









POLITICAL SCIENCE.

VOL. I.



# POLITICAL SCIENCE

OR

## THE STATE

*THEORETICALLY AND PRACTICALLY CONSIDERED*

BY

THEODORE D. WOOLSEY

LATELY PRESIDENT OF YALE COLLEGE

VOLUME I.

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TO  
PRESIDENT PORTER,  
OF YALE COLLEGE,  
**These Volumes are Inscribed,**  
IN MEMORY OF LONG FRIENDSHIP,  
BY THE AUTHOR.

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## PREFACE TO THE SECOND EDITION.

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THE first edition of this work being exhausted, the publishers have called on the author to prepare a second. Not having anticipated nor expected such a call, nor supposed that during his life-time, if at all, it would be made, he has attempted such a revision as the time that could be used for doing the work, together with feeble health and advanced age, permitted.

THEODORE D. WOOLSEY.

*March 31, 1886.*



## P R E F A C E .

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THE present work grew out of lectures, delivered in successive courses, while the author was president of Yale College, between the years 1846 and 1871. On his resignation of his office in the year last named, it was suggested to him to prepare his notes for publication. When he came to the task, the large mass of materials which was on hand was almost entirely laid aside; and the book has been composed after new examination of the subject, and with consultation of a number of the most approved recent writers.

With regard to the plan of the work the author desires to say a few words. The division into three parts, which somewhat answers to the *Naturrecht*, *Staatslehre*, and *Politik* of the Germans, seemed to be necessary, unless the results of the first or introductory part on rights should either be taken for granted, or discussed somewhat at length here and there within the second part, which treats of the theory of the state. It seemed more advisable to begin the theory of the state on the foundation of a conception of justice, than to work at this foundation while the theory was in the process of construction.

The relations of the second part of the work to the third need a word of explanation, if not of defence. A leading thought of this second part lies in the distinction between that which the state must do, if it would fulfil the essential office of the state, and that which it may and perhaps ought to do, without prohibiting individuals or associations, where the nature of the case allows, from doing the same things. After endeavoring to establish this distinction, it seemed best to leave the particulars to be considered in the appropriate section of the third or practical part. Thus, for example, it being established that some immoral actions ought to be forbidden by state law, it remained in the third to consider what these were. And

while in the second part the author tried to show that the state might set up an established church, provided that in so doing no rights were violated, the discussion of the expediency of establishments in modern societies seemed to find in the third part its appropriate place. This plan of looking at the theoretical and the practical sides of the same subjects in different places must be confessed to be not without its evils. It can hardly be followed rigorously and without exceptions. But a greater evil is that it exposes a writer to repetitions against which the author was on his guard, and did much to prevent or to remove them, yet not with complete success.

The plan of the third part included not only a general view of forms of government, departments and institutions in their growth and at their maturity, but of a number of individual states also, which, having figured largely in the history of the world, may serve as types and illustrations of the forms to which they pertain. Here the enquiry arose, Shall those states which passed through a succession of forms—Rome, for instance—be treated as having a continuous life through their stages, or shall they be considered in one of their forms, under the head of monarchy, under another, of aristocracy, and so on? The latter plan was pursued, and if it should be condemned as breaking up the existence of certain nations into parts, the author must acknowledge its disadvantages, which seemed, however, to be overbalanced by the gain on the other side.

The third part is much larger than the two others taken together. This was caused by the wish to exhibit the politics of the leading states in their growth and changes, with so much, and only so much of their history introduced as might seem necessary for this end. Whether these exhibitions of the course of politics in the historical way is a useful part of practical politics, the reader must judge.

As far as style, selection of materials, and proportion in using them are concerned, the book must speak for itself. The political opinions which find their appropriate place in the work, especially in the last part of it, the author could not disguise, nor can he hope that they will be acceptable to all his readers.

THEODORE D. WOOLSEY.

*October 30, 1877.*

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# POLITICAL SCIENCE.

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## Part 1.

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### DOCTRINE OF RIGHTS AS THE FOUNDATION FOR A JUST STATE.

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#### INTRODUCTION.

##### § 1.

IF, according to a true theory of man, there are any personal rights, they can be realized only in and by means of the state. If there is any such thing as a just state, one of its offices consists in protecting personal rights. Rights and the state, then, have intimate connections, so that either we must assume a certain theory and system of rights in treating of the state, or we must examine the doctrine of rights and make it our starting-point for the consideration of organized society. In this treatise we intend to include them both; but the theory of rights will be made to serve as a preface to the theory of the state, rather than to take an independent place, such as it might have in a work devoted to natural law.

Some things must be assumed in an essay like this. We assume the personality and responsibility of man as a free moral being. We assume also a moral order of the world, not founded on utilities that are in such a sense discoverable by man that he could construct a system of laws for human actions upon them, however the divine author of the world may have arranged it on such a plan. We discard the greatest happiness theory as of no use, nay, as harmful in the de-

partment of politics; and believe that in human relations there must be a distinction drawn between benevolence and justice. At the same time we admit that happiness is an end which the individual and the state may rightfully aim at, and an important one, although subordinate to the right and to the ends contained in the perfection of human nature. We hold, also, most firmly to a system of final causes, running through the moral and social as well as, and more clearly than, through the physical system, which, in the plan of man's nature, appear in most wise and beneficent preparations for a good and just society.

We wish, also, to forewarn our readers that in starting from the point of individual rights we by no means would be understood as believing the protection of rights to be the only end for which the state exists: far from this, we hold that a good state has other most important objects placed before it, as we hope to show in the sequel. But a state has no right to exist, and does not deserve to be called an organism fit for human society, which is not a just state. Now, a true view of human rights is necessary, in order that a state may be intentionally just. Possessed of this quality alone, it would be an imperfect state; but without this quality it would not deserve the name of a state for human beings at all.

The plan of the present work will require us to consider first the general conception of rights, which will be followed by all necessary explanations of particular rights; after which will come an exposition of the theory of the state. This will be followed by practical politics or a discussion, historical and critical, of the means that have been used, or that are best fitted for attaining to the ends implied in the existence of the state, so far as they seem to be worthy of notice.

## § 2.

The subjects of which we propose to treat in the first part of this work are sometimes comprised under the science of natural law, or the law of nature,—terms which owe their origin to the Roman jurists, but are

Rights and natural law.

used in modern times, with an altered signification. Grotius (de jure bell. et pac. i. 1. § 10) defines *jus naturale* in substance as the conclusions of right reason in regard to the moral quality of an action from its conformity or want of conformity with the moral and social nature of man. The terms, then, will include both morality and *jus*, if not something more. Sir James Mackintosh, at the beginning of his discourse on the law of nature and nations, gives the following account of this branch of study. "The science which teaches the rights and duties of men and of states has in modern times been called the law of nature and of nations. Under this comprehensive title are included the rules of morality, as they prescribe the conduct of private men toward each other in all the various relations of human life; as they regulate both the obedience of citizens to the laws and the authority of the magistrate in framing laws and in administering government; and as they modify the intercourse of independent commonwealths in peace, and prescribe limits to their hostility in war. This important science comprehends only that part of private ethics which is capable of being reduced to fixed rules." This definition seems to include all private, political, and international rights and obligations, but confines the science to a department of ethics where fixed rules can be applied. But since the irreducible part of private ethics depends upon an idea or an opinion concerning our nature as really as that which can be subjected to rules, it is not easy to see why the term *natural law* should be restricted to the latter. And, again, while it is in theory true that the law of nations belongs to the same ethical science with private and public right or *jus*, practical convenience seems to require that it be treated of by itself, since the greater part of international law is of a positive character, not deducible directly from fixed rules of ethics, but ascertained from convention only. Nations, being independent communities, it is free for them to determine on what conditions they will hold intercourse with one another.

All these branches of study depend on ethical principles;

but the conception of rights leads us into a field so peculiar and distinct from the wider department of morals, although contained within it, and is also so important for the proper consideration of man in the state, that I cannot hesitate to abandon the old term, *natural law*, preferring to constitute the doctrine of rights and that of the state as two branches of political science.

### § 3.

The science of morals relates to all those acts, internal and external, of moral beings, over which the will can have control, and without which a perfectly right life is impossible. But among these acts, the internal ones, such as feelings, motives, intentions, cannot, as a class, be accurately judged of by finite beings unless by him who is conscious of them : they can, therefore, in themselves, never be the subject-matter of human law, positive or prohibitory. It is only outward acts, taken in connection with the inward intention which they disclose—including also designed neglect to act—that human law can notice. How far a right-thinking society will take notice, in its laws and punishments, of wrong outward actions, is a subject which we shall have to consider hereafter. At present we refer to the subject only to show that there must be a limit to the laws of society within the broader sphere of the laws of a perfect system of morals. Society was never meant to be the principal means by which the perfection of the individual was to be secured, but only the condition without which that perfection would be impossible.

In order to fulfil his work in the world the individual must have certain *powers of action*, which neither public law nor the will of other individuals can be permitted to control. Thus, if he would work he must have the free use of his muscles ; if he would join another individual in working, they two must agree upon the terms ; if a man and a woman enter into a state of marriage it must be with free consent, unless it can be shown that the strong can compel the other.

But it may be asked, cannot the law of society regulate these powers of action, so that the individual himself shall not judge how he shall employ his power of using his muscles or of making a contract? One answer is that this is as much beyond the power of society as it would be to read the heart. Half of society would be employed in seeing that the other half did not exercise its powers improperly, and the great body of supervisors would have no one to supervise them. The powers of free action would be taken from half of the society in order to be given in larger measure to the other half.

## CHAPTER I.

### GENERAL EXPLANATION OF RIGHTS.

#### § 4.

THE powers of action lodged in the individual by nations must then be, to a certain extent, powers of *free* action. But that the individual should have some unrestricted powers of action springs not merely from the necessity of the case—from the inability of the community to superintend the movements of the individual—but also from the reason of the case. Here we appeal to the convictions of men, who will admit that a certain amount of freedom in mature human beings is essential to nobility of character. Freedom is essential to virtue, courage, strength of character, sense of responsibility, high aspiration.

These powers or ways of free action are called rights,\* or *subjective rights*, as pertaining to the individual, so that *it is right* that he should use them, or, as it may be, refrain from using them when and as he will. And if it is right for him to use them, it is wrong for others to interfere in his use of them; or in other words, they are bound to abstain from interference—are bound to leave him

\* The word right is derived from a root denoting in its physical sense to *stretch out*, or *straighten*; as straight is allied to stretch, Anglo-S. streccan. So raihts in Goth., rectus in Latin, and ὀρέγω in Greek, show the same root for the most part in the physical sense, but denote also the reaching forth of desire after an object. The moral sense appears in rectus, Latin, in recht, right, etc., in Germanic languages, and answers to wrong connected with *to wring* or twist. So in Hebrew, the first notion of the very common roots, yashar, tsadaq, is straightness. What is the explanation of the transition to the moral idea? Does rightness or straightness denote conformity to a straight rule, or walking in the straight way, without diverging or wandering?

free in this respect. This binding force imposed by his free power or his right, and indeed necessarily involved in it, we call *obligation*; and in this work we intend accurately to distinguish the correlative to a right or rights by this word, and to use the word *duty* in a wider moral sense. We make a distinction (following the lead of several recent writers, as Lieber, Whewell, Wildman) between the *jural* and the *moral* spheres or departments. That which has to do with rights and obligations we call the *jural*, that which is concerned with moral claims and duties we call the *moral*. The intimate relations, and the differences of these two branches of ethics, we intend to consider hereafter.

### § 5.

But how does it appear that there are *powers of free action* pertaining to individuals, to which the name of rights is applied? And how do we discover what they are? To the first question we reply first that there is a general agreement throughout mankind on the point that there are rights, however indistinct the conception of them, and however different in different ages or races the enumeration of them may have been. 1. Take the case of the child in the family. A parent has given something to one of the children, and he calls it his own. If now an older and stronger child takes it from him by force, he feels that a wrong is done to him and endeavors to recover it by force. Or let a younger child steal such a gift given by the parent; here too the older and stronger child feels that a wrong has been done to him. Thus there is an acknowledgment and a conviction within the family society that neither superior force gives a right to a thing, nor superior craft; but that a connection has been somehow formed between a person and (in the case supposed) a thing, which—unless some higher authority interposes—continues until the will of the individual himself breaks the connection by transferring the thing to another. For let the boy who has been wronged by fraud or force be placated, and he will be ready,

And correlative obligations.

Proof that rights exist.

1. From family life.

perhaps, to pass over the object to some other boy, or even to the wrong-doer. He does not doubt that the relation formed between him and the thing gives to him the free disposal of it. But let the parent have given the thing to him with the injunction that he is not to part with it. In this case he feels that, while he calls it his own, certain uses and a certain disposal of it are prevented by the manner in which he received it. His will, his power of free action was thus limited, and the property in the thing was not absolute in all respects. But if it had been given to him in complete possession, he will not hesitate to exchange the thing so given for something which another boy agrees to give him, and then, if this contract of exchange is violated, he will feel that the other boy has injured him. Here we see the "*cruda exordia*" of the great system of justice which binds the world together, and it is worth while to notice here how early and easily, amid normal human relations, the conception arises of a special right, an ownership of some object in the material world, of a right of transfer to another of the object owned, and of an obligation created by contract. The child does not look to the rights of property beyond the family circle, he does not ask how the father came to have the right to give him the thing; but as little, in general, do grown-up people in the state ask how the state comes to have the right of property over wild land, or even how private persons acquire their titles, unless for their own security it becomes necessary to decide this question.

2. The rights thus acknowledged by children at an early

age are expressed in the laws of most nations.

2. From state law. We do not affirm that either in laws, or in decisions when laws are broken, there is always a distinct conception of what rights are. Some persons, as slaves, have no rights, but are property themselves; or there is a small amount of rights as against the government in a despotic society; or religion and civil rights are so blended—owing to the protection which early society draws from religion in order to secure justice—that the distinctness of the



civil relations does not stand forth in its due clearness. But in such cases the sense of justice is better than one might think. The slave is such by way of punishment, or as a captive in war, the sum total of persons in one nation being conceived to be at war with the sum total of another; or for the payment of a debt; after which *partus sequitur ventrem*, according to a principle which would be just enough if man was only an animal. And if we look at the law of nations, from those of Manu or of the Jews downward, we find similar notions of rights and obligations running through them all. The ten commandments are, in part, simple statements of obligation in the prohibitory form, implying the conceptions of the rights of property, of the family, of marriage, and of life, and, by forbidding false oaths and false witness, securing the obligation of contracts.

3. It will, perhaps, be said that such recognitions of rights do not belong to human nature as such, but <sup>3. Are recognized in inferior races.</sup> to tribes and races that are somewhat above the lowest level at which men have been found. Were this true, it would only show that there is a certain degradation in which moral ideas have almost faded out from a savage tribe. But the readiness with which some such tribes have received the moral code even of Christian ethics, shows that their sense of justice only needed to be quickened, not to be created. But it is not true. In many places, where ships have visited islands of the sea, the people will steal every small article on the vessel, but so the sailors will commit acts of violence, and indulge their lusts with the women, married or not. Have they, too, had no moral ideas? If you look at the laws of the islanders, you will find that the conceptions of rights are not wanting. Almost everywhere theft is punished, violence is esteemed a crime; blood-revenge, with compositions by money and weregild, points at a sense of wrong and of injury done to a family or a kindred. It is true that conceptions of rights are faint, and mingled with religious ideas, it may be, in savage tribes; but it is true, also, that moral and religious ideas are equally undeveloped. And when a nation grows in

culture, there is assuredly no new principle communicated to it, but only a more correct feeling and a sounder judgment are drawn forth. The savage state is not the condition of life which shows us most clearly what human nature is: it reveals to us man in the most unfortunate conditions and in the most imperfect development.

4. Thus, then, the *consensus humani generis* that individual men have rights is universal, and the lowest races are no exception to the universality. The opinion concerning rights is not derived from state law. The sense of rights is nearly as uniform and pronounced as that men have duties or that there is a moral law. The same general admission is seen when men complain of a judge's unrighteous decisions or of political injustice. For instance, if a judge, out of compassion, were to decide in favor of a poor man, giving him, on the general principles of benevolence, what the rich had owned in times past, every one would feel that a wrong was done; that the judge was not meant to be an equalizer of comforts, or a distributor of good things, but had to deal with the question of property; that the rule *suum cuique* is his guide, and that his feelings of compassion ought to have no weight in the case. But men go in their judgments still farther: they complain of the law itself, as being unjust, which shows that they have a standard—true or false—according to which they pass judgment over and against the law of the state.

### § 6.

But how do we discover what rights are, and what is the rational ground on which we can defend their existence? The answer is, that the nature of the individual human being, his needs, the purpose implied in his nature, especially in his moral nature, demand that he be invested with certain powers of free action. The fact of being a man involves the exercise of those activities which are necessary to sustain and unfold the nature of man. Thus he cannot be a man without keeping himself alive, without labor, without the family state, without relations and engage-

ments between the members of society or relations to God. For the great ends which his existence as a man in the world points out, he must have a certain range of free action. Thus we may say that the sum of all rights amounts to this, that every one has a right to be what he was meant to be; that he has a right to develop himself; to maintain and to carry out his true nature.

And this appears the more necessary, when we reflect that without this free action he could not attain to any high moral elevation; that his social, moral, religious nature needs these rights as the foundation for its development nor could he live in society without a sense of obligation, which implies the recognition of rights as belonging to others. Here we come to the *a posteriori* argument for the existence of rights, which Dr. Whewell has made use of,\* that as men have a desire for objects in the outer world which are in the hands of others, there would be no security in possession, but continual struggle to get what another has by fraud or force, unless the desire were controlled by the conception of property, by looking on a thing as another's property. "In like manner the conceptions—of contract, of marriage, and the like, restrain or limit most of the acts to which the uncontrolled desires and affections would give rise." "So the desire of personal safety requires that there should exist a right of personal safety." "Without such a right, the desire would give rise to a constant tempest of anger and fear, arising from the assaults, actual or apprehended, of other men." To all which it might be replied that it does not appear that brute animals recognize the rights of each other, while yet they get along tolerably well in their intercourse within their own kind by some sort of social feeling. The exposition is hardly conclusive, unless you take into account man's moral nature. Obligation goes along with the recognition of rights. "You have a right to a thing, and therefore, I have no right to take it from you." These two

\* Elem. of moral. Book I., chap. iv., p. 78.

propositions complete the appeal to the moral sense. But when we conceive of a being with such immense desires supported by such resources as man, it would seem to be a curse for him to have them, if they must conflict with other similar desires eternally ; and so the final cause of implanting a sense of obligation in his nature is apparent, for this is the great controlling force—this leads to law and public control over the wrong-doer. The mere conception of property, however, if we could conceive of it apart from obligation, would only bring into the mind the wrath caused by invasions of property.

These three considerations, then : the general consent of mankind embodying rights and enforcing the obligations to respect them by law and punishment ; the proper estimate of the destination of the individual, requiring that he have a power of free action in certain directions for the development of his nature ; and the demand of a check on aggressions caused by excited desires, which would necessarily ruin man if a sense of obligation did not form a part of his being—these show that the possession of rights recognized by others belongs to man, and could not be practically denied without extreme evil.

One course of thought shows the importance of obligations as correlative to rights. The existence of a right, pertaining to any one or inherent in any one, implies an obligation laid on every other one, and so there are innumerable moral threads, so to speak, passing from every person to all others, and binding their consciences to observe the same rule of non-intrusion upon the rights of others which they claim as a protection for themselves. Without this, which may be called the moral factor in jural science, the science would have no connection with ethics, for the exercise of rights, which are free powers of action, implies no moral quality whatever. A man may exert his right of acquiring or holding property with entire selfishness or disregard of others' welfare, and yet their obligation arising from, or correlative with his right of property continues. Only when he injures them—that is, violates one of their rights and

Importance of the sense of obligation.

his own obligation in the use of this property, is he jurally accountable. And yet he may commit a moral wrong in the use of the same property all the time.

The possession of rights is necessary for the highest moral development. This is shown by two considerations. The person deprived of all rights is cut off from almost all the ways of doing good to others, and from nearly all the motives which raise one above a listless, sensual life. Let but the acknowledgment of the right of property disappear from the minds of men, and there could be no property and no civilization. At the same time there could be no industry, no life with plans looking far ahead; and in relation to other human beings there would be constant suspicion and fear. Thus, although rights may be exercised without any morally good quality by him who is endowed with them, they are essential to the manhood of the individual, to the proper development and the perfection of human life. They are franchises, and man cannot be a man unless he is free.

The feeling of obligation which is collateral to rights cannot be regarded as a benevolent grant or tribute paid to another, nor can it be explained merely as a deduction from principles of utility, as the teaching of experience in regard to the greatest amount of individual and social happiness. It is true that the utilitarian, when he looks at the part which this feeling or conviction plays in securing the sway of justice and keeping society together, has a sound reason for accepting of it as necessary in the social and jural system. But it is more deeply implanted in our nature than any utility, than any means to a desired end. It is as inevitable a rule for conscience and for abstaining from an invasion of the rights of others, as the rights are a justification of free action. Let me believe that a man is free—that is, has a right to the use of a given thing or to the performance of a given action, and, whether this be true or not, I cannot avoid the conviction that it is wrong for me to interfere with his freedom in that particular.

## § 7.

We are now prepared to show the relations between the Relations of rights and morals. *jural* and moral departments of ethics, or between the sphere of rights and obligations and the sphere of moral claims and duties.

1. The *moral* comprehends the *jural*. Let it be conceded that a man ought, according to right reason, to have the power of free action and to be a law to himself within certain limits; this does not remove his exercise of his rights in each particular case from the control of the law of duty; that is still supreme and universal. He may have, for instance, the right to burn up a roll of bank-bills or destroy a precious picture; but it may be wrong for him to use his property in this way, although his right may make it wrong for others to control him. So, in very innocent actions, as in acting according to the right of locomotion, it may be wrong for him to do this in his circumstances. The law of free action and the rules of duty must be reconciled by giving the supreme control to the latter. Duty follows the man endowed with rights by the side of his freedom, telling him that the freeman has his responsibilities from which no amount of freedom can deliver him. Nay, the greater the freedom, the greater the responsibilities. It can never be too often repeated in this age that duty is higher than freedom, that when a man has a power or prerogative, the first question for him to ask is, "How and in what spirit is it my duty to use my power or prerogative? What law shall I lay down for myself so that my power shall not be a source of evil to me and to others?"

The principle thus laid down, however, does not imply that a man who commits immoral acts in the exercise of a general right, as, for instance, one who uses his property to circulate obscene books or to set up a cockpit, is to be the sole law for himself, and is not to be interfered with herein by the state. The contrary, which we hold to be true, we shall endeavor to show in another place. (§ 81.)

2. Rights *may be waived*. The very nature of a right implies that the subject of it decides whether he shall exercise it or not in a particular case. To require him to exercise a right, to force him to make a contract, the contract of marriage, for instance, is, in the very statement of it, an apparent contradiction. There are, indeed, certain so-called political rights, which citizens or subjects have sometimes been required to perform. Of these we shall speak hereafter, contenting ourselves with saying here that they are not rights in the same sense with those pertaining to the individual man according to his nature and the destination of his being, which now concern us. Again, some states, conceiving of state-life as family life on a large scale, prevent a man from exercising his rights or require him to renounce them. But this is immoral misgovernment. If a person has any rights, he must and may decide on his own responsibility whether he shall in a particular case exercise or renounce them. It is hardly necessary to add that waiving is a free act, and that no renunciation of rights under duress or by constraint can extinguish them, or deprive the subject of rights of them, except so far as to give a legal ground to the consequences of the act, when it emanates from a power that is the fountain of positive law.

But it is important here to observe that this power of waiving one's rights does not mean that a person is at liberty to renounce the exercise of the right in all future cases. Here the moral reason for the right must be the determining consideration. If in general rights are acknowledged that the individual may unfold his nature according to its idea and fulfil the destination of his being, to abridge or destroy one's own rights is the highest immorality. Hence, as life is the condition of the discharge of all rights and obligations, to take one's own life and thus put an end to one's jural existence, is criminal. So also, to become a slave by a free act of one's own is criminal. Rousseau, at the beginning of his "*contrat social*," justly finds fault with the opinion of Grotius that a people may submit itself to slavery. (De Bell., ii., 5, 31.) The most that can be

said is that a conquered people may accept the ordinances of a conqueror as something inevitable; but to refer to such submission as a jural ground of an unrighteous government is to confound a legal or political condition of things, which may often be founded on the highest unrighteousness, with a jural or just constitution. If slavery means the negation of all or nearly all rights, no one ought freely to submit to it; but, as a man in the hands of a robber may give up his property to save his life, so a nation may save itself from worse evils by letting the usurper of power have his way.

3. The negative side in the doctrine of rights is the most important, the most essential side, in all cases where the right is strictly an individual one and all other persons are neutral. In cases of morals the affirmative or positive side is often the most important. Obligation, as correlative to rights, is prohibitory or negative, and is the bond of society—the moral security of freedom. A man is not obligated to acquire property for another, nor to help him do this for himself—though the law of benevolence may make this latter activity right; but is obligated not to prevent him from exercising his right of acquisition, not to injure his good name, not to interfere with his family rights, and so on. Obligation, to a great degree, consists in non-interference. Hence it often, if not generally, in laws takes a negative form, as in the decalogue is the case with thou *shalt not* kill, steal, commit adultery, bear false witness. Only the command to honor father and mother appears in the affirmative form; a reason for which is that the family rights, owing to the nature of the family, are so bound up with duties of several descriptions, which, together with them, result from the family union, that it would be an incomplete command here to prohibit disobedience or irreverence.

On the other hand, duties either take the negative or the positive form, according to the nature of the moral relation. "Thou shalt not tell a lie" takes the first form, but it would not be right to say "Thou shalt not conceal the truth," for this may be right in certain cases. So the duties of charity



to the poor, of hospitality, of patriotism, and many others appear most naturally as positive precepts.

The cases where individuals bind each other to some performance are peculiar. Here the rights conveyed and obligations assumed by the parties are alike positive. For such cases, compare what is said of the right of contract, § 34. But here all persons, excepting the parties to the contract, are simply obligated not to interfere, while they have mutual obligations of a positive character.

4. The jural sphere includes only external actions; the moral embraces both actions and interior states of the moral nature. If a man discharges his obligations or exercises his rights with any motive, good or bad; or if he exercises his rights to his own harm, or wastes his property, while still respecting his obligations to others, rights and obligations are satisfied; law, so far as it does not go beyond these, says nothing to him. There have been indeed societies, chiefly small, or hierarchical or patriarchal, where control over the conduct of individuals has gone far beyond these limits; and we concede that the law of no state can confine itself within the narrow bounds of protecting rights and enforcing obligations. But with all this, as far as the jural sphere is concerned, it is impossible that command or prohibition should go beyond the external act; for rights themselves are powers of specific external action.

On the other hand the moral nature, when enlightened, is not satisfied with having done or omitted an external act, but lays down for itself the great laws of right feeling, and condemns itself for deviations, ever so slight, from a perfect standard.

Thus jural science is external, heartless, and, if one chooses to call it so, pharisaical; it is no rule for the whole of life—no safety, of itself, to society; and yet, as the foundation for a right life in a community, it is supremely important. It is a foundation on which order and society rests, but is no exciting cause of virtue, and has nothing heavenly about it.

It is possible, also, since obligations are external perform-

ances, that it may be right to refuse to discharge them in certain cases ; but it can never be right to fail to do a duty. For example, a contract would not be binding which required that a sum of money should be paid at a certain time to a specific person, if at the time the payee should be insane. Duty depends on an immutable moral law ; but obligation, correlative to a right, may be so injurious to the subject of the right that it would be wrong to fulfil it in the manner or at the time specified. Agencies, which are forms of contract, may present many instances of this kind.

5. Rights and obligations can in a good degree be sharply defined, but moral claims and duties, being dependent to a great extent on varying conditions, cannot be sharply defined. Thus the right of contract is clear enough in its general nature, although in special cases it may be matter of doubt what the parties, or one of them, expected in making the contract. The family state is clear, and the obligations between its members. But, on the other hand, a multitude of duties expressed in general terms are not duties for particular persons or on particular occasions. Thus the duty of charity to the poor is acknowledged by a benevolent mind ; but in practice one has to consider various things, such as his means and the number of demands upon him, the relative claims of applicants, what others in a community will do, and the interests both of society and of the needy, as affected by benefactions. No codes could settle the doubts that may arise in a conscientious mind in regard to this duty ; no such mind can lay down absolute rules for itself. I have selected a comparatively easy moral question. But when we come to some other moral rules, such as those touching the amount of one's expenses, style of life, relations to one's neighbor, amusements, use of the tongue, position to be sought in the world, much greater perplexity arises. We find that for such cases a general rule can hardly be discovered ; that two persons may have duties wholly diverse, and that in this department *disposition* rather than *rule* is the guide to right action.

We need, however, at this point, to make two qualifying

remarks. The first is, that certain rights may be capable of a strict definition, while yet their *limits* cannot be accurately fixed. Examples are found in the rights that grow out of the family relation, where the time of majority is in itself indefinite; and in the right of testament, where perhaps there is no limit to collateral inheritance given in the nature of the case. While there are reasons, lying in the nature of the mature child and his destination in the world, why he should be exempt from parental control, there is no *exact time* for such exemption pointed out. And again, if the propriety of collateral inheritance can be argued from the family union, it cannot be laid down to *what remote degrees of kindred* this rule ought to extend. But the general right of independence of parental control, or of collateral inheritance, is not thereby affected.

On the other hand, certain violations of moral order by action may be so clear in their nature and so harmful in their tendency, that as far as prohibitory law is concerned, they do not differ from violations of rights. These will be considered at large when the limits of state action come under consideration.

### § 8.

Since rights are capable of tolerably exact definition, they can be made the subject-matter of law, and it may follow that when obligations are violated, the injured person may invoke the force of the state, or use force himself, if possible, for his own protection.

The use of force has been often, in modern times, introduced into the definition of rights, as distinguishing them from moral claims and corresponding duties; or, more generally, as marking the difference between the jural sphere on the one hand, and the spheres of morals and of religion on the other. The first to put this distinction in a clear light seems to have been Thomasius, a professor at Halle, and one of the prime agents in founding the university in that city (1694). This enlightened and tolerant man was led to seek for a distinction between

Use of force no  
criterion of *jura*.

the jural and the moral by his aversion to the persecutions to which the Pietists were subjected; he tried to draw the line beyond which force could not, according to a right theory, control human actions. One of the many writers \* that have followed him expresses himself thus: "A right is a possibility determined by the law of right, of imposing on others an obligation, to the fulfilment of which they can be held by force. Thus to every right an obligation according to right answers, and to every obligation a right answers."

It is better, however, to regard the use of force *as resulting* from the clearness with which the right of the individual may be defined, and the consequent clearness of the obligation of others and of the wrong done when the obligation is violated. For, *first*, the right is not originally determined by the fact that force is used to protect it, but by the clearness with which it can be shown to pertain to the nature and destiny of man. If an individual is disturbed in his rights, that is, in the powers of free action clearly and rightfully belonging to him, the state and the court can perceive that this is a right, and can give the necessary protection. *Secondly*, sometimes violation of duty is as plain as violation of obligation. Thus ingratitude in conduct may be as manifest as breach of contract. Shall modern law, then, punish ingratitude, as was done of old? *Thirdly*, many positive *duties* toward society may be and are secured by force, as that of removing snow from the sidewalk in front of a man's house. Even duties declared by the state to be religious, such as attending divine service at the parish church on Sunday, have been enforced by the danger of fine or imprisonment for non-performance. And *fourthly*, there is a large class of immoral acts committed against the welfare of society which states have always undertaken to punish, such as prostitution, distributing obscene books or prints, and even cruelty to animals. Here the act is a clear and definite one, although there is no violation of an obligation to an individual attending it. Such acts states

\* Zachariæ, vierzig Bücher vom Staate, i. 3.

will always frown on with more or less severity, either because this is demanded by the moral sentiment or by the supposed good of the community, or for other plausible reasons. Thus it appears that it is not wholly peculiar to rights and obligations that they can be protected or made to be fulfilled by force. It may indeed be said in regard to the other cases just now mentioned that force can be justified by the destination of the state to be the protector of common interests. This high vocation gives it rights, and so disobedience to laws which do not regulate relations between man and man is a breach of obligation to the state. The state, we answer, has rights and obligations, but the cases supposed are not instances of them. Such laws prohibiting immoral action, prohibiting even the immoral exercise of personal rights, are restrictions on freedom. They call for obedience on all alike; if disobeyed they are followed by penalties which never visit violations of obligations between man and man as such—in short, they have not the characteristics of laws enforcing obligations, but those rather of laws enforcing general morality, and only by indirection enforcing private obligations. We must, then, as it seems, either take the position that law ought to confine itself strictly within the sphere of individual acts, to rights and obligations, or must hold that force may go beyond acts which are of a jural character.\*

### § 9.

Thus it becomes apparent that the recognition of the rights of the individual, as they are pointed out by a Law and society dependent on recognition of rights. right view of human nature, is necessary, in order that upon them may be founded a body of laws and

\* I am well aware that it will be contended, and with some justice, that most actions which are punished as being immoral or as disturbing the public peace, have their criminal character explained on the ground that they tend to produce disrespect of private rights, expose to hazard the interests of property and the like. But why should they be *punished*, if violations of private rights which may be far more serious evils, are not punished? Does not this criterion show that states feel the necessity of protecting society against some evil which is not violation of rights?

securities, without which the perfection of the individual, the progress of society in good, and the highest forms of virtue cannot exist. For, 1. The cultivation of the individual would not be possible, if he did not feel himself able to use the powers or faculties of action which are implied in humanity itself. 2. There could be no advance in society beyond the very cradle of civilization, if a feeling of obligation were not supported by the force of society; for fear and anger would take the place which now calm provision for the future, hopefulness, ability to do all that becomes a man to do, occupy. 3. Virtue might, it is conceivable, exist in any form of life. A man deprived of his property by robbing or fraud, or with his eyes put out or his limbs cut off, might have the most Christ-like sentiments; but if there were no security and no advance possible among our fellow-men, the motives of action would be cut off, and the number of virtues that were possible would be greatly abridged. As there could be no labor for the man without limbs, so there could be no results of labor, no motive to labor without property, and thus no property; and hence the virtues which presuppose the existence of property would be impossible. Instead of them would be the malignant or selfish excitements growing out of fear of invasions of rights, and a listlessness and indolence which would thwart all attempts to do anything beyond preserving our existence.

