo-democracy does not contain a contradiction, however

isted, indeed, we may fairly say, none equal to it. It unites democracy and communism, which is absolutism, with continuous and permanent revelations of the deity, not only on dogmatic points, but on every measure of weight. It is a jus divinum such as the ancients did not even dream of when they derived their kings from the loins of the gods, and it is a communism such as Mohammed never dared to embody in his politico-religious system.

As a feature of Gallican liberty must be mentioned here the unicameral system, because it seems to be held by all those persons who seem to be the most distinct enunciators of this species of liberty, a necessary requisite, if they allow the principle of representation at all. They consider that the bicameral system of representatives is aristocratic, or else, as one of their writers expresses it, that two houses can never be reconciled except by money or by blood. The love of a legislature of one house is a necessary consequence of the French idea of unity in the govern-

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novel, and, at first sight, startling the term may appear to us. If democracy necessarily expressed the idea of liberty, then, indeed, the name theo-democracy would be senseless, for all theocracy or sacerdotal rule is a negation of civil liberty. It immures in dogma.

In a similar manner, and with equal justice, does the missionary I. Payne say of the Grebo tribe, at Cape Palmas, that their constitution is patriarchal, with a purely democratic government. His account is contained in "The Report of the Rev. R. R. Gurley, who was recently sent out by the government to obtain information in respect to Liberia," published by the Senate of the United States, in 1850, 31st Congress, 1st Session, Executive Document, No. 75. The political philosopher can hardly read a more interesting paper than this.

ment or the unity of the state, which does not only mean a unitary state, and actual abhorrence of confederacies, but a compact system of centralization.

The Anglican wants union in his general government; the Gallican, unity. He wants his government to be a solid unit.[10] He wishes to deprive every institution, as much as possible, of the principle of self-government and independence, and the only question which remains is, who shall be the ruler and receive that power which government gives? To this subject as to many others on which I have

[10] The extent to which this idea is occasionally carried out is almost inconceivable to us, accustomed as we are to so essentially different a system and train of political thoughts. A few years ago the minister of the interior had given some new directions regarding the quarantine regulations. They were more in conformity with the opinions of scientific men on the contagiousness of the plague. The people of Marseilles, who still keep the terrible plague of last century in vivid remembrance, disapproved of these orders from the central government, and a meeting of certain persons was called together. Whereupon most newspapers took part with the government, and charged the citizens, with whom this little germ of self-government had shown itself, with the hideous sin of *federalism*, the crime for which many had lost their heads in the first revolution. This was in the times of the so-called republic before the 2d of December, and the few papers which took side with the citizens were legitimist papers, thus furnishing by the way another instance of the fact that all sorts of things are possible under peculiar circumstances. It was the tories who resisted Walpole's septennial bill abolishing triennial parliaments; it was the Jesuits who first enunciated the doctrine of the sovereignty of the people in order to get a fulcrum against heretical monarchs; it was a Spanish Jesuit who defended regicide under Philip II.; and here we have legitimists, working for a descendant of Louis the Fourteenth who took side for a principle of self-action against the central government!

touched, we shall return when I shall treat more fully of the institutional government and its opposite.

It is not likely that people who speak with derision of parliamentary government, by which nothing is meant but a government in which a deliberative and representative legislature forms an integral part, and of "parlementarism" as the new phrase is, would treat the legislature as an institution with self-government and a necessary degree of independence. According to their idea, the safeguards which we believe are found in a mutually moderative contrivance ought to be done away with. Speedy energy, absence of opposition, no results which are the products of mutual modification, unity of ideas, not consisting in collective results but in a merely logical carrying out of some abstract principle; these are the main objects, according to Gallican views.

The Spaniards, the Portuguese, the Neapolitans have made the trial of imitating the French, but have succeeded with the system of one house no better than the French themselves, and have passed over to the bicameral legislature.

There are states in which the medieval principle of estates still exists. But it may be fairly said that this is a remnant of the middle ages, at variance with the totally changed state of modern society. Nowhere do they present themselves as a system of civil liberty—it is rather a system (and rarely even that) of privileges or *liberties*. In Sweden the estates still exist, namely four—the clergy, nobility, citizens, and peasants, and a high degree of liberty is enjoyed.

But in examining the constitution of Sweden we cannot fail to observe that modern liberty is rather superinduced or engrafted on the system of states, than evolved out of it. The constitution of Norway on the other hand is clearly of the character of that liberty which we have designated as Anglican.

I believe that Frenchmen would point out their national guards as an element or guarantee of Gallican liberty. They were established during the first revolution, and have always been diminished in number and restricted in power, in those periods in which the government made war upon liberty. They cannot, however, be considered a valid guarantee in so concentrated a government as the French is, and in a country in which the army is so gigantic.

It must have plainly appeared that liberty seems to me efficiently secured only by the Anglican system. Other attempts in modern times have been but very partially successful, and of these there are but few. The question arises at once, are those persons in the main correct who roundly assert that no people are fit for liberty except the Anglo-Saxon? For thus they call the English nation, and those who have descended from it. Or is it correct to say that whoever wishes to enjoy liberty must copy the main institutions of Anglican liberty? On these and some cognate subjects there exist so many startling errors, that the remarks on the different types of liberty may be appropriately concluded by some observations on them. They have a practical bearing, and influence large masses.

It is doubtless true that the greatest amount of

liberty is at present enjoyed by the Anglican tribe, whose institutions and guarantees seem to form the only extensive and consistent, as well as practical system of civil liberty, the only one in which liberty and law have become firmly interlocked, and by which it has thus become possible to establish, as a practical reality, what Tacitus held to be impossible—the union of libertas and imperium. It is true also that the Anglican tribe has had, and still has, a greater influence than any tribe on the whole white race, and that other nations seem to have enjoyed liberty or advanced on her path in recent times in the same proportion only in which they have adopted the main principles and chief institutions elaborated by this tribe; and it is equally true that we enjoy so great an amount of freedom because we are accustomed to liberty and a government of law, and because our tribe has perseveringly developed it for centuries. But it must not be forgotten, on the one hand, that other nations and tribes may possibly develop certain principles in a manner peculiar to their character and circumstances; and, on the other hand, that it is the rule of all spreading advancement of humanity that the full amount of what has been gained by patience, blood, or fortunate combinations, is transferred to other regions and distant tribes.

The missionary—from St. Paul, when he went to Rome, to those who now embark for the Pacific—does not demand the neophyte to pass through the dispensations of the old testament, and all the experience of the early church, before he begins to teach the dispensation of the new testament, and establish

churches according to the government and the theology which exist at his home.

There are many persons who pretend to admire liberty, but withhold it from the people on the plea that they are not prepared for it. Unquestionably, all tribes are not prepared for the same amount of liberty, and many are not yet fit for any real liberty at all. But two things are certain, that all nations, and especially all nations belonging to our own civilized family, prove that they are prepared for the beginning of liberty, by desiring it and insisting upon it, and that you cannot otherwise prepare nations for enjoying liberty than by beginning to establish it, as you best prepare nations for a high christianity by beginning to preach it at once.

There are persons even among ourselves who, observing how many and sad failures have taken place with other nations, bluntly assert that none but the Anglo-Saxons are fit for liberty, and that it cannot be enjoyed by others. That some nations are fitter for the elaboration or peaceful enjoyment of liberty than others, according to their character, which makes them perhaps less fit to excel in some other branches of civilization, cannot be denied. So was the Greek more fit for the fine arts than the Roman. That some tribes appear on the stage of history, act their part, and vanish again without having made any progress in civil liberty, or ever having become conscious of it as an element of advancing civilization, is equally true. But do we hold any nation, once fairly entered upon the path of civilization, unfit for science or the arts, or

a stable government, or a literature, or for christianity? That in which man rises highest, and manifests himself most intellectually—christianity, is believed to be meet for all, but liberty should be restricted to a tribe or a single nation? It is not likely. I have allowed that some nations are fitter for the one or the other. All will not equally cultivate all branches; each cannot originate each branch; but all will partake of every element of civilization; and while it may be proper for the historian to say such a nation has not been able to act with originality in this or another branch, it is not becoming to the philosopher to say that this part of our race *will* not be able to do so. When the Greek scholars were driven from Constantinople, and carried the last embers of Grecian civilization and intellectuality over the west; when Providence made them the missionaries of a renewed civilization, and the restoration of letters prepared the way for still higher achievements, no one said that the English, or French, or Germans were unfit to partake in the humanizing blessing, although the Italian soil, still bearing the effects of former culture, was the first to bring forth delectable fruit. When Gothic architecture had been elaborated by some, it was not believed that other nations could not raise cathedrals in the same style, and enjoy it and develop it in their own way.

On the other hand, we meet with the very reverse. Anglican liberty is opposed on the ground that it is not indigenous, and that it is both inexpedient and unworthy to adopt it. Large numbers in France,

both communists and imperialists, treat "parliamentarism" in this manner; and the emperor lately said, when he had assembled the senate and the legislative corps, that France for "the first time enjoyed the happiness of possessing institutions, exclusively French and original." As to the originality, we would only observe that they are fac-similes of what Napoleon the First had established, and that he copied the senate, as he did the eagle, the title and idea of emperor, the name of legion, of prefect, from Rome, unfortunately at her worst period, for the Roman senate during the better time was part of the proud Senatus Populusque Romanus; and the corps legislatif, if there be any element of a representative legislature in it, is not of French origin; if it be a mute body, however, there is no originality in it either. Even if it were as the emperor proclaimed it, it would convey nothing to be delighted in of itself. The law of all spreading civilization is emigration, transmission, and addition. Ought the French to reject the Grecian orders of architecture because they are not French, or ought our medical students not go to Paris because the French science of medicine is not ours? Ought the French to reject saving banks because they were first established and developed in England, and ought the English to discard Jacquard's machine because invented in France? The son of Sirach said: that wisdom was hovering like the clouds until it "took root in an honorable people"[11]—the Israelites. It is

[11] Ecclesiasticus, 24.

thus with all wisdom, all great ideas and comprehensive systems. They take root with "an honorable people," that develops them. After that come the winds of heaven and carry the seeds far and about. Patriotism and national vanity are not the same. Patriotism is excellent so long as it is the love of its own to such a degree that it is ready to bear any sacrifice, and to do all for its benefit; it is not a virtue when it consists in an enamoredness with itself. Narcissus is not the symbol of patriotism, but Lycurgus and Solon travelling far in order to gather knowledge for their own country, are.

At all great and distinct periods of modern history, there are a general idea and certain adequate forms pervading the whole. Such was the papal period at the beginning of the middle ages; such was the universal feudal system; such the period of universities springing up everywhere; such the periods of art; such the periods of Abelard and scholastic philosophy; such the rising of free cities in all parts of Europe; such the ardor of maritime discovery and enthusiasm for "cosmography;" such the period of monasteries; such protestantism; and such is, I believe, the present period of civil liberty; and this I believe to consist, for centuries to come, essentially in the Anglican type. To learn liberty I believe that nations must go to America and England, as we go to Italy to study music, and to have the vast world of the fine arts opened to us, or as we go to France to study science, or to Germany that we may learn how to instruct and spread education. It was a peculiar feature of antiquity that law, religion, dress, the arts

and customs, that everything in fact was localized. Modern civilization extends over regions, tends to make uniform, and eradicates even the physical differences of tribes and races.[12] Thus made uniform, nations receive and give more freely. If it has pleased God to appoint the Anglican tribe as the first workmen to rear the temple of liberty, shall others find fault with Providence? The all-pervading law of civilization is physical and mental mutual dependence, and not isolation.

I do not think it necessary to reply here to those perverters of truth who try to justify their denial of liberty to the people on the ground that it is not national. This is done by governments who at the very time copy foreign absolutism. There is doubtless something essential in the idea of national development, but let us never forget two facts: Men, however different, are far more uniform than different; and all the noblest nations have arisen from the mixture of others, from the Greeks to our own.

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[12] The mutual influence of different literatures is daily extending. Take as an instance the literature of England, France, Germany, and the United States, and add the mutual influence of the journals of these nations. Then consider how many of the elements of civilization are not national, but common to all—the alphabet, the numeric signs, with the decimal system, commercial usages and bookkeeping, social intercourse and laws of politeness; the visiting card, the railway, the steamboat, the post-office, the institution of money, the bill of exchange, insurance—indeed it is impossible to enumerate all the agreements of nations belonging to our race. I shall only add the dress, the furniture and even cookery.

CHAPTER XXIV.

THE INSTITUTION. ITS DEFINITION. ITS POWER FOR GOOD AND EVIL.

It has been shown that civil liberty, as we understand and cherish it, consists in a large amount of individual rights, checks of power and guarantees of self-government. We have more or less fully indicated that self-government, in the sense in which we take it, and in connection with liberty, consists in the independence of the whole political society, in a national representative government and local self-government, which implies that even general laws and impulses are carried out and realized, as far as possible, by citizens who, by receiving an office, be it by election or appointment, essentially remain citizens, and do not become members of a hierarchy of placemen.[1] We have seen that self-government,

[1] At a sumptuous ball, which the city of Paris gave, in the year 1851, to the commissioners of the London Exhibition, I was sitting in a corner and reflecting on the police officers in their uniforms and the actual patrols of the military pompiers in the very midst of the festive and crowded assemblage, when I was introduced to one of the first statesmen of France and liberal members of the national assembly. He had been at London, to view the exhibition. It was the first time he had visited England. "Do you know," said he,

in general, requires that there be an organism to elaborate and ascertain public opinion, and that, when known, it shall pass into law, and, plainly, rule the rulers; that government interfere as an exception,

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"what struck me most—far more than the exhibition of works of art and industry? It was the exhibition of the *civism anglais* (this was the term he used) in the London police." It may be readily supposed that an American citizen turned his face toward the speaker, to hear more, when the Frenchman continued: "I am in earnest. The large number of policemen, with their citizen appearance, although in uniform, seeming to be there for no other purpose than to assist the people—and the people ever ready to assist them—*voilà* what has most attracted my attention. Liberty and the government of law are even depicted in their police, where we should seek it least. What is it that strikes you most in coming here?"