#### § 10.

The doctrine of rights, as thus explained, contemplates the  
Rights imply co-existence of men. co-existence of beings equally partakers, through their common human nature, of jural relations. It would be of no use or significance, if men were isolated beings. And if their nature changed, there would be, as we have already said, a change of rights, or rights would entirely disappear. Thus, if beings needed neither food, raiment, nor shelter, the right of property would have no meaning, and would never be suggested by the actual form of existence. If men sprang out of the ground separately, there would be

no marriage nor family rights. But as the rights of contract, reputation, property, the family, point to the coexistence of many, the sense of obligation arises to prevent encroachments. Separate rights, therefore, so far from separating men, make it possible to be free and at peace, where all have common desires ; and where rights alone would lead to a selfish society, the correlative sense of obligation serves as a check, and gives room for the social sympathetic feelings to bind the community together.

Kant's definition of right or *jus* is valuable, as contemplating this coexistence of human beings, and as reconciling the freedom of the individual with a life in society to which our destination points us. He defines right or *jus* to be " the sum total of the conditions under which the outward freedom of every one can subsist together with that of every other, according to a general principle of liberty." Right or *jus*, then, has only the negative quality of securing one from the invasions of others ; and the feeling of rights as pertaining to others, together with law in the state conformed to it, depend on the personality and liberty of the individuals of whom a society consists. This definition is defective, as making liberty an end in itself. If liberty is freedom to choose, then mere freedom, irrespective of the objects presented to the choice, *i. e.*, of the motives appealing to the sensitive and moral nature, is without meaning, and cannot be an end. If it be freedom to attain to or strive after certain objects conceived or felt to be good, then it is another name for rights, as the right of locomotion is the power of free, unhindered locomotion, and the right of property the power of acquiring property without being prevented.

The considerations that men exist together in society, that they have an irresistible impulse towards society, that their perfection of soul and of outward condition can be secured only in a social life, and, on the other hand, that recognition of rights and obligation alone make a social life a tolerable or even a possible thing, and that wherever men reflect on their own nature they admit the existence of certain classes of

rights and shield them by public power, show a divine purpose which none who believe in a Creator of the world can deny. The Creator of man, having made him such that his temporal, moral, and spiritual perfection can be found only in society, prepared his moral feelings for the life for which he was destined. The destination for society; the means within human nature by which it is fulfilled; the means by which the individual and the community, when brought into society, are able to secure the good and avoid the evils possible in a state of coexistence—these form a complete, harmonious whole, which manifest comprehension of view and forethought. It is provided in our nature, when it is not perverted—that is, when it does not swerve from the true idea of human nature—that we shall form societies under law. A state of society is a state of nature, and the only true one.

#### § II.

When therefore *natural* rights are spoken of, we can accept the term, if it be used to denote such rights as grow out of our nature, and may be inferred from the destination to which it points us. Another and a heathenish kind of sense was attached to the words, when they were taken to mean the rights, or rather uncontrolled liberties, which men possessed in a state of human nature in which there was no organized society or government. Some of the Greek writers led the way to this theory by deriving the condition of men from a time when the life of man was bestial, without law or penalty. These securities were introduced to begin a state of order in the world. But they could not reach actions that were secret, and so some deep-thinking man, in order to make the bad afraid, invented the doctrine of the gods.\* The theory, however, which explains natural

\* See the fragment imputed to Euripides by Plutarch, de plac. philos., No. vii., and usually to Critias, as Sext. Empir. has done, p. 402, ed. Bekker, where the whole passage is given. Comp. a fragment of Moschion in Stob., ed. phys., i., 8, 38, as also the end of the sixth book of Lucretius, and a passage in Lactantius, de inst. div., vi., 10.



rights by a state of nature, does not need to start from a savage condition of mankind. It contemplates men as enjoying certain powers of free action in this state of nature, and these powers must serve for a foundation of their state as members of society, or so many of them as it cannot be shown that they gave up, in order to make a state of law and order possible. In other words, the theory of the derivation of these rights from a state of nature may take a hypothetical shape, and deduce rights from what a man could do in a state of things which exists only in a jural fiction.

The aim of these speculations was to find a representation of man's state, by which he should appear as free as possible, and to find a foundation for rights which could not be overthrown by the doctrine that they are creations of law and civil order, and must bend to circumstances. We find no fault with the objects which the theories had in view, but with their want of conformity to truth. It must be pronounced, in *the first place*, contrary to fact that such a state of nature ever existed. Man has always been under law; he is a *πολιτικὸν ζῶον*. The family takes him first under his care, and he is there trained up for law. He never existed in an earlier state of isolation. *Secondly*, if it could be shown that he had such an origin, it would prove nothing. The question is, To what does our nature point—what relations in civil life do we need to have towards our fellows, that the ends of our life may be placed within our reach? If it could be shown that man had been developed in the course of ages out of other forms and ranks of being, standing lower down the farther you go back, this would not bear upon his rights and obligations now. If it is necessary, for the fulfilment of the purposes implied in his nature as it now exists and has existed within the historical period, that in the society of his fellow-men he should now have certain powers of free action, that there should be certain metes and bounds beyond which other men should not pass, that is enough. His primeval origin is immaterial for our purpose. If men can now feel the obligation to respect each other's rights—if now they can, with this

moral sense, enter into jural society, the doctrine of rights and obligations has a broad enough foundation. It is unnecessary to go back to the infancy of the individual, or to that of the race, or to some possible early condition when the race had not yet become men.

We mean then by natural rights those which, by fair deduction from the present physical, moral, social, religious characteristics of man, he must be invested with, and which he ought to have realized for him in a jural society, in order to fulfil the ends to which his nature calls him.

### § 12.

It is manifest from this exposition that there ought to be no surprise if there has been a progress in the doctrine of rights and obligations. The earlier societies of men either allowed so much license that individual rights were not distinguished from individual powers, or the individual was controlled to that degree that rights were scarcely recognized. Even in the family the father's power was misunderstood, so that the child was his chattel, rather than a being committed to his charge, to be trained up for a just life and for God. It is not strange that neither the Greeks nor the Romans conceived distinctly of a sphere within the state and under state law, where the will of the individual should have the decisive voice and no state law should control him.\* For to them the individual man did not present himself in his true importance; the state in its freedom and independence was to control all within its limits, directing their education, and in fact the manner of their lives with reference to the good of the community. Christianity, by revealing the worth of the individual, makes rights and obligations more precious, and especially adds new sanctity to family rights, and to those which have to do with religion.

\* Comp. what is said of the state according to the view of classical antiquity, § 58 *infra*, and see Hildebrand, *Gesch. d. Rechts-philos.*, i., 1, § 5.

## § 13.

If rights rest on the foundation of a common nature, all must have an equal share in them, they must be the same for all, and so all must have common obligations. There is no reason why one should have more or higher rights than another, because he is richer, or more powerful, or stronger, or of better birth; for these differences between men affect position in life, they do not imply differences of nature. A man may by his own choice remain a poor man, and cut himself off from the acquisition of property, or may not enter into the family state; but the right exists still. It must be added, however, that there are imperfect, *i. e.*, undeveloped human beings, whose nature as yet does not at all fit them for the exercise of rights, and who can scarcely be called responsible for the fulfilment of such obligations as rest on others. Such are children, who are growing up to exercise rights on a level with others, but as yet are incapable of intelligent action. They may be owners of property, but have not the legal control over their property in order that they may be protected against their own possible acts and the fraud of others. For their future entrance into the condition of full human nature, it is necessary that they be kept from injuring themselves now. So idiots, through their lives, and insane persons, for a time at least, being not fully men, are not competent to exercise the rights of men. These limitations are just, as well as humane.

Another remark needs to be made in regard to political equality, which must be repeated and defended more at large in another place. When we affirm that rights are according to right reason equal, we do not intend to include what are called political rights. It may be that under a good government such so-called rights ought to be granted to all. But we deny that they are rights in the sense in which the rights of property and of contract are such. The right of suffrage is so restricted in the freest societies

Equality of rights.

Exception to equality of rights.

Political equality is another thing.

as to the time of exercising it—which is but a single moment, perhaps, in a whole year; as to the persons who exercise it, who must reach the years of discretion; as to the persons eligible for office, who may be but a small part of a community; and also as to the numbers who are thus selected for office compared with the numbers who are appointed without a vote of the people—that it has not, in fact, the full characteristics of a right, and, if it had, it might ruin a country. The right to hold office is still more restricted, and depends, not on the will of the person chosen, but on that of his electors or appointers. These rights, then, are rather privileges involving duty; and thus, in some countries, to neglect a vote is in some way punishable, whereas, if it were a right, it might be waived.

And here, perhaps, we may fitly notice the two kinds of equality of which Plato speaks in the *Laws*, vi., 757 C., and in *Gorgias*, § 63, 508 A. The one he calls in the latter place geometrical equality, the opposite to having more than one's share; the other assigns more to the greater and less to the smaller, giving to each what is commensurate to his nature, and hence always greater honors to those who are greater in respect to their virtue; but to those who stand in the contrary relation towards virtue and culture, it assigns what is becoming to each one in a due proportion. This thought is thus expressed by a contemporary of Plato, Isocrates (*Areopagit.*, p. 144, ed. Steph.), in speaking of the early Athenians: "The greatest influence in favor of the good government of the city was, that, whereas there are conceived to be two kinds of equality—the one assigning the same to all, and the other assigning what is fit and suitable to each—they did not fail to perceive which was the most useful, but rather disapproved of that kind which held the good and the bad to be worthy of the same things, as being not just, and rather preferred that kind which honors or punishes each one according to his worth. And so by means of this equality they governed the state, not in the method of giving the public offices to all by lot, but in that of preferring the best and the fittest for every sort of business."

As the ancients started from the state and its interests in their judgment of what the individual ought to do and to have in the community, they naturally merged or confounded individual rights with the necessities and rights of the state. If there had been a clear distinction between personal and political rights, they would more easily have reached the principle of equality in the former sphere, while they retained the principle of worth or fitness for state service in the latter. In criminal law, however, they felt that each must be treated according to his due—that is, according to “geometrical equality.”

#### § 14.

There are some classes of duties which lie on the border-line of obligations, so that it is hard to distinguish them. Such are those which are required under the law of honor. What is honor? According to Wordsworth, it is

Relations of rights  
to the law of honor.

“The finest sense  
Of justice which the human mind can frame,  
Intent each lurking frailty to disclaim,  
And guard the way of life from all offence  
Suffered or done.”

The poet has honor between states especially before his mind, but his words will apply where the private relations are taken into account. Honor is either broadly a sentiment connected with a high standard of character in all acts of intercourse with our fellow-men, or more narrowly a nice sense of justice, rendering to them what is their due, and demanding from them what is due to us. Its relations are closest to the right of reputation, which is the most intensely personal and subjective of all rights in civilized society. Where injuries without cause to the feelings of others, insults, exposure of them to public ridicule, are of enough account, a personal right is clearly violated; but there are a thousand petty provocations and depreciations of others which can no more be noticed than the smallest invasions of the right of property. In fact, since as much offence may be taken at neglect or slights

which are thoughtless or unintended as at manifest insults, and since interpretations put on the actions of another by an irritated party are often unfair ; there would be more difficulty in bringing such petty things under the rubric of invasions of rights than in noticing trifling injuries done to manifest rights by boys or wayfarers. In such cases the rule “ *de minimis non curat lex* ” must be made practical.

It is worthy here of mention that there are certain feelings and modes of expressing them which are thought and spoken of under the form of rights and obligations. Thus we say that we have not done justice to a person of whom we have had a bad opinion without reason ; and we speak of treatment *due* to another on account of something in himself or in our relations to him. These illustrations, and many more from the rules of gentlemanly conduct and of propriety and courtesy, might be given, which will show that there is no exact boundary between the domain of duties and of obligations, of moral claims and of rights. They shade off into one another. And so the law of love may be represented as a debt due. “ Owe no man anything but to love one another.”

It has sometimes been represented that there is an opposition between the system of rights and the spirit of Christianity. The one is self-assertion, self-defence, the very spirit of selfishness ; the other is self-renunciation, self-denial, giving way to others. The one separates the individual from the community, the other unites men together ; the one causes wars and fightings, the other is the spirit of universal peace. It is not to be denied that the two differ in their nature, and in the feelings as well as the relations on which they are founded ; but they are not antagonistic, nor mutually destructive. A man cannot attain to the perfection of his being who acts solely under the sway of that part of our nature which leads us to prosecute our rights and fulfil our obligations ; and yet justice is the stability of the world, it is the foundation of the universe. When a man waives his rights, it is self-renunciation ; when he does this in a Christian spirit, it is Christian self-renunciation. When one

Relations of rights  
to Christianity.

waives his rights, he has rights to waive. Self-renunciation itself implies the giving up of what is our own for the sake of a greater good. When one fulfils his obligations, so far forth he does well; and if Christianity did not quicken the action of conscience in urging him to do this, there would be a flaw in it—it would be indifferent to true morality. A man who has rights that are invaded, must consider whether it is best, according to the highest conceptions of duty, to enforce them. The decision of the question of enforcing or renouncing must be entrusted to a right temper. And this decision must vary with circumstances; as we find the Apostle Paul at one time suffering persecution without complaint, at another requiring the prætors at Philippi, who had unjustly put him in prison, to come personally and take him out.

We may add to this that if there were no rights and obligations admitted by men, there could be no society and no law. Thus, the results of the realization of rights in the state, such as security of acquisition, productiveness of labor, a secure family life and the like, being made impossible; Christianity itself would fare hardly, and practical benevolence would be out of the question.

### § 15.

It has been sometimes said that rights grow out of duties, but a better statement of the relations of the two, where they are related, makes them both dependent on the nature of man.\* Thus, if man's nature

\* See Trendelenburg, *Naturrecht*, § 46, ed. 2, for the opposite view in a particular case. It is the case of a ship at sea. Such a vessel is like a little state, threatened by enemies on every side. Self-preservation requires the almost unlimited obedience of the sailors to the captain, and of the latter to the pilot; it requires severe punishments for mutiny, and for assault on the captain, etc. "The authority of the captain over crew and passengers—the captain's rights—depend on his duties, and are given to him on account of his duties. His duties do not appear first on account of his rights, but his rights on account of his duties." Then he adds, "strictly speaking, his duties and rights have sprung out of the same idea at once and

were such that separate and private property satisfied no human needs, and there were no desires for the acquisition or accumulation of external goods, there could be no duties in relation to the uses of property; economy, charity, liberality, and kindred virtues could find no place for their exercise. So also, if men grew out of the ground, the family duties could not exist. If, however, one should say that man was made such as he is, with his free personality and the rights attending on it, that he might the better evolve his moral nature, that might be indeed the reason for his having rights and feeling that he has them, but his duties would not give rise to his rights or define them. The various departments of our nature have reference to one another; and free individual action in society is as necessary for human perfection as are the feeling of responsibility and the perception of our relations to man and God, which are the conditions on which we can discharge our duties.

#### § 16.

If justice is correctly defined as the “*animi affectio suum cuique tribuens*” (Cic., de Fin., v., xxiii., 65), it Relations of rights to justice. can as a quality of law and of a society only mean, as far as individuals are concerned, the definition, protection, and redress of the rights of each. And so injustice is the withholding from any their due, as ascertained by a true view of rights and obligations. But as justice, in the ordinary use of the term, has two senses, namely, the one which we have given, and the sense of awarding *punishment* to those *to whom it is due* (which is an exercise of state power not directly for the sake of the individual whose rights have been violated, but for the sake of the community and of the state), we may class it here with the other kind of justice, and consider what there is peculiar in it hereafter.

together.” This latter is the true statement as it appears to me. Obligation correlative to rights does not exist in this case, but the office is like the political one of a military officer, and has for its duties the preservation of the crew. The captain of a merchant vessel has a portion of public power in his hands. My remarks relate to duties growing out of a relation from which rights spring.



## § 17.

Rights are powers of free action belonging of right to the individual. <sup>Relations of rights to freedom and slavery.</sup> If law does not withhold from him any of them, or wrongfully limit him in the exercise of any, he is said to be free, or civilly free. If it abridges his rights, so far forth it abridges his freedom, and if it takes away from him, or prevents his exercising many or all of them, we call him a slave. Slavery, therefore, and freedom, admit of degrees. We may therefore enquire, in regard to many classes or conditions of life, whether they are free or not, with a degree of doubt as to the answer; and much unprofitable discussion has been wasted on the meaning of these terms, which the consideration that they are terms admitting degrees would remove. The Roman *colonus*, who could not be bought or sold, but could be chastised by his master, and could not remove from his place of labor at his will, was above the *servus*, who could be bought or sold, and could have no property except what his master allowed him. Somewhat above the *colonus* was the Saxon *litus*, who was represented, it is said, in councils of the tribes by the side of freemen, but in other respects was like the *colonus*.\* A hereditary tenant may have all political rights, but is not fully free if he cannot become quit of his obligation resulting from the tenure of land by his ancestors. It will follow, then, that the terms *free* and *slave*, as being capable of greater or less comprehension, are of little use in jural science, the main question being, does such a person possess, or is he denied the exercise of such and such rights by the law of the country.

Political freedom and the want of it belong to another place. We only add here that there may be all the forms of political freedom with no free exercise of personal rights guaranteed to the individual, and with their constant violation by the community; while, on the other hand, it is possible, where there is no proper self-government or share in public

\* Comp. Stubbs, Cons. Hist., i., p. 22.

power, for the individual rights \* to be defined nicely and protected faithfully.

§ 18.

It is impossible for two persons to have separate rights to the same thing at the same time, or to the exclusive exercise of two rights at once on the same spot of ground. But very often the general right of one may conflict, or seem to conflict with the general right of another. Thus there is a general right of locomotion, but two persons cannot have simultaneously the right of moving over the same identical spot of ground at the same time ; and a general right of contract, but a conveyance by contract of some article to one precludes the first proprietor of it from making the same conveyance to another.

There are seeming cases of collision which must be explained by the essential limitation of certain rights. One of these is the right of taking life in lawful self-defence, as when a man is attacked by a robber. The harmless passenger and the highwayman have both by nature a right to life, but the right is not unlimited ; otherwise the state could not take the life of the criminal, and the man who respects his obligations would be required to renounce for ever the right of self-defence against enemies seeking his life. The true statement is that the right of self-defence belongs only to the innocent man, and not, in this particular case, to the robber. He has the general right of life, but now he is in effect punished for a crime, and there can be no punishment without deprivation of rights. Again, when a road is constructed across a man's

\* Mr. Bentham says in his rationale of punishment, that " Liberty being a negative idea (exemption from obligation), it follows that the loss of liberty is a positive idea." Is it not equally true, liberty being a positive idea (including the rights of free action), that the loss of liberty is a negative idea (viz., the absence, the actual non-existence of civil rights). The status of the slave consists in the loss of various free movements, one of which alone, the right of locomotion in an unrestricted degree, would destroy the slavery.

Would it not be better to say that a right is a power of acting in a certain specific way, and that as the sum of these powers constitutes liberty, the loss of liberty is the loss of the powers of acting in many specific ways, which loss certainly, and not liberty, is the true negation.

property, there is a seeming invasion of his rights as a land-owner; yet a satisfactory explanation of this, reconciling it with the general right of property to the soil, will be given, when we consider the purposes and the extent of the right of property, in another place. Another seeming collision is that between the right of speech and the right of reputation. Here, however, the conflict is only apparent. One man can no more blast the good name of another, and plead the right of speech in his defence, than he can plead the right of contracting marriage for marrying another man's wife. The necessary and general limit in nearly all cases is that no injury be done to another by the exercise of a right. I say in *nearly* all cases, for it might seem that a man, who, in self-defence, takes away the life of a robber, does an injury to another. The true statement, however, seems to have been given already: he does no injury to the robber, although he does harm to him, for he acts as a minister of justice.

The cases where righteous state laws seem to come into conflict with private rights will come up when we treat of the state (§ 91). It seems strange that the state, the existence of which is justified by its vocation to protect the rights of individuals, should by law encroach on and violate those very rights, as it seems to do by the demand of military service, by taxation, and by taking property for a public road, on paying the price, even against the owner's will. On such cases we remark at present only (1) that many laws, which are often accounted for by the public welfare, are intended to enforce rights or secure obligations between individuals; (2) that the state has rights of its own which are truly such; and (3) that the state's right of self-preservation and of preserving private rights will account for other, especially for extraordinary, exercises of the public power.

### § 19.

What has been said in the last section touching collisions of rights may justify some miscellaneous remarks grouped together on the subject of limitations of rights. Rights, being general powers of man arising out

Limitations of  
rights.

of his nature, may be limited in particular cases, as (1) by the inabilities or deficiencies of individuals. Thus bodily weakness, deficiency of a limb, illness, make the exercise of certain rights for the time impossible. (Comp. § 13.) (2). The loss of mental powers, by taking a person out of the category of complete men, destroys his capacity to exercise the rights which men as men possess. Thus the insane person, the drunkard, for the time being, and others, may be rightfully prohibited from performing certain acts which convey rights to others. (§ 13, u. s.). (3). A prior act limits in regard to certain future acts, as in contract, the very essence of which is to limit the power of will of the contracting party in a certain respect (§§ 34, 35). (4). A waiver of a right, which may be classed with contracts, has the same effect. (5). The right of property does not mean that every one must have his share in the property or the landed property in the world. (Comp. § 28). (6). The right of labor is limited by the want of an object on which the labor may be expended. (7). Punishment is necessarily a limitation of some right during its continuance. (Comp. § 115). (8). A right may be indefinite in some respects so as to need the definition of law. (9). Foreigners are, to a great extent, limited in the present state of the world, in regard to certain rights, especially that of holding real property. How far the disqualifications of this class of persons are right will be considered elsewhere. (10). State law, as was just said, puts limits on the ownership of property by taxation, by requiring military service (§ 19), and on the more vague plea of the public welfare. (Comp. § 91.)

#### § 20.

Rights may be said to be almost infinite in number, and one might cast ridicule on the science by speaking of the right or free use of the eyes, the nose, the mouth, the arms, etc. Such an enumeration might go well with the details of the compositions in the old Germanic laws. A division is not very important, but perhaps the last

*Divisions of rights.*

one might be found in the principal parts and relations of our nature. I suggest the following division :

(*a*). Rights connected with the physical nature of man, as the right to life, limb, locomotion, self-defence.

(*b*). Rights growing out of the relations of man to the external world, as the rights of labor and of property.

(*c*). Rights growing out of the relations of men to other men, and first the more general and temporary rights of contract and association.

(*d*). Rights growing out of distinctions of sex and the introduction of new beings into the world—the family rights as an aggregate, including among them rather than under them the right of testamentary disposition.

(*e*). The social rights of free speech and of other means of communication.

(*f*). The rights of reputation and of exemption from insult.

(*g*). The rights of conscience and of opinion, together with that of open religious profession and worship.

Another division would be into those rights which are carried out by the action of a single human being, and those which imply a concurrence of human wills. To the first class belong the rights of life and limb, of labor and property, of speech, conscience, and worship. To the second, contract and association, together with marriage, so far as it is a contract or union. But the family rights cannot all of them be subjected to this division.

The terms *perfect* and *imperfect* rights and obligations, formerly quite common and still sometimes used, denoted rights and moral claims under the first class, obligations and duties under the other : that is, those moral requirements were called perfect which could be defined with precision and therefore enforced by law ; while the imperfect were indefinite, and hence incapable of being the subject-matter of law. The terms are misleading, and may with advantage be laid aside.

## CHAPTER II.

### PARTICULAR RIGHTS.

#### § 21.

THE right of an individual to life, means, in relation to another, that no one shall deprive him of it. It includes the right of continuing one's physical existence by all the means, not otherwise immoral, which do not invade the rights of others, and of defending it when it is attacked. If there be any rights at all, this must be one of them, for life is that essential condition without which no other right can be exercised. Accordingly usage and law in all nations endeavor to protect it. Not only is the public power in well organized communities clothed with the office of punishing murder, but in early, immature societies this power was put into the hands of the nearest of kin. Thus, among the Hebrews the right of blood-revenge appears as an ancient practice brought down from the nomadic life of the tribes. The *goël*, or avenger of blood in the first sense of the word, was the *redeemer of land*, which by law could not be alienated in perpetuity from the family ; then *the next of kin*, and then, as such, the punisher of one who had killed his relative. To prevent the unlimited exercise of this power, cities of refuge were established to which the man-slayer could flee, and, if found guiltless of intentional or premeditated murder, could remain there in security. But if he left his refuge, the *goël* had the right of killing him (Num. xxxv.). This usage was common in the time of David (see 2 Sam., xiv., 7, 11). Mahomet found and allowed it among the Arabs, but recommended mercy. It prevails still among them, among the Persians, Abyssinians, Druses, Circassians, the Morlachs of Croatia, the Montenegrins—the two last nominally Christians

—not to trace the practice among many tribes of still inferior civilization. We may add that the Greeks, as they appear in Homer, had blood-revenge, and that there is a trace of it among the Romans. That it was widely extended among the ancient Germans is certain; yet Tacitus tells us of the *weregild* (life-price, composition) in the words "*luitur homicidium certo armentorum ac pecorum numero, recipitque satisfactionem universa domus,*" that is, the whole family are precluded, on receiving the fine, from pursuing revenge further. It is worthy of notice that blood-revenge continued in some of the German territories, as in Switzerland, long after they were Christianized.\* The compositions for other bodily injuries caused by violence, down to the most minute, appear in all the German laws.

This practice of the primeval times seems to have grown out of the feeling that retribution for so fearful a thing as taking life was necessary, and out of the damage done by the homicide to the family interests. As time went on and bitter feuds arose on account of revenge for murder, which would naturally often fall on the innocent and thus call for new revenge, the feeling of just retribution took the back-ground, and family interests were satisfied by composition. Yet the obligation to pursue the intentional murderer with vengeance, expressed in some laws which admit of no compositions, shows a strong moral sense, however liable it might be to go astray. It is not mere blind hatred, but was connected with and required by religion.

The *right to life* is one that cannot be waived, because, as we have already said, to give it up would be to give up the possibility of exercising all rights. If given up, it is given up forever and all other rights with it. Whether a man can take his own life, whether he can expose it or give it up for great

\* See E. Osenbrüggen, Alamannische Strafrecht, §§ 17, 18. For the whole subject, compare for the Hebrews, Winer's Realwörterb, voce Blutrache, and Saalschütz, Mos. Recht., cap. 71; for the Greeks, Schömann, Gr. Alt., i., 470, ii., 6, Nägelsbach, Homer. Theol., p. 249; for the Germans, Waitz, D. Verfassungsgesch., ed. 2, i., 66 and onw.

ends lying outside of himself, are *moral* questions which do not touch our subject. Of the first, however, we may say that it appears to be the highest immorality to try to escape from a state of existence which is full of obligations and responsibilities, by an act of one's own. If a person cannot waive his right to life when another seeks to take it, how can he reach the same point by a free act of his own. As for the other questions, we need only say that the closeness of the connection between the individual and the state, or between the individual and other natural unions within the state, demand, according to the law of benevolence and the sentiments of every noble soul, a sacrifice of one's own life. As for exposing life, we have to do it even for the sake of other rights that are to be secured.

Of the right to one's limbs or members and to the use of them, nothing need be said but that their integrity is necessary for most of the ends which are placed before the individual in the world.

The right of *locomotion* is equally evident, because life, intercourse, society—all the ends contained in our being, imply that a man cannot fulfil them and be confined to one spot. How this right is to be harmonized with the rights of property will presently appear. It implies freedom of movement over the earth—except so far as the safety of nations imposes restraints—the liberty of the seas, the right of emigration and of peaceful settlement in unoccupied land. Yet these rights have been hardly ever recognized in the history of the world.

The right of *self-defence* may be said to be a right lying back of every other: it is the right of using force for self-protection or self-preservation. The more internal or spiritual rights, however, do not admit of self-defence in the same way in which life and limb, property, the family rights, and, it may be, contract, when these rights are interfered with, may call for the use of force in their vindication. It may be that free speech, free worship, the right of reputation, as far as their exercise is concerned, lie outside of the use of force. Insults or attacks on the good name of a person may be pun-



ished, but the good name is not forcibly defended. The force does not secure it nor disprove the calumny. In regard to these rights, then, which may be said to remain as long as the spiritual nature remains, there is no efficient protection to a man in anything he can do. They are rights which rise into importance when men become civilized, and increase in importance with increase of refinement. In regard to the other rights, which have something external to the man for their objects, as property or special relations to other persons or his own physical existence, they need the power and involve the right of resistance to attacks because one successful invasion can destroy the exercise of the right forever.

The right of self-defence is limited by the right of the person who makes the assault. If I myself begin the assault causelessly, I cannot plead self-defence for resisting another who defends himself, for he is exercising a right. The only reason for repelling such violence proceeding from an injured party is that the sense of wrong may lead him to go beyond the bound of just self-protection—that, for instance, he may take life or limb on very slight grounds. This shows the dangers attending such a right, and the impossibility of observing just limits under the sway of anger and fear. Hence, the right of self-defence only exists when nothing besides force will answer the needs of the moment; and we see here occasion for the supervision of society to repel not only invasions of rights by violence, but also to help the individual by its power, so that he shall feel no need to be on his guard and in a state of apprehension against attacks.

#### § 22.

The word *property* comes from *proprius*, own, peculiar, and denotes in English, as *proprietas* does in Latin, a *peculiar* or essential *quality*, or in general a *quality*, the *peculiar* sense of a word, and then *ownership*, or that in which ownership inheres. It is in the same way that from *eigen*, Ger. (Anglo-Sax. *agan*, Engl. *own*), come *eigenschaft*=property or quality, *eigenthum*=property, thing

Right of property.

owned, *eigenheit*=peculiarity. In Latin, *proprietas*, in the sense *ownership, thing owned*, belongs to the age of the empire, and *propriarius*, a *proprietary* or (irregularly) a proprietor, to the civil law. In the restricted sense of the word, when used of the relation of a subject of rights to material or corporeal things, it denotes some power or control over something external to a man or a body of men which excludes the power or control of all other persons or communities.