"The American," I replied, "in visiting the continent of Europe, is most impressed by the fact that the whole population, from Moscow to Lisbon, seems to be divided into two wholly distinct parts—the round hats, the people, and the cocked hats, the visible government. The two layers are as distinct as the hats, and the traveller sees almost as many of the one form as of the other."

I believe that my French interlocutor showed a penetrating mind in thus singling out the English police.

There are large police establishments in all European countries, as all densely peopled countries require them. The different spirit and organization, however, of these establishments are most characteristic. Nothing, perhaps, shows more the character of a citizen-government in England than the wide-spread institution of the police, which has developed itself, under sir Robert Peel, out of the ancient constable. It has immense power; it has preventive, detective and custodial power; yet it is supported by the citizens, and no one fears that it will ever be used as an institution of political espionage and denunciation—as delatores of old and mouchards of modern times. It is strictly under the public law, and that implies under publicity. There is a whole literature on this subject, but I know of no brief paper exhibiting so well its essential character as the seventh paragraph of Mittermaier's English, Scottish and American Penal Processes.

and not as the rule; and that, on the other hand, self-government neither means self-absolutism, nor absence of rule, but that, on the contrary, liberty requires a true government. A weak government is a negation of liberty; it cannot furnish us with a guaranteeing power, nor can it procure supremacy for public will. In other spheres it may be true that license is exaggerated liberty, but in politics there can be nothing more unlike liberty than anarchy.

We have still to ascertain how this system of civil liberty is to be realized. Liberty cannot flourish, nor can freedom become a permanent business of actual life, without a permanent love and a habit of liberty. How is the one to be engendered, and the other to be acquired?

There is no mathematical formula by which liberty can be solved, nor are there laws by which liberty can be decreed, without other aids. We gain no more by throwing power unchecked into the hands of the people. It remains power, and is not liberty, and people still remain men. Flattery does not change us, for we are all

> "Obnoxious, first and last
> To basest things,"[2]

and thus flattery is no foundation for liberty. Each one of us may be declared a sovereign, as every Frenchman was designated in a solemn circular,[3] by

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[2] Paradise Lost, Book 9, line 170.

[3] In a circular, sent by the provisional government all over France before the general election for the national constituent assembly, in 1848, was this sentence: "Every Frenchman of the age of manhood

the provisional government, or the people may be called almighty—le peuple tout-puissant—as in the midst of loathsome political obscenity they were termed by the dictatorial government when they were expected and led to vote for a new emperor, and by an act of omnipotence to extinguish all. They were asked to divest themselves of this very omnipotence, which nevertheless is claimed for the people alone, as inherent in its own nature, and to submit their omnipotence to a still greater omnipotence of one man. Nothing of all this is liberty. Self-immolation, even where it is an actual and not a theoretical act of free agency, is not life.

Enthusiasm is necessary for liberty as for every great and noble work, but enthusiasm comes and goes like the breezes of the ocean. How shall they be used for the positive interests of the navigator? Enthusiasm is not liberty, nor does the reality of liberty consist in an æsthetical love of freedom. The poet may be as much the priest of liberty, as he is the seer of love, but poetry is no more the thing it sings than theory is the deed, or ethics the character of man.

Education has been considered by many as the true basis of popular liberty. It is unquestionably true, and proudly acknowledged by every lover of

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is a political citizen; every citizen is an elector; every elector is a sovereign. There is no one citizen who can say to another: 'You are more of a sovereign than I.' Contemplate your power, prepare to execute it, and be worthy of entering on the possession of your kingdom." The author of these phrases is Mr. de Lamartine, who says, in his Revolution of 1848: "The reign of the people is called the republic."

modern popular liberty, that a wide-spread and sound education is indispensable to liberty. But it is not liberty itself, nor does it necessarily lead to it. Prussia is one of the best educated of countries, but liberty has not yet found a dwelling-place there. The Chinese government is avowedly based upon general education and democratic equality in the hierarchy of officers, but China has never made a step in the path of liberty. Education is almost like the alphabet it teaches. It depends upon what we use it for. Many despotic governments have found it their interest to promote popular education, and the schoolmaster alone cannot establish or maintain liberty, although he will ever be acknowledged as an efficient and indispensable assistant in the cause of modern freedom.

How then is real and essential self-government, in the service of liberty, to be obtained and to be perpetuated? There is no other means than a vast system of institutions, whose number supports the whole, as the many pillars support the rotunda of our capitol. They may be modest in their appearance, and even unseen by the passer-by, as those pillars are, but they are nevertheless the real support.

Let us then consider the nature of institutional liberty more closely. In order to appreciate this subject, it will be desirable to inquire first into the nature of institutions in general.

According to the highest meaning which the term has gradually acquired, an institution is a system or body of usages, laws, or regulations of extensive

and recurring operation, containing within itself an organism by which it effects its own independent action, continuance, and, generally, its own farther development. The idea of an institution implies a degree of self-government. Laws act through human agents, and these are, in the case of institutions, their officers or members.

We are likewise in the habit of calling single laws or usages (which are laws of spontaneous growth) institutions, if their operation is of vital importance and vast scope, and if their continuance is in a high degree independent of any interfering power. These two characteristics establish a close affinity between such laws and institutions proper as they have been just defined. Thus we call marriage an institution in consideration of its pervading importance, its extensive operation, the innumerable relations it affects, and the security which its continuance enjoys in the conviction of almost all men, against any attempts at its abolition. Indeed, we generally mean by the term Institution of Marriage, pretty much the institution of the family, that is the family as a community sanctioned and fostered by the law, by authoritative usages, and by religion—the cluster of laws and usages, social, political, and religious, which relate to this well-defined community.

It always forms a prominent element in the idea of an institution, whether the term be taken in the strictest sense or not, that it is a group of laws, usages and operations standing in close relation to

one another, and forming an independent whole with a united and distinguishing character of their own.

A system of laws very often consists of a variety of systems, each enjoying a proportionate degree of self-government, as a general organism is composed of many organs with distinct and peculiar actions of their own, although working in unison and according to the principles and regulative laws of the general organism. We have many institutions which consist of a number of institutions either of the first mentioned or second sort, and as institutions may exist in all the great spheres of human action it naturally results that there are institutions of the greatest variety in character and extent. A bank, parliament, a court of justice, the bar, the church, the mail, a state are institutions, as well as the lord's supper, a university, the inquisition, all the laws relating to property, the sabbath, the feudal system. The Roman triumph, the Hindoo castes, the bill of exchange, the French Institute, our presidency, the New York tract society, the Areopagus or Olympic games, an insurance company, the janizaries, the English common law, the episcopate, the tribuneships, the "captainship" of a fishing fleet on the banks, "the crown," the German book trade, the Goldsmith's Company at London, our senate, our representatives, our congress, our state legislatures, courts of conciliation, the justiceship of the peace, the priesthood, a confederacy, the patent, the copy right, hospitals for lunatics, estates, the East India Company—all these and thousands more are or were institutions in the one or the other adaptation of the

term. Whether they are good or bad, expedient or unwise, human or divine has nothing to do with the distinctive character of an institution as such.

"The School," that is to say the whole school system, as well as the modern national army, in Prussia, have been called institutions, when it was desired to express the idea that they are establishments of vast importance and that they enjoy a supposed degree of independent vitality. Mr. Bunsen, in his Hyppolitus, calls the book of common prayer "a national institution."[4]

The noun Institution is, indeed, formed of the verb to Institute, but it does not, on that account, express, as noun, the action or the effect of that which constitutes the meaning of the verb. The sense of the noun frequently diverges from that of the verb, in all languages, and especially so in the English.[5] We institute an inquiry; but an inquiry

[4] Vol. iii. 293.—A member of the late French National Assembly, speaking of the enormous California lottery, which was then in its full ruinous operation in France, used the expression: "This is not a lottery; it is a series of lotteries; I ought to say an institution of lotteries."

The exaggeration was carried farthest when an English newspaper called the duke of Wellington an institution. We see, however, through the exaggeration, the original sense universally attributed to the term.

[5] The word is a finished and a given thing; the idea is in a constant state of expansion or contraction, far exceeding the formative powers even of the most perfect language, so that frequently a whole class of words derived from the same root retains nothing in common but a vague association of ideas, and even this often vanishes. The history of the changing meaning of man's words is instructive, and equally so the history of the changing word. I

is not an institution; and on the other hand, there are many institutions which have never been instituted. They have grown.

This class of institutions forms in a certain point of view the most important, as will be admitted when we consider that the jury, systems of common law, the British parliament and our bicameral systems of the legislature, most governments and the states themselves are grown institutions.

The English language has but one term for both, the crescive institutions, as they might be termed, and the instituted or enacted institutions, such as a corporation, congress or our legislatures; whose institutors are the people, enacting the constitutions. Grown or spontaneous institutions are not ill-defined or loosely distinguished from one another on that account; they may be as individualized as a shady tree in the forest; and enacted or contrived institutions are not confined and narrow on that account. They may be as extensive in action as an

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need only allude to such remarkable words as *Stare*, Status, Statute, Stand, Establishment, Stabilis, Estate, and the whole history through which the meaning of the word State has passed and is still passing on the one hand, and the many branches such as Stable, Staple, Staff, Station, Statistics; or we may take *Civis*, Civitas, Civilis, Civilitas, Civility, Civil (in its two distinct terms), Civilization, Citizen; Nascor, Nation, National; Populus, Publicus (for populicus), Public, People, Popular and Populari: Gignere, Genus, Gens, Gentile, Gentle, Genteel, Gentleman, with the different meanings through which this last word has passed from the time when it meant a man of gentle, that is, not vulgar, not common blood or extraction, to its present import, which relates exclusively to character and breeding. Breeding itself might be mentioned here.

Atlantic steam-ship. The speakership is a well-defined cresive institution; the supreme court of the United States is a vast enacted institution.

Most of the institutions which owe their origin to spontaneous growth have become in course of time mixed institutions. Positive legislation has become mingled with self-grown usage, as is the case with the institution of property, the jury, the bill of exchange, the Hindoo castes, money.

It is with the object of comprehending the grown as well as the established institutions, that the words "usages, laws, or regulations" have been employed in the definition at the head of this discussion.

Dr. Thomas Arnold, whose name I never mention without veneration, says, at the beginning of his Lectures on History: "I would first say that by institution I wish to understand such officers, orders of men, public bodies, settlements of property, customs or regulations, concerning matters of general usage, as do not owe their existence to any express law or laws, but having originated in various ways at a period of remote antiquity, are already parts of the national system, at the very beginning of our historical view of it, and are recognized by all actual laws, as being themselves a kind of primary condition on which all recorded legislation proceeds. And I would confine the term laws to the enactments of a known legislative power at a certain known period."

It will be seen that this writer restricts the meaning of the term institution to what has been called

grown institutions; nor does he do this with philosophical cogency. He enumerates instances rather than gives a definition; and it seems arbitrary to bestow the term on grown institutions only. It is contrary to universal usage, as well as to the necessity of the case. What is an instituted legislature of Wisconsin, an incorporated bank, an orphan asylum, or a chartered city government, if it be not an institution? According to Dr. Arnold, scarcely a pure institution exists, for in all, or nearly all, institutions positive enactments have become mixed up with the unenacted usage, as has been mentioned before.

Nor is it accurate to call certain "officers or orders of men" institutions. What unites the individual officers into an institution? or how can the institution outlast the individual officers existing at any given period? How could the house of representatives of congress be an institution, which every one calls it, and which assuredly it is, when its members cease to be such every two years? They are but temporary members of the perpetual institution. The institution itself is the organic law in the constitution of the United States which provides for the organization and periodical renewal of the house. The same is true with reference to the state and its citizens, living at any given time. Citizens are born and are dying all the time, but the state is a continuum. The jury of the common law is an institution now spreading over the territory of at least sixty-eight millions of people, but the jurors form

only very transitory, although continually repeated representations or embodiments of the institution.[6]

It is this very fact, passed over by Dr. Arnold, that constitutes one of the most important practical features of the institution. It spreads the framework of the same system of laws over sets of men periodically renewed, prescribing their line of action, so that it becomes a consistent continuation of that which their predecessors have done, or, to express it in other words, it breathes the same leading principles into different aggregates of men and different generations, as the same principles in varying matter produce and reproduce the same seasons. The institution thus insures perpetuity, and renders development possible, while without it there is little more than subjective impulsiveness, which may be

[6] The term Institute seems to differ from Institution, according to present usage, in this, that the first, when it does not mean the initiatory knowledge of a wide system of knowledge (as institutes of the pandects, of medicines), is chiefly used as a noun proper for an institution of learning or the diffusion of knowledge, for instance French Institute, Mechanics' Institute. It may be used as a generic term for institutions of diffusion of knowledge of a higher character; but it is frequently abused in these cases. Schools of some pretence are called institutes, with that deplorable extravagance with which common schools are called academies, common colleges universities, auction rooms auction marts, a single and simple person a party, every chairman a president, and which has so sadly invaded our manly language that many superlative words, such as splendid, magnificent, giantlike, transcendent, illustrious, and hundreds of others can hardly be any longer used by a sober and vigorous writer, and have become worth little more than old coins, once good but now clipped, punched, and swetted by unlawful usage.

good and noble or ruinous and purely passionate, but always lacks continuity, and consequently development and safe assimilating growth. A market assembly, convened at stated intervals, without institutions, can produce little more than a succession of impulsive or instinctive actions, the more impulsive the more exciting the subject is on which the uninstitutional multitude acts. The same applies to larger communities, if they act without institutions, and in this resemble the Indians of the pampas, who meet and act on each question by simple majority, unguided, unmoulded, unrestrained by permanent laws and usages, or without a maturing organism.

There is nothing so void of lasting good as that history which consists of a succession of actions through which there runs no connecting idea, no growth and expansion. It sinks to mere anecdotical chronology. All that is deeply good or truly great, and not only vast, in the sense of Attila's conquest, requires development and progress. Impulsiveness without institutions, enthusiasm without an organism, may produce a brilliant period indeed, but it is generally like the light of a meteor. That period of Portuguese history which is inscribed with the names of Prince Henry the Navigator, Camoens and Albuquerque, is radiant with brilliant lustre, but how short a day between long and dreary nights! Portugal had no institutions to perpetuate her glory, and that splendor was but the accidental effect of fortunate circumstances happening to combine at that period. The best national impulses, without institutions, remain but happy accidents.