What is this exclusive power, or, in other words, what relations of the external world to a human being can be embraced under the term property or ownership? The stages of connection with a person through which property may pass are acquisition, retention with or without personal use, and transfer. Ownership and use may be transferred, or the power of transfer or that of use may be limited. It will thus result that one or more persons may be said to have rights in regard to the same physical substance by means of which they limit each the other's right, while each has a right partaking of the nature of property. And again, there may be property held in common. (1). In the first rank stand full ownership with full power of use and of disposal. (2). The owner may part, by contract or otherwise, with the use of a thing, while remaining owner of the thing. Thus, the owner of a horse, by lending it to another, shuts himself off from all control of it for the time contemplated in the contract; and the owner of a house, by giving a lease of it to another, excludes himself, it may be, from the power even of entering it. If he sells his property, he sells it subject to the existing use. (3). In the case of an indestructible thing, the original owner may part for any length of time, and even for all time, with the use. (4). There may be ownership qualified by use in certain respects, as in the case of servitudes on land and houses. (5). There may be ownership with no power of alienation, and, vice versa, power of alienation of what right there is without ownership. The feudal proprietor could not part with his land without the consent of his seignior who enfeoffed him; and his heir could not succeed him for the most part, without doing homage, and

paying the fine called *relief*. This was a recognition of the seignior's ultimate right of property, which could never become actual except by the crime or the consent of the vassal. A transferable lease is an instance of the power of transfer without ownership. (6). Complete ownership and power of transfer may be limited by a law preventing landed property from coming into the hands of foreign settlers. (7). There may be ownership where the owner retains the use of a thing, but has parted with the control of it by making it a security for the fulfilment of an obligation, as in mortgage contracts, or where he transfers the thing to another while retaining the ownership, as in pawns and pledges. (8). There may be common property in an indivisible thing and in an undivided thing, as in rights of common use, and in unsettled estates. (9). There may be such ownership of thoughts put into a material form that the owner himself, or another by his consent, may multiply the copies of that form. Now, in these and all similar cases, exclusive ownership in the absolute sense must be supposed as the starting-point from which the qualifications or restrictions of the ownership proceed. These are chiefly reducible to contract or the act of human will limiting itself; and as they are of common occurrence, so that the business of human life could not be carried on without some of them, and for their validity imply the ownership of immovable property, they show the immense importance of the recognition of the ownership of such property for the affairs of the world.

But our concern here is not with this; it is rather with the use of the word *property* or *ownership*. Can the mortgager and mortgagee both, the lessor and lessee, and so on, be said to have property in that thing to which they sustain these different relations. If a right to the use of a material object can be estimated according to some standard of value—coined money, for instance, or day's work, or the price of wheat at a certain market—we are disposed to call it property as much as the money for which it is transferred. Especially can such things be called the property of the user of them, when, like the original party, he himself has the power of transferring his

right in them to another. The relations, however, which each of the persons interested in the thing sustain towards it are such that they do not have exclusive possession of the thing considered as a whole ; although together they exclude all other persons from all power over the thing in question, and so together have an absolute right of property.\*

### § 23.

As life, growth, health, the very existence of the human race, depend on the use, consumption, or retention of articles belonging to the physical world, <sup>Is there a right of property ?</sup> there is a necessity that many things should be appropriated which serve for food, clothing, or shelter. There must be a right of property in this sense, that it is right for some one or some family to consume or dispose of commodities, and wrong for others to interfere with the power of doing this. All the necessaries for the life and comfort of man are obtained by labor, whether they be simply caught or gathered, or are produced by the help of the earth, or of the natural forces in connection with instruments used in aid of labor. But labor is strictly personal, depending rightfully on the laborer's choice, and directed by his choice towards the procuring of a particular object. If the object belongs to no one already, whenever by labor it is transported to a spot where it can be used or brought into a shape fit for use, and so has acquired an increased value, it seems to be naturally just that it should belong to the laborer. For, by fitting a thing for use by means of his labor, he has come into a closer relation with the thing made or produced or even transported, than any one else. There is a reason in that fact why he should be the proprietor of that thing. Every one else stands in a neutral attitude towards the thing, and all in the same attitude. Either, then, all or none must have a right of some kind to the thing, which will make them joint owners with the laborer. It is plain that such a relation of joint ownership of all to a thing on which labor has been spent by one would destroy all motive for

\* Comp. in general, Gaius, Inst., ii., § 66-69 and onward.

labor, and prevent labor itself from being put forth to any considerable extent. And thus we reach an additional consideration, that as the necessity of labor is connected with all art, all comfort and upward progress, as well as with the improvement of character, with forethought, with self-sacrifice for the benefit of a family and the like, the institution of property, which mankind have fallen into almost spontaneously and without reflection, commends itself to reason, as it judges from a view of the effects of the institution and from an estimate of the evils of a state of things in which no right of property should be recognized: We may argue also from the universality of property in some shape and in relation to some things, from laws against stealing as an acknowledgment of the right, and from the sense of injury when one is deprived of what he holds to be his own.

#### § 24.

Labor and occupation of that which is without an owner are the two primary sources of property, which are followed by gift, sale, and testamentary disposition. The latter we shall treat of under family rights. Labor has been spoken of already. Occupation is used to denote the act of one person, or of more than one acting together, in getting control of a thing which has no owner, for the purposes of immediate or of future use. Cases of occupation mentioned by Roman jurists are: (1) The capture of wild animals on the land, in the sea, or in the air, and it is indifferent whether they ever had an owner or not, if they are, at the time of capture, in the wild state. And so, if they escape from the captor, his ownership ceases. There are, as Gaius says, certain animals which have the habit of going away and returning to their owners' premises, such as doves, bees, and deer. If these should lose the habit, it would be equivalent to a resumption of the wild state, and whoever found them would own them. (Gaius, ii., 66-68). It mattered not whether the seizure took place on one's own or on another's land; this, according to Roman law, did not affect the ownership. In

How does property begin?

later times law in Europe has restricted the right of capture on the grounds of another ; although some jurists think that even then ownership may find place, even if the captor may have acted unlawfully. (2). Treasure trove was held to be long to the finder if he found it on his own land or on land without an owner ; but, if on another's or on public land, half went to him and half to the proprietor or the *fiscus*. (3). As enemies had no rights, that which was taken from them, even from unarmed inhabitants of the hostile country, went to the captor. "*Ea quoque quæ ex hostibus capiuntur naturali ratione nostra fiunt.*" (Gaius, ii., 69). That is, according to the principles of justice, a nation is engaged in an attempt to recover what is lawfully its own, and as there is a solidarity of interests between the citizen and the state, the property of each must answer for the whole. Otherwise there is no "natural reason" in the transaction. (4). Property forsaken by its owner, without the intention of transferring it to another, could become the property of the occupier. This rule would apply to land as well as to other property. The rule was carried so far under Valentinian, Theodosius, and Arcadius, that taxable land forsaken and left untilled could become the property of a new cultivator after two years of undisturbed cultivation. The reason for this was to offer a motive to settlers on deserted land.

By an extension of the same principle, soil added to the ground of a proprietor by alluvion becomes his, if the addition is made so gradually "that it cannot be estimated how much is added in each moment of time." But if a stream has taken away a portion of one man's ground and added it to that of another, this portion remains the property of the former. (Gaius, ii., 70). So, if an island is formed in the middle of a stream, it belongs in common to the owners on the opposite banks ; but if it is nearer one bank, it is the property of the owner of the nearest land. (Ib., 71, 72).

Another principle is to be applied when a man has put his labor into something belonging to another. Thus he may place a house or something immovable on another's land, or

plant a crop there which will in time be removed, or employ his labor on something movable which belongs to another. In the two former cases the house or crop is an accessory to the land, and if he had occupied another's property in good faith he might be entitled to have his expenses paid. In the case where the property is something movable, the relative value of the labor and the material seem to have determined which was the accessory to the other. Thus that which some one has written on my paper or parchment is mine, says Gaius, even if it be written in golden letters, "*quia literæ cartulis sive membranis cedunt;*" while in the case of a picture painted on another man's wooden tablet, the tablet is an accessory to the picture. (Ib., 73-78). For this difference Gaius adds "*vix idonea ratio redditur.*" In pursuing his inquiries into cases of property he mentions a number where the material (as grapes, olives, wheat-stalks, gold, silver, wool) belongs to one and the finished product to another, and states that there was a difference of opinion respecting the ownership—some jurists, as Sabinus and Cassius, assigning it to the owner of the material, others to the author of the product. (Ib., 79). It is interesting to see in these speculations a recognition of the rights both of labor and of occupancy, however we may decide in regard to the soundness of the opinions expressed.\*

Akin to occupation, which implies that a thing is without owner or known owner, is possession—that is, the mastery or control of a thing which is without known or visible owner. Thus, a horse must have had some owner once, but by straying from him and coming into my hands he is separated from his owner and brought into relation to me. If I should keep him in use for a certain length of time, or if I continued to cultivate a piece of land forsaken by a private owner for a time, it would by Roman law become at length my property. Thus *possessio* by means of *usucapio* passes into *proprictas* or *dominium*. The principle here is the same as in occupation,

\* Comp. Hadley's lectures, pp. 164-168.

except that there is no such obvious separation of the property from the first owner as to render it absolutely a *res nullius*. Hence, time is necessary to make clear that it is actually without an owner, and the length of time prescribed is determined by the lawgiver's opinion in regard to the amount of evidence so afforded. Our right by prescription and limitation of claim to property in another's hands seems to be in part accounted for by the inconveniences to society arising from the disturbances of old titles, and is dictated by equity and by expediency rather than by strict right. (Comp. § 92).

Gaius accounts for *occupatio* by *ratio naturalis* (Comp. Inst., ii., § 66), and those will agree with him who conceive that the destiny of man cannot be fulfilled without the existence of property or exclusive use and power of control over a part or substance of the material world. But some attempt to explain property itself on the theory that originally all things were common to the human race, but by compact or a series of compacts were appropriated first to a tribe or community, then through such a society to a smaller one, and so to the individual at the end of the series. Thus not only all land, but all things material, whether inhering in the land or separable from it, would be the property of the nation, except so far as it should grant tacitly or openly the free use of things to the subject inhabitants. This theory might seem at first as harmless as the division of the world between Zeus, Poseidon and Hades, for probably no man who digs up mud clams on a barren shore ever doubts his liberty to engage in his occupation. Certainly the records of these privileges to individuals are lost. But the theory rests on a fiction and leads to false explanations. If we suppose a single pair of human beings, the sole representatives of their race, their right to use what they found at hand was the same, and resulting from the same nature and needs as the settler on a desert island has now. If the world was common, it was so in the sense of *being unappropriated, and not in the sense of being held in joint property*. We speak of a common table where all are free to sit down and eat, al-

How is the right to make use of a *res nullius* to be explained?



though no one might have any property in the table or in the food, until he had appropriated a portion of it and a seat. So it was with mankind. As at the table, each, when he selected a portion, made it his own, so it was with the earth and its contents; each takes what suffices him, but cannot carry off and put by for himself what the others want. The necessities may be unequal, but they are *individual*.

Here it may be remarked that the lower races, which get their living not by labor on the soil, but by labor in raising flocks or in procuring game or fish, have admitted rights of property like the most cultivated peoples. The land is of itself to them of no value, but a household or a tribe that has first occupied a pasture feels injured by being driven off; an American Indian feels that he has the right of ownership in the wigwam and the garden of herbs, and a fishing station is considered as belonging to one tribe or clan, so that if others resort there it is an invasion of their rights. Even the right to roam over a large tract of land in quest of game may be considered to belong to the individuals of a particular community only; and property in a *res nullius* is held to pertain to the first finder. Thus the Greenlander, as Sir J. Lubbock says, by towing driftwood ashore and putting a stone upon it, shows that he claims it as private property, that is, by his labor in bringing it ashore he has come into a relation to the thing which no one else has, and which no one else, after he has declared it by the appropriate form or symbol to be his, can have.

#### § 25.

We come now to the subject of property in land, which is attended with more difficulty in its explanation than property in materials separable from the land. It is unlike most products in that it cannot be produced or increased at will, but is the source and basis of all production. It has again certain general relations to a whole community which nothing has that can be separable from the soil. Its history again shows that individual or even family prop-

How is private property in land to be explained?

erty in the soil cannot have existed in all the conditions of human culture. And the state itself must have a certain control over land which it cannot be conceded to have over other articles that are capable of being held in ownership. The points here most deserving of notice are :

(1). That no appropriation of the soil can be so entire as to obstruct the locomotion and intercourse of a community. This is a right as truly deducible from the nature and destination of men as society itself; nay, if private property did essentially conflict with the power of moving from place to place, this would be a reason why it should not be put on the catalogue of rights. There must be roads, ferries or bridges, removals of impediments to travel, which no combination of private owners of property could provide for, except in the most advanced society and where the power of association was the most free. But the obstacles from bad roads in the way of advancement would prevent altogether, or greatly retard the power to combine for the improvements of communication. Society then has a right to have and construct the ways of intercourse. When this is done by the nation or government, or by a company commissioned by the government, it is simply a provision for the rights of locomotion which every member of the society possesses.

(2). No property can be so exclusive that the natural channels of intercourse can be obstructed by proprietors of land through or between whose fields a navigable or boatable stream runs. This depends on what has been said already. We add in regard to the relations of land and water that the use of a stream cannot be such as to flood the lands of a proprietor by the back-water, unless the rights of the injured person are provided for by compensation. (3). The state, as acting for the defence and security of all the inhabitants, may make such use of the land of individuals as it judges to be necessary for that purpose. But as no one person ought to bear more than his share of the burdens, it is right to make to the owner of land or buildings which are thus used a suitable compensation. This power of the state does not prove

that it was the original owner of the territory, any more than the taxing power proves that it is the actual owner of the whole property. This explanation of *dominium eminens* from the state's original proprietorship is indeed favored by the feudal theory that the suzerain was the highest and ultimate owner of the soil, and by the Roman doctrine that the land in the provinces belonged to the emperor or to the people (Gaius, ii., § 7); yet even under the feudal system there was much allodial property to which the theory did not apply, and landed property in Italy was held by a different right from that in the provinces. Such a theory may be true when territory is acquired by conquest, but in the end it will not be carried out into its consequences. In confiscations and escheats it will appear; but apart from such a theory, where property is forfeited or has no owner, it falls to the state not as receiving back its own but as representing the whole body of inhabitants making up the state.

(4). Notwithstanding what has been said, the history of land tenure shows that ownership of land by individuals or households was not in many parts of the world, if anywhere, the original form of ownership. In parts of the world at this moment a community system prevails; in others, traces may be discovered of the same kind of tenure, and in others still history shows that it once existed. In general it may be laid down that in a hunting, fishing, or nomadic people there is no motive for separate property in land unless it be in that which is connected with the house, the homestead proper, or garden; and that land begins to be appropriated by individuals when agriculture is the prevailing employment, and the house is built for permanence and at considerable cost of labor. As the tendency is at a certain stage of culture to have better houses and more comforts, local attachments necessarily become greater. Land valueless to the hunter or nomad acquires a price when it is a place for fixed habitations and fixed crops, when by labor it is cleared and rendered easier to be cultivated, when cities and villages spring up in the neighborhood of farms, when roads are laid out, when

divisions of employments become more marked. But even after the transition from nomadic or pastoral life to a life on the whole agricultural, some of the old habits will continue, and tillage is at first rather a new employment added to the former care of herds and flocks than a wholly distinct branch of industry. Where in the neighborhood of ploughed land there are pastures and woodland, the motives for dividing up these portions of the district by fence will be small, the cattle, sheep, or hogs can feed together, and as there will be a substantial equality among the householders, no one will feel that another has more than his share. The community feeling will be further cherished by the tie of blood-relationship, until greater intercourse and sale of lands within the district to persons outside, if it be allowed, impairs this bond of union. A purely agricultural people, homogeneous and of common descent, may transmit usages founded on this community of land from age to age, and traces of its early existence may be discovered where one would not expect to find them.

The communal systems have been made a subject of great research, especially since G. L. von Maurer published his *Einleitung zur Gesch. der Mark-Hof-Dorf- u. Stadt-Verfassung* in 1854, and his *Mark-Verfassung* in 1856. Sir. H. S. Maine introduced the subject to readers of English in his "Ancient Law" (1861) and "Village Communities" (1871). In an appendix to the latter work the names of other authors, especially of Germans, who had treated of the subject, are given. Nasse's work on the "*Feldgemeinschaft*" of the middle ages (1869) has been translated into English, and that plan of cultivating fields has been shown to have left numerous traces of itself in England down to the present day. The community of pasture lands and other forms of common property were brought over by the first settlers of the English colonies of America, especially of New England; but to what extent usage, and how much circumstances favorable to such institutions, contributed to their existence, it may be difficult to determine. Prof. Thudichum's works, especially the *Gau- u. Mark-Verfassung in*

*Deutschland* (1860), *die Altd Deutsche Stadt* (1862), and for the mark-courts his *Rechtsgeschichte d. Wetterau* (1867), present the German mark, which he identifies in its original form with the hundred, in its community of property in a most interesting light. Mr. George Campbell's essay on tenure of land in India, Mr. Julius Faucher's on the same in Russia, and Mr. Morier's on agrarian legislation in Prussia, in the present century, in the "*system of land tenure*" published by the Cobden Club (1870), are valuable for the comparison of tenures in different lands, and the communal systems prevailing there. The same is true of an article in the number of the *London Quarterly* for July, 1871. And finally, M. Émile de Laveleye, in his work *De la propriété et de ces formes primitives* (Paris, 1874), has given a full and most valuable account of communal systems over the world.

On account of the great importance of this subject for the history of human development and in reference to the theory of the right to property in land, we shall make a brief statement of the principal facts which have been gathered by different authors, without taking care to give credit to the particular sources from which we have drawn. The forms of communal societies may be divided, as M. Laveleye has done, into village and family communities, of which the first is earlier, and the other a subdivision and breaking up of the village, clan, or brotherhood. But we do not intend to separate the communities into classes, preferring rather to give the facts in a miscellaneous way as they are found in different ages and countries.

The Greek and Roman writers call our attention to a system of common lands, which are sometimes spoken of as subject to frequent redistribution. Thus, Strabo (iii., 152 C.) speaks of the Dalmatians as dividing their acres every eighth year, which of course implies community; and Diodorus Siculus, (v., 34) says that the Vaccaei of Spain—a people living near the Durius (Douro)—make a yearly division of their acres used for tillage, that they hold their crops in common, distributing his portion to each, and that they punish with death those hus-

bandmen who fraudulently conceal any of their fruits. This division of crops must mean division among the inhabitants of small cantons or communes. So Horace speaks of the “*immetata jugera*” of the Getes, of their annual change of fields and the succession of cultivators. Cæsar (De B. G., iv., 1) says of the Suevi that they have no private and separate lands, and are not allowed to stay longer than one year in one dwelling-place. He also speaks of the Germans as being without any fixed amount or boundaries of land held in ownership, and as having assignments of land made every year to their clans and kindreds, so much in amount and in such a place as the magistrates and princes saw fit. For this annual change of land Cæsar mentions several reasons, as if it were an artificial institution and not handed down from their ancestors. The assignment to blood relations, who might in the course of time be few or many and would therefore need smaller or larger portions, seems to involve another assignment within the district to the several householders by the head men of the kindred. Tacitus, in a passage the sense of which is not wholly clear (Germ., § 26), says that “the Germans occupy their lands in turn (?) according to the number of the cultivators, and divide them out (*secundum dignationem*, *i. e.*, apparently) according to the relative standing of individuals. The large extent of the open fields makes this division easier than it otherwise would be. They change their arable land (*arva*) annually, and there is more land than is wanted.” For the charges of inaccuracy against Tacitus and the varying opinions of German writers, Thudichum’s *Altdeutsche Staat*, pp. 132–134, may be compared. We accept his account as verified by Cæsar’s, and by the community systems in ancient times already mentioned, and see nothing incredible even in the taking down and putting up of houses such as they had every year; but it is not clear whether, when Tacitus wrote, the almost incredible migration from one part of the territory of a tribe to another was thought to take place annually as well as the distribution of the *arva*. The sense seems to require the contrary. And if this be so, an advance towards

fixed abodes was made between the time of Cæsar and that of the historian. For an examination of the subject and of this passage, Prof. Stubbs's *Const. Hist. of England*, vol. i., chap. 2, §§ 10-13 may be consulted.

Assuming a community and interchange of lands at first, we come down to a time when the *arable land* in the *zent*, hundred, or mark—the feldmark—became separate property, which, however, was cultivated by each householder, but in concert with the rest and according to common laws touching “the alternation between fallow and plough-land.” Even here, when the crops were gathered, the community had the common right of pasturage on the stubble, as they had also on the fallow. The pastures, waters, and wood were still held in common; at first the householders or members of the mark could cut as much wood as they pleased; afterwards the trees to be felled were fixed upon by the officers of the mark, and the wood hewn was divided by lot. The meadows also from which the grass was cut were fenced around, and before the hay harvest were divided by stakes into as many parts as there were associates. Thudichum informs us (*Gau- und Mark-Verfass.*) that in Eberstadt, in the Wetterau, where a third part of the meadow-land still pertained to the community until 1830, it was the practice, at the time of hay harvest, for the drummer to arouse the community early in the morning; that from each house a man was obliged to come and mow the grass land, with others to turn and spread it, and that when the hay was made it was put into as many heaps as there were members of the mark and widows, and then divided by lot. In many places, however, one or two acres (*morgen*) of hay-land were granted to the households for a term of years, for life, or for an indefinite period until revocation of the grant. In some parts they went so far as to grant the right of inheritance in these portions.

In the Scandinavian countries, as long as the clans remained in a semi-nomadic condition, all the land was the undivided common property of the clan. But when the cultivation of the soil became permanent, separate lots were assigned to

households, while the rest of the district, including, with pasture and woodland, some enclosed land still undivided, continued to be common property. Traces of this same land-tenure remain, or not long since existed in the Shetland Islands, which were settled by Norwegians.\*

In all the lands of the Teutonic and Scandinavian race traces of these institutions appear, even in England, where some curious remains of the old community of land are still to be found. It is interesting to discover that the early settlers in New England had common pastures more or less, and other lands undivided at the first settlement, and afterwards held in joint property.

Among the Slavonian nations also community of lands seems to have been the primeval usage. The village system in Russia was "the joint husbandry of a whole village. The village, not the family, was the social unit." † Much more primeval is the community system in Servia, Croatia, and Austrian Slavonia, where the communities not only hold their land in common, but cultivate it also by the combined labor of all the households, among whom the produce is divided yearly, sometimes according to their supposed wants, sometimes according to rules which give fixed shares to particular persons." ‡

In the French village of Les Jault, in the old province of Nivernais, the land, buildings and cattle were a few years ago held in common; each family had lodgings in the common building—the village being quite small—and meals were taken in a common hall. As a number of such communities formerly existed in the same province, they were probably old Celtic institutions.§ Probably community of land was the

\* See *London Quarterly* for July, 1871, where the relics of the English village communities are noticed. (Rev. of Sir H. S. Maine's "Village Communities.")

† Fancher in *System of Land Tenures*, p. 302; Laveleye, u. s., pp. 9-49. We speak again of the Russian Mir in part 3. Comp. Laveleye, u. s., for village communities in Russia, chaps. 2, 3, and for family communities among the southern Slavonic nations, chap. 13.

‡ Lond. Quart., u. s.

§ Ibid.



early rule in the Celtic race. In the fifteenth century communal lands were extensively seized and appropriated by the French noblesse. In Ireland the first cultivation is said to have proceeded from fraternities of some kind ; and the strange custom formerly existing there of making a fresh division of the lands in a district on the decease of a proprietor, so that his heirs shared in common with the rest, seems to point to an earlier condition of things when all had equal and undivided shares.\*

The village communities of India are thus described by Mr. George Campbell : † “ It is true that in early times the land was held to a great degree in common for grazing purposes, private property being in cattle and not in land ; and even after it has been distributed for the purposes of cultivation, the custom of periodically adjusting inequalities by redistribution has not unfrequently subsisted to a much later time. But even in this latter case the land was never equally distributed, but was only reported according to the recognized ancestral shares, casual inequalities and usurpations being redressed. As communities become more and more fixed and settled, this practice of redistribution dies out ; and it may be said that in modern communities, in civilized parts of the country, it no longer exists.” The same writer speaks of the Jats, in the Punjab territory, as presenting the strongest and most perfect village forms. “ A Jat village community consists of a body of freemen of one caste, and who traditionally derive from a common ancestor—clansmen, in fact. Every man has his share, which is generally in the Punjab expressed in plough-lands. A plough-land is not a uniform quantity of land, but a share in a particular village. There may be sixty-four or a hundred and twenty-eight, or any number of shares ; one man has two ploughs, another a plough and a half, another half a plough, and each holds land representing his share,” etc.

We add one or two facts in regard to the tenure of land in

\* Comp. Sir H. S. Maine's *Early Hist. of Inst.*, lect. iv.

† *Systems of Land Tenure*, p. 149-229.

other races of inferior civilization. The Baskhir settlers on the eastern slopes of the Ural, descended from Tartar nomads, follow for half of the year a pastoral life, each village keeping itself within a certain district. During the other half-year they remain in their several villages, where the house and garden are private property; but the plough- and grass-lands, although parcelled out to households, show their original condition as common land by the fact that the heads of the villages assign new plots to new families from the village reserve, and take away from households lands on which for several years they have raised no crop.\*

In the island of Java the system of common property must once have been universal, although now the Mahometan theory of the sovereign's ultimate property in the lands and even private property of individuals have come in to obliterate the old usage, and in some districts to root it out. The village community there pays the imposts as a body, it has common pasture-lands, and a right to a part of the wood-land and others unoccupied. The rice-lands are divided up among the inhabitants of the village annually or every two or three years. "Yet, as in the Russian village, the houses with adjoining gardens are held to be private property."†

C. Sartorius says of the Indians of Mexico ‡ that "most of them have communal property, landed possessions, but cannot be induced to divide their lands, which is very hurtful to the cultivation of them. Only a house-plot and a garden pass down by inheritance; the lands belong to the village, and are annually used without rent. A portion of land is cultivated in common, and the returns are used for the expenses of the village or community." And again, "the villages or towns which possessed territory of their own either leased them to inhabitants of the place to go down to their heirs, or left the common lands undivided in such sort that the

\* Lond. Quart., u. s., partly in the reviewer's words.

† Laveleye, u. s., p. 49 et seq., where much more on this point may be found.

‡ Mexico u. die Mexicaner, Darmstadt, 1859, cited by Thudichum.

meadows remained free for common use, while the ploughland was annually divided among the residents. To prevent all claims by prescription, the use of the plough-lands was given to different tillers from time to time, and the expenses, such as for hedges, ditches, aqueducts, were borne by the communities."

Whether all the earliest groups of people who held property in common derived this institution from primeval times, or adopted it as a positive and artificial improvement on earlier customs, we cannot affirm with certainty. The tenure of land at Sparta, after the Dorian conquest, is imputed to positive law, but whether this was so or not, it seems to point back to village communities of an earlier period. Another point of interest is the comparative antiquity of the different kinds of communities. The progress of such associations, according to Sir H. S. Maine, has the Hindoo *joint family*, the *house* community of the Southern Slavonians, and the true *village* communities of Russia and India for its types. The joint families, united "in food, worship, and estate, are constantly engaged in the cultivation of land, and dealing in its produce according to the modes of enjoyment of an undivided family," yet they are only accidentally connected with the land; it is not land but consanguinity that holds them together, "and there is no reason why they should not occupy themselves, as indeed they frequently do, with trade or with the practice of a handicraft." The house communities, known to the Slavonians themselves by words signifying an association, consist of descendants of one ancestor, in number from ten to sixty, under the government of the family chief (or *gospodar*), who has extensive powers, and is chosen by the community itself. When there is need of a new choice, the successor is not always the eldest. The members of the communities live in little villages, the lands are held in common, they eat at common tables, but have separate houses for the different families of married people and their children. When a family becomes too large, it divides itself into two (Laveleye, u. s., ch. xiii.). These house-communities Sir H. S. Maine thinks

(u. s., p. 80) to be expansions of the Hindoo joint family settled for ages on the land. "All the chief characteristics of the Hindoo institution are here—the common house, the common table, which in theory are always the centre of Hindoo family life; the collective enjoyment of property, and its administration by an elected manager. The community is a community of kinsmen; but though the common ancestry is probably to a great extent real," strangers may be absorbed from outside. But "the land tends to become the true basis of the group; and it remains common property while private ownership is allowed to show itself in movables and cattle."

"In the true village community the common dwelling and common table disappear," giving place to a collection of separate dwellings. "The arable lands have been divided between the various households; the pasture-lands have been partially divided; only the waste remains in common." In comparing the two best known types of village communities, the Russian and the Indian, we may be led to believe that the traces of the ancient mode of life "are faint just in proportion to the decay of the theory of actual kinship among the villagers." (Early hist. of inst., 78-81.)

### § 26.

Assuming it to be made out that there was little or no individual property in the earliest human societies, Common property in land still property. we do not reach the conclusion that the land was thought to belong to nobody, or that there was no conception of property; on the contrary, the communities had as clear an idea of their rights over against other communities as the shareholders in a railroad or cotton factory now have of theirs in things which are absolutely indivisible. The communists do not contend for the abolition of property, but for the abolition of private property. There would be, if they could carry out their system, immense numbers of bodies for whose existence the recognition of property in the communal form would be necessary. They would change the face of

society, but could not change the conception of a right belonging to human nature in all its forms, at all its stages.

The exclusiveness belonging to private property must once have inhered in communal property also. As all the members of the communities originally were blood-relatives, no other person could enter into the district as a settler without their permission. Together they had the same relation to their premises that a private person has now to his. This is shown by the remarkable forty-fifth chapter of the Salic law, "de migrantibus," as the title is in the older manuscripts. According to this law, if a person comes into a village with the consent of one or more of the inhabitants, while only one makes objection he shall not be admitted, and the objector in the presence of witnesses may warn him to depart within ten nights. Then there are further police provisions against him if he stays, rising to a fine of thirty solidi. But if he comes in and stays twelve months without being summoned by any one to quit, he may securely remain like the rest. Thus he becomes by tacit consent one of the "neighbors" (vicini).\*

#### § 27.

It is important, before we finish the subject of property, to notice the distinction between the right and the ownership of property. A person may have the right of acquiring, retaining or alienating property, without actually owning any article of property, just as he may have the right of labor without being able to find any one willing to employ him, or the right of contract when no one wants to make a bargain with him, or the right of entering into the marriage state although no woman wants him for a husband, or the right of reputation when he has a bad reputation. It really seems almost foolish to make this remark, and it would be, were there not a feeling that society is to take care of every one of its members, and that the land of a country never properly belongs to the private person, but

The right of property does not imply possession of property.

\* This law, however, is variously interpreted.

to the country, which can redistribute the lands at its pleasure. We may be sure that the associates in the *mark* would never have admitted a right on the part of all the other *marks* of the tribe or kingdom to send their poor members into its borders as settlers. The communistic ideas that lie at the bottom of this claim may be considered in their political aspect hereafter. Here we remark that property in land, however acquired when land had no value, becomes valuable by the labors of the cultivator or other settler in clearing, fencing, helping to make roads, draining swamps, and the like, so that the expenses on some lands within a moderate period of years may have amounted to more than the present money price. The land, then, is an instrument of production like a plough or a spade on which labor has been spent, besides having a tendency to wear out in its producing qualities, and needing to be kept up by fertilizers. As it agrees thus with many articles of movable property in a part of the sources of its value, it cannot be separated wholly or principally from them so as to constitute a class by itself.

#### § 28.

The obligation correlative to the right of property is simply to respect the right, to leave it undisturbed. The crimes by which the obligation is violated are theft, robbery, and fraud, under which latter term may be included numberless commercial crimes which multiply in civilized countries with the multiplying forms of business.

#### § 29.

Property may be given away, exchanged, consumed—in short, may lose its connection with a person more easily than this connection was formed. The question, however, may be asked, whether there is any right of testamentary disposition, that is, any right of a person to determine to whom his estate shall go after his death; or, if there be such a right, whether it is absolute and unrestricted. This subject, however, will be deferred, in the pres-

ent essay, until we reach the family rights, for the reason that the head of a family is no longer a simple individual, but sustains also obligations to the family union of which he is a member.

We close what we have to say of property in land with a brief examination of two modern theories which can here best find a place.

§ 30.

Mr. Herbert Spencer has propounded in his *Social Statics* (part ii., ch. 9) a theory of "the right to the use of the earth," which deserves examination. It is based on the law of equal freedom. According to this law equity does not permit property in land, (that is, it is necessary to add, not only property of an individual, but of a community of individuals,) because if a state or the world should be parcelled out among a multitude of such communities, the argument would be equally valid. The argument is that, if *one* portion of the earth's surface becomes the possession of an individual in exclusive right, *other* portions may be so held, and eventually the whole of the earth's surface may belong to a single individual. Hence, all others can exist on the earth by sufferance only and be equitably expelled from the earth altogether. Thus the assumption that land can be held as property, by the consequences which it involves, renders necessary an infringement of the law of equal freedom. "For men who cannot live and move and have their being without the leave of others cannot be equally free with those others." (§ 2).

And if one should say that his title to his land is just, because it is obtained from another by just title, by payment of money or by inheritance depending on original purchase, we come back universally to a title derived from force or some kind of wrong or interference with freedom. "Any flaw in the original parchment, even though the property should have had a score of intermediate owners, quashes the present owner's right." Whether it may be expedient to admit

claims of a certain standing is not the point. We have simply to inquire what is the verdict given by pure equity in the matter. And this verdict enjoins a protest against every existing pretension to the individual possession of the soil, and dictates the assertion that the right of mankind at large to the earth's surface is still valid, all deeds customs and laws to the contrary notwithstanding. (§ 3).