When it is said that one of the requisites of the institution is that it shall contain within itself an organism by which it effects its own independent action and continuance, it is obvious that this must be taken in a comparative sense, because every institution ought to stand in connection with others, and is frequently a minor organism of a more comprehensive one; or an institution may be actually the creature of the legislature, and the legislature itself may be the creature of the constitution, which may have emanated from the sovereign will of the people. Yet we call a body of laws or usages an institution only when we unite the idea of an independent individuality with it. It must have its own distinct character, its own peculiar action, and it must not owe its continuance to the arbitrary mandate of a will foreign to it. Independence does not mean sejunction or isolation.

If this were not so, we would not stand in need of the term institution, and the simple term of Law or Ordinance would suffice.

Neither the Romans nor the Greeks had a separate term for institution;[7] indeed the Greeks had not

[7] The Latin Institutum does by no means exactly correspond to our word institution. It means a purpose, object, plan or design, and, finally, a settled procedure, by which it is intended to obtain a certain object; hence a uniform method of action, to be observed when similar cases occur. *Institutum* is very frequently used in conjunction with *consuetudo*, and often means nothing more than settled usage with reference to certain cases. *Institutum* thus designates one of the elements of our Institution, but it does not include the idea of a distinctly limited system of laws or usages with a considerable degree of autonomy, nor does it comprehend the idea of our enacted institutions. *Institutum* retains the idea of

even distinct words for the Latin jus and lex, a paucity of language which we share with them; and if the Romans had no word for institution, although they had many real institutions, we have many important separate systems of law, such as the law of insurance, of bailment, the maritime law, without having an appropriate term for separate bodies of laws and rules. Nor did the Roman probably feel the want of a word for Institution, for the same reason that he expressed time by saying: "Two hundred years after *the founded city*." The thing itself, the city, was in his mind. We would say: Two hundred years after the *foundation of the city*. The foundation of the city, an abstraction, is in our mind. The Roman said Respublica, the Public Thing; and upon this raft of words, strong but coarse, his own political progress and civic life forced him to put a heavy freight of meaning, until it came to designate the vast idea of Commonwealth. The Roman was adverse to abstract terms.[8] Ab-

usage throughout. Still, it is readily seen how the Roman word *institutum* was naturally changed and expanded into the modern word Institution.

[8] The Roman shunned abstraction even though he should become illogical. He said: In medias res, into the middle things, instead of into the middle of things, and we moderns abstract even against all sense. I read but yesterday in large letters over a shop this word—Carpetings. Here we have first an unmeaning abstraction of a simple and sound word, carpet, and then a plural is made of the more abstract term. The Americans, altogether inclined to use pompous and grandiloquent words, are also given to use these abstract terms or those that approach abstraction far more than the English. The sign of the smallest baker's shop will not be John Smith, Baker, but Bakery by John Smith, perhaps even Ameri-

stracting was a process at which he was no good hand.[9] The Greeks, however, may have lacked a proper term for the idea Institution, although so ready to abstract, and possessed of a plastic language, which offered peculiar facilities for the formation of abstract terms, while yet the people were characterized by an eminently political temperament, simply because the Greeks were, comparatively speaking, not a tribe of an institutional bias. They were not prone to establish political institutions, and, with the exception of the Dorians, preferred to bring everything under the more or less direct will of the mass. But, although the Greeks abstracted well, and had a language in which they could readily cast any abstraction, it must not be forgotten that they rather restricted their terms of abstraction to philosophical speculation, and in all the other spheres of life and action they manifested the true antique spirit, that of positive reality. Their style and expressions accorded with this bias.

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can Bakery, or, should it happen to be near the sea, Ocean Bakery. A common shop of a green grocer in the second largest city of the United States calls itself United States Market. The negroes have caught the fever. Not long ago I saw a common *shanty* erected in a southern forest, to accommodate travellers with coffee while their luggage was ferried over a river, adorned with the following words on a pine board: Jenny Lind and Sontag Hotel. The railway bridge had been carried away, and the café was but for a few days.

[9] The best grammarians tell us that Latin nouns ending in *io*, and adjectives ending in *ilis* (that is, abstract terms), must be used with circumspection, and not without good authority, since they are comparatively rare in the best writers. This is true, and speaks volumes concerning the Roman character and mental constitution.

They might as easily as ourselves have said the Union or the League of the Achaeans, but their word for our union was simply "the whole" (το κοίνον).

Few nations have evinced a greater and more constant tendency to build up institutions, or to cluster together usages and laws relating to cognate subjects into one system, and to allow it its own vitality, than the Romans in their better period. The Greeks, as has been observed, were far less an institutional people. There is a degree of adhesiveness and tenacity —a willingness to accumulate and to develop precedents, and a political patience to abide by them— necessary for the growth of strong and enduring institutions, which little agreed with the brilliant, excitable, and therefore changeable Greeks. This was at least the case with the Athenians and all their kindred, and to them belongs the main part of all that we honor and cherish as Grecian.

The London Times has called the queen of England an institution. This is rhetorically putting the representative for the thing represented—the queen for the crown, which itself is a figurative expression for the kingly element in the British polity. Nevertheless, the meaning of the assertion that the queen of England is an institution, is correct and British. It originated from a conviction that the monarch of Great Britain is not such by his own individuality, that he is not appointed by a superior power or divine right, but that he enjoys his power by the law of the land, which confines and regulates it. It means that he is the chief office-bearer, or, it may be, the chief emblem-bearer, of a vast institution, which

forms an integral part of the still more comprehensive institution called the British government or the state.[9]

[9] The reader who desires to become acquainted with the opposite view, must turn to the Christian Politics, by Rev. Wm. Sewell, Fellow and Subrector of Exeter College, London, 1848; a book which carries out the views of Filmer to an extent which that apologist of absolutism never contemplated. It may be fairly considered to occupy the point opposite to that of the most rabid socialist of France; and, according to the rule that we ought to welcome a work which carries its principle to the fullest length, no matter what that principle may be, it is worth the student's while to make himself acquainted with it. If he can get through the whole, however, he is more patient than I found it possible to be. According to Mr. Sewell, there is but one true government, absolute monarchy, demanding absolute obedience: the king makes the state, and the view I have endeavored to prove in my Ethics, that the state, despite of its comprehensive importance, still remains a means to obtain certain ends, is attacked as the opinion of mere "philosophers." The king, the house of lords, and that of the commons, as they ought to be considered, indicate, according to this writer, the relation in which possibly the three persons of the one deity stand. Filmer stopped short at least with Adam. To counteract the revolting effect which may have just been produced, I refer the reader to page 146, where he will find, in a passage of great length, that the Greek at Marathon fought *only* for his country, his hearth and his laws, while the Persian far surpassed him, because he fought for his king (those also who, according to Herodotus, were whipped into battle?), and that "a christian eye will look with far greater satisfaction and admiration on the Persians, who threw themselves out of the sinking vessel, that by their own death they might save their king, than upon Thermopylæ or Marathon." Enough! I should not have alluded to such extravagances and crudities, were not the book a very learned yet illogical apology for a doctrine which many may have supposed to be dead, and did it not occupy, in view of its preposterous theory, the first place of its class. Nor is it historically uninteresting that such a work has been written in the middle of the nineteenth century. So much is certain, that were the English government actually founded upon

In the same way are the lord chancellor, the justice of the peace, the coroner, institutions; not indeed the individuals who happen to be invested with the office, but those systems of laws and usages which they represent at the time.

It is likewise obvious why very old usages or offices of large influence are often called institutions. The fact of their being old proves a degree of independent action or existence. No change of things around them has swept them away; no power has ventured to strike them down. They appear to be rooted in society itself, beyond the reach of government; and single offices occasionally are called institutions, by way of flattery, because all feel that a real institution is in dignity superior to a single law or office, on account of its inherent principle of self-government.

The following, then, are necessary attributes of a complete institution, taking the term in its full modern adaptation:

A system or an organic body of laws or usages forming a whole;

Of extensive operation, or producing widely spread effects;

Working within a certain defined sphere;

Of a high degree of independent permanency;

With an individual vitality and an organism, providing for its own independent action, and, fre-

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that hyper-absolutism, which the author considers so christian, no one would be permitted to assail its fundamental principles with that impunity which he now enjoys.

quently, for its own development or expansion, or with autonomy;

And with its own officers or members, because without these it would not be an actual system of laws, but merely a prescript in abeyance.

The institution is the opposite of subjective conception, individual disposition and mere personal bias. The institution implies organic action. In this lies, not only its capacity of perpetuating principles and of insuring continuous, homogeneous and expansive action, but also its great power, its grandeur, its blessing, its danger and its curse, according to its original character and its inherent principle. Christ imprinted on his church the missionary character, and from the apostles to the servants of the gospel who lately starved near Cape Horn, the institution of the missionary ministry has been the pioneer and handmaid of extending civilization. But if the institution is intrinsically bad, or contains vicious principles, it lends additional and fearful power to the evil element within it, and gives a proportionate scope to its calamitous influence. If it be established in a sphere in which the subjective ought to prevail, it becomes a fearful curse when it makes the objective prevail more than is desirable, or when it makes the annihilation of individuality and personality in general one of its very objects. The gigantic institution of the Society of Jesus, and some of the modern Trade's Unions are impressive and amazing examples.

Whenever men allow themselves to glide into the belief that moral responsibility can be aught else

than individual, and that responsibility is divisible, provided many perform but one act; whenever the esprit du corps prevail sover the moral consciousness of man, which is inseparable from his individuality, the institution gives a vigor to that which is unhallowed and unattainable by the individual. The institution is, like every union of men, subject to the all-pervading, elementary law of moral reduplication, as I have called it on previous occasions, and which consists in this, that any number of united individuals, moved by the same impulse, conviction or desire, whether good or bad—whether scientific, æsthetic or ethical, patriotic or servile, self-sacrificing or self-seeking—will countenance and impel each other to far better or far worse acts, and will develop in each other the powers for the specific good or evil, in a far greater extent, than would have been possible in each separate individual. It is the law which is illustrated by the excellence of whole periods in one particular sphere; by the rapid decadence of nations when once their fall begins; by the lofty character of some times, and by the terrible effect of indiscriminate imprisonment; by the power of example; by the silliness which at times pervades whole classes or communities; by the sublime, calm heroism on board a sinking man-of-war, and at other times by the panic of large masses. It is the universal law of mutual countenance and excitement.

If an institution is founded on a vicious principle, or if a bad impulse has seized it for a time, it will not only add to the evil force, according to the general law of moral reduplication, but lend addi-

tional strength by the force of its organization and the continuity of its action. Members of an institution will do that which, as individuals, they would never have possessed the immoral courage of perpetrating. They will deny the obligation of paying what is due to widows and orphans, in cases which would have made them look upon the denial as disgraceful, had they acted in their own individual cases. Thousands who have committed acts of crying cruelty as members of the Holy Office would not have been capable of committing them individually. The institution in these cases has the same effect which all united and continuous action has.

On the other hand, institutions have been able, for the same reason, to resist iniquitous inroads, or its members have been wrought up to a manly devotion, when the individual would not, often at least could not, have resisted. In almost all cases of an invasion of rights by one of the domestic powers, we find that some institution has formed the breakwater against the rushing tide of power. There are many instances, such as the "Case of the Bishops" under James the Second, and the rejoicing of the better disposed Frenchmen, when lately the court of Paris declared itself, although in vain as it turned out, competent to judge of the spoliation which the dictator had decreed against the Orleans family, which show how instinctively men look toward institutions for support and political salvation.

I have purposely restricted my remarks on the resisting force of institutions to cases of invasion

by domestic powers. When foreign invaders trample upon rights and grind down a people, something different and sharper is required to rouse them, to electrify them into united resistance. Humanity itself must be stung, an element in man's very nature must be offended, so that the most patient cannot endure it any longer. We find, therefore, that innumerable popular risings against foreign oppressors, in antiquity and modern times, have taken place, when the overbearing oppressor, having gone all lengths, at last violates a wife or a daughter. That at length comes home to the most torpid heart, and will not be borne by the veriest slave.

We investigate, here, the nature of the institution in general. Like everything possessing power, it may serve for weal or woe, as we have seen. Constituted evil is as much worse, as constituted good is more efficaciously good than that effected by the individual. When we know the essential nature of the Institution, we shall be able to judge when, and where, and how it may be used beneficially. An institution is an arch; but there are arches that support bridges, and cathedrals, and hospitals; and others that support dungeons, banquet rooms of revelry, torture chambers, or spacious halls in which criminal folly enacts a melancholy farce with all the pitiful trappings of unworthy submission.

The greater or less degree in which the institutional spirit of different nations is manifested furnishes us with a striking characteristic of whole nations. The Romans, the Netherlanders, and indeed all the Teutonic tribes, until the dire spirit

of dis-individualizing centralization seized nearly all the governments of the European continent, were institutional nations. The English and ourselves are still so. The Russians and all the Sclavonic nations, the Turks and the Mongolian tribes, seem to be remarkably uninstitutional.

A similar remark naturally applies to different species of governments. Some do not only result from a decidedly institutional tendency of the people at large, but they also promote it, while there is in others an inherent antagonism to the institution. No absolutism, whether that of one or many, brooks institutions. The reason is not only because all absolute rulers discountenance opposition, but because there is in every despotism an ingrained incompatibility with independent action and self-government, in whatsoever narrow circle or moderate degree it may strive to maintain itself. This is so much the case that often despots of the best intentions for the welfare of the people have been the most destructive to the remnants of former, or or to the germs of future institutions, in the very proportion in which they have been gifted with brilliant talents, activity and courage. These served them only to press forward more vigorously and more boldly in the career of all absolutism, which consists in the absorption of individuality and institutional action, or in levelling everything which does not comport with a military uniformity, and with sweeping annihilation of diversity.