Indeed, it is impossible, according to Mr. Spencer, to discover any mode in which land *can* become private property. The reclaiming of a piece of land from its original wildness is usually thought to confer a valid title on the new settler who has thus cleared his farm. But Mr. Spencer dismisses this claim by saying that if the land belonged to all men before the clearing was made it belongs to all men still, just as an empty house, occupied, repaired and made comfortable by a stranger who supposed it to be without an owner, could not be held by him against the proprietor, if he should make his appearance. If the new settler—the squatter, as we say—may have given the soil an additional worth, he may have a claim to this extra worth imparted by his labor; “and although without leave he may have busied himself in bettering what belonged to a community, the community will duly discharge the claim. But admitting this is quite different from recognizing a right to the land itself.” (§ 4).

Nor is it possible to distribute land equitably to different persons so that it should become their exclusive property. For such distribution is made impossible by differences of productiveness, nearness to the market, climate, and the like, as well as by the fact that all who at a certain time receive no allotments—all, for instance, who are born after the division, become practically serfs. And the existence of such a class is wholly at variance with the law of freedom. (§ 5).

It is not fair in reply to these arguments to say that the right of private property must not be pushed to its extreme limits. For ethical truth is as peremptory and exact as physical truth. Either men have not such a right, or, if they have, all its actual or possible evil consequences must be allowed to



have their course, for the right is sacred. (§ 6). But, in fact, nobody believes in "landlordism" implicitly, for it is subject to be set aside by convenience. Land is taken by public law for canals, railroads and turnpikes, whether the owner consents or not, whether he is satisfied with his compensation or not. And acts of a legislature supersede the authority of title-deeds, interfere with private rights by requiring the sale of encumbered estates, and put an end thus even to legal contracts concerning landed property between man and man. (§ 7).

Such a doctrine as Mr. Spencer advocates is, he contends, consistent with the highest civilization, and is wide apart from communism. If it were reduced to practice, "separate ownership would merge in the joint stock ownership of the public." "Instead of leasing his acres from an isolated proprietor, the farmer would lease them from the nation." "Tenancy would be the only land tenure." A state of things so ordered would be in perfect harmony with the moral law. Under it all would be equally landlords, all men would be alike free to become tenants. On such a system the earth might be enclosed, occupied, and cultivated in entire subordination to the law of equal freedom. (§ 8).

Mr. Spencer seems to regard this breaking-up of private property in lands as the ultimate goal towards which society should move forward. Great difficulties, he admits, must attend the resumption by mankind at large of their rights to the soil. The question of complication is a difficult one, the more so because most landlords or their ancestors have honestly given equivalents for their estates. "But with this perplexity and our extrication from it, abstract morality has no concern. Men, having got themselves into the dilemma by disobedience, must get out of it as well as they can, and with as little injury to the landed class as may be." But it must be remembered that others besides the landed class are to be considered, and "the injustice thus inflicted on the mass of mankind is an injustice of the gravest nature. By and by it may be perceived that to deprive others of their rights to

the use of the earth is to commit a crime inferior only in wickedness to the crime of taking away their lives or personal liberties. (§ 9).

“ Briefly reviewing the argument, we see that the right of each man to the use of the earth, limited only by the like rights of his fellow-men, is immediately deducible from the law of equal freedom ; we see that the maintenance of this right necessarily forbids private property in land. On examination all existing titles to such property turn out to be invalid, those founded on reclamation inclusive. It appears that not even an equal apportionment of the earth among its inhabitants could generate a legitimate proprietorship. We find that, if pushed to its ultimate consequences, a claim to exclusive possession of the soil involves a land-owning despotism. We further find that such a claim is constantly denied by the enactments of our legislature. And we find, lastly, that the theory of the co-heirship of all men to the soil is consistent with the highest civilization, and that, however difficult it may be to embody that theory in fact, equity sternly commands it to be done.”

On this theory I remark, first, that it is true that the right of property in land can never be so strictly interpreted as to prevent a community from having certain uses of soil that is not theirs. The rights of locomotion are not extinguished by private property ; there must be roads, canals, bridges, ferries, with the proper access to them. This has been sufficiently discussed in another connection, and we refer to what is there said as an attempt to reconcile the rights of the many to do that which is essential to human beings with the right of the one to hold property which is contiguous to a ferry or bridge, or contains the best path for a public canal or railroad.

2. We cannot confine Mr. Spencer's law of equal freedom within any one division or separate nation of the human race. If all men are owners of all the earth, an over-populated state must have the right to demand from one less densely populated a part of its soil for emigrants, and on refusal to comply

with this right must have the same right of recourse to violence as when any other right is violated.

3. The principle of Mr. Spencer must apply not only to ground that can be used for agricultural purposes, but for all other kinds of soil, such as that which is used for the sites of buildings, which constitutes a very large part of the capital of a nation, that out of which stone is quarried, quarries and mines themselves, all places fit for docks, wharves, and the like.

4. The problem of dividing up would be increased, if we should take into account the improvements on land, and the new claims of those who are continually growing into the capacity to have the full use of their freedom.

5. These remarks under the three last heads show that practically the doctrine of Mr. Spencer is worthless on account of the difficulty of application, but not that it is false in a moral point of view. But the law of equal freedom does not prohibit private property in land any more than it prohibits any other kind of private property. Equal freedom, as far as property is concerned, does not imply that a man must possess land or anything else, nor that all must have equal advantages for getting forward in the world, which family connections and other causes make impossible. So long as family and acknowledged kindred exist, some must have more advantages than others. If a community system should take their place, which God forbid, it were better that the communities should be small and self-governing than that the state should form one vast community.

6. The problems that it would then fall to the state to solve, which Mr. Spencer admits to be difficult, and only part of which he has noticed, would be far beyond anything which now calls for state action, and would require an amount of force on private will, an array of officials to do what private persons do now, which would be practical tyranny.

7. Whether any limitations on the amount of land in the hands of a single person or family, and if so, what limitations are just or are demanded by the welfare of society, may be considered in another place. That some kind of control over

the engrossing of property, especially in land, may be defended by specious arguments we admit, and that the power of bequest ought to be subjected to certain limits we believe. But as the private ownership of land formed an era in the progress of society, we do not believe that society will ever go backward to a tenancy system more objectionable than community of goods.

### § 31.

Mr. Spencer's denial of individual or separate property in land is founded, as we have seen, on the equal Buchez on the right of property. right of all to freedom, which, as he claims, is inconsistent with any person's permanent connection with the soil and with the accumulation of it in a few hands. M. Buchez's explanation of property in his *Politique* (i., p. 327) derives the right of property entirely from labor. This is the only title, and this, as creating the form and utility of products, confers a complete right to their use and disposal. A product of labor is the only thing that can be owned, and this by right independent of and anterior to law. It is remarkable, however, that purely intellectual productions, which are without connection with the material form, and are the most complete property of the individual as fruits of his own labor, are not respected in any age or country, but made use of by all without scruple; and that they have been, when put into a material shape, protected by copy or patent right only in modern times.

Property, then, inheres only in products. A much wider range belongs to objects held in possession. Such are portions of the earth, and whatever, aside from products or the material of them, is acquired by inheritance, by gift, by exchange, by first occupation or conquest. All things held by this tenure are subject to law; the right of the individual to them is derived from law, and thus can be modified by law. They are not property, nor held by the right of property in the strict sense (p. 338 u. s.).

Still another limit must be set to the right of property.

The form alone, given by labor, is property ; the material is the " domain of all." What conclusion, then, is to be drawn from this analysis ? It is that " the right of *possession of material* belongs to an individual in proportion to the value of the form, that is, of the quality or utility he has put into " or superadded to it. If, for instance, he has enriched the soil by manures, he has a right to it according to the special qualities imparted by him, and as long as they continue. If, again, a mechanician or artist should make a very perfect work out of a piece of metal, in such sort that the value of the skill should far exceed that of the material, and the form should so far exceed the material in value that the latter might be said in some sort to vanish, " then the work might pertain entirely to its author."

This explanation of property and of the right of property is deficient and unsatisfactory. For *first*, if labor alone confers a title, organized society can have no more property in the soil than belongs to the individual, since the soil is not its product. If it be said that organized society must have some standing and dwelling-place, and therefore a certain territory must belong to it to the exclusion of all other organized societies, the same may be said of the individual. And here we land at the old idea of *occupation*.

2. How can the individual acquire property in material which is not his by expending labor upon it ? Who gave him the right to take a portion of matter which is not his own, and cannot be his own, because it is not the product of his labor ? Or, if he is addicted to pastoral life, what right has he to appropriate sheep or cows at the first, or to claim any right in his flocks which have multiplied by use of the soil and by a natural propagation which is not even the result of his direct labor ? Will it be said that human beings must live, and in order that they may live must have control over the earth, over animals and natural agents ? Very true ; but this necessity depends on a nature and destination of human beings which is the source of the right of labor as well as of other rights.

3. But in matter of fact for all the higher uses of labor, for agriculture, for buildings, for ways of intercourse, the earth itself is material and is prepared for use like any other product. Land is cleared, fenced, broken up; seed is sown, crops are gathered; when the returns diminish, manures are saved and applied; houses are put up for the men, and perhaps for the cattle. If the highest improvement and greatest multiplication of the human race depends on this kind of life, which makes all division of labor and all city life possible, here we have the destination of man, his highest culture pointing to a recognition of a right to do such things, and to be sure of permanence in occupation, as well as of the right of transfer if the owner desires. Land thus cannot be entirely severed from other objects that can be held as property, although it may have some relations to a community which its special relation to an individual cannot annihilate. (Comp. § 26).

4. As we have said before, land in new settlements has no value in exchange. Its value in the market, apart from situation, which it shares with crops and other products, and from fertility, is determined by labor, and the actual price at a certain time may not be an equivalent for the labor of fencing, clearing, etc., and of providing against the law of diminishing returns by new fertilizers. Whatever M. Buchez can say of the right to the material as procured by the labor spent upon it, can be said of the earth as the source of all growth and product.

It is true, indeed, that as the earth cannot grow, land is a monopoly, and good, accessible land a narrower monopoly. But so are the products of land, and it may be possible for over-population to make the amount of accessible supplies of food insufficient. Ought not the state, on the principle of an equal right of all to all, and especially of an equal right of all to life, to interfere in order that at such a crisis all might have their exact share.

## § 32.

To sum up what we have said of the right of property in land, we observe :

Summary as to property especially in land.

1. That labor cannot be the sole source of that right because the material on which it is expended is not produced by labor.

2. A *res nullius*, or that which has no personal owner, cannot belong to mankind in joint ownership. Otherwise, there can be no property held by the state unless it can be shown that there has been a partition of property between states.

3. Occupation must confer a right to that which has no owner, if we define occupation as taking possession with intention to consume or to employ in production, for this is an equal impartial condition for all, interferes with the right of no one, and fulfils the destination of man to spread over the world. Moreover, it is as easy to account for individual ownership of land as of material not produced by labor.

4. The common use or common ownership of land in primeval times, of which many traces still exist, does not prove that such a tenure is an ultimate one for human society. There were reasons for its existence lying in the nature of communities where the members were blood-relatives, where land was worth nothing by reason of its abundance, and where the occupations of society did not need separate ownership of the soil ; but with the advance of industry, the mixing up of men of diverse extraction, and the greater cultivation of the soil, the reasons have ceased. The development of society points to a higher state of individual independence, and yet of the dependence of men on one another, of mutual need without isolation.

5. The notion that private property in land may by the superior skill or greater success of some prevent others from having a share in the earth's surface, because the earth is fixed in area while men increase beyond any fixed limit except the possibility of subsisting, is most unpractical and false one. It would be a calamity if every one had a piece of

ground. The division of labor is the goal which high civilization reaches. More is produced, men are wiser and happier by multiplicity of employments than if they had one and the same ; and if the earth could be distributed into shares, men and society being as now, thousands would want to get rid of their portions, because they had some employment which they could pursue at greater advantage.

### CONTRACT.

#### § 33.

A contract is a transaction in which at least two persons, or parties, acting freely, give to one another rights and impose on one another obligations which relate wholly or partly to some performance in the future. If an exchange of property is made at once, the transaction comes to an end, and no obligations or rights in the future grow out of it, as when a man buys a horse, paying down upon the spot the price for it, and it is delivered to him at once. At the most it can be said that a state of contract exists during the few moments taken up in the fulfilment ; but when the moments have passed, the men are to one another like any other men. In a contract, however, a new relation of the parties to one another begins at the time of closing the contract, and continues until it is fulfilled or until they have released one another from the obligation. It may be, indeed, that one party performs his part at once, so that while he has a right he has no obligation, and while the other has an obligation he has no right, but the transaction would not be a contract, unless the performance on one or both sides lay in the future. Thus a person may pay down at the beginning of the year a subscription for the year for a newspaper, or may pay beforehand the wages of a laborer for a month. The subscriber or hirer has rights growing out of the agreement, but has fulfilled his obligation ; the publisher or laborer is under an obligation, but can claim no right. Most con-



tracts, however, are of such a kind that both parties place themselves under an obligation and acquire from each other rights in regard to something in the future. Thus in hiring a house the tenant has the obligation to pay a rent and a right to occupy the house ; and the owner has a right to the payment of the rent and an obligation to leave the tenant in undisturbed possession for the time fixed. Contract thus derives much of its importance from the connection which it begins between present and future time. Man is no longer a creature of the present, but draws his motives from, and is affected in his desires by that part of life which is yet to come. He brings considerations from the future into the present, and thus brings permanent purpose, foresight, control over present impulse, into his character.

Contract can hardly find place in those states of society where there is no or almost no division of labor, Contracts increase with civilization. for it implies mutual service, while, where there is no division of labor, men are isolated and do all things for themselves. Nor could it be an important form of rights, where land was held in common, since all the communities that could readily have intercourse with one another would have much the same occupations, and the individual's choice as to his work would be exceedingly limited. But as soon as there are fixed diversities of employment among free laborers, as soon as different parts of the world know of the supplies for wants to be found elsewhere which may be obtained by exchange, and have means of transport, and especially when there is a medium of exchange, convenient and desired by all; contract will of course begin, because each person can produce more of his special product than he wants for his own use. At first it will be confined to persons living not far off from one another, but at length it will reach its arms across oceans and bind together entire strangers. It is, therefore, a social transaction, bringing men together in more or less permanent business unions, and is related to labor and property something as marriage answers to difference of sex. Its forms are so various, it lies so at the bottom of the intercourse of

business, that it cannot be doubted that it rests on natural reason ; it is and should be acknowledged as such, because it is essential to the development and advance of human society.

### § 34.

A contract begins with acts of will having reference to a specific object and a specific person or persons, and imposing a moral restraint on any act of one's own will in the future which would make the first act void. How contract begins; its binding force. In it a man is a source of power over himself ; he transfers something to another in purpose, just as if he gave away a piece of property out and out. As he cannot recall the property, and has, by the act of giving, ended his connection with the property, so that no act of will directed towards it will have any effect ; so he gives a right over himself to another, and ends his moral power in regard to that right. But wherein consists the obligation to keep a contract ? Some might think that it lay in the free will of the contracting parties, in their power over themselves. But this, although it must be presupposed, is not enough. If the binding force of a contract were to be ascribed simply to a man's free will in relation to something which was his, why might not the same will break the contract ? We must seek for a moral foundation which can go along with that necessity of contract to human intercourse, which might be a reason of itself for enforcing the obligation *ex contractu*. That moral foundation is the sacredness of truth and the necessity of trust for all virtues that look heavenward, or towards men who could have no fellowship with one another if separated by distrust, but would be suspicious and suspecting, hateful and hating one another. If the expression may be allowed, a man by an engagement to another creates truth and can never rightfully create a lie in his mind. Truth and trust are the props without which " the pillared firmament is rottenness, and earth's base built on stubble."

There is yet another consideration which shows the binding force of contracts, at least in the greater number of cases. By

the motive which I have presented to the mind of another, I have induced him to agree to give me his labor or his product in expectation of my transferring something of value to him. If I do not fulfil my engagement, I really deprive him of what is his. I make him lose or expose him to the risk of losing his labor or capital, so that the transaction does not essentially differ from my taking away, without an equivalent, something that he owns, except so far as it has in view some future performance.

To put all this in the simplest form we may start from the right of property, and suppose a man to have a product of labor on hand which he is desirous of selling. He can, if he please, keep the product for sale in the future. Some one offers to take the product if he will wait and receive another product in exchange. The exchange would have been a transaction consistent with the rights of both, if they had exchanged on the spot. What is there in the futurity of the exchange to affect the transaction, except that the parties consider each other pledged to do a thing in the future which would have been mere purchase and sale, if the delivery had been on the instant? If, now, such an obligation really exists, either because it is necessary for carrying on the transactions of human life or for some higher reason, contract has a binding force. If it unites present and future, if it is a principal motive to labor, if it is a source of union among men, if division of labor to a great extent would be paralyzed without it, if it rests on the sacredness of truth as a principle of universal morality, no right can have a higher origin.

### § 35.

A contract implies in each party a right to do that to which the contract relates, and to pass over to another what is one's own. If I have no right to use my labor according to my will, or have no property in a thing, I cannot transfer the product of my labor or what I have in my hands to another. It is thus the exercise in a special case, for the benefit of another, of a right already existing. I can-

Contract does not create, but only transfers rights.

not make that the property of another *by contract* which is not *mine* already. Were it otherwise, were contract a source of new power, it could affect and overthrow all the relations of the world, it would be stronger than God. Nor do I see how a man by his power of making contracts can renounce forever the power of making contracts. We have already seen that a man has no power, according to the law of right, to waive his rights in general, for instance, to consent to becoming the slave of another, since this implies an abridgment of his moral nature, a shrinking of his existence and a cutting off of his power to do good. So to consent to hold a man as a slave is to assume that to be a right which is not such, but is a flagitious transaction. On the same principle, a man can never make a morally binding contract to do wrong, or be justified by a contract in joining another in doing wrong. *Immoral contracts*, therefore, are void, and the breach of them has no remedy by the laws of upright states. To enter into such a contract may be, and in many cases is, a penal offence against a state's existence or welfare, as when bribes are offered to voters, representatives or jurors, or an agreement is made to supply an enemy in war with arms ; and even when the effect of the transaction does not reach public life, its immorality makes it void. A contract to do an *illegal* act can scarcely have validity by the law of a state, and so cannot be enforced, although it is conceivable that it may be *morally* binding. Thus a promise to pay a public agent for doing his duty has been justly held to be void. Hence it is common for state laws to pronounce gambling and betting contracts void, and they will not provide a remedy, when a person refuses to pay such a debt. A *senatus consultum* at Rome forbade playing for money, except in contests with the spear or javelin, or in running, leaping, wrestling, "*quod virtutis causà fiat.*" Here an action might be brought for the money staked, but "*ubi pro virtute certamen non fit*" there could be no action. When money had been paid for doing something base or unjust, if both giver and receiver were sharers in the baseness, there could be no

recovery of it by the giver, as “*si pecunia detur ut male judicetur,*” where it was base to bribe a judge, and base to take a bribe. But if the baseness was on the side of the acceptor of the fee alone, it could be recovered even if he had been true to his word (*ctiamsi res secuta sit*). The first supposition would include something given *stupri causâ*, or paid to prevent a complaint or information in reference to a crime that had been committed. When the giver, not the receiver, is involved in the turpitude, he too could not recover the money, that, for instance, paid to a professed and licensed *meretrix*, such a one being under the protection of the law. See more in Vangerow, Pandekt. iii., §§ 627, 628, 673.

There may be cases where a person has excited expectations in the mind of another knowingly, without having made any express, much less any formal agreement. These engagements have the nature of contracts without being such strictly; they contain considerations which influence the conduct of another; there seems to be no reason, therefore, why these *quasi contracts* should not be treated as binding the person who allowed or created the expectation, if he was aware of it and if the other fulfilled what he considered to be his part. Must now the consideration be

Quasi contracts ;  
Promises ; Nuda  
pacta. always a material substance, or some service spent upon a material substance, or may it be a mode of treatment also or expression of a sentiment? As, for instance, may a person, having legally bound himself to educate and support an orphan, on condition (among other things) of respectful treatment, be justified in refusing to continue the aid on the ground of manifest and persistent disrespect? If the disrespect consisted of outward acts of insult or neglect, such acts would constitute a want of a consideration. Some states with reason go farther. It has been said that at Athens there was an action for ingratitude; \* the Romans required of the freedman gratitude towards his pat-

\* Compare Meier u. Schömann, Attische Prozess, pp. 540-544.

ron, gave the latter a power to banish him from Rome for the want of it, and by the *Lex Aelia Sentia* allowed the prosecution of ungrateful freedmen. (Dig. xl. 9).

A nudum pactum, at least where a contract is not under seal, is generally void, so that no action can arise out of the non-fulfilment of it, and this is true of all promises. But why is it true? It is very easy to state a promise in such clear terms that it can, as far as the mind of the promiser is concerned, be enforced; and it is easy also to show, by writing if necessary, that the promise has been a matter of serious reflection. It may also be evident that the promiser considered it to be his duty to make the promise. But, on the other hand, if he meant to bind himself for the future, why did he not give to his intention the form of a contract? and as he calls for no answering performance it is natural to suppose that he left the matter in such a condition that he could rescind it. As mere kindness or some other moral sentiment dictated the promise, so a change of feeling or some new relations towards the promisee may lead him to recall it.

Why law does not generally recognize nuda pacta.

### § 36.

There are two kinds of contracts, as far as the subject-matter is concerned, one in which the parties enter into a contract-relation, the terms of which they make or define wholly or in part for themselves; and another, in which they enter into relations determined by something outside of themselves, and which they, according to the law of nature, of morality, or of the state, cannot alter. Most contracts, especially those of business, are of the first class. Thus domestic service being of various kinds, the contracting parties come to an understanding what it shall be, or leave it to be defined by the custom of the place; so also partnership does not demand the same share of capital or the same active concern from all the partners; and agency has its own conditions and performances in each especial case. There are, however, a few contracts where the agreements of the parties cannot change the form or the thing to be performed, or even

Two kinds of contracts.

the consideration in any essential respect. When certain great transactions of life are reduced in theory to the form of contract, they must fall into this class. If there is a *social contract*, it must be conformed to the laws of justice, and cannot oppose the rights of individuals or the laws of God. If the church is called a voluntary body, the members of which determine the order and discipline, it does not depend on the will of its members so far forth as to disregard the doctrine or duties implied in Christianity. The same may be said, as will soon appear, of marriage, which cannot go aside from a certain fixed idea. Whether these institutions do in any way owe their origin to contract we will not now discuss, but we add the remark that, as contract is one of the leading ways for men to enter into new relations, it is often used to explain great transactions of a moral or religious kind, although it unfolds in but an inadequate way their true nature. Thus the Scriptures represent God as entering into a covenant with the Hebrew people because he promised great blessings if the people remained faithful; but the transaction was not of the contract species, in so far as it was not really left to the option of the people whether they would close the contract or not, since over against the supreme moral Governor and Lord they were obliged to accept of it. Following the analogy of this representation which contains most important truth, the theologians have constructed a covenant of God with Adam, on account of violation of which he and his descendants were involved in evil. But when they come to apply this form of jural proceedings to a great race principle and a moral economy, and to reason from it, as if the system of things could be brought within Roman or Dutch law, we must respectfully ask whether a great law of character like the spread of evil among men can receive a satisfactory solution from such penalties as the corruption of blood of a political offender's descendants.

Contract used to explain society,

God's dealings with men,

and the moral state of men.

## ASSOCIATION.

## § 37.

By the right of association is meant the right of uniting in The right of association. bodies, sometimes considerably numerous, for any purpose pertaining to human nature and not in collision with the natural unions of the family and the state. These associations are voluntary and artificial, *i. e.*, not given in nature, have a definite sphere within which they act, make their own rules, have generally their own officers. The members enter into them with more or less solemnity, sometimes in the way of a contract, as when the object is their pecuniary advantage, sometimes of a promise or an understanding. The members may either seldom meet, their business being transacted by agents and officers, or it may be their main object to meet, and that frequently. There may be in these unions a single definite point, as when laborers combine to raise wages, or a number of points to be carried, as in political clubs or leagues. They may be open so that auditors or reporters may be admitted to the sessions, or so secret as to require pass-words and oaths not to divulge the proceedings. They may be mere assemblages of individuals with slight bonds of union, or joined together by interests which lead to a close constitution with important provisions for self-government. They may be too unimportant to be noticed by the state, or may have corporate powers, and a dangerous strength gained by combination.

Such unions will not generally exist until society has a certain compactness, until centres of population rise, and a number of persons having common interests or pursuits are found together. Then, with that advance of the means of intercourse which renders communication easy and safe between distant parts, their sphere will be extended so that the members of some kinds of associations will be scattered over the world. Instances of them are offered in the history of Greece by the *θίασοι* or fraternities for religious celebrations, especially



for those in honor of Bacchus; by the political clubs or *Ἐταιρείαι* which at Athens became, during its troubles, a most formidable power, and led to the rule of the four hundred,\* and which were professedly founded to help the members into office, and aid them in the courts, and by the *Ἐργαῖοι* or associations for mutual assistance. At Rome the operations of the associations were on a much larger scale. The "colleges of workmen"—the institution of eight of which is ascribed to Numa—were very numerous; and the *publicani* or farmers of the revenue in a number of bodies, forming joint-stock companies with shares of different amounts, had vast sums of money in their hands, and were able to make advances from their funds to the state in its needs. The colleges of *navicularii*, or shippers and freighters on the sea and navigable rivers, had in their hands the immense work of supplying the cities of Italy, especially Rome, with grain, and similar corporations existed in other parts of the empire; the bakers also were associated to furnish bread to the poor in the "frumentations" on a great scale towards the end of the republic. The public scribes constituted a large and important college. The sodalities for religious and festive purposes embraced another class of unions, which, as running easily into political clubs, were viewed with suspicion under the emperors. The priests of several ancient divinities and of deified emperors were associated in colleges, and the *Augustales* of many municipal towns constituted almost an order of citizens. There were *collegia tenuiorum* also, where the poor members provided for the burial of deceased brethren by a monthly contribution. These associations were controlled by the law and police of the empire. They were incorporated or made jural persons, and could be dissolved by public authority. The self-protecting guilds of the middle ages were unions partly for industrial, partly for political purposes, and many of the towns came to have a constitution founded upon them. The fraternities of monks and nuns, and

the universities of the same period, are other instances of unions first voluntary, then controlled by law. But in modern times the principle of association has received its largest development.

Unions for the purposes of trade or colonization have changed the face of the world. Various forms of benevolence have had fraternities with members diffused through great nations, and with emissaries acting on remote lands. The various branches of knowledge, the arts and sciences, have gained by association new strength and facility of correspondence. Even workmen by their trades unions are able to form a powerful class in modern society. The political spirit gives rise to clubs or leagues which control public opinion on important questions of the day, or seek to get the government of towns or of a nation into their hands. It is shown by this brief sketch that as a country grows rich and populous, the individual seeks aid for his various aims in life by uniting more and more with others; so that the tendency towards a community life, so strong in the primeval expansions of the family, reappears under modified forms in societies of later growth, restricted in its sphere, without the shackles of place, and in connection with the freest disposal of property. But it is evident that a joint-stock company, if not checked, may become by its political power, like that of the East India Company, or by its influence over a legislature an *imperium in imperia*; that the terrors which trades unions bring before workmen who refuse to join them are anything but a preparation for a life of political or moral freedom; and that political clubs may be yet more tyrannical. Associations, therefore, besides the protection, need the check, of public law, and the more, because persons united in bodies do, or suffer to be done, evils at which an individual, acting alone, would be horrified. It may also be questioned whether any secret societies, unless for merely social purposes, ought to be permitted to exist, or at least to have a juristic existence, for the individual as well as the community has a right to be freed from apprehension of evil from those who are stronger; and the

oath or promise with the feeling of honor towards the society is so strong, and the sense of personal responsibility so weak, that such bodies, if their object does not forbid, are in great danger of hatching evil. In fact, the obligation to secrecy itself is often a ground of suspicion that the object in view is not consistent with the general welfare. But, however this may be, associations in general, especially those which manage capital, need strict supervision; practically the shareholders neither know nor can know much about them, and so ought not to be responsible as principals; hence, among the safeguards against the wrongs that can be done by such bodies, it seems to be demanded, by the rights of individuals as well as by general justice, that their officers should be civilly and penally amenable for their doings.

The associations of old and wealthy communities are able to control and overawe individuals who are engaged in the same pursuits. Hence, it may be a question sometimes whether they ought to be allowed to exist, as relatively depressing and oppressing those who do not join their unions. There seems to be no injustice in this, if they make the productive efforts of a man working for himself unprofitable and fruitless.

Voluntary associations, by their organization and power over members, approach the character of the natural communities, as the state, the church, the family, and with them may be called *societies*. The difference between the two classes of societies is not only that the voluntary associations have a restricted activity and a scattered membership, but also that their functions are fixed chiefly by their objects, which vary greatly; while the natural societies are in great part determined in their constitution by something in the nature of man and not by the will of the society. Thus, the state has fixed ends, however states may differ, and families are constituted by the nature of human beings, and the church chiefly by the doctrines and precepts of religion.

## FAMILY STATE.

## § 38.

There are quite a number of rights that are connected with the family state. Among these we name marriage itself, or the contract of the persons entering into the marriage state, and the right of the parties to form such a union, together with the dissolution of the union by divorce or separation ; their mutual rights and obligations ; the *patria postestas* with the rights and obligations of children ; minority and majority ; the obligations of others towards the parties, including the breach of such obligation, especially the crime of adultery ; the right to marry a second time, and the obligation of the head of the family towards the family ; under which head the subject of testamentary disposition will be considered.

If any relations in human life can be called natural and necessary, those of the family must have these attributes. If any are of importance in themselves and for the conservation of all others, these are so in a pre-eminent degree. If any show the prevision of the divine mind by a series of designs, one built on another, until the structure of human society and obedience to God are reached, it is the family that contains in itself this system of purposes. The formation of the sexes for each other ; the union of bodily desire and of devotion ; the mother's love of the most helpless of beings ; the care of the child until it can take care of itself ; the family feeling that arises between children ; the necessary morality in the family, especially when there are children of both sexes ; the preparation for obedience to law and to God by the family training ; the close ties of blood-relationship binding men together in clans and tribes and securing the existence of states ; the education for religious reverence by reverence of parents—such considerations show how full of meaning the family is, and they will lead us to admit at once that if there are rights

and obligations anywhere among men, they must be found here.

The relations which begin with and grow out of marriage blend eminently the *jural and the moral*, and show how vain it is to place them in entirely separate spheres even by the side of one another. It is for this reason that the celebration of marriage has been generally attended with religious ceremonies, and that the system of institutions having this for their beginning, together with the right of testament, were early brought within the jurisdiction of interpreters of Christian duties. The question for whom is it lawful to contract marriage as far as hindrances by blood were concerned, was brought before the bar of Roman and Jewish law; that of monogamy has been submitted to Roman law and to the New Testament; that of divorce to the New Testament. And we find a new set of moral notions suggested, but not sanctioned by the latter authority, which, by the rigid form they took, produced as much evil as good.

### § 39.

The first point to be looked at in relation to marriage is its beginning. We have in common use the expression to contract marriage, and with great propriety. Two persons do contract, with or without form, to live together in the state generally understood to be marriage. The contract looks towards a particular state so-called, and has no power to modify or alter it. Thus, to agree to live together as man and wife as long as love lasts, or on condition of having children, or for a term of years, or with leave given to either party, as to the husband by the wife, to have a similar relation simultaneously with another party—these would be immoral agreements, as truly so as to form a partnership to engage in the slave trade, or to frame a compact, like that of the Pilgrims at Plymouth, for a state organization, in order to send out piratical expeditions on the sea. The justification of these remarks is to be found in the important distinction already explained (§ 38) between contracts

Entrance into marriage by contract.

which are in their general nature indefinite, and may be defined by the terms used in each case, and contracts which for some reason have a definite, unalterable form. Marriage, like the state, belongs to the latter species.

§ 40.

This engagement implies power to make the engagement and to enter into the state of marriage, and is an act of free consent. If either of the parties is, according to the jural ordinances of the place—wise or unwise—not *sui juris*, he or she cannot enter into the state without leave of the parent or guardian; and, on the other hand, it is flagitious to force a child or ward into consent without his or her own will confirming it. The case may here be put of a prior engagement which is now broken off, and it may be asked whether this is an absolute impediment, even if made in a solemn manner. The answer is that, jurally speaking, to break off an engagement is a violation of obligation which gives a right to an injured party to seek for a remedy; but that in the intercourse of life so many cases of hasty engagements occur, made perhaps after strong solicitation by a young person of feeble will, that it would be a great evil to force such a pledge to its fulfilment, especially after new revelations of character, and still more perilous to make it an obstacle in the way of union with another.

The marriage engagement again implies that there are no other impediments in the way of being married, such that the law of morality deduced from the idea of marriage, or the law of the state confirming that law pronounces them to be weighty. In stricter language, the impediments may be such as to make a marriage void or to make it voidable. In the latter case, if known, they are good ground of breaking off the contract before its consummation. If concealed purposely by one of the parties, in order that the decisive step may be taken, they furnish ground for a sort of divorce of which we shall presently speak. If there are real obstacles, and yet unknown to the party in whose case they exist, the other may before marriage,

as after, sue for a divorce. But, on the other hand, a party injured by intention or ignorantly may waive the right to this remedy and live with the other.

One such case is a physical condition which makes it impossible to have children, provided it existed before marriage. If supervenient, it ought to have no effect in sundering the tie. And this exception holds good only for those who marry in the years of life when to have children is possible.

#### § 41.

There are again impediments of such a kind as to render a marriage void altogether. One class of these Prohibited degrees. is prohibited degrees. As children grow up in the family it is of the highest importance that reserve and a kind of sacred honor should be maintained in the intercourse of the boys and girls, because otherwise what nearly all men and all law hold to be frightful crimes might exist. The horror of incest is necessary for preserving the purity of the world. It is therefore worthy of notice that if the human race sprung from one pair, their children must at first have married each other. This, however, is not perhaps more strange than that at a certain time of life the feeling of modesty arising in the girl serves as a moral protection against evil. Yet examples are not wanting of marriage with sisters in the early history of mankind, as Abraham's wife was his half-sister, a thing forbidden by the Mosaic law ; and this appears to have been not only practised among Egyptians and the Persians (as Cambyses had for his wives his sister Atossa and another sister), but may have been favored by their religion.\* The few other examples of it that have been gathered out of the history of the more civilized nations were sporadic cases, not showing the usage to be general, and especially

\* Artaxerxes Mnemon went still farther, and had two daughters among his wives. From Herodot., iii., 31, it appears that the act of Cambyses was contrary to Persian usage. Strabo, however, xv., p. 735, imputes incest with mothers to the Magi, and others charge it on the Persians. (Duncker, *Gesch.*, ii., 549, ed. 3).

drawn from the customs of licentious dynasties. At Athens a legal marriage existed between a brother and sister who had not the same mother. (Demosth. c. Eubulid., § 20, p. 1305.) But the feeling expressed by Plato (Laws, viii., p. 838 C.), must have been shared by his countrymen. He speaks of the unwritten law which deters from such things so effectually that scarcely the desire at all enters the minds of the greater part of men. "A little word," he adds, "extinguishes all such pleasures—the word that they are by no means according to divine law, but are hated of God and the basest of base things." Nothing could more clearly show how the better Greeks felt towards crimes of this class than the horror of Œdipus, in the drama of Sophocles, when led into incest by mistake.

Besides the moral, almost religious recoil against marriage within the closest degrees, whether in the ascending, descending, or collateral line, the argument urged by Augustin is a strong one against it, that it confines the affections of life within a narrow circle instead of spreading them abroad, and so binding men together by various lines crossing one another. But there is a reason also for the prohibition of marriage within certain degrees of near kindred in a physiological law which is of wide extent. In regard to fallow deer and all domestic animals, it seems to be an admitted fact that "*les accouplemens consanguins ne réussissent pas ou réussissent mal; et si l'on y persiste, espèce, race, santé, fécondité, viabilité, tout s'éteint.*" (Dr. Prosper Lucas, cited by H. W. J. Thiersch, *d. Verbot d. Ehe*, p. 9). The same physician adds that aristocracies, seeking to recruit themselves within their own circle, become extinct, and often fall into derangement and imbecility. An analogous law prevails, it has been found in recent times, in the vegetable world. Not only is it important to change the seed in order to improve the crop, but nature performs the work of bringing the pollen from one flower or plant to another by the help of insects, and this on a large scale, so that the animal is contributing to the perfection of the vegetable, while seeking a supply for its own



wants. The evil for the human race of marriage between near relations has long been known. In a letter imputed to Pope Gregory I. the remark is made that Roman law allowed own cousins to marry, but it is added, "experimento didicimus ex tali conjugio sobolem non posse succrescere." \*

It may be laid down that marriage between relatives in the first degree, whether of whole or half blood, and between those brought into a similar degree by marriage, and between near relatives in the ascending and descending line, are unnatural and perilous to society, because all such are brought into the closest family ties. But how far shall the prohibition extend, founded as it is on moral feeling and a certain "horror," as well as on considerations of expediency of the highest importance. Do the interests of society demand the prohibition to be extended farther than between members of the immediate family—to cousins, for instance, to a wife's sister, and so on? The reasons for it exist nowhere with such strength as among near relatives of the same blood and living together in closest intimacy from youth. It is very doubtful whether legislation ought to go much beyond the natural household in its prohibition.

The Roman law allowed first cousins to marry, and when the Emperor Claudius wished to marry his brother's daughter, Agrippina, a law was made allowing marriage with a brother's daughter only, while marriage with a sister's daughter still remained unlawful. The provisions of the canon law prohibiting marriage between sixth cousins seem utterly unreasonable, and indeed, the great Pope, Innocent III., showed that he felt a larger liberty to be expedient. Still more unreasonable, and founded on no correct views of marriage, was the extension of the old canonical prohibition in the Greek church to those whose relatives were allied by marriage. As for the question of the marriage of a man with his deceased wife's sister, which would be quite against the rules of the old church, there is a difference of opinion and of

\* Comp. "Divorce and divorce legislation," by the author of this work, ed. 2, p. 121. (New York, 1882.)

legislation among Protestants. But this connection is forbidden by no law of the Jewish Scriptures, for the passage in Levit. xviii., 18, applies to the contemporaneous marriage of two sisters to one man; and the *jus leviratus*, then allowed, goes much farther than such a union. Moreover, it is often a blessing for children to have a female relative who has a natural attachment for them become their responsible guardian, and there is then less danger of division in a family than where a stranger takes this place.

§ 42.

The subject of primitive degrees brings us to the question much discussed of late, but which we must dismiss with a brief notice, What was marriage, as understood by primeval man? It has been held that, as property in the early communities was held in common, so in the same forms of life there was a promiscuous union of men and women, and the children were the children of the community. This is argued, not from instances of such promiscuity so much as from practices surviving through untold ages the decay of the original form of society. On the ground of these it is claimed that marriage as now understood in the highest races was once unknown.\*

\* This inquiry was started, we believe, by Bachofen, of Basel, in his strange book entitled "Mutterrecht" (Stuttgart, 1861), in reference to succession through the mother. J. F. McLennan followed in his important book on primitive marriage (Edinb., 1865), in which the practice of bride-stealing and exogamy are the main points of enquiry. A second edition, which has recently appeared (Lond., 1876), contains discussions of other points and reviews of the opinions or theories of other writers. Mr. L. H. Morgan, of Rochester, N. Y., approached the subject through the terms which denoted consanguinity and affinity in several races. (Smithsonian Contrib., xvii., 1870.) Sir John Lubbock (*Origin of Civilization*, 1876) examines this question of early history with a tendency to find an ascent of man from the lowest sensuality. M. A. Giraud-Teulon (in *les origines de la famille*, Geneva, 1874) gives a clear criticism of the leading facts and criticisms. Mr. Herbert Spencer (in the *Popular Science Monthly* for Jan., 1877, in an article entitled on theories

Herodotus found among the Lycians (i., § 173) what seemed to him a unique usage, that children there took their mother's and not their father's name. They adopted the rule "partus sequitur ventrem" to the extent of depriving the children of a principal man, by a foreign woman or a concubine, of political rights. This usage, which seemed to Herodotus so strange, is found all over the world at the present day, in the form that children belong to their mother and her family; and has been accounted for on the assumption of promiscuous unions, upon the ground that mothers would know their own children, their mothers and her children, and so on in the female line, while in our sense of the term they themselves had no husbands.\* Marriage with sisters prevailed in a number of tribes belonging to different races, especially in their royal families, and appears in a number of mythologies. Thus, Zeus and Hera, Osiris and Isis, the sun and moon—divinities of the Peruvians, etc., were brothers and sisters.

Polyandry, also, is found even now in Thibet, among the Todas and other tribes of India, in the Marquesas Islands, etc.; and Cæsar found it in Britain. Nay, among the Spartans it was known. For the most part, the men have been brothers with a common property.

Further, the community-marriage being assumed, all the names of nearest kindred, as father, mother, sister, brother, grand-parents, might denote a class of persons; the father, for instance, might not be distinguishable by the name of his degree of kindred from uncles of various sorts, sons of a

of primitive marriage,) discusses McLennan's theory and rejects it, as it respects the important points of exogamy and bride-stealing. A. H. Post unites inquiries into communities by blood and primitive marriage in his *Geschlechts-genossenschaft u. d. Entstehung der Ehe*. (Oldenburg, 1875).

\* With this is to be brought into connection the fact that in Southern India extensively, in parts of Siberia, in Polynesia, sisters' children are heirs of a brother's property in preference to his own children. Comp. what Tacitus (*de mor. Germ.*, § 20) says of the esteem of a maternal uncle for his sister's children in that nation.

grandfather's brother or grandmother's brother or sister, etc. And this poverty of words descriptive of a number of relatives might pass down into the period of more regular marriage.

The practice of taking a mother's name, of belonging to her and not to the father, will meet us again. We observe on the other points (1), that incest is now forbidden almost everywhere in the world. Where practised, purity of blood, as in royal families, or considerations of property, as in marriages at Athens among half brothers with their sisters by another father, might generally account for it. There seems to have been a feeling that the closest union came through the mother; and thus children of the same mother could not intermarry, while those of the same father could. Polygamy aided this kind of incest.

(2). The mythological conceptions do not represent what is right for men. Thus, the thefts of Hermes, and the adulteries of many gods,—which, by the way, presuppose regular, permanent marriage,—do not show that the moral sense of the tribe justified such things, but only that it was not strong enough to condemn them in fables. Such unions as those of Hera and Zeus, of moon goddesses and sun gods are inevitable, if mythology would express the close connection between the dual objects of nature. Moreover, the mythology must have been formed after this supposed promiscuous marriage had disappeared from the world.

(3). Polyandry is due to poverty and to infanticide growing out of poverty, and cannot be said to be a general practice, still less one growing out of primeval usage. This is the explanation of it in Thibet, where the females are sent into Buddhist convents, and in the cases where it was practised at Sparta. (Polyb. xii., 6.) Among the Todas, now a very small polyandrist tribe, infanticide of female children has been common.

As the application of the names of father, brother, etc., to a class of relatives does not represent the existing state of things in the Hawaiian Islands, and as the names for mother, for sister and brother by her, on any supposition, ought to

have had a restricted sense, the usage of speech to which we have referred is rather a proof of poverty in the language than of any special early customs. We have a similar poverty in the use of our words uncle, aunt, merely because the need of new words of more exact sense has not been felt.

(4). There is a class of facts of great interest bearing on primitive marriage which are not at all easy of explanation. In quite a number of races or of tribes marriage is allowed between members of the same clan or tribe only ; while in others, marriage between members of the same clan or even of those who have the same name, is forbidden.\* In the latter, to a considerable extent, the child is reckoned to belong to the mother's kindred. This is called now *exogamy*, and the wife, all over the world where this was in use, was obtained by capture. Indeed, bride-stealing has been far more general than exogamy. Thus it was practised in early Greece ; to it the stealing of the Sabine women points ; and the rape of Proserpine by Pluto is an old instance from mythology. Exogamy, as well as its opposite (now called *endogamy*), points to a later era than the primitive communities—to a time when marriage had its fixed rules and was considered a relation between two persons. Mr. McLennan accounts for both exogamy and bride-stealing by infanticide arising from poverty, which led to the capturing of women from another tribe, as well as to polyandry within the tribe. If poverty caused this, it ought to be a common cause in the neighboring clans also ; but, as Mr. McLennan puts it, there ought to be a plenty of marriageable young women in one tribe and none in every next one. Mr. Herbert Spencer cogently asks (see note above) why hostile tribes should rear their daughters as wives for their foes. Mr. McLennan finds also in this exog-

\* It was required in the laws of Manu of the Dwidja, or twice born person (who was to belong to one of the three higher classes or castes), that his wife should not be a descendant of one of his ancestors, maternal or paternal, to the sixth degree, and should not pertain to the family of his father or mother by a common origin proved by identity of family name. ii. 6, Deslongchamps' trans.

amy "the primitive instinct of the race against marriage between members of the same stock." If so, the resort to infanticide for explaining it is needless, and it is hard to see how the asserted original promiscuity could ever have existed.

Bride-stealing, as Mr. Spencer suggests, may have sprung from the raids of neighboring tribes who would carry off everything of value they could find, especially young women who could serve for wives or slaves, or both. And he thinks that the successful raid, by making a warrior distinguished, rendered the stealing of a wife a required proof of a fitness to have one. Next would follow a peremptory law of exogamy. But is it not strange that foreign women, in spite of the natural jealousy of the native women, should take such a place that at length all the young men should be required to get their wives from another sept or totem? Other causes may be conceived of why this exogamy became necessary in many tribes. One might be the feeling, as yet vague, that there was something unhallowed in marrying a near relative. Another might be the greater probability of peace between the tribes; and possibly another the discovery from experience that such marriages were most fruitful. Bride-stealing may be explained by the unwillingness or inability of the young men to pay the price almost universally demanded by the father of the girl; and it might continue as a ceremony after the original sense of the practice was lost. This explanation, however, would require the previous establishment of separate property.

Many tribes practise *endogamy*; among them some that belong to the same race and use the same language with others where *exogamy* prevails. It seems most natural that marrying within the tribe should have been the earliest usage, for objects of worship, religious rites, fear of strangers on the part of females, would be so many arguments against the opposite practice. Mr. McLennan's theory that exogamy was prior in time to marriage within the tribe, and his view of the stages up to the usages of civilized life is ingenious (pp. 183-210, ed. 2), but I cannot persuade myself either that there

was any one law of progress everywhere and in all races, or that finding a wife at home should have been posterior by long stages to getting her from abroad. Whatever custom prevailed at first would be modified, and might be differently modified where village communities and separate abodes began to succeed to joint families. Until the connection of the stages, especially until the practice of exogamy, is better cleared up, we must delay forming a judgment with M. Giraud-Teulon, who, at the end of his very good account of this subject, declares "that he suspends his conclusion until he gains further light."

There is no doubt, however, that, whether by degradation or by never rising above a primitive bestial condition, many communities of mankind even at the present day show the lowest type of human nature in regard to sexual unions. If they are representatives of man in his first estate, they put in a striking light the progress of humanity in regard to moral ideas, and point to the possibility of a higher progress. If they represent man in a degraded condition they show how uncivilizing and what an obstacle to progress sensuality is. In either case we must regard man as being true to his nature and destination, when he rises in his conception of marriage, his respect for women, his feeling of the sanctity of the household.

#### § 43.

Polygamy is contrary to nature and an abuse of nature, if  
 Polygamy. the true idea of marriage implies a surrender of  
 the personality of each of the married partners  
 to the other, or, as the earliest pages of the Bible express it, if "they twain shall become one flesh." Marriage, therefore, can only be between one man and one woman, because the nature of the union, of its interests, its affections, its objects, is such as to exclude any contemporaneous union of the same kind. How can a person who is one flesh with another become one flesh with a third person? How can one who leaves the closest relatives of his earliest years, who "leaves father

and mother" in order to cleave to his wife, have any other similar relation which compares with this in closeness?

And yet in all the races of men, except the Indo-European, has polygamy been allowed and practised from time immemorial; nay, in some of the members of that race, among the Indians, Persians, Slavonians, Celts, among these latter, together with polyandry (Cæsar, *B. G.*, v., 14) and in the practices of the German aristocracy (*Tac. de mor. Ger.* 18, *Cæs. u. s.*, i., 53), it was either a primeval institution or had superseded an earlier monogamy. How came it to pass that a usage, so revolting to our sense of morality, and once pervading the world excepting two or three gifted nations, should not have been seen in all its deformity by at least the higher races of mankind? One cause may have been that while the relations of man to man in business were looked at on the side of right, the marriage relations were looked at on the physical side; the members of the family were not contemplated in their jural relations, but as a whole, under a head who had powers like an owner of property and authority like an officer of state within his little dominion. To this the impulse of lust is to be added, together with the consideration which the polygamist enjoys, where this usage is endured, as a person able to support a large household. Even the wives of such a one may like the distinction of belonging to a man of rank. Add to this that in most of the passive races the wife is a slave connected with the house master and not likely to run away. In fact, polygamy may have been helped to spread by slavery, and vice versâ. Polygamy imbrutes the woman, makes her a thrall and an instrument of animal desire, and gives prominence in the family to that which is most animal. How are families to rise up towards the idea of true family life in such a condition? A reform cannot spring up from within.

Thus we come to the essential moral evils of polygamy which show it to be in a true sense unnatural. Affection is scattered and lost. Appetite reigns in the man. The wives are rivals and jealous, so that in some countries they have



separate huts or kraals. The children side with the mothers. Equality between the sexes is impossible. Polygamy requires a despotical power at the head, and seems to favor the despotical form necessary in the state.

It may be added, as nature's testimony against polygamy, that the number of children who grow up to a marriageable age in the two sexes is about equal. Among children born in countries where statistics give us reliable information the males exceed the females by between four and six per cent.; the sexes approach, before they reach the age of seventeen, to an equality of numbers, and after that, until about forty-five, the females slightly preponderate. Beyond the age of forty-five, there is a still larger excess of women. Thus we have two interesting facts: that the number of those who are intended for each other is in the earlier years of life nearly equal, and by the greater waste in the male sex becomes still more so; and that in the years when women bear children a small excess appears in their number, as if to allow husbands a larger range of years than wives. These general facts are slightly modified in different countries. In Prussia, where 105 or 106 boys are born to 100 girls, the ratio by the census of 1846 is that of 100 living males to 100.241 females, and the ratio for the ages between seventeen and forty-five is almost precisely the same. In Sweden, Russia, and the British Islands there is a greater excess of females, whose numbers to those of the men are as 107.64, 105, and 104.93 to 100. But, at least in Great Britain, the absences of men all over the world would doubtless bring the number of males nearer to equality. There seems some reason to believe that in more southern countries also there is an excess of males; thus the ratio in Italy of males to females is as 100 to 98.96. By the census of the United States taken in 1870, the whole number of males was 19,493,465, of females, 19,064,806, which is too large a ratio on the male side, and is instantly accounted for by the relative numbers of foreign males and females, 3,006,943, and 2,560,286. The difference here, 446,657, more than balances the difference of the totals 428,-

659, and must be accounted for by the greater number of male emigrants. In the *native* white population the ratio of males to females is as 100.55 to 100, and among the native blacks as 96 to 100 (nearly); where perhaps but for mortality in the late war the ratio would be in the case of both whites and blacks slightly nearer to equality.

It has been said, however, that in polygamous countries there is a considerable excess of females born into the world. It may be so, but I have seen no good grounds for the opinion. In India, males are decidedly in excess, but this may be due to the prevalence of the murder of female infants. In four Zulu tribes Dr. Colenso found 988 men, 1,812 wives, 352 widows, 1,435 girls, 1,720 boys, in all, 2,708 males and 3,599 females, and from such data he argues that the female sex considerably preponderates in that part of Africa. But the main point, how many of each sex come into the world, is decided by his own figures against him. His 1,720 boys and 1,435 girls, who all ought to be natives, are in the ratio of 100 to 83.5 nearly, showing, in fact, too great a proportion on the side of the males, and needing to be accounted for by the sale of girls or their early marriage; while the great number of wives is explainable by not killing the women in wars between the tribes when the men are murdered.\* The truth is that in most polygamous countries the husbands with more than one wife form but a small part of the number of those who are married, while licentiousness must be promoted among the men who are unable to have a plurality of wives by the unwillingness to enter the family state on the plebeian plan of monogamy.

#### § 44.

The duties and claims on each other of a married pair must be left to the science of ethics. (1). The rights, as interpreted by the usages and laws of many even of the most civilized nations, have been thought to include a

Rights and obligations of a married pair.

\* See the author's review of Colenso and Grout on polygamy, in the *New Englander*, Vol. xvi., p. 407 onw.

certain dominion on the part of the man. He is the house-master, the protector against outward force, the centre of jural relations. This is so far true that superior strength and knowledge of business fit him to manage family affairs, and there can, in most jural relations, be but one manager. He, and not the wife, is thus responsible, which is certainly for her protection. But he cannot rightfully demand that the wife's and the family's interests shall be sacrificed to his. He is the head on their account, and society is bound in its laws to take this position, when it acts over him as upper protector of his family. We cannot here enter into the details of arrangements needed against the head of the family, as when he is wasting his goods in vicious pleasures, when he is cruel, when his wife had property of her own before she entered his house, or had it afterwards bequeathed to her,—where a long array of laws on the principle of separate or of joint property would show the difficulties felt in civilized lands of so adjusting rights as at once to give protection to the feebler, without dividing the house, and to leave the operations of business unembarrassed. These questions arise mainly in highly civilized lands, and it may be mentioned as a characteristic of such lands that their laws shape themselves almost necessarily more and more in favor of females.

(2). The wife has a right to a support. That is, her part being to take care of household and children, the husband is bound to see that she is maintained according to the usage of her class, so far as it lies in his power, and according to the understanding at the time of marriage. They are partners who divide the family work between them. In savage life the wife does the drudgery even in planting and gathering crops. She hence becomes prematurely old, and the result is a degradation, moral and physical, of the children.

(3). They are reciprocally bound to fidelity in all that which constitutes their union, and while for others the violation of sexual purity may be simply an offence against the laws of morality, for them adultery is not only a crime, but the highest breach of obligation. With the criminal side of

this wrong we now have nothing to do. As the rights of both partners in marriage are equal, both can violate obligation equally; yet, under Roman law, the technical offence called *adulterium* could exist only where a married woman was one of the offenders. The husband could not become obnoxious to this charge by concubinage or intercourse with an unmarried female. The evil of adultery, as a violation of right, is certainly greater in general for the wife than for the husband, both because it may be connected with *confusio sanguinis*, and because it is more morally offensive on her part, just as the moral sense revolts more at polyandry than at polygamy. Yet, according to the principle of substantial equality which prevails from the commencement of marriage to its termination by death, as the rights of the parties are equal, so their obligations and their violations of them ought to be placed on common ground.

§ 45.

If, then, either of them should disregard the obligations as well as duties implied in the idea of marriage, what is the remedy, or rather, what is the natural result, for there is no remedy? The innocent party cannot, according to the rules of justice, be expected to continue a contract which has been broken by the sin and shame of another, unless, by a waiver of right in the spirit of love and of Christian self-sacrifice, such party forgives the offence and seeks to save the other. But is not marriage indissoluble? Not certainly according to the idea of marriage, which, although it places the termination of the state out of the power of the parties' consent, as we have seen, yet does not involve that it shall never cease. Adultery is, in fact, a termination, as ending the condition in which they were one flesh. It declares that one of two parties, in whom another had a property, lawlessly transferred that property, as far as he or she is concerned, to a third person. It also, as far as the wife is concerned when she is guilty of the crime, destroys the peace and violates the idea of the family, by making it uncertain to

whom a child belongs. Hence, the worst form of adultery, and in some codes the only form, is when a married woman is one of the parties to such intercourse.

But is there any other ground for divorce besides this? Natural law, the rights involved in the case, do not give a definite answer; they allow divorce in one case, but are able to fix no limit for the wrongs which ought to justify separation, just as they require a termination of the minority of the child, while the point of time when this state shall end must be determined by positive law. Christ allows of divorce in but one case, and one only; the apostle Paul, in the particular instance of a marriage where one of two heathens has left the other, *seems* to decide that the other is released from obligation. Christ, in the rule that he has laid down (Matt. xix., 8), meets the great liberty of divorce under the Mosaic law with the declaration that a civil code given even by an inspired law-giver may be imperfect, in order to suit the character of a people so wedded to old usages as to be unable to endure a regulation in itself desirable, and that, according to the idea of marriage, to its institution "at the beginning," a stricter law, cutting off divorce in all cases but one, was the proper rule. This strict rule, then, must bind Christian believers; but does it bind states? So far as I can see, a rule less strict may be found necessary in civil society for the same reason for which Moses found it necessary. A state may call itself a Christian state without following the path of Christian morality. It may not require anything forbidden by Christianity, but it may forbear to enact many things which Christianity requires, for the spheres of the two are different. A strict rule of divorce, however, is on the whole the best for that which the state aims at. Granted that under a strict rule some might commit adultery to get a divorce; yet (1) the facility of divorce often leads a married pair to quarrel when otherwise they would be forbearing and would preserve their union; (2) the strict rule upholds the sanctity of marriage, and testifies in favor of family life as too sacred to be overthrown by any but great deviations from right,

since the condition of marriage, except in extreme cases, is indissoluble. (3). Facility of divorce does not prevent adultery, but tends to multiply the cases of it by making marriage seem a slight thing. Dion Cassius tells us (lxxvi., § 16) that the Emperor Septimius Severus made certain laws against adultery, at a time when divorces at Rome were easily procured, and that he himself, when Consul under Septimius, found three thousand records of processes for this crime. (4). That there are evils attending great strictness respecting divorce is admitted; but the question is whether there would not be more if they were easily granted. (5). Add to this that a divorce law, when it breaks the barriers of the old Christian rule, grows looser and looser until almost anything becomes a ground for it. Of this we have some signal examples in several of the United States. That this must attack the morals of society at a vital point is evident.\* Divorce ought not to preclude the innocent party from marrying again, for there is no reason why such persons should be stripped of their rights through the fault of others; but the guilty party may with the highest justice incur that disability.

#### § 46.

The feeling in uncivilized tribes to this day generally is that the children are the property of parents, Rights of parents. like sheep or cattle. This appears in a variety of usages, as in that almost universal one of selling the daughter to her intended husband (although here a right to a child's labor would be a sufficient explanation); in the right of the father to choose whether he will expose the infant or raise it up—whence the words *tollere, suscipere infantem* draw their meaning—and in the willingness of Plato and Aristotle to have abortion practised.† It seems, however,

\* See the author's "Essay on divorce and divorce legislation, with special reference to the United States." New York, ed. 2, 1882.

† Plato de Rep., v., p. 461 C., *μάλιστα μὲν μηδ' εἰς φῶς ἐκφέρειν κήνημα μηδέν.* Arist. (Polit., vii., 14, § 10), seeks to limit the number of children, and to improve the breed. Nothing maimed is to be reared

that the Greek humanity revolted against abortion, or that over-population was not dreaded in all the states alike, for we have evidence that somewhere in Greece it was a criminal offence. (See C. F. Hermann, *Gr. Antiq.*, iii., § 11, note 5.)

The Romans, however, carried out the *patria potestas* and the rights of the house-master most remorselessly, until the new humanity, from the stoic philosophers and perhaps from Christian morals, changed legislation. The power of the *paterfamilias* involved the right of life and death equally over the slave and the child, and these rights were not terminated in either case except by a form of emancipation. In this form the triple sale of the son and then his liberation by the father buying him made his freedom complete. On the other hand, the old form of adoption of those who were under no one's control, known as *arrogation*, brought with it these powers to the new father, as appears from the words of the old formula in which the question was submitted to the *comitia curiata*; "*utique ei (i. e., the father by adoption) vitæ necisque in eum potestas sicut, uti patri endo filio est.*" According to this strict rule the son could have no property of his own unless by permission, and remained in his father's power even when grown up, except so far as the claims of the state freed him from control. The married daughter belonged to two families; but by Roman law, the husband's father did not acquire the *patria potestas* over her, and a son's children

up. If law does not forbid, the number is to be kept down by exposure. Abortion, also, may be used before sensation and life come on. And then, as if to excuse himself for something that might be thought inhuman, he adds, "for the question whether it be according to natural right and piety (*δσιον*) or not, must be decided by the existence of sensation and life." In the same part of the *Politics* and in the *Republic* there are abundant illustrations of the tyranny (over the individual) which these two greatest of Greek philosophers would allow to the state. The due succession, without over-population, of a healthy race, was a state concern. On the other hand, Plato (*de Leg.*, vi., p. 784 B.) lays it down that not to have children for ten years after marriage would be a reason for divorce, about which family friends and the matrimonial committee of woman (784 A.) are to have the deciding voice.

belonged to him as to a new fountain of power. For the mitigations of this *patria potestas*, from the ancient one—when on moral grounds a family court was called to decide upon the reasonableness of exercising the power of life and death—to the completion of the system of law in the empire, the writers on Roman antiquities (as L. Lange, i., § 32) and on Roman law, may be consulted. Gaius says (i., § 55) “*item in potestate nostra sunt liberi nostri, quos justis nuptiis procreavimus; quod jus proprium civium Romanorum est; fere enim nulli alii sunt homines qui talem in filios suos habent potestatem, qualem nos habemus.*” The contrast between this Roman usage and Greek institutions is noticed by Dionys. Hal., ii., §§ 26, 27. This stern power, be it remarked in passing, was with Roman conscientiousness, formalism, and sense of justice, a main source of the greatness and of the law of this remarkable people.

The extent of power given to the father of the family by the Romans grew out of a sense of the closeness of the family union, and was an extreme carrying out of a true view of the domestic relations. It may have derived its origin, like the family courts for trying the misconduct of wives, from the feelings and precedents of the *gentes* and the early community system. The true statement should, however, include the rights of the child as well as those of the parent. Thus,

1. The child is not the father's property in any sense. He did not come into existence for the sake of the father any more than the state is constituted for the sake of the ruler. The relation is established for the training of the children that they, under a good discipline, may take their place in the world of men. Hence, the father has a right to use such and so much corrective discipline as is necessary for the good of the child and the maintenance of the family state.

He has a right to the services and labors of the child when the latter is strong enough to labor, in order thus to diminish the burden of the child's support, if his circumstances should demand such relief. Hence, as well as for the child's benefit,



the right of apprenticing the child to a master under an indenture in order to learn a trade.

He is the natural guardian of the child in all those relations and matters of business in which the child has no jural competence to act. Thus his consent to his child's marriage, when under age, to his course of education, and the like, is necessary. But as parents are often incompetent to take care of property left to their children, there is need of some higher judgment to decide who can fulfil this office best. This office the state assumes. In regard to the child's education there is equal need of a supervision over the parent, for he may be inclined to sacrifice vital interests and even rights through a narrow or parsimonious spirit. In the matter of education the true view is that the state has a right to interfere. The child has a right to an education if it be within the parent's power. If, now, the state places this by public schools within his power, the state has a right to see that the child shall be sent to school, **not** to speak of the benefit to the state and all its inhabitants of having the future men and women of the country well educated. In such education the authority of the master takes the place, for the time and for the object, of that of the parent, and justifies such discipline, not involving injury or outrage, as usage and opinion do not forbid.

2. The parent is obliged to support the child, unless inevitably prevented, in such a way as his condition in life requires, and so that he may act a useful part in the world. He may, therefore, if possessed of property which he is manifestly wasting, be restrained from so doing on account of the rightful claims of his family.

He is obliged to provide for the future support of his family if he leaves young children or a wife. This point we shall look at again in another connection.

3. The rights and obligations of children towards parents are sufficiently implied in what has just been said of the correlative jural ties of parents to their children. It may be asked, in addition, whether it is a duty or an obligation of children to support parents in old age and poverty, if it lies within

their power. We may reply that if the child is able to do this it may be called his obligation, and he may be compelled to do it, rather than that the state or the humane members of it should take his place. But it certainly is his duty, as almost all nations admit, and some few express in law. It is better, however, in general, to class this among those numerous other duties to which the family relation gives birth, and which, if that relation has not been wholly taken off its hinges, will be discharged with a gladness of affection which the family pre-eminently cultivates.

#### § 47.

Humanity, or regard for kindred, or other motive, may prompt a married pair to take into the family and treat as a child the child of another. This is a definite jural relation which imposes obligations on those who open thus their doors to a stranger, and gives him substantially the rights of a child, unless there is an explicit understanding to the contrary. The child's good is in all to be considered. As the circumstances vary greatly,—sometimes a poor child being received out of benevolent feeling, sometimes a childless home being made happy by a new inmate, sometimes an orphan relative being provided for,—it is impossible to say exactly what is due to the adopted one in the future. Here we come into the field of duty. But expectations of a share of property certainly ought not to be excited without being fulfilled, unless misconduct prevents.