As institutions may be good or bad, so may they be favorable or unfavorable to liberty. They may indeed give to the representative of the institution

great freedom, but only for the repression of general freedom. The viziership is an institution all over Asia, and has been so from remote periods, but it is an institution in the spirit of despotism, and forms an active part of the pervading system of Asiatic monarchical absolutism. The star chamber was an institution, and gave much freedom of action to its members, yet the patriots under the Stuarts made it their first business to break down this preposterous institution. When in 1660 the Danes made their king hereditary and absolute, binding him by the only oath that he should never allow his or his successors' power to be restricted, the Danish crown became undoubtedly a new institution, but assuredly not propitious to liberty. Of all the Hellenic tribes the Spartans were probably the most institutional, but they were communists, and communism is hostile to liberty. They dis-individualized the citizens, and, as a matter of course, extinguished in the same degree individual liberty, development and progress. A state in which a citizen could be punished because he had added one more to the commonly adopted number of lute strings, cannot be allowed to have been favorable to liberty.

Many of those very attributes of the institution proper, which make it so valuable in the service of liberty, constitute its inconvenience and danger when the institution is used against it. It is a bulwark, and may protect the enemy of liberty. It is like the press. Modern liberty or civilization cannot dispense with it, yet it may be used as its keenest enemy.

CHAPTER XXVI.

THE INSTITUTION, CONTINUED. INSTITUTIONAL LIBERTY. INSTITUTIONAL LOCAL SELF-GOVERNMENT.

CIVILIZATION, so closely connected with what we love in modern liberty, as well as progress and security, themselves ingredients of civil liberty, stands in need of stability and continuity, and these cannot be secured without institutions. This is the reason why the historian, when speaking of such organizers or refounders of their nations as Charlemagne, Alfred, Numa, Pelayo, knows of no higher name to give them than that of institutors.

The force of the institution in imparting stability and giving new power to what otherwise must have swiftly passed away, has been illustrated in our own times in mormonism. Every observer who has gravely investigated this repulsive fraud will agree that as for its pretensions and doctrines it must have passed as it came, had it not been for the remarkable character which Joseph Smith possessed as an institutor.[1] Thrice blessed is a noble idea, perpetuated in

[1] The great ability of this man seems to be peculiarly exhibited in his mixture of truth and arrant falsehood, his uncompromising boldness and insolence, and his organizing instituting mind. Two

an active institution, as charity in a hôtel-dieu; thrice cursed, a wicked idea embodied in an institution.

The title of institutor is coveted even by those who represent ideas the very opposite to institutions.

Louis Napoleon Bonaparte, when he lately inaugurated his government, dwelt with pride, or a consciousness that the world prizes the founding of good institutions as the greatest work of a statesman and a ruler, on the "institutions" he had established.[2]

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men have met almost simultaneously with great success, in our own times—Joseph Smith and Louis Napoleon. Of the two the first seems the more clever. He would almost reap all the praises which Machiavelli bestows upon the founder of a new empire. And he did it against all chances, without any assistance from tradition or prestige. Whether he be also the worse of the two will not be hastily pronounced by a careful inquirer.

[2] He meant, of course, the senate, legislative corps, and the council of state. Why he calls these *new* institutions no one else can see, but he evidently wishes to indicate his own belief, or desired, that others should believe, in their permanency, as well as, perhaps, in some degree in their own independent action. To those, however, who consider them as nothing more than the pared and curtailed remnants of former institutions, who do not see that they can enjoy any independent action of their own, and are aware that their very existence depends upon the mere forbearance of the executive; who remember their origin by a mere decree of a dictator whose very power by which he established them bears witness that he considers himself bound by no superior law, and who at any time may decree their cessation—to those who know with what studied and habitual sneer "parliamentary governments" are spoken of by the ruling party in France, all these establishments appear in principle no more as real institutions than a tent on a stage, the outpost of an army, or the clerk's office on board of one of our steamboats.

Institutions may not have been viciously conceived, or have grown out of a state of violence or crime, and yet they may have become injurious in the course of time, as incompatible with the pervading spirit of the time, or they may have become hollow, and in this latter case they are almost sure to be injurious. Hollow institutions in the state are much like empty boxes in an ill-managed house. They are sure to be filled with litter and rubbish, and to become nuisances. But great wisdom and caution are necessary to decide whether an institution ought to be amputated or not, because it is a notable truth in politics that many important institutions and laws are chiefly efficient as preventives, not as positive agents. It is not sufficient, therefore, that at a glance we do not discover any palpable good produced by the institution, to justify us in setting about lopping it off. Antiquity is prima facie evidence in favor of an institution,[3] and must not rashly be confounded with obsoleteness; but antiquity is certainly no proof against positive and grounded arguments. On the other hand, hollow institutions have frequently the serious inconvenience of deceiv-

[3] I am aware that many persons believe nowadays so little in this truth that not only does antiquity of itself appear to them as a proof of deficiency, but they turn their face from the whole Past, as something to be shunned, thus forgetting the continuity of society, progress and civilization. Mr. Guizot, in his lectures on the History of Representative Governments, delivered in Paris, 1820, found it necessary to warn his hearers against this horror of the past. The reader will find remarks on the impossibility of "beginning entirely anew," in my Political Ethics.

ing and changing the proper venue, as lawyers would express it. The form of a representative government, without the spirit, true principles and sincere guarantees of self-government in that body, or without being founded upon a candid and real representation, is worse than a government without these forms, because it eases the executive of the responsibility which without that hollow form would wholly rest on it. But here, again, it is necessary to observe that an institution may for a time become a mere form, and yet that very form may soon be animated again by a proper spirit. Parliament under Henry the Eighth had become a subservient tool, highly noxious because it formally sanctioned many atrocious measures of the king. Yet, it was that same parliament which rose to action and importance within fifty years, and within a century and a half became the virtual seat of government and supreme power in the state. There is hardly a species of penal trial which has not at times and for an entire period been abused; yet the existence of this very trial, intended to rest on the principle of independence, became in a better period the starting-point of a new order of things.

We must also mention the fact that there are perennial and deciduous institutions, or institutions avowedly fit only for a preparatory state of civilization. Their office is limited in time like that of the deciduous teeth, which must be drawn if they do not fall out of themselves, or resist too obstinately their perennial substitutes.

We may here close our general remarks on insti-

tutions, and investigate in what the force of the institution consists, when wisely taken into the service of liberty, and in what institutional self-government consists in particular.

By institutional self-government is meant that popular government which consists in a great organism of institutions or a union of harmonizing systems of laws instinct with self-government. It is essentially of a co-operative or hamacratic character, and in this respect the opposite to centralism. It is articulated liberty, and in this regard the opposite to an inarticulated government of the majority. It is of an inter-guaranteeing, and, consequently, inter-limiting character, and in this aspect the negation of absolutism. It is of a self-evolving and genetic nature, and in this respect is contradistinguished from governments founded on extra-popular principles, such as divine right. Finally, institutional self-government is, in the opinion of our tribe, and according to our experience, the only practical self-government, or self-government carried out in the realities of life, and is thus the opposite of a vague or theoretical liberty, which proclaims abstractions, but, in reality, cannot disentangle itself from the despotism of one part over another, however permanent or changing the ruling part may be.

Institutional self-government is the political embodiment of self-reliance and mutual acknowledgment of self-rule. It is in this view the political realization of equality.