#### § 48.

These subjects belong here rather than under the head of Inheritance and Testaments. property, because it is necessary to take into view the closeness of the family union before they can appear in their proper light.

There has been a very general feeling among nations, as expressed in their laws, that a man is bound to leave his property in the main to his next of kin. It is true, as we have seen, that in a number of cases land is placed by itself, and

goes down by certain fixed laws.\* Thus, in the community system there is no right to bequeath land, for the deceased person had no separate share of it, and his family, if he had one, would take his share as a matter of course. In the tribal system, land is retained in the family by the family principle itself. Under the Spartan constitution, according to the received accounts on which Mr. Grote tries to throw suspicion, equal shares were made at the Dorian conquest, and the endeavor was to keep families up, but without success.† In the theory of the feudal system, the fief went in some countries to the eldest son by law; in others, though not generally, to all, and for some time females could not inherit on failure of direct male heirs. In despotic countries, where conquest gave much of the land into the hands of a military power, the despot was conceived to be the ultimate owner of the soil; and no disposition of it could be made without his consent expressed in law. This theory and the similar one of feudal times would prevent even free sale of lands by the occupant, since he was only a tenant.

But where houses, lands, and other property can by law be conveyed with equal ease, it has been contended by some that no one ought to be able to bequeath what is his, because no one ought to have the power to control his property after his death. In defence of which it may be said that a man often makes his will long beforehand, without foreseeing what will be the condition of his family at his death, so that his

\* It is probable that in the earliest communities there were no testaments. Tacitus (*de mor.*, § 20) says this of the Germans, although it was allowed afterwards to dispose in this way of one's property. (*Grimm D. Rechtsalterth. B. ii.*, near the end.) According to Plut. (*vit. Solon.*, § 21), before Solon wills were not in use in Athens, and they were first allowed in Sparta by the law of Epitadeus. (Plut. *vit. Agid.*, § 5.) While lands were held in common within the village community, the mark, etc., there was little or no need of testament. Usage derived from family feeling determined succession for some time afterward.

† See besides other works on Spartan institutions, Schömann's *Gr. Alt.* and his monograph on this point in examination of Grote's views.

provision may be unequal and hurtful ; that he may make arbitrary arrangements which will be even injurious to his family after a few years ; that he may be too weak in his last days to make a wise testament, or may be under undue influence from ecclesiastical persons, and so on. If this meant that there should be no wills and that property, on the death of the head of a household, should be escheated to the state instead of passing down by good intestate laws, it would defeat its own objects. For a man would take care during his lifetime to do that which he could have no power to do at his death. The family feelings will have their way in spite of theorists. But I should not contend against taking from men the power to make testamentary dispositions, provided that intestate laws could be framed, founded on the nature and wants of families, and should allow a certain liberty of equitable rather than equal partition of estates in special cases. As it is now, the widow is defended in many codes against a will framed without regard to her interests, or rights, as they can well be called. Why should not the children have similar protection ?

The Roman *querela inofficiosi testamenti*, devised at a somewhat late period, it is probable, was intended as a remedy against wills which manifested a want of the proper sense of duty towards a natural heir or heirs. When an heir, who had no such claim (a *scriptus hæres*, who had perhaps insinuated himself into the favor of the testator), had taken possession, a natural heir might bring this complaint ; and the effect was to give to the complainant what would be his share if the deceased had died intestate. The will was not broken, but altered only so far as the complainants had an interest. (See Vangerow, Pandekt. ii., § 478 et seq.) It seems to the writer of this treatise that the principle of this complaint is entirely just. The property of a head of a family is his against others outside of the family, but not his as against the family itself. During his lifetime a man must have free disposal of his wealth, for the business and intercourse of the world demand it ; but when he has it no longer as active capital, it belongs

to his family by reason of the family union. Let him not be allowed to violate under any influence so sacred a relation. Let him, if you will, have control over a portion, but a portion only. The Roman law bound from one-third to one-half of an estate for the benefit of heirs. The French binds from one-half to two-thirds. The Prussian code follows the same principle of the civil law.\*

If the power of making a will is left to the heads of families, some such provisions are necessary. If it is taken away, the question arises, and the same questions meet us whenever a will is not made, how far into the line of relations, especially of collateral ones, should intestate laws run in their provisions? In a state of society where a man's kindred are all around him, and the tie to the more remote partakers of his blood is strong, the question is important, and probably the feeling of society would include them in the benefit of intestate laws. But in a country like the United States, where blood-relations are separated by moving from the old hive of the family, and rarely see one another, where the genealogical feeling is weak, and where direct heirs seldom fail; it makes little difference whether intestate laws embrace remote agnates or not. Yet if they are included, the law does good by binding families together.

As a parent seems to have a right to banish from the household a corrupt member of it for the sake of the children and family, so it may be thought that he can cut off such a child from a share in his estate. This as a punishment of ingratitude might be allowed perhaps, if the courts could re-examine and judge over the grounds of his conduct, as was done in the *querela* of Roman law just now spoken of.

\* The principle of the *querela inofficiosi testamenti* was extended afterwards to similar lavish gifts, violating the feeling of kindred in a person's lifetime. This was called *querela inofficiosæ donationis et dotis*. Comp. Vangerow, ii., § 482, and Windscheid, Pandektenr. ii., § 586 et seq., ed. 3.

If anywhere the power of bequeathing property ought to be under a higher control, there ought to be a control as to gifts for public objects which are in their nature perpetual. The endowments of monasteries will serve as an illustration. There was once, in some countries of Europe, nearly a third of the existing property in the hands of religious corporations, of which no small part must have been given *pro animi salute*, and at the instigation, perhaps, of the officiating priest. When a change of religion came on in Protestant countries, and a change of opinion in others, monastic establishments were almost everywhere abolished, and their goods disposed of, often in very shameless ways. Here the common practice of Europe has decided that religious endowments may, for reasons of public policy, be taken by the state, and made use of for purposes which the giver had not in his mind when he made the endowment. This, of course, affected all property, whether given in a man's lifetime or at his death. The right of states so to interfere does not now concern us; but the experience of those times shows that, on the one hand, the powers of corporations ought not to be unlimited as to the amount of money they may receive and the time for which they may hold it, as well as that, on the other, the power of bequeathing to such bodies, and so of alienating it from natural heirs, ought to be controlled.

#### § 49.

We come next to those rights which are concerned with the more spiritual powers of man, the first of which, the right of free expression of thought, needs but a brief exposition. The right of speech is given in reference to society; there could be no true society without it, unless we could suppose that man could, in time, elaborate a sign-language which could answer the same purposes. Even then there would be no sufficient substitute for communication at a distance and by writing, so that the range of human improvement would be very limited. If speech is natural and supplies a natural want, free speech is a right

Right of free speech.

which is limited only by its interference with other rights (as that of reputation), and by the same principles of duty that are to control individuals in the exercise of other rights in particular cases. Further, the right of speech implies the right of addressing public assemblies (so far as this does not come into conflict with other obligations), together with the "liberty of prophesying," with free letter-writing, a free press, and free authorship. How far state rights may interfere with these modes of expressing thought will be a subject of enquiry when we come to the doctrine of the state.

§ 50.

A man's good name is, by the constitution of our nature, of value to him, and becomes of more value with every increase of civilization. As the standard of character, of fashion, of proficiency in an art or trade arises and advances, the judgments of others respecting the individual become more important in affecting his earthly career; and there is a new sensitiveness, connected in part with improved moral or social training, in part with a greater nervous sensibility, which makes obloquy, scandal, ridicule, false reports to be more keenly felt. There seem to be two rights included in what is commonly called the right of reputation. One is causeless insult or reproach, the injury to a person's sensibilities, which can occur when two men are alone, as easily as a blow may be given in the same circumstances, and which is as true an injury as a slap on the face. In all insults or reports unjustly aspersing the character, this injury to the feelings is to be considered, apart from injury to business and a good name. But the unwitnessed kind of insult is a less important species of wrong, for the punishing of it requires the publishing of it. It leads, however, to feuds, blows, duels, and separations of families, and there is no reason why it should not have its remedy.

The other right, which has respect to society and the standing of individuals in society, is of great importance, but varies according to the acuteness of the sense of honor, and regard

for reputation. No cause of private alienations is more common than those thousand intended or unintended marks of disrespect which are among the *minima* that law cannot notice. From these come alienations, false reports which destroy character or prevent success in business, and revenge. The right is the more difficult to protect, because free speech, by which it is invaded, is a right, because scandals are propagated from mouth to mouth without thinking, and because there is no possibility of concealing the foibles, faults or misdeeds of other men. Society has the right to know and judge of its members, and the members have a right to be protected against unfounded attacks. The press and newspapers make the remedy of the abuse of free speech only the more difficult.

A strong contrast has been thought to exist between the sense of honor of the most cultivated ancient states and the modern ones, since Christianity called men more to self-analysis; and the subjective, Germanic feeling began to influence Europe. But the Athenians and Romans were by no means destitute of these sensibilities. The former in their laws provided private suits for evil speaking. (*δίκη κακηγορίας*).\* The laws on which this was founded, according to Meier and Schömann, (*Att. Proc.*, 481, et seq.) provided first that certain words called *ἀπόρρητα*, *i. e.*, forbidden or abominable, should never be uttered against any one on penalty of 500 drachmæ, which probably went to the injured party. Such words were murderer, he who threw his shield away, parricide, matricide. Another law prohibited saying evil of the dead, leaving it to the heir to prosecute. Another still made actionable any evil words in public places or festivals, and prescribed damages to the amount of five drachmæ, two of which went to the state. And still another protected magistrates from insult by a public penalty of civil dishonor. In the oration against Theomnestus, ascribed to Lysias, the person

\* There was, as Meier and Schömann, *Att. Proc.* 321, show, no public action for abusive words. The *γραφὴ ὑβρέως* must not be taken in that sense.



for whom it was written sues the other for charging him with parricide.

The Romans, as early as the time of the twelve tables, made it a grave offence "*si quis occentavisset sive carmen condidisset quod infamiam faceret flagitiumve alteri.*" And Cicero (in Augustin. de civ. dei. ii., 9) gives it as one reason for this, that no one ought to "hear reproaches" save under circumstances allowing him to answer and to defend himself in court. Under the Emperors from Augustus onward, libels (*libelli famosi*) subjected their authors to severe penalties. And, by Roman law, a man could suffer injury when a person nearly connected with him was aspersed with slander.\*

It is not strange that the Christian nations, so much more sensitive and subjective than the most refined of the ancients, as well as having a higher standard of character, should acknowledge, and in law protect the right to a good name. But we meet with difficulties where we try to define the right, as well as the extent of the correlative obligation. One is the difficulty of protecting the right of speech and of the press at the same time. It is easy to define the liability a man incurs by a pistol that he carries, or by his unchained dog, but the tongue, which no man can tame, will speak of the faults of neighbors, and, indeed, the character of men is public property so far as it is indicated by public acts or habits. Nor can we deny that a certain freedom of satire and of holding people up to ridicule, both by speech and in writing, is good

\* Comp. Augustin. de civ. dei ii., § 9; Gaius, inst., iii., § 221, who says, "pati autem injuriam videmus non solum per nosmet ipsos, sed etiam per liberos nostros, quos in potestate habemus; item per uxores nostros, quamvis in manu non sint. Itaque si filia meae, quae Titio nupta est injuriam feceris, non solum filiae nomine tecum agi injuriarum potest, verum etiam meo quoque et Titii nomine." Comp. Paulli Sentent. v. 4, § 3. For the treatment of *libelli famosi*, by Augustus, comp. Tac. annal. i., 72, Dio Cass., lvi., p. 825, ed. Reimar. and Suet. vit. August. § 55. Here we may add the suggestion that the just principle of Roman law, extending the injury of slander or libel, ought to be followed in modern law and extended so as to protect the good name of persons not long deceased, from contumely, and their graves, recent ones, at least, from desecration.

and allowable. It was wise in the Athenians to suffer the comic drama to utter such things as would make demagogues and other knaves wince, although the poets went beyond true bounds. Here then we have the rights of speech and the statement of the truth on the one hand, personal feelings and reputation on the other. The principles reconciling the two rights seem to be these : 1. To tell the truth, to disclose the truth when the character of a man ought to be known, to do this publicly when he is talked of for a public office, may be entirely justifiable. 2. To put the principles or conduct of a person in a ridiculous light by word or caricature, when he is thus before the public, is equally defensible. 3. It is reasonable, therefore, that the truth in a statement, even if uncalled for, should take off something of its libellous character, unless especial malice in bringing to light that which was not known, and was not necessary to be made public for the purposes of truth, can be alleged in the case. 4. In all cases, then, the malice and the causelessness of the injury to a man's name are important considerations, nor can party any more than petty professional or other jealousies, excuse libels. 5. Ridicule, equally with sober statements, may violate rights, when it is malicious or causeless, whether there is reason for it or not. 6. The revelation of former faults or misdeeds, [without good cause,] of persons who have long led an upright life, is a wrong demanding redress.

Nowhere in the department of justice are there so many trivial offences as where the feelings and good name of men are concerned ; and for no reason do men take the chastisement of others into their hands as much as for charges affecting their honor. When this is done on sudden provocation, it partakes of the nature of self-defence, and perhaps the fear of chastisement for slander or ridicule, in cases where no court would interfere, is wholesome for society ; but the duel, which is now almost entirely given up, is as absurd as an ordeal ; and, worse than an ordeal, it gives to a malicious enemy the power, first to vilify a man and then to kill him.

## § 51.

The religious faith and sensibilities of men, as they express themselves in worship, are a most distinguishing part of our nature. We cannot properly say that a person has a right to his religious opinions as long as they are unexpressed, or to his convictions of duty ; these are not rights which might be waived, but belong to a higher domain of the soul which rights cannot enter, and they must be carried out into the appropriate acts. When, however, there is an *expression* of religious faith and feeling, it becomes a right more sacred than any other, in the proportion that a sincere man's religion is his highest interest. No one, either individual or state, may interfere with it. What the state can do, consistently with right theory, in the matter of outward religion, will be considered hereafter. At present it is necessary only to enquire whether the right of worship or of expression of religious sentiment or faith has any limit? The only conceivable limits are these two : *first*, where the worship involves something that is outwardly immoral, or is opposed to the rights of individuals. The worship of Mylitta, at Babylon, as described by Herodotus, and the worship of Kali by the Thugs, may serve as examples. Certainly such abominations may be put down by all the power of the state ; religious rights never justified impurity or invasion of the rights of men. The other case is where a religion by its tenets and the authority put into the hands of the priests, is actually interfering with the legitimate powers of the state. Suppose, for instance, the Pope to assert the right of deposing kings who were enemies of the church, or even to endeavor to make void the laws of the state by his sentences *ex cathedra*, and that it was a received doctrine of the Catholic faith that he might so do ; or suppose the members of some Protestant communion to have formed a political league with a foreign power to bring in a new sovereign. What should be done in a case like this? The answer is that opinion without acts flowing from it cannot be noticed ; that when acts are committed which are against law and the existence

of the state there is some responsible individual to be dealt with as the doer of the acts; and that if the religionists as a body are implicated in treasonable attempts to subvert the government, they must still be made subject to the ordinary processes of law, unless they should break out into civil war, when, of course extreme measures can be justified.

§ 52.

If a man's rights are suddenly invaded, he does his best to protect them, and superior strength or skill brings the issue. But there are many wrongs where self-defence is out of the question, as where men dispute about the fulfilment of a contract or their respective titles to land. Is there any right of self-redress? Is there in such cases a right to redress one's-self, which often implies a right to decide in one's own case? If there were, in the case of a dispute about a contract both would have the right, for both claim to have the truth and justice on their side; so that there would spring up wars about contracts, as well as Hobbes' wars before contract. But there seems to be no such right; at the most, a man may get possession of a disputed thing with an intention to have the question of ownership submitted to some arbitrator. Self-redress implies not only subjective conviction that you are right, but actual right; and how can persons interested and selfish rightfully become judges in their own case. If a temporary overturn of society, as in a revolution, were to take place, men would betake themselves to wise and equitable persons for the adjustment of their disputes. Natural equity prescribes that men do not judge in their own causes. There is need of a higher wisdom provided with the means of enforcing its decisions as to what is just between man and man. This wisdom, if it can exist anywhere, is found in the STATE.

§ 53.

If there cannot be said to be a right of the individual to repair his own wrongs, except when invaded by sudden violence, still less can there then be an obligation to shield others from wrong, unless The right of defending and redressing the wrongs of others.

they form with him a natural society, like the family. But if there is no obligation, there is in the nature of man a sympathy with the injured, especially when they are helpless, and an indignation against wrong, which will lead him, with calculation of consequences to himself, to throw himself on the side of the injured. These noble impulses are eminently social, and allied with the noble virtues of courage and self-sacrifice. But if a man is without them, or if, when he sees wrong attempted upon the helpless, he is too weak to interfere, he violates no obligation; nay, further, if through cowardice or pure selfish regard for his own ease he will not take part in the affair on the right side, he still violates no obligation; he may behave basely or unmanfully in this, but there was no right in the injured party imposing on him the obligation of assistance, or calling on him to satisfy justice as if he had failed in fulfilling his obligations.

This supposed case shows how the social feelings and the rights and obligations of men conspire to make a society-life both necessary for man, and a certainty, if we could suppose man ever in a state of isolation. And it shows also that our moral feelings and our sense of rights would conspire with the desire of security in a state of disorder, to give rise to an association, to a union, for instance, of neighboring families, or villages, or districts, for mutual protection, out of which organized permanent institutions might grow.

#### § 54.

There are other considerations also derived from the doctrine of rights itself which show that a state, or a just and permanent power, is needed, in order that a just and secure society of any considerable number of persons may be possible. Thus, *in the first place*, rights, as we have seen, are indefinite in some instances, and need that an acknowledged power should define them, once for all. Men need to know, for instance, when the *patria potestas* ceases, and when the grown-up child is authorized to do business on his own account, or who shall succeed to an intestate

Rights need the state for other reasons.

estate within the family, who, if the deceased had no family.

2. There are seemingly a number of collisions of rights which need an interpreter, placed above all contending parties. Such is the case when a father bids a child do some act which interferes with the rights of others. So also the right of speech may seemingly collide with that of reputation; the right of self-defence with the attempt to redress a wrong; the right of property with the rights of locomotion; the right of worship with the state authority, or even its existence.

3. Certain infractions of rights are grave and others petty. Thus injuries to the good name of a person may be exceedingly trivial; or the rights of property may be invaded by the pettiest theft and by wholesale plunder alike, and the rights of persons by a violent assault and by an act partaking more of the nature of insult. The experience acquired by a standing power is needed to determine what law and justice ought to notice and what not, whether a litigiousness shall be encouraged which will make a man hated, or whether he shall be forced to use violence to redress his own wrongs.

4. There will often be cases, again, like many under the rights of contract and testamentary disposition, where strict right is felt to be wholly wrong, where the letter interferes with the spirit; as there are cases when unforeseen and extraordinary circumstances call for some relief, and others where an advantage is taken, under the forms of law, of the ignorance or simplicity of a contracting party. Hence we see that not only rules of *justice* but of *equity* also—which is the borderland where *justice* and *benevolence* meet, where man rises above the definitions of temporal rights, so as to imitate the infinite Creator who judges by the rule of his own intelligence,—need to be applied by some power higher than the individual.\*

5. It is absolutely necessary that the laws should be known, and should be so permanent that men can calculate upon them for a long time to come. When the laws are fixed,

\* Aristotle's definition of equity makes it to be a rectification of law, where it is defective on account of its generality. Eth. Nicom., V., 10, § 6.

justice will not seem arbitrary, and will be respected, and confidence in an established order of things will exist. 6. The power of society is needed to make rights real, after it is ascertained what they are. The wrong-doer may flee, and the injured, if the execution of a sentence is entrusted to him, may be unable to leave his work for the pursuit. Or an orphan may be stripped of his patrimony by a man of fraud, or an unknown culprit needs to be ferreted out, or men in distant places refuse to fulfil their obligations. There is need of a power that is present in all parts of a land, that is stronger than any strong invader of rights, that has it for its constant work to administer justice, that knows what right demands, that has no fear of taking the side of the humblest. This permanent justice, armed with might, is embodied in the STATE.

### CHAPTER III.

#### SOME OPINIONS ON JUSTICE, NATURAL LAW, AND RIGHTS.

##### § 55.

We will now endeavor, by way of supplement, in a few Opinions on natural law, justice and rights. brief sketches, to set forth the opinions on justice, natural law, and the nature of rights held by some of the principal writers of ancient and modern times.

The main current of Greek thought on jural questions was directed towards the enquiry into the nature and origin of justice. The Sophists denied the objective nature of justice, and man was the measure of all things; which might mean that what the state pronounced to be right and just was such, or that what the individual thought to be just was such. Thus there were two sophistic tendencies, the unlimited right of the state to bring all things into conformity with the prevailing subjective view, and the unlimited right of the individual to overturn the state and rule it as a tyrant.

The rights of the individual in the state, and over against Plato. the state, and determining by their imperative nature what the justice of law ought to be, were not distinctly recognized by the Greek philosophers. Plato enquired earnestly into the nature of justice, and the constitution of the just state; but the individual, he thought, existed for the state, and law was to be shaped with reference to the state's welfare and permanence. A Platonic definition of justice for the individual is found in the words *τὰ αὐτοῦ πράττειν*,\* *to mind one's own business*, to fulfil duties and do one's part within a certain sphere, but the sphere is fixed

\* *Repub.* iv., 10, p. 433 B. "This we have heard from others and have said ourselves," says Socrates.



by the state. In the Republic, where, however, the ideal state is intended as an enlarged image of the soul, the classes of inhabitants are determined by the state, and there is no free marriage and no family, but in fact a communism exceedingly gross in some respects. Political justice is thus that harmony of the parts and elements of society, which corresponds to the "good order of the parts of the soul towards one another, and in relation to one another," in which the Platonic definitions of an uncertain author make justice to consist.\* Another definition of justice in the same collection—that it is "a habit that apportions to each one that which is according to his worth"—puts, as I understand it, the conception of the value of the individual in society, according to the qualities which differentiate him from others, in the place which the modern conception of equality, as the standard of justice, occupies. In the Laws—to adopt the words of Hildenbrand (*Gesch. d. Rechtsphilos.*, § 43)—"the sphere of private right is most intimately connected with the organization of public life, and is entirely controlled by the state. The state distributes the immovable property, it determines the amount of movable property, it puts obstacles in the way of inheritance by clumsy coins current only within its own limits, it decides what kinds of business citizens and denizens shall pursue, it forces the citizen at a certain age into marriage, prescribes to him how many children he shall procreate, etc." See especially, books viii. and xi.

Aristotle describes justice as a mean between two extremes, and the doing of justice as a middle thing between wronging and being wronged. "The just man is he who practices justice of course, and apportions a share both to himself over against another, and to another over against some one else, not so as [to take] more of that which is desirable for himself and [to give] less to another, and to do the opposite in respect to that which is harmful, but so as to take and give equally of that which is propor-

\* Comp. the discussion in *Repub.* iv., pp. 433-435.

tionately equal, [as between himself and another], and to do the same as between two other persons." (Ethic. Nicom., v. 17, p. 1134). Political justice or right he makes to consist of two parts, *the natural*, or that which has everywhere the same validity, and *the legal*, or that which the laws make such. The former, for its origin, is to be referred back to the divine being. There is a common right and wrong by nature, although there may be no society or compact between the persons concerned. (Rhet. i., 13, 2, p. 1373, where he quotes the noble passage in the *Antigone*, v. 456-7). But in the constitution of the state he shows, as far as I can judge, no recognition of any right of the individual against the state, although he avoids some of the errors of Plato.

The opinions of these two great philosophers respecting slavery are a test of their doctrine of rights.

Opinions on slavery. Plato, in a brief but remarkable passage of the laws (vi. 776 B. and onw.), shows himself to be aware of the practical difficulties attending slavery, but he makes slaves a component part of the state, the laws and constitution of which are there discussed; he dreads familiarity with them and a treatment of them which is due to freemen; and he would have those of the same race kept apart from one another. In short, all his difficulties centre in the questions how to treat the slave—"man being a difficult animal to get along with,"—and what practical distinctions are to be observed between him and the free master. (777 B.).

Aristotle makes the slave an essential part of the economy of life. (Polit. i., 2, § 3-7). Slaves are such by nature, his definition of a slave by nature being that "he does not belong to himself but to another, while yet he is a man." But here he has to face the question which had been started by others (*ibid.*, § 3), whether by nature there is any such person as a slave, and whether or not all slavery is contrary to nature. His solution is that by nature something rules and something is ruled;—thus the soul rules the body, man, the beasts, the male man, the female; and hence those men who are as much inferior to others as soul to body, or man to

beast, ought to be under the control of others, and are naturally slaves. Nature wishes to express the difference between the two classes in their bodily constitution, so that slaves shall have bodies strong for necessary uses, and freemen, bodies erect, but useless for such labors; yet it often happens, on the contrary, that some slaves have the bodies of freemen and some the souls of freemen. What, then, is the distinctive mark between the classes? Shall law decide? But many, says Aristotle, charge the laws with being unlawful, on the ground that, if there is no natural slave, force must make the difference, and especially victory in war. To this he answers again, that a successful war at the outset might be unjust, and that the best-born persons might be reduced to slavery. Or shall we say, he asks, that the barbarians are naturally intended to be slaves? But it does not follow that the descendants of barbarian slaves will have the characteristics of the slave by nature. Thus, although slavery is founded on nature, we cannot divide men once for all into two parts having permanent characteristics. At this point, as another remarks,\* we stand in expectation of some practical consequences, but Aristotle stops short of them, and contents himself with accepting the opinion of the Greek race, that the barbarians were intended to be slaves, and the Greeks to be freemen. He wishes, also, that those who cultivate the soil should be slaves, if possible (iv. or vii., 9, § 9), and expresses the intention to speak in a part of his *Politics*, which is lost or never was written, on the importance of holding out the hope of liberty to slaves as a reward for good conduct.

If it had occurred to Aristotle that the condition of the barbarian slaves might, after all, be a transitory one, that a system of education might raise them up into a capacity for political life, and into equality of endowment or something like equality with the Hellenic race, his defence of the naturalness of slavery would have appeared to him untenable.

\* Hildenbrand, *Gesch. u. system der Rechts u. Staats philos.*, i., 399.

He might have fallen back on the necessity for society to have a working, uneducated class, in order that another above them might addict itself to political affairs. But this would hardly have been satisfactory to a mind like his.

It is interesting to notice that the Greeks asked what man was intended for by nature, although they failed to reach the truth of individual rights; just as they failed to reach the true monotheistic doctrine, when Pindar, Æschylus, and Sophocles gave forth the noblest thoughts on divine righteousness and providence. Early was the distinction made between what human law and what divine statutes required. "I did not think," says Antigone, "that thy proclamations had so much power, that thou, being a mortal, couldst over-ride the unwritten and steadfast ordinances of the gods. For not to-day and yesterday only have these been living, but everlastingly, and no one knows how long ago they appeared."

The inheritance of the best moral ideas of Greek philosophy fell to the Stoics, who, by the doctrine that virtue consisted in living according to nature—  
 Stoics. that is, both to the law of general and of human nature,—by their approach to the principle of human brotherhood, by the dignity they attached to moral freedom and to the life of a philosopher who was the true king, infused a new spirit of humanity and justice into law, and contributed to shape the views of the best Roman philosophers. The growth, also, of the Italian city into a vast world-empire, helped those sentiments which rise above local ordinances to take deep hold of thinkers. The Stoics did little for political doctrine, but in concert with the vastness of the Roman state their tenets encouraged cosmopolitan feelings and the idea of mankind. Thus they prepared the way for Christianity.

Cicero mainly leaned on the Stoics, when he spoke of the  
 Cicero. highest good as consisting in a life congruous with nature, and of virtue as an "animum habitum naturæ modo atque rationi consentaneum" (*de invent.*, ii., 53); when he described law (the law of nature, or natural law), as something eternal, governing the whole world, as the supreme

reason which commands what ought to be done and prescribes the contrary ; (de leg., ii., 4, 8, 10), as not beginning to be law when it is written, but as coeval with the divine mind ; and in a celebrated passage of the republic, preserved by Lactantius (Inst. vi., 8), as eternal, beyond the power of senate or people to abrogate, the same everywhere, found out by God, disobedience to which, being contempt of the nature of man ; will thereby involve the transgressor in the greatest penalties, should he even escape those punishments that are commonly thought to be such. Views like these would lead to a condemnation of law, if it did not seem to agree with natural law or right reason, and to an endeavor to establish a *jus naturale*, which could serve as a standard for the improvement of law. Without enlarging, we may say that the law-  
Roman lawyers.yers enunciate many noble maxims which have to do with right, and even with personal rights, as being according to the *lex naturæ* or *jus naturale*. Thus we find it said that "as far as relates to *jus naturale*, all are equal ;" that it is *jus naturale* for the owner of the soil to own the surface ; that force may by natural justice be repelled by force ; that support is due by the child to the parent according to natural reason ; that to keep faith has in it a natural equity ; that the rights of blood, and *naturalia jura* in general cannot be set aside by *jus civile* ; that for this reason *cognatio*, or blood-relationship, could not have its rights destroyed by *capitis deminutio*, while *agnatio*, as a civil law relation, could ; that, according to some authorities (see § 25), natural reason gives to the owner of the material the ownership of the finished product ; that *locatio conductio* and *societas* (partnership), belonged to *jus gentium* ; that it is according to natural reason that immature persons should be under guardians.\* Principles of this kind were regarded as naturally right by others besides lawyers, and even slavery, in a land full of slaves, was held to be an unnatural condition.

\* I have derived much in this brief sketch of Roman opinions on the *lex naturæ*, etc., and of the opinions of the Stoics from Voigt, die Lehre vom Jus Naturale der Römer, 1856.

The Roman lawyers would seem then, to have based nearly all the natural or personal rights, as we call them, on natural law of reason; and yet they did not reach the right of rights in the subjective sense. Their high ideas of justice, therefore, did not have power enough even to overthrow abuses they condemned. Nor was the conception of rights fully disclosed to the Latin fathers, although Christianity teaches the brotherhood of men, awakens the sense of responsibility, and empowers the meanest person to adhere to his convictions of right, even to the suffering of death. This religion taught the converted Roman the endless worth of the soul, it led him to condemn slavery, but it taught him to endure even unjust law, and withdrew his mind from temporal things.\* It could not but happen that under Christianity personal rights should be justly apprehended by and by, but it took time to do this. For establishing this sense of rights great influence has been assigned to the characteristics of the German mind. "The subjectivism" of the German, says Bethmann-Hollweg (Civilprocess, iv., § 3 p. 4), "gives to him the immediate consciousness of the infinite value of personality, and thus produces that enhanced and sensitive feeling of honor which is a stranger to Greeks and Romans. To the Roman also, it is true, the person, as he objectivized it in its relations to the outer world, was the fundamental conception of all justice. But the German took hold of the conception subjectively and in the synthetic unity of its inward and outward side, and so in the unity of its moral and jural relations. Consequently, in the relation of person to person he strives more after their moral union than their jural separation. It was otherwise with the Roman, who proposed to himself the problem of preparing the foundation for free morality by an acknowledgment of abstract jural will, who thus drew a sharp line between *will* and *will*, and hence shaped the different relations of life into as many separate jural institu-

\* Lactantius has the words "justitia quae nihil aliud est quam Dei unici pia et religiosa cultura." Such remarks destroy all science, as far as they are accepted.

tions. The Roman *jus* was able, on this path, to reach a greater perfection in form; the German *jus* sets up for itself a higher never fully attainable mark, and thus fails of the same formal perfection." "To the Roman the sum total of *jus* presented itself objectively as the ordinances of the state, of which the separate private rights are a part."

However this may be, it has taken a long time to arrive at a clear and scientific definition of rights. According to Grotius (in the prolegom., to his *de jure bel. et pac.*, and elsewhere), the social impulse "*societatis appetitus*," is the foundation of a life in communities, and a state of society is that into which this impulse, acting unselfishly, brings them together. The forms which human wants give to societies are derived from express or tacit contract; and the object of organized societies is to secure to every one his own, that is, to maintain justice. Property arises, by an express contract, as in division of lands, or by a tacit one, as in occupation. In a state of nature there is no separate property in things. Here we see contract beginning to play the part which it played on an enlarged scale afterwards, and a fiction of a state of nature as a support of theory. Otherwise the explanations are lame and imperfect.

The state of nature of Hobbes is where the desires of all are for the same things, and where all war against all, to escape from which a strong power was instituted for the preservation of justice and order. Selfishness reigned in the state of nature; a more enlightened selfishness endeavored to put a check on the outbursts of the first. (See § 62 for further statements.)

Pufendorf did little more than unite the views of Grotius and of Hobbes, except that he separated natural law from religion, as an independent science resting on moral foundations, which he expounds with great copiousness.

Thomasius makes an era by endeavoring to draw a distinct line between the jural and moral spheres. He has had many followers, and the distinction, so far as

it can be carried out, is of great importance. (Comp. § 8, supra.)

Locke's influence on the modern theory of the state in several respects has been very considerable, as we shall set forth more fully in another place; but in regard to natural right and rights—with some exceptions, such as his theory of the right to property derived from mixing up labor with a natural object—he seems to have followed earlier writers, Grotius, Pufendorf, and Hooker. He lays the foundation of society, as of the state and of the ruler's authority, in contract. Rousseau's opinions we shall reserve until we come to the doctrine of the state.

Kant shed a new and striking light on jural science by defining *jus* and rights as the sum total of the conditions, under which the external freedom of the individual can be maintained in company with the freedom of all. The conception of the equality and co-existence in equal measure of all personal rights is a most important thought, and a great truth lies in it. But the philosopher's definition does not so much contemplate freedom as the limitations of freedom caused by the co-existence of many in one society; it does not bring forward sufficiently the side of obligation to respect the freedom of others; it makes freedom or rights too much an end rather than a means.

Hegel's philosophy, in its first principles, denied the independent personality of the individual, and in its leanings favored absolute power. It could not, therefore, attach a high importance to the conception of personal rights, as a rule of just legislation in the state.

The English school of utilitarianism, which originated with Bentham, has produced many able writers on English utilitarians. jurisprudence, politics, history, and metaphysics. We select Mr. John Austin as the expounder, in his lectures on jurisprudence, of the opinions of this school. According to him, "a command is distinguished from other significations of desire—by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded."



“Being liable to evil from you, if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.” (ed. 3, i., 91.)

And so in another place he says, in criticising the assertion that rights are powers, “that the party invested with a right is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the state. The power resides in the state; and, by virtue of the power residing in the state the party invested with the right is enabled to exercise or enjoy it.” (i., 409.)

And again (i., 353), he says that, “like the obligations to which they correspond, natural and moral rights are *imperfect*. In other words, they are not armed with the legal sanction, or cannot be enforced judicially. Strictly speaking, there are no rights but those which are the creatures of law.” There is, however, another sense in which the term *innate rights* may be used. “They reside in the party without any other title or investitive event than the mere fact of his being a citizen of a community.” (p. 592.)

From these passages it appears that Mr. Austin holds: 1. that *duty* grows out of liability to evil in case of non-compliance with a wish signified; 2. that a right becomes such by virtue of the corresponding duty; 3. that no natural rights can be called perfect but those only that are the creations of law; 4. and it would follow that there is no real difference between an unjust and an inexpedient law, as well as that, in a state of lawlessness, a person or association possessed of superior strength, by giving me a command with the purpose to inflict evil in case of disobedience, binds or obliges me temporarily, so that I lie under a duty to obey him.

Mr. James F. Stephen, in his “liberty, equality, fraternity,” interprets the teachings of the English utilitarian school as follows: “If the distinction between an unjust and an inexpedient law is to be maintained, it must be done by the help of some such theory as is involved in the expression ‘rights

of man.' It must be said that there are rights which are not the creatures of law, but which exist apart from and antecedently to it; that a law which violates any of these rights is unjust; and that a law which, without violating them, does more harm than good, is simply not expedient. I need not say how popular such theories have been, or what influence they have exercised in the world, nor need I remind those who, like myself, have been trained in the school of Locke, Bentham, and Austin, that this theory is altogether irreconcilable with its fundamental doctrines. The analysis of laws (political or ethical), according to that school, is as follows: The first idea of all is force, the power to reward and punish. The next idea is command. Obey and you shall be rewarded. Disobey and you shall be punished. Commands impose duties and confer rights. Let *A* do what he will with this field, and let no one else interfere with him. *A* hereupon has a right of property in the field, and the rest of the world is under a duty to abstain from infringing that right. This theory is irreconcilable with any natural rights which cannot be resolved into expediency." (p. 196, Amer. ed.)

The *theory* of the utilitarian school lies beyond our present scope, and we have assumed at our starting-point (§ 1) its untenableness. We only say here that as duty, according to this theory, proceeds from the bidding of a superior power, it must remain such, until another power takes the place of the first. But how is it to take the place, if the duty of all the subjects of the unjust or inexpedient government is to obey the existing power, unless through a failure in duty. There can, then, be no remedy for tyranny, the most grievous possible, consistently with duty. And so rights, also, will continue in existence, not because they ought to belong to a being like man, but because no duty owed to the power that can inflict evil can interfere with them or do them away. A most gloomy system, by which power—not right and righteous law—but power, is constituted the ruler of the world; and the subject of this power is not called on to ask whether the commands issued are conformed to reason, to the nature

of man, to a moral sense, or even to the rules for securing the highest happiness of the whole, since duty or obligation grows out of the ability of power to make disobedience a source of evil to the disobedient person. *Τὰ δίκαια, ὧ Ἀλκιβιάδη, συμφέροντά ἐστιν.*

§ 56.

In closing this sketch we offer to our readers the definitions of rights which appear in several writers on natural law and political philosophy. Paley (1785) considers rights to be those powers with which it is right that the individual should be invested. This is true, but unmeaning, and takes no account of the factor of freedom.

Abicht (1792) defines natural law (*naturrecht*) as the science of rights, so far as these flow out of the nature of man, in agreement with the nature of all the things that man needs as means and conditions for the attainment of the ends prescribed by reason.

Dr. Lieber, in his political ethics (1838, 2d ed., 1874), expresses himself thus: "It appears to me that the only axiom necessary to establish the science of natural law is this: I exist as a human being, therefore I have a right to exist as a human being." (i., 68.) "Natural law then inquires into the rights of man to be derived from his nature, both physical and moral, for the latter is closely connected with the former. The law of nature is the law,—the body of rights, which we deduce from the essential nature of man." (i., 68.) "The state is founded on those rights which are essential to all its members, and which can be enforced." And so he speaks of primordial rights as coeval with the very beginning of man's existence, as not created, but admitted and defined by the state. (i., 202.)

C. Von Rotteck (1829), a follower of Kant, says that "all actions are jurally right (*rechtlich*), which, in their notion, are in union or accordance with the equal and greatest possible outward freedom of all." The jural, he lays it down, is the same with equal and external

freedom. "In the subjective sense, *jus (recht)* is the competence—or the permission conceded by reason to one in relation to another—to do such actions or have such ways of action" as are not opposed to objective right. Thus the essence of right here consists in *being allowed* to do an action. (*in einem dürfen*).

Zachariae, to whom we have referred already (Vierzig  
 Zachariae. Bücher vom Staate, revised ed., 1839), says  
 "that a right is a possibility arising from the law of right, of imposing an obligation on others, to the performance of which they may be held by force." The definition is too narrow, for it seems to imply in the word "imposing" (*aufzuerlegen*) that some positive act may be necessary in order that an obligation may lie on another. But physical life, with all its capacities, and some departments of moral life, lay the obligation without a person's will; it comes not from will, but from nature. The enforceable character of an obligation, moreover, is, as already said, not universal.

Whewell (Elements of morality, incl. polity, 1845, i., 64 and  
 Whewell. onw., Amer. ed.) explains rights in the following way. There are certain conceptions, such as those of property, promises, contract, marriage, which, in an abstract and general shape, include the principal, really existing, objects of human desire and affection. The desires and affections are personal, and the individual's desires are not necessarily controlled by the fact that the real objects of desire are attached to another, as attributes or possessions. To balance, moderate, check, and direct the desires and affections which tend to really existing objects, there must be rules of action, having a moral nature and subordinate to the supreme rule of action, according to which these objects may be regarded as attributes or possessions of particular persons. "Abstractions vested in particular persons, as possessions by rules subordinate to the supreme rule, are rights." "The desire of personal safety requires that there should be perceived to be a right of personal safety;" and so that of property, that there should exist a right of property, etc. For other-

wise the desires would give rise to continual anger and fear, which would destroy society. That is, if we may put Whewell's train of thought in another shape, non-interference within the sphere appropriate to personal existence—which sphere is defined by man's natural desires and affections—is maintained by rules of action involving an acknowledgment of the freedom of the person within that sphere, and the wrong of interfering with his freedom. The view taken by Dr. Whewell is excellent, although to start from desires instead of starting from the life-ends or destination of man, looks a little Hobbesian. It is not capacity to realize desires without being disturbed, but to fulfil the ends of our being, to unfold our nature according to the perfect law of life, that is the important thing to be considered.

Röder (*naturrecht*, 1846), a high-minded but obscure writer, defines right (*recht*) to be the law of the life,  
 Röder. both internal and external, of rational beings.

But it is not, he adds, a law in the sense of the necessary laws of nature or of thought; it has to do with life, so far as life is variable and subject to the self-determination of the man in thinking, feeling, and acting. But the good and the right is not shaped by our free choice; it is something universally and permanently demanded through our own human nature—a law of reason (*vernunftgesetz*) for our free will, a law of freedom or a law for the will. (pp. 22–23.) And again, “the maxims of right and morals are wholly different. That of morality is to will good and do good,—including right as a part of it, in all, even the most difficult circumstances. On the other hand, the principle of right requires of all to will and feel bound to do what is necessary, in order that each one may be able to fulfil his whole destination as a man, that in which, for him, the good consists. Right then, in part, and indeed mainly, is an outward order of things. Only there, when a person—from whatever motive—acts in conformity to right objectively and outwardly, that is, does not injure another's life, but renders him assistance, can all thrive and flourish. Such actions, although not inwardly moral, but merely

outward, are a great gain for mankind. Right, also, according as it is external, can be realized by means of force.

The author here makes the true distinction between the domain of rights and that of morals ; but when he passes beyond the negative, not injuring another, to the active, rendering him assistance, does he not pass over into the sphere of positive morality ?

Ahrens, once professor at Brussels, and at the close of his life, at Leipzig, where he died in 1874, published his "Cours de Droit Naturel" first at Brussels, in 1837. It passed through seven editions in French, the last in 1875, and appeared in German and in various translations, so that more than twenty editions indicate the great favor with which the work has been received. It has, however, been greatly modified since its first appearance. The introductory article in Von Holtzendorf's Encyclopædia is from the same honored author.

In the German edition of 1846, after the second French one of 1843, he defines right (*recht*) as the sum and substance of the conditions dependent on the will of the individual, and necessary for the attainment of his destiny, as pointed out by reason. (p. 69.) And again, "right has its foundation in the necessity for man to develop himself as a moral and rational being. Hence, man alone is the subject of right, since the attainment of the rational end of individual and social life is the only object of right." (p. 83.) Further, "individual right includes all rights which flow out of the universal quality of humanity, and which hence pertain to all individuals. These rights, having their foundation in the nature of man, are called especially natural or original or absolute rights."

In the sixth and seventh French editions, Ahrens defines *droit* "as the sum total of the conditions dependent on the will, and necessary for the realization of all the individual and the common good which form the destination of mankind and of society." "It is an effect of the creation of free finite beings to be called to complete themselves by their liberty."

The aim and end of right is in general the perfection of the human individual and of human society. By right all are united in solidarity; the right of one presupposes the recognition of the rights of all others." "The *material* of right is twofold; it is composed, on the one hand, of the good or the ends which are to be realized in the relations of rights, and, on the other, of the objects which form the means for its realization. These are relatively good, or useful, and so right (or *jus*) is a principle of utility," "but the great difference between our conception of utility and Bentham's is, that, instead of referring utility to the subjective and variable sensations of pleasure, we give it an objective base in the principle of the *good*, the objective face of which it presents. To appreciate the useful there is no need of appealing to the individual sentiment; we must discover the aims of man, the good which ought to be realized in life." Right again, is a formal principle, as setting forth the form—that is, the manner—in which the relations between men ought to be regulated, in such sort that in the end and aim of the community each man may attain to his own end and aim. The proper *contents* of right imply the performances to which one of the parties is obliged and which the other can claim. "Right is both an objective and a subjective principle—objective as a rule or harmony of relations essential and necessary to human nature; " subjective, as pertaining to an individual or collective subject, and to be realized by his will. In every jural relation, for the persons or subjects that compose it, there are always claims on one side and obligations on the other, etc. (i., 146, § 20, and onw.)

Stahl (professor at Berlin, afterwards minister of state), in his *Philos. des Rechts* (2d ed., 1847), has the following definition in vol. ii., I, p. 218: "By the law of right a definite form is given to the relations of human life, and each man has his sphere of existence and action assigned to him, in which he is morally protected. Owing to the personality of the man, this sphere thus assigned to him becomes a moral power of his own to protect him against

others. Others are morally bound to him ; he is not merely the object of their duty, but the cause of it. This is right in the subjective sense, or *rights*.

Trendelenburg (professor at Berlin), in his "Naturrecht auf dem Grund der Ethik" (ed. 2, 1868, comp. especially §§ 45, 46), expresses himself thus :  
 "The will of the individual dwells within the organization of the whole. As he who inhabits a house acts out his will and pursues his work in the house according to his own wisdom or folly, so the individual, within the limits drawn by the whole, has the province of his own determinations ; and where he is too weak of himself to protect it, he derives his power for that purpose from the power of the whole. In this sense rights are a possibility of determining one's will [in actions], which is secured [by the whole], through which individuals act out their freedom, and give and receive in the community. The rights of persons are the acknowledged power of their will, in the definite direction of its decisions. Behind the acknowledgment on the part of the whole stands the force which threatens the injurer ; behind the demands that flow out of the rights stands the complaint [of the injured], involving in itself an appeal to force. Rights, in this subjective meaning, as authorizations given to individuals, so far as they carry with them moral relations, are based on the same inward ends of the morally right out of which the duties arise. (§ 45.) And again (§ 46, beginning), "Right in the moral whole is the sum and substance of those general rules of action by which it happens that the moral whole and its organized parts can maintain and further cultivate themselves. All right, (*i. e.*, *jus*), so far as it is right and not the opposite of right, flows out of the effort to maintain a moral existence."

Prof. Lorimer (Institutes of law, Edinb., 1872), says that  
 "our subjective rights are rights exigible by God against us, and by us against others in God's name, for the simple reason that they are rights inherent in the nature which God has formed. To these rights duties to God correspond, the fulfilment of which, in his eyes,



and with reference to the whole scheme of his government, are just as imperative as those which correspond to the objective rights of others." And he lays it down that "in our relation to creation, animate and inanimate, nature reveals rights." Thus the fact of our being involves the right to be—to continue to be—the right to the conditions of our existence—the right to develop our being and to the conditions of its development—to reproduce and multiply our being, which itself involves the right of transmitting to our offspring the conditions of our existence—to dispose of the fruits of our being *inter vivos* and *mortis causa*. All our subjective rights resolve themselves into the right of liberty. Again, nature reveals objective rights (or the objective side of morality), which exactly correspond to our subjective rights, and objective duties or duties by others to us, which exactly correspond to our subjective duties or duties by us to others. The existence of subjective and objective rights and duties, and of their mutual dependence, constitutes the sole revelation which nature makes to us in regard to human relations. (Book i., ch. 7).



## Part 2.

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### THEORY OF THE STATE.

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#### OPINIONS ON THE NATURE AND ORIGIN OF THE STATE.

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#### CHAPTER I.

##### § 57. (INTRODUCTORY SECTION.)

WE have already reached the conclusion that in order to define and realize rights, there must be a permanent power, at once just and strong. The definitions of rights must be expressed in laws or must proceed from appointed judges, or from judges chosen by parties who have disputes with one another. These definitions must be permanent ; otherwise, as there could be no security for the future or calculation upon it, the motives for industry and intercourse, reaching beyond wants for the time, would be greatly weakened. These definitions, again, must be more than standing determinations as to what is just ; they must be accompanied by might equal to the work of compelling those who refuse to be just toward their fellow-men, to obey the law of righteousness by making reparation. They must, finally, have a distinct province or territory where they operate. For it is evident that men will differ in their opinions concerning justice, just as they differ in race, in religion, and in culture ; that different laws will be passed ; and that it would bring

The state and other  
synonymous terms.

about endless confusion if two laws should be valid within the same territory, relating to the same right or act.

The body or community which thus, by permanent law, through its organs, administers justice within certain limits of territory, is called a state. This word, like several others in our language that have become fixed political terms, is derived from the Latin, but is not, I believe, used by the Romans in the sense so frequent among us. They speak of the *status nostræ civitatis*, but the word *civitas*, denoting a body of citizens united in a community,\* comes far closer to our State than *status* itself, which is simply *state* or *condition*, in a most general application. But *civitas*, which, in a more secondary sense, denoted a city, a place where a civic community dwelt, lost that other and nobler meaning, for the reason, perhaps, that a *city* and a *state* were no longer commensurate after Rome had conquered many cities. State, therefore, the condition, the political condition, *par eminentie*, came to represent the notion of a system of public life in a people. The word *populus*, denoting *multitude* originally,† then taking the nobler sense of the citizens with full rights, as opposed to the *plebs*, is defined by Cicero as “*coetus multitudinis, juris consensu et utilitatis communione congregatus*” (de Rep., i., 25), *i. e.*, a *politically organized mass of men*. This notion of political union appears in the noble term *res publica*. As Mr. Burke says, “the idea of a people is the idea of a corporation.” (Appeal to old Whigs, iii., 82, Bohn’s ed.) *Natio* had little if any political sense. It rather referred to those bodies of men who were brought together by birth and other co-operating causes. Cicero speaks of the “nation of the Greeks” (de Or., ii., 4, 18), who never had political nationality, and it is not, I believe, used of Rome in the early writers. And, to mention but one more word, *gens*, connected with *gigno*,

\* A fine example of this sense occurs in Cic. Acad., ii., 45, 137. “Non dubitavisset quin et praetor ille esset, et Roma urbs, et eam civitas incoleret.”

† G. Curtius connects it with the root PLA. full. and so with *πλήθος*, plebs, folk.

as *natio* with *nascor* (= *gnascor*, and so both from one root), from meaning a union of families connected by birth, a clan or sept, became synonymous with *natio*; but, as the *gentes* of the earliest Roman constitution were political bodies, the political notion adheres somewhat to the word: thus, *jus gentium* denotes those principles of right which all nations, including Rome, had in common; *jus civile*, what was peculiar to the latter.\*

The practice in our country of using the word States both of the United States and of each state, creates a political difficulty which cannot be removed but by some term for the Union in general, such, for instance, as Nation, Republic, or Commonwealth. The want of a term to distinguish the Union as being in reality a state in the unitary sense, is an evil that goes beyond the mere use of words; it confuses or colors thoughts. Thus we often have to say "the general government," as if it were the United States; thus exalting the organ, the administration, or the law-making and executive powers above their true place; and, on the other hand, giving the impression that there is no state, besides those states which compose the Union. This, and the word sovereignty, as an attribute of both, have been the means of no small amount of evil. The Dutch used state in the mediæval sense of estate, *i. e.*, territorial lords or their deputies, as forming an incomplete political whole. Thus the States General were spoken of as the highest body of deputies, the States of Holland as those pertaining to one of the provinces in a separate, provincial session.

State has this advantage over other words that have been used in English to denote a political union, that it is more comprehensive. Thus we cannot speak of a political union embracing several nationalities, and call it a nation, for it

\* The word state acquired in the mediæval times some important significations, now common in a number of languages. See Du Cange, sub voce, where it is defined as *regnum, ditio, imperium*; = the State; as *estates*, doc. of A.D. 1361; as *public show, pomp, dignity*; as *reditus, fiscus regius* (from a Charta of Henry V. of England), etc.

is not one ; there being no tie of birth or common descent to bind it together, and perhaps no common language. Hence, the kingdom of the Netherlands, as constituted by the treaties of 1814-1815, was a state, but not a nation, since the inhabitants differed territorially in religion, language (speaking Dutch, Flemish, and French), and past history. Austria, again, is a *compages* of peoples of German, Hungarian, and Slavonic extraction, the latter differing in dialect among themselves, which constitute no nationality, but are united as a state. The characteristic which attaches to the nation is a sense of union springing out of inner causes, while a state need imply nothing more than an external connection. The cause which constituted the state may have been conquest, or voluntary union for mutual advantage, and it is conceivable that the parts may coalesce so as even to lay aside one of the languages they used at first, and to identify their institutions. On the other hand, two nations may subsist, speaking the same language and having the same institutions, but there is a want of one binding force, of a common government or constitution to bring them together. Still further, there are forms of political life where neither nation nor state can be said to be found, save in a very rudimentary form. Such were the parts of Europe, particularly France, after the feudal system came in. The feudal barony was not a state nor a nation ; the general country under the suzerain could be called in some sort a state, although quite an imperfect one, but not a nation in any true sense. The United States are a state, and are a nation also ; yet the essential character of the union of states under different laws and constitutions is such that the separation of the parts is absolutely vital, and the name of nation is not a safe one to us. On the whole, *state* is the only scientific term proper for a treatise on politics.

When we go beyond political science we find a great use of the term nation. As comprehending those characteristics which make up nationality, and which are often active causes in the world, a nation is a factor in the philosophy of history. A nation, by its peculiarities, such as language, religion, his-

tory, common sentiments, is brought into antagonism with another differing from it, and thus, when opportunity and a motive are given, war may be greatly helped by these differences between contiguous bodies. These simple facts are reduced to a theory by Cousin, in his course on history delivered in 1828, where he taught that each nation represents an idea of a given time, which within the nation itself seems to be entitled to universal reception. War arose, he thought, from striving to force this idea on a nation representing another idea, and results in good, owing to the triumph of the more powerful idea over the less powerful. Thus war always was an aid to human progress and the advance of truth. That differences of nations, as it respects religion, human rights, institutions, and the like, produce mutual dislike and render wars easier, that war often helps the truer opinions, may be admitted; yet the generalization is unsafe, and not borne out by facts.\*

The term *State* may embrace a variety of forms, and there is no other term so comprehensive. *Republic*, although by its signification including any form under which a people is found or which it adopts, tends to be applied only to those where the people controls or has an active participation in the government. *Commonwealth*, a beautiful word, expresses a state where the weal or good of all is aimed at in the constitution and government, in opposition to the supposed good of a line of kings, or of a governing class; but it is most naturally used of a state where there is a popular cast of administration. It may embrace all the forms which Aristotle calls pure, as distinguished from those which are degenerate, or have in view only the personal interest of the governors, or governing class (Pol. iii., 4., § 7, 5, § 1-4); but in use, it is confined to such as come near to a popular form, to states under an aristocratic or democratic control. It is, therefore, too narrow a term for the purposes which a writer on politics must have in view.

\* Comp. Flint's *Philos. of Hist.*, i., p. 194.

State and nation alike contain no direct reference to the territory where the state's power is especially put forth or where the qualities of the nation are developed. And yet the territory must be united in thought with the people, in order that any organized community can be conceived of as having come into existence. A small state may embark all its citizens in ships and start for other settlements. Meanwhile the organization holds over, but if no settlement is found, the union called a state must dissolve. We have seen elsewhere that the state of old was looked at on the spiritual side, while in modern times it is the material side—the territory that has become more prominent. Thus a rex Francorum, or Anglorum, was spoken of before a rex Franciæ or Angliæ. So Judah, Israel gave name to the land. Yet the reason for this may have been that in the cases mentioned the population changed its territory, while in other cases, as at Athens and Rome, the people were called from the territory Athenians and Romans. The Franks and Angles going into another country would not call it by the name of Gaul or Britain, and so they named it from themselves. In modern times the words jurisdiction, realm, kingdom, and many others imply place, but it may have been a secondary meaning. "During a large part of what we call modern history," says Sir Henry S. Maine, "no such conception was entertained as that of territorial sovereignty." (Ancient Law, chap. iv.) Comp. § 72.

### § 58.

Whatever the form of a state may be, it claims to have a right to exist, for man even in uncivilized tribes or nations resents the claims made by mere power without some perceived right of which it is the support. And in civilized times,—when speculation demands some reasonable foundation for the right which a government has to require obedience, and the right which a state has to exist and to express its life by a particular government,—there will be many answers given which are theoretical in part or

Theory of the state, especially of its right to exist.



entirely, which are intended to justify the right of a particular state to exist, or to show by what process consistent with right a state comes into existence. The interest in such inquiries is in part purely theoretical, and in part moral and practical. The practical, moral inquiry is dictated by historical experience, or by positive oppression of a part of the society by a stronger class, or of the people by the government; or again the government endeavors to keep a hold upon the consciences of its subjects, and is not content with the argument "sic volo sic jubeo." Thus civil strife, revolution must be shown to be wrong or right by a theory, and it is in times of conflict that political theories most deeply interest communities. Afterwards the theory may rest on a wider and sounder basis, when the deductions from past history are united with the conclusions from the nature of man.

A very interesting part of political inquiry consists of the theories that have been propounded for the state's right to exist, and for its rights in general. The present writer feels it to be important to give a brief sketch of these explanations of the doctrine of the state as they have been attempted by writers of various times and schools, before presenting to the reader the results of his own reflections.

There are few of the questions which we now ask respecting the state, that seem to have struck the Theory of state in Greece. Greek inquirers as being of prime importance. To a great extent, after they leave the subject of justice, they confine themselves to the practical side of politics, which does not now concern us. Their end is an ethical one—to make good and virtuous states through institutions and laws. Thus, the Athenian speaker in Plato's laws blames Crete and Sparta for the military direction given to their political system, because, although courage should be cherished, it is a part only of virtue. *A truly* good polity will encourage all virtue (i., 626 B. onw.). And so Aristotle says (Eth. Nicom. ii., I, p. 1103), "that lawgivers make their fellow-townsmen good by giving them good habits, and this is the intention of every lawgiver; but some miss the mark by not doing this well.

Herein a good state-system differs from a bad." In the Republic of Plato, as we have seen, τὰ ἑαυτοῦ πράττειν, or to fill that place in the state which is properly one's own, is the idea of political justice. But the state needs wise men, courageous men, and working men. In order that the upper classes may give themselves wholly to their appropriate work—the rule and defence of the state—they are to have no family cares; and hence, to have property in common, and no children whom they can regard as their own; nay, mothers are not to know their own children. As for the third class, he gives no thought to their education, and he says nothing of slavery in the Republic, because his working class supersedes the use of any such human chattels. Plato conceives of a natural origin of states from the family, in which the oldest rule, and the rule is that of a king-patriarch. (Laws, iii., 680 E.) The view of Aristotle is that man is naturally a political animal; that the state, developed out of the family through the village (κωμη) or unwalled collection of families, is thus of natural origin, but in its institutions afterwards is modified by the will of men. Yet the state is φύσει prior to the household and individual, because the whole must of necessity be before the part. But it seems that they drew no conclusions from this natural origin of society. Nor did they found the right of governments to exist upon consent, so far as I can see. The old kingdoms of which Thucydides speaks (i., 13, comp. Aristot. Pol. iii., 9, § 7) belonged, one may say, to the class of constitutional monarchies; the rulers ruled ἐπὶ ῥητοῖς γέρασι, that is, they had fixed prerogatives assigned to them (such as those of army-leader, judge, and priest). This implies some covenant or understanding between the king and the heads of the little state; and covenants were not unfrequent in later times, when factions, weary of civil dissension, agreed to accept a constitution or code of laws prepared by a law-giver. Colonies again framed constitutions for themselves, or like other self-governing bodies altered those which were given to them at their foundations. Thus, one might say that the consent of the citizens, the right of revolution, the

right of modifying institutions, were admitted by the Greeks in practice. But the philosophers did not trouble themselves much with such questions as by what right does a state exist, how do state rights arise, how must the citizens give their consent, is there any right of revolution, have all men a share by natural law in the control of the state, and in the election of officers. Holding that the individual was made for the state, and yet that the state's aim was to secure justice as well as the welfare of all, they were ready to sacrifice to the state's supposed good what we call natural rights; their ideal was a state in which the wisest should govern, and so they did not like democracies; they were willing that the state should control education, religion, art, and interfere with domestic economy; in short, they leaned to the communistic theory without giving into it entirely. Most of what Plato in the *Laws*, and Aristotle in his *Politics*, teach us is practical rather than theoretical, as how states depart from their type, what is the best state, or what kinds of laws are best for a state's permanent welfare.\*

The constitution of Rome contains the notion of the sovereignty of the free people, which people, by internal changes, instead of remaining as originally, an aristocracy of descendants of the original founders or of others admitted to share political rights with them, came at last to include all free Romans of whatever class. The right of the people to alter the constitution is seen in the revolution which expelled the kings, in the institution of tribunes and in all those subsequent changes by which the equality of all in political rights was at length reached. It is illustrated in a striking way, also, by the accumulation of powers conferred on the first emperor by the people and in the forms of electing them which for some time continued, which shows the necessity for their sense of right of a formal

\* The circle in which forms of government were thought to run almost of necessity is described by Polybius vi., 6-9. He begins at the origin of human society and ends with *cheiropcratia*, the *government of the worst*, below which the "economy of nature" cannot go. See more in § 154.

ground for the empire. The Roman statesmen derived their speculations from the Greeks, but tempered them with Roman practical wisdom. Cicero has not much valuable theory respecting the state. It is laid down by one of the speakers in Cicero's Republic (i., 31, 47.) "that liberty has no abode in any state, except that in which the power of the people is supreme." But by the people is intended the mass of the citizens, as opposed to a monarch or an oligarchy. As for the forms of states, which are three, the principal speaker, Scipio, says that if he had to make a choice between them he should give the preference to the royal form, but that he thinks a mixed constitution, in which the three are combined, better than any in which they are separate. As for democracy, he finds it unable to preserve equality of rights, and that an equality, according to which like honor is paid to the highest and lowest, is itself unequal. (Repub., i., 35, 54. 34, 53.) This doctrine of the superiority of mixed forms of government had been taught by earlier political philosophers.

#### § 59.

The Roman imperial system gave little encouragement to the propagation of political theories, but could not help feeling the influence of the new religious ideas which came in the company of Christianity. The emperor, who was at first the vicar and embodiment of the powers of the people, is now, like the Jewish kings of the house of David, a delegate of God. But a new question of great importance, theoretically as well as practically, began to be discussed when the western world came to regard the bishop of Rome as the head of the church, as the representative of moral and religious power. How shall the claims of the state and of the church be reconciled? The answers given at various times to this question we intend to discuss in the part of this work devoted to practical politics. At present it is enough to say that the heads of the church were not content with the theory that state and church were co-ordinate. That theory in fact encountered, in

Theory of the state  
in the Roman em-  
pire,

and in the mediæval  
church.

the carrying of it out, great practical difficulties. While it was admitted that obedience was due, according to the scriptures and general ethical principles, to the civil power, there were limits arising from the moral quality of the state's commands which needed an interpreter, and the interpreter must belong to the church itself, which expounds by its office the principles of morals. Moreover, as the interests of the soul are more weighty than those of the body and of external life, they who manage the affairs of the soul ought to have the last word.

It was to be expected that the old principle of the supremacy of the Pope, which the growing strength of the national principle had opposed, and the policy of the times after the reformation had held as it were by a leash, would be let loose again in the reaction after the French revolution. Nothing new indeed can be added to the theory of the middle ages, but it was revived and found expo-

Revival of the Catholic theory.  
Bonald. nents, among others in Bonald and Count Joseph Le Maistre, a Sardinian minister of state and ambassador to St. Petersburg. Bonald teaches that the peace of Westphalia first established the atheistic doctrine of the religious and political sovereignty of man, the principle of all revolutions, the root of all the evils that trouble society. In acknowledging the independence of Switzerland and the Netherlands, the heads of the nations concerned in that peace sanctioned the existence of political democracy, and in their religious concessions that of religious democracy. Le

Count J. Le Maistre. Maistre's opinions are embodied in his "Essai sur le principe générateur des constitutions politiques," (1810, 1814); his "Du Pape" (2d ed. 1825) and his "Soirées de St. Pétersbourg," a posthumous work published in 1821. His works want method and system, but his views are something such as follows: "All states are divinely ordained. For man to undertake to change them is to assume the prerogative of God. Of the various constitutions, a hereditary monarchy is the most perfect. This form requires an order of nobility which is God's institution and

must not be invaded. Over all stands the Roman Catholic church, and its head by Christ appointed, the Pope. To this source the nations are to look for justice united to religion. The revolution in France aimed at good, but began in the wrong way. Reforms must begin at the top ; they must emanate from the Pope, and go downward." Such as this was the genius of the old French monarchy. One cannot fail to feel a sort of respect for the religious element, however perverted it may be, in this political theory ; but the weakness of the scheme is manifest. If existing states are ordained of God, and the Pope is supreme over all states, what is to be said of states ordained of God and yet rejecting the Pope's authority altogether ? What of states rejecting kings, nobility and Pope all at once ? They have a right to exist, and yet they refuse to submit to the principle which alone reconciles their existence with the true religion. Le Maistre confines God's agency to the guidance of outward affairs by means of rulers, but excludes him from the progress of events and changes in a nation, and from the inward convictions of mankind.