Institutional self-government is the only self

government which makes it possible to be at once *self*-government and self-*government.*

According to the Anglican view, institutional self-government consists in the fact that all the elementary parts of the government, as well as the highest and most powerful branches, consist in real institutions, with all the attributes which have been ascribed to an institution in the highest sense of the term. It consists, farther, in the unstinted freedom and fair protection which are granted to institutions of all sorts, commercial, religious, cultural, scientific, charitable and industrial to germinate and to grow—provided they are moral and do not invade the equal rights of others. It receives its aliment from a pervading spirit of self-reliance and self-respect—the real afflatus of liberty.

It does not only require that the main functions of the government—the legislative, the judicial and the executive—be clearly divided, but also that the legislature and the judiciary be bona fide institutions. The first French constituent assembly pronounced the separation of the three powers, and was obliged to do so, since it intended to demolish the absolutism which had grown up under the Bourbons; but so long as there existed an absolute power, no matter of what name, that could dictate, liberty was not yet obtained. Indeed, it may be said that a real division of power cannot exist, unless the legislature and the judiciary form real institutions, in our sense of the term.

These institutions, again, consist of many minor institutions, as an organism consists of many minor

ones. Our congress is a real institution, but its component parts, the senate and house of representatives, are its constituent institutions, and the whole is in close connection with other real institutions, for instance the state legislatures, or it depends upon other institutions, for instance the common law.

Yet the self-government of our country or of England would be considered by us little more than oil floating on the surface of the water, did it consist only in congress and the state legislatures with us, and in parliament in England. Self-government, to be of a penetrative character, requires the institutional self-government of the county or district; it requires that everything which, without general inconvenience, can be left to the circle to which it belongs, be thus left to its own management; it consists in the presenting grand jury, in the petty jury, in the fact that much which is called on the European continent the administrative branch, be left to the people. It requires, in one word, all the local appliances of government which are termed local self-government;[4] and Niebuhr says that British liberty de-

[4] T. Toulmin Smith's Local Self-government and Centralization, &c. London, 1851.

A work which many of my readers will peruse with interest and instruction is Ferdinand Béchard's Lois Municipales des Républiques de la Swisse et des États-Unis, Paris, 1852. Mr. Béchard is also the author of a Traité de l'Administration Intérieure de la France—a work which must be welcome to every inquiring citizen, because it pictures the details of French centralization, probably the most consistently carried out centralization in existence.

Mr. Béchard uses repeatedly in his French work the English term Self-government.

pends at least as much on these as on parliament, and in contradistinction to them he calls the governments of the continent Staats-Regierungen (state governments, meaning governments directing all detail by the general and supreme power).[5]

It must be in view of this local self-government, combined with parliamentary freedom, that sir Edward Coke said of the Justice of the Peace: "It is such a form of subordinate government for the tranquillity and quiet of the realm as no part of the christian world hath the like, if the same be duly executed."[6]

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[5] A German work, the translated title of which is: An Account of the Internal Administration of Great Britain, by Baron de Vincke, edited by B. G. Niebuhr. Berlin, 1815. Niebuhr, who had spent a part of his early manhood in England, published, and probably modelled in a great measure, this work in order to influence, if possible, the Prussian government, to reorganize the state after the expulsion of the French, and to reclaim that kingdom from the centralization it had adopted in many respects from the invaders of Germany. Niebuhr was a follower and great admirer of baron de Stein, who, when minister of Prussia, had given to the cities some degree of self-government by his Städte-Ordnung—causing not a little umbrage to Napoleon. Niebuhr desired to give increased life to the principles contained in the Cities' Charter, when he published the work I have mentioned.

[6] Coke's Institutes, part 10, ch. xxi. Justices of the Peace. The earl of Strafford, who, like his royal master, died so well, after, politically speaking, having lived so ill, bade his brother, on the scaffold, to take this among other messages to his eldest son: "Wish him to content himself to be a servant to his country, as a justice of the peace in his county, not aiming at higher preferment." May 12, 1641. Rushworth (who was on the scaffold), vol. viii. p. 760. George Washington, after having aided in founding a great commonwealth, and after having been twice its chief

Anglican self-government requires that every institution of local self-government shall have the right to pass such by-laws as it finds necessary for its own government, without obtaining the consent of any superior power, even that of the crown or parliament, and that of course such by-laws shall stand good in the courts of law, and shall be as binding upon every one concerned as any statute or law. I believe that it is in the Anglican system of liberty alone, that by-laws are enacted and have full force without consent of superior power. There are in other countries exceptions, but they are rare indeed, and very limited in power, while the by-law is the rule in our system. The whole subject of the by-law is characteristic and important, and stands out like the comprehensive and peculiar doctrine of the Anglican warrant. The character of self-government is moreover manifested by the fact that the right of making by-laws is not derived from any grant of superior power, but has been ever considered in the English polity as inherent in the local community—a natural right of the freemen. Coke says, with reference to these laws and their force: "Of more force is the agreement of the folk and people than the grant of the king;"[7] and in another place he says: "The inhabitants of a town, without any custom, may make ordinances or by-laws for any such thing which is for the general

magistrate, was a justice of the peace in his county, in which he was imitated by John Adams, and, perhaps, by many of the other ex-presidents.

[7] 8 Reports, p. 125.

good of the public,[8] unless indeed it be pretended by any such by-law to abridge the general liberty of the people, their inherent birthright, assured to all by the common law of the whole land, and which that common law, in its jealous regard for liberty, does not allow to be abrogated or lessened even by their own consent—much less, therefore, by the consent of their delegates in parliament."[9]

It may be added that by-law does not mean, as many suppose, additional law, law by the side of another or complementary, but it means law of the place or community, law of the bye or pye, that is of the collection of dwellers, or of the settlement as we, in America, perhaps would most naturally express it.[10]

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[8] 5 Reports, p. 63.

[9] Ibid. p. 64.

[10] See Smith's Local Self-government, page 230. The quotations from Coke to which the three last notes refer are likewise in Smith's work, which I recommend to every reader.

By, in by-law, is the same syllable with which the names of many English places end, such as Derby, Whitby, and is etymologically the same with the German Bauen (to build, to settle, to cultivate), which is of the same root with the Gothic Bua and Boo, and especially the frequentative Bygga, *aedificare*. See Adelung ad verbum Bauen. It is a word which runs through all the Teutonic languages, ancient and modern.

Gradually, indeed, bye-laws came to signify laws for a limited circle, a small society, laws which any set of men have the right to pass for themselves within and under the superior law, charter, &c., which constitutes them into a society, and thus it happened that bye-law was changed into by-law, as we have by-ways, roads by the side of others. It cannot be denied that by-law at present is used in the sense of law passed by the side, as it were, of another and main law. Very few persons know of the origin, and the present sense of by-law is doubtless that of collateral,

expletive or subordinate law. Such double derivations are not uncommon in our language. The scholar is probably reminded, by this note, of the term God, which we christians derive from *good*, and a better, holier derivation, as to the sense of the word, we cannot give to it; yet the historical derivation, the *verbal* etymology if I might so say, is an entirely different one. See Jacob Grimm's German Mythology, ad verbum *Gott*. The starting-point of adoration is, with all tribes, dread, acknowledgment of superior power; then follows acknowledgment of wisdom, and last of all acknowledgment of goodness, purity, holiness.

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