This sort of absolutism goes farther than the theory of the middle ages. It is remarkable, however ; as being the system to which consistent Catholics have been inclining since the modern revolutionary period.

#### § 60.

Macchiavelli might be omitted here on account of the almost exclusively practical character of his observations, but we cannot pass by so important a man without devoting a few words to his opinions. It has been said that his political maxims were purely subjective and arbitrary ; that his motto is, whatever suits my end is right. But this is not true ; his aim was the safety and order of the state. His principle in the most objectionable parts of *Il Principe* is not that what secures the prince's object is right, but that for the preservation of a state or of a new prince any needed measures are permissible. In other words, self-preservation knows no morality ; which is bad

Macchiavelli's political principles.

enough, but not a denial of moral distinctions. In his admiration of ability and strength he looks at hesitation on moral grounds as weak, as leaving the advantage in the hands of a flagitious foe. Of course, if men acted by such a rule, all public morals must give way in a bad age like that in which he lived, and universal distrust must hurry on the ruin. In *Il Principe* he says (chap. xviii.) that "a prince must be a fox as well as a lion. A wise seignior cannot and ought not to keep faith, when keeping it is to his disadvantage, and when the reasons which led him to make a promise have ceased. If all men were good, this precept would not be a good one; but because they are sad creatures and will not keep faith with thee, thou also art not bound to keep it with them." Nor will a prince ever be without legitimate occasions to excuse his want of faith. In his wise and able discourses on the first decade of Livy, we see how he regards religion as a handmaid of state policy and allows pious frauds, while he holds religion to be necessary for the existence of the state. (i., II, pp. 70, 72, ed. of 1797.) In this and other respects, he was, like the literati of Italy in general after the revival of learning, quite a heathen. In chap. xxx. he advises a captain who is afraid of a prince, if his own security requires, to corrupt the heads of his army, and to get into his power those whom he cannot corrupt. In chap. xlv., fin., he remarks on "the great folly and little prudence that there is in demanding a thing and saying that you mean to do evil with it before you get it into your hands. For one ought not to disclose his mind, but should resolve to seek to obtain by any means what he desires. For it is enough to ask arms of another without telling him that you mean to kill him with them, since thus you will be able, after getting the arms into your hand to do your will." These are specimens of a want of reverence for truth, of an admiration for talent so great as to excuse its abuse, and of a belief that a people may and must be cajoled, which is as much opposed to freedom as to morality. How much higher are the principles of the young Neoptolemus in the drama of Sophocles, where he feels compunction for the

trick to which the old "fox" Ulysses has led him to give his consent. (Philoct., 1049, 1224, 1249, 1270). As Wordsworth says of Dion,

"Him, only him, the shield of Jove defends  
Whose means are fair and spotless as his ends."\*

### § 61.

The object of Grotius was not, so far as I know, in any work, to construct a theory of the state. In his Grotius. treatise *De jure belli et pacis*, he discusses rather questions of natural law and of justice. In the prolegomena of that work we find statements relating to human nature and to the moral necessity of fulfilling promises which are important for the theory of the state as well as for the doctrine of justice. In § 6 he says that "among the properties peculiar to man is the appetite for society, that is, not for any and every kind of community, but for a tranquil one, for one suited to his kind of intelligence;" and therefore the assertion that every animal by nature is led on only towards its own advantages, if applied to man cannot be regarded as true. § 8. "This tendency toward the conservation of society, which is in accordance with the nature of man, is the fountain of that *jus* which is properly so called." Under this he includes the not taking what is another's, the restitution of it or of the gain from it, the fulfilment of promises, the reparation of wrongs, and the desert (*i. e.*, the recognition of the desert) of punishment. § 15. "Since it belongs to the *jus naturale* to stand to an agreement (for some way of obligating men to one another was necessary and no other was conceivable), civil rights were derived from this fountain. For they who had joined any society or subjected themselves to any man or men—these either did this by an express promise; or, by the nature of the transaction, ought to be understood as promising that they would follow that, which either the major part

\* Comp. Vorländer, "Gesch. d. philos. moral, rechts u. staatslehre der Engl. u. Franzosen mit einschluss Macchiavellis."



of the society, or those to whom power had been committed should determine." In this important passage he must be understood as explaining political obligations by tacit consent to comply with the will of the majority or the ruler. He thus furnishes a ready fiction to explain the origin of the state as well as of the laws and constitution. In this, doubtless, he follows earlier writers on natural law and civil obligations. Thus the original source of natural law is not utility, as Carneades the Academic asserted (§ 16), but the nature of man itself, which would lead us towards society, although we needed from society no supply of our other wants. Natural law, however, finds a help and an accessory in utility; our wants impel us to society that we may the more cling to it; and as by compact the individual obligates himself to obey the law of the society, so societies or nations in the same way are united by the law of nations. Natural law may thus be said to be the foundation of all law, in so far as the provisions of law are in conformity with that which nature points out for us.

From the principle of natural law that we must abide by our compacts, it will follow that many of the institutions of man are according to natural law. (de jure b., i., 1, § 10, 4.) Thus property (*dominium*), as it now is, has been introduced by human will, and on the introduction of property it becomes wrong for me to seize what is yours, without your consent. And yet natural law is so immutable, that not even God can change it. Thus, though there is a *jus voluntarium* by the side of the *jus naturale*, the latter transfers its binding force to the former, since consent or compact is by natural law obligatory. (Comp. I., 1, § 11.) "Voluntary law is either civil, pertaining to a company of free men associated for the purpose of enjoying a jurál condition and common advantages, or to states, all or many, from whose will it receives its obligatory force." (§ 14.) But he would, without question, limit voluntary *jus* by the obligations of voluntary law.

The association of free men, or, as he says (ii., 5, § 23), one in which many fathers of families come together to form one

people and state, gives the highest right to the body over the parts, for this is the most perfect society, nor is there any external action of man, which, of itself or from circumstances, may not have a regard to this society. "But each part has its rights, so that if a part of a state is alienated it must agree to the alienation. (ii., 6, § 4.) For they who unite to form a state contract a certain perpetual and immortal society, as integral parts of the same; whence it follows that these parts are not so subject to the body as the parts of the natural body are, which cannot live without the life of the body and therefore may be rightfully cut away for the body's utility. But the body in question is of another kind, brought together by will; and thus its right over its parts must be measured by its primeval will, which cannot be thought to have been such that it would be right for the body to cut off parts from itself and put them under the sway of another."

This will, according to Grotius, would necessarily limit the public power. Yet Grotius is not unwilling to defend the absolute sovereign's power against the doctrine of the sovereignty of the people, that is, against the opinion of those (i., 3, § 8, 1) "who, without exception would have the power of the people supreme, so that it may be right for them to control and to punish even kings whenever they abuse their power." He offers two arguments against this opinion: one, that a people can, of their own will, subject themselves to a ruler without conditions; and the other, that they may be subjugated in a war otherwise just. If this seems hard doctrine to be received, he has this to say, that whatever government one conceives in his mind, it will not be without its evils and inconveniences. (i., 3, § 8, 1, et seq.) We have touched already on one of his opinions, that a man may surrender himself up to be a slave. (§ 7. 2.) Here a people can make its own slavery a jurally right condition. *Licet homini cuique se in privatam servitutem cui velit addicere, ut ex lege Hebræa et Romana apparet; quidni ergo populo sui juris liceat se unicuique aut pluribus ita addicere, ut regendi sui jus in eum plane transcribat, nulla ejus juris parte retenta.*

Hooker's theory of the ruler's power, which was independent of that of Grotius, and actually of an earlier date, is substantially the same at bottom. He holds that, unless it proceeds from conquest, or from God's special appointment, it is the result of compact between the prince and the people.

But it is not necessary that there should be a compact between every successor in a hereditary line, for the compact may be made once for all with the first ruler. Thus he says (Eccles. pol., B. viii., ch. 2, § 8) "we do not construe the king's dependency as some have done, who are of opinion that no man's birth can make him a king, but [that] every particular person, advanced unto such [regal] authority hath at his entrance into his reign the same bestowed on him, as an estate in condition, by the voluntary deed of the people, in whom it doth lie to put by any one, and to prefer some other before him, better liked of or judged fitter for the place," etc. This was the opinion advocated in the *vindicia contra tyrannos* of Junius Brutus. (Comp. notes in Keble's Hooker, iii., 346-7.) Hooker's statement of his own views is as follows (u. s., § 9): "Albeit we judge it a thing most true that kings, even inheritors, do hold their right to the power of dominion with dependency upon the whole body politic over which they rule as kings; yet so it may not be understood as if such dependency did grow for that [because] every supreme governor doth personally take his power from thence by way of gift, bestowed of their own free accord upon him at the time of his entrance into his said place of sovereign government. But the cause of dependency is in that first original conveyance, when power was derived by\* the whole into one, to pass from him unto them whom out of him nature by lawful birth should produce, and no natural or legal inability [should] make incapable." "Neither can any man with reason think but that the first institution of kings is a sufficient consideration wherefore their power should always depend on that from which it did then flow."

\* Another reading is "from."

He then asks whether a body politic "may at all times withdraw, in whole or in part, that influence of dominion which passeth from it, if inconvenience doth grow thereby." His answer is that, without the consent of the supreme governors, he does not see "how the body should be able by any just means to help itself, saving when dominion doth escheat." (§ 10.) In the next section he lays it down that in power of dominion all kings have not an equal latitude. "Kings by conquest make their own charter." "Kings by God's own special appointment have also that largeness of power which he doth assign or permit with approbation. Touching kings which were first instituted by agreement and composition with them over whom they reign, how far their power may lawfully extend, the articles of agreement between them must show; not the articles of compact only, at the first beginning, which, for the most part, are either clean worn out of knowledge, or else known unto very few; but whatsoever hath been after, in free and voluntary manner, condescended unto, whether by express consent, whereof positive laws are witnesses, or else by silent allowance, famously notified through custom reaching beyond the memory of man."

Hooker is thinking especially of English royal power, but his theory of compact makes any rules possible which are consistent with the notion of such power. Thus it may be election by compact with one man, or hereditary, as if it were an estate transmissible or he were the head of a race holding the power in solidarity. In all cases a violation of the compact may be a reason for the reversion of the power to the body politic, which is indeed in a qualified way the English doctrine. Nor in modern times is there any other source; for if mere conquest were one, it would cease when a king had been conquered by the body, and God has not signified his sanction for one government more than for another.

Hooker, like many other writers, judges of a compact between a people and a prince, the head of a line, after the analogy of private contract. A contract to hold lands by tenant's

right, transmissible to the next of kin in the male line perpetually, would not be vitiated if the next of kin should turn Roman Catholic ; but the succession to the English throne would pass over a next heir who should do this. If compact is made a ground of political right, it cannot bind for all time, nor in all circumstances, nor even in all changes of political opinion.

### § 62.

The doctrine of the state in most of the subsequent political theories was built on the foundation which Hobbes. Grotius laid. But theorists differed in regard to the part of human nature which they selected as giving an impulse to the formation of states. A theory, remarkable on account of the eminence of the author as well as on account of its decidedly positive characteristics, was that of Hobbes, which found favor also with a still more eminent man, the Dutch Jew and Pantheist, Spinoza. The views of Hobbes are contained in the *de Cive* (1642), and the *Leviathan* (1651). The former may be found in Molesworth's Hobbes' Latin works, vol. ii., the latter in vol. iii.

In Hobbes' view the starting-point for the existence of organized society is not the social nature of man nor the desire for a community-life, but selfishness. Selfishness, too, he presents to us in one of its most unpleasant shapes, in mutual fear. Before a social contract all men had equal rights to all things. Thus "all had an equal right of reigning which was coeval with nature itself. The abolition of this right among men was due to mutual fear." For war was necessarily consequent upon the equality of men in regard to natural strength and power, and the destruction of the human race would follow upon war. If, however, any one had so far excelled the rest in power that they would not be able, even with their united strength, to resist him, there would be no reason why he should refuse to exercise a right conceded to him by nature. Those, therefore, whose power cannot be resisted, and con-

sequently Almighty God, derive the right of ruling from power itself. (de Civ., iii., 15, § 5, vol. ii., p. 334.)\*

The state of war of all against all exists not because there are no ethical laws of nature—of which nineteen are mentioned by our author (Leviath., xv.)—but because while these are obligatory *in foro interno*, to respect them *in foro externo*, where others despise them, would make one man the prey of the rest, “contrary to the foundation of all natural laws, to wit, the conservation of nature. To escape from this miserable condition is impossible, on account of human passions, so long as there is no visible power able to restrain those passions, and to make the laws of nature and compacts to be observed.” (Leviath., xvii.) Laws and facts, of themselves, cannot bring this about. Nor can security be gained by the agreement of a few men with one another, nor by a temporary government. Nor again, could men, like some animals, live in comparative peace, since their vast and various desires, and even their moral nature, as making them susceptible to a sense of injury, would produce dissensions. “The only method of constituting a common power, able to preserve men from foreign invasion and mutual injuries, is for each one to transfer all his power and might to a man or company of men. This transfer is more than a consent; it is a true union of all in one person made by a part of each with each, as if each should say to each, “I concede to this man or this company my authority and right of ruling myself on this condition, that thou also transfer to the same person all thy authority and right of governing thyself. This done, that multitude is one person. And this is the generation of that great Leviathan, or, to speak more worthily, that mortal God, to whom under God immortal we owe all our peace and protection.” (Leviath., xvii., pp. 130, 131.)

\* Comp. a similar place in Leviath. xxxi., vol. iii., p. 256. “Regni divini naturalis jus, quo Deus illos, qui leges naturales violant, affligit, non ab illo derivatur quod illos creaverit cum non essent, sed ab eo quod divinæ potentæ resistere impossibile est.”

But another subsidiary pact must be made in order to give the pact constituting the state, force; each must agree to obey the man or company of men for whom the majority of the votes are cast. No one can pretend to have made a pact with God inconsistent with this social pact. "For a pact with God can be made only through the mediation of some one representing God; and he alone does this who under God has the supreme power." (xviii., p. 133.) Again, "this supreme power cannot be taken from the holder of it, on account of bad administration of the commonwealth. For, in the first place, as he represents the state, what he does the state does. But who is there to charge the state with crime? (*Qui autem est qui civitatem ream faciet?*) Next, he on whom the supreme power is conferred makes no pact with any of those who conferred it, and therefore can do no injury to any one for which he should be deprived of his power. But if we were to concede that the holder of supreme power could both make and break pacts in which the state was the other party; in case he, when he had broken his pact, should deny that he had broken it, who will be judge in the question?" etc. (*ibid.*) Moreover, "since each of those who conferred the power is the author (the responsible cause) of all the actions of him on whom the power was conferred, it is manifest that no injury can be done by the holder of power to the conferrers of it. I cannot deny that the holder of supreme power can act *iniquic*. For that which is done against the law of nature is *iniquum*, but that which is done against civil law is *injustum*. *Nam justum aut injustum ante civitatem constitutam non erat.*" (p. 135.) Accordingly the supreme ruler cannot be killed or otherwise punished by the citizens; he must judge of the measures necessary for peace and defence; must determine how far meetings of the people may be held or addressed, to what censure books must be subjected, and whether they may be published; must determine private rights and have in his hands the right of judicial decision, that of declaring war and making peace, and that of appointing all councillors,

magistrates, and ministers of war and of peace, etc. (pp. 135-138.)\*

The Leviathan may be a man or a company of men, or rather it is the state represented in either way. Hobbes prefers a monarchy, in which the power of the ruler is not circumscribed; and as to the succession, he says: "*Perfecta civitatis forma esse non potest, ubi successorem eligendi jus non sit in antecessore.*" (xix., pp. 146-148.) Of absolute power he says that the principal objection against it is drawn from that which is wont to happen, and it comes from them who ask, where and when absolute power has been acknowledged by its subjects. "But I, in my turn, ask them, where and when a state free from sedition and civil war has existed, in which the power has not been absolute. In those nations where states have lasted long and only been destroyed by foreign enemies, the subjects never disputed about the power of their princes. The science of founding and preserving states "has its certain and infallible rules no less than arithmetic and geometry; nor is it dependent on experience alone. These rules the poor have no leisure to think out, nor have persons with the leisure and a will fitted for this understood by what method it ought to be done" (xx., p. 159)—a striking passage as explaining in part Hobbes leaning toward theories of absolute power by the civil wars during which it was written.

In respect to religious power, Hobbes held that "the right of judging, what doctrines are useful for the conservation of peace and ought to be publicly taught, belongs inseparably to the civil power." (Leviath., xlii., p. 396.) "He who is chief ruler in any Christian state is also chief pastor, and the rest of the pastors are created by his authority. Hence, it follows that they are his ministers only, just as those who are set over states, provinces, or towns. In a state, therefore, where a foreign person [as the Pope] appoints pastors, he does it not

\* A striking protest against divided power (p. 138), contains a reference to the civil war then in its course.



in his own right, but in the right of him who rules over that state. If, therefore, a person seeing a pastor preaching or baptizing should ask him, as the priests and elders asked Christ (Matth. xxi., 23), 'by what authority doest thou these things and who gave thee this authority?' he could return no other answer than that he acted by the authority of the state drawn from him who represents it or sustains its character." p. 398.

This may be enough to set forth the opinions of Hobbes.

Spinoza. Spinoza does not essentially differ from him either in regard to the conception of *jus* or in general results, except that he prefers the republican form of government to the absolute power of one will. A few passages, from his *Tractatus Theologicus Politicus*, first published in 1670, but suppressed by public authority, and from his *Tractatus Politicus*, which saw the light after his death in 1679, will best set forth his theory.\* A comparison between the views of these writers has been drawn by Hartenstein in his *Histor. Philosop. Abhandlungen*, pp. 217-240, which have been of great service in the preparation of this sketch.

By the terms *jus naturæ* Spinoza means the laws of nature in themselves, or the rules according to which all things take place, that is, the power of nature itself. The *jus naturale* of the whole of nature, and consequently of each individual thing, reaches as far as its power. Consequently, whatever each man does by the laws of his nature—nay, whatever any individual being does, whether human or other, and among human beings, what an idiot or madman does—that he does with the highest right. (Tr. P. Th., xvi., §§ 1-5.) This is what Paul teaches, who denies that sin exists before law, that is, as long as men are considered as living under the sway of nature. (Ibid., § 6.) Hence, the *jus naturale* of each particu-

\* The first of these treatises may be found in Bruder's edition of Spinoza's works (Leipzig, 1846), vol. iii., and the other in vol. ii. The views of Spinoza, with which we are chiefly concerned, may be found in chap. xvi. of the first, and chap. ii. of the second of these treatises.

lar man is not defined by sound reason, but by desire and power. (§ 7.) Whatever then each one, considered as being under the sole sway of nature, holds to be useful to himself, either through the leadings of sound reason or through the violent force of his feelings, it is lawful for him to desire that *summo jure naturæ*, and to get possession of for himself by any method, be it by violence or fraud or entreaty, or in whatever way he most easily can; and consequently it is right for him to regard as an enemy him who wishes to prevent him from satisfying his desires. (§ 8.) So he says in the Tract. Polit., ii., § 8, that “it is the law and institution of nature, under which all men are born, and in great part live, to prohibit nothing but that which no one desires and none has power to do, and to turn away from nothing—not from strifes nor hatreds nor anger nor fraud, and absolutely from nothing—to which appetite prompts. Nor is this to be wondered at; for nature is not shut up within the laws of human reason, which aim at nothing save the true utility and conservation of men, but includes other laws without number, which have respect to the eternal order of the entire whole of nature, of which man is a small part.” Whatever then in nature seems to us ridiculous, absurd, or evil, this opinion is due to the fact that we know things only in part, and are in great measure ignorant of the order and coherence of the whole of nature and wish to have all things controlled according to the judgments of our reason.” (§ 8, also Theol. Pol., xvi., 9-11.)

To live under such a *jus naturale* is very undesirable, and no one can doubt that the dictates of reason point at a better kind of life; no one can help wishing to live securely without fear, which it is impossible to do, so long as each may do what he pleases and no more authority is conceded to reason than to hatred and anger. But to attain to a secure life without fear, mutual agreement is necessary. (Theol. Pol., u. s., § 13.) For surely the life in *statu naturali* must be miserable, since men, “being more prone to anger, envy and hatred, and also more cunning than other animals, are by nature [mutual]

enemies, for he is my greatest enemy from whom I have most to fear." (Tr. Polit., ii., § 14.) "From this condition men are rescued by an agreement to the effect "*ut jus, quod unusquisque ex natura ad omnia habebat, collective haberent, neque amplius ex vi et appetitu unius cujusque, sed et omnium simul potentia et voluntate determinaretur.*" (Tr. Theol. Pol., xvi., § 13.)

But how can such an agreement or compact be made, consistently with *jus naturale*, as Spinoza conceives of it? Only by a conviction that some greater good is to be gained by passing into another state which is created by a transfer of power. By such a transfer of power to another, whether made under compulsion or voluntarily, the person making the transfer yields to him so much *jus*; so that he who has the supreme power has supreme right over all (*summum jus in omnes*), and thus is enabled to compel all by force and to hold them in check by fear of the highest penalty which all dread,\* "which *jus* he will hold in his hand, so long as he shall keep this power of carrying out whatever he will. Otherwise he will have a precarious sway, and no stronger person will be held, unless he chooses, to compliance with his demands." (ibid., § 24.) No power and therefore no *jus* is retained by the individual after this transfer. "Every one transfers to society all the power he has, so that society alone will retain *summum jus in omnia, hoc est, summum imperium.*" (§ 25.) The *jus* of such a society is called *democratia*, which accordingly is defined *cœtus universus hominum, qui collegialiter summum jus ad omnia quæ potest, habet.* (ibid., §§ 25, 26.) "From

\* The expression of Spinoza, "*in alterum vel vi vel sponte transfert*" (§ 24), is remarkable, as Hartenstein observes (u. s., p. 225), because it suggests, although only in a cursory way, another origin of power besides transfer by voluntary compact. How can he, or that portion of a body of men that is really powerful, be expected to wait in the *status naturalis*, until the rest enter into terms? As for the terms, they are just as binding, on Spinoza's principles, as the most voluntary compact possible could be. A choice of evils determines the transfer of power in both cases. The power of the superior is his *jus*. Thus we come upon the grounds of the Greek sophists. Comp. Plat., Gorg., p. 491 E. onw.

this it follows that a supreme power is bound by no law, and that all ought to obey it in all things; for this they ought to have promised tacitly or expressly when they transferred to it all their power of defending themselves, that is, all their *jus*. For if they wished to reserve any *jus* for themselves, they were bound at the same time to take security so as to be able to defend it; but since they did not do this, and could not do it, without a division and consequently without a destruction of public power, by that very act they submitted themselves to the will and pleasure of the supreme power. (ibid., §§ 26, 27.) Of this absolute subjection he speaks in the Tract. Polit. (iii., § 5) as follows: "We see, therefore, that every citizen is not under his own but under the state's control; all whose commands he is bound to execute without having any right of deciding what is equitable, what is inequitable, what is sanctioned by religion, what forbidden (*quid pium, quidve impium sit*). But, on the contrary, inasmuch as the body over which public power is exercised ought to be led by one mind, so to speak, and consequently the will of the state is to be accounted the will of all; that which the state decrees to be just and good is to be regarded as decreed by each individual. And, although a subject may think the decrees of the state unrighteous, he is bound nevertheless to execute them."

We have thus a close agreement so far between the political theories of these two remarkable men. But Spinoza seems to qualify his doctrine by the remark (Tract. Polit. Theol., xvii., § 2), "that no one can ever transfer his power, and consequently his *jus* to another, so far as to cease to be a man; nor will any such supreme power be given as can execute all things according to its pleasure." He seems here to flee from theory to facts, and he says, in so many words, that his doctrine "must in many things remain merely theoretical." (ibid., § 1.) A state has grounds of fear for its existence, as well as an individual in his condition of nature. "If it were as easy to rule over minds as over tongues, every ruler would reign safely, and no public power would rest on violence."

(*ibid.*, xx., § 1.) Spinoza would have the institutions of outward religion placed in the hands of the chief authorities of states, but thought and the expression of it free. (Chapters xix., xx.) In fact, "*finis reipublicæ re vera libertas est.*" And he limits power by the remark that he would allow to the supreme magistrate in any city no more right over his subjects than accords with the measure of the power by which he is superior to the subject.\*

In these theories of two eminent thinkers there is a conception of *jus* as equivalent to power, which divests it of moral quality. Their state of nature is an unreality, not possible since the condition of parents and children began to exist and broadened itself into natural associations or tribes. The motive for seeking some new order of things, a social order, is simply self-preservation, or fear, and no moral or social principle is taken into view. The means is compact, which has no binding force when the utility to be gained by breaking the compact is greater than by keeping it. The process of formation of a state is a transfer of power and right, by which, according to Hobbes,—and logically,—an irresponsible sovereign is created, who has all political authority, and whose servants all functionaries are, whether civil, military, or religious. And yet at the end nothing of perpetuity is gained for the state, unless the compact itself has the force of moral obligation. For any new power that can overturn the old one has by that fact the right to exist.

\* From Epist. 50 (ii., 298, ed. Bruder), to which Hartenstein calls attention, Spinoza is asked wherein he differs from Hobbes, and replies. "quantum ad politicam spectat, discrimen—in hoc consistit, quod ego naturale jus semper sartum tectum conservo, quodque supremo magistratui in qualibet urbe non plus in subditis juris, quam juxta mensuram potestatis quâ subditum superat, competere statuo; quod in statu naturali semper locum habet." I am not sure that I understand these words, but if I do they are an accommodation of theory to fact; for the theory requires the transfer of all *jus* and consequently of all *potestas* to the supreme power, so that in all cases the measure of *jus* which it has over subjects is the same.

## § 63.

A contemporary of Hobbes, Sir Robert Filmer, wrote several treatises in defence of the monarch's absolute power; as the "anarchy of a mixed and limited monarchy" (1646), "necessity of the absolute power of all kings, and in particular of the king of England" (1648), "original form of government against Milton, Hobbes, Grotius," etc., and "Patriarcha or the natural power of the kings of England asserted," the latter published in 1680, long after his death in 1647. This work was refuted at large by Locke in the first of his discourses on government, and by Algernon Sydney in his discourses on government, published in 1698, fifteen years after his execution. The object in the "Patriarcha," which has now become a curiosity of political philosophy, was to support actual absolute power by deriving it from patriarchal, as according to Mr. Hallam (*Hist. of Lit.*, iv., 369) had been attempted in what is called "Bishop Overall's Convocation Book" at the beginning of the reign of James I., which, however, was not published when Filmer wrote. The main points in the *patriarcha* are that no man is born free, that all lawful government is monarchy, and all monarchies absolute. In proof that men are not born free he alleges the subjection of the child to the parent, and the dominion over the world conferred by creation and donation upon Adam. 1. The relation of the child to the parent is absolute. But this is false according to Scripture and to right reason. The control over the child, as we have seen, is one determined by the moral quality of the command, varying with age and expiring with death. It must cease, being a power given for the benefit and protection of the child, until he can sustain his part in all human offices which require responsibility and free action. And again, if royal power were in succession to paternal power, there could now be no paternal power, unless whatever power parents have they derive by grant from kings. 2. Filmer's argument from creation and donation is to be met by a flat

denial that he understands the passage aright on which he bases his argument. The world given to Adam did not include men themselves, but the materials and inferior creatures in the world, as is shown by the eighth Psalm, where the human race is made the subject of the power spoken of in *Genesis* and referred to by Filmer. The lordship over the earth therefore passed to all Adam's descendants and not to his eldest son. 3. The patriarchal power was of natural growth, but, when, established was liable to interruptions and modifications. For instance, if the patriarch died after most of his children, leaving only a young son, does any one imagine that in a state of society, when experience and knowledge of precedent was everything, the tribe would not have interfered, and broken the succession by the choice of a new leader? 4. The connection between kings of to-day and the patriarchs is entirely untraceable. 5. If it were alleged that the power and authority of the patriarch, either as having grown up naturally or as being derived from Adam, were legitimate for all time; it might be replied that what is true of the first stage of human society does not necessarily apply to a subsequent stage, after the tribe feeling has faded away, any more than we can reason in all respects from the child's condition to the man's. Filmer's theory, then, rests on a misapplication of Scripture and on the assumption that the original forms of human authority are to be a norm for mankind in all the changes of human society. And yet it contains a grain of important truth, where it goes back to the past in search of a historical right of states to their existence.\*

Locke. Locke has had a wider influence on English political thinking than either the want of originality in his views or the amount of his writings on politics would lead us to expect. In his theory of government he supposes a social compact and a compact between the people and the prince. The breach of this latter engagement on

\* Comp. what Mr. Hallam says of the critique of this patriarchal theory by Suarez, written long before Filmer's time. (*Hist. of Lit.*, iii., 355 et seq.).

the part of the prince and his line justifies rebellion. In regard to property, as we have already seen, he introduced or made more prominent than before the right derived from labor employed in production. In his theory of the powers of the state he, more than any of the earlier writers, showed the importance of a separation of government functions. The doctrine of a compact between the prince and the people had so much ground for it in the early practice of the Germanic race that history as well as theory could be pressed into its support. It was formally accepted by the English Convention-Parliament, when it was voted that the king had endeavored to subvert the constitution by breaking the original compact between king and people.

#### § 64.

In the age of Louis XIV., where Bossuet, in his “politique tirée de l'Écriture,” uttered extravagant sentiments concerning royalty, and could say that “kings are sacred things,” there were not wanting those in France who felt the evil of the absolutism of the monarch. Montesquieu. Fenelon expressed some opinions which were not in accordance with the reigning politics. He declared that subjects ought to be left in perfect liberty to examine, each one for himself, the authority and the reasons for the credibility of a revelation. In the plans of government which were to be laid before the Duke of Burgundy, Fenelon wished meetings of the states general, to which some of the members should be called by election, as of old. No recommendation of the king should be considered a command, no deputy should be perpetual. It was for such faint expressions of a desire for a little practical liberty that he fell into disgrace. In 1724, not long after the death of Louis XIV., the Abbé Alary founded a political club—suppressed by public authority in a few years—called the Entrésol from an apartment in the Place Vendôme, in which free discussions were allowed, and of which the Marquis d'Argenson, the Abbé St. Pierre, Ramsay, a friend of Fenelon, who wrote as an expression of his ideas



the "*Essai sur le gouvernement civil*," and, it is said, Montesquieu, were members. All these men wanted some change in the government of France. Montesquieu in his "*Lettres Persanes*," where he speaks in the character of a Persian, uses quite a degree of disrespectful liberty towards all authorities, social and religious. Such expressions as "the corps of lacqueys is more respectable in France than elsewhere; it is a seminary of grand seigneurs; it fills the void of the other estates;" and as "the dervishes [priests] have in their hands almost all the riches of the state, it is a society of greedy persons who always take and never restore," show a dissatisfaction with the condition of things in France which vented itself in biting sarcasms. These letters were written in 1721; the "*Considerations on the causes of the greatness of the Romans and their decline*" appeared in 1734, while the "*Esprit des lois*" belongs to the year 1748. The "*Spirit of the Laws*" was the great work on this subject which the eighteenth century produced, and has given more impulse to political thought than any other that has appeared in Europe. It is divided into twenty-eight books, the first of which briefly defines law and states the subject of the work. "Law in general," he says, is human reason—and so "the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied." . . . "They ought to be adapted to the nation where they are made, and it is therefore unlikely that those of one nation should be proper for another. They ought to be conformed to the nature of the various governments, to the climate, manner of living, degree of liberty, religion," etc. He does not separate political from civil laws, "for," says he, "as I do not pretend to treat of laws but of their spirit, and this spirit consists in the various relations which the laws may have to different things, it is not so much my business to follow the natural order of laws as that of relations and things." This is a vast field, and when in the course of his subject he inquires into the influences which different forms of government have on laws, as well as the other influences of the physical and moral world, he comes

into a thicket which he could not thoroughly explore. We may honor him for being the first in modern times to become aware "of the epoch-making principle"—I use the words of another—"that the course of history is on the whole determined by general causes, by widespread and persistent tendencies, by broad and deep undercurrents; and only influenced in a feeble, secondary, and subordinate degree by single events, by definite arguments, by particular enactments, by anything accidental, isolated, and individual. The recognition of this principle is an essential condition of the possibility of a science of history."\* But his plan almost forced him to make hasty generalizations, and his great erudition could not save him from accepting as true many unreliable assertions of the ancients or of travellers. His plan, too seems to me to be defective in this. He seems to suppose that all which we need to know of the different forms of government, in order to be sure of the manifestation of their nature in particular laws, can be supplied to us by a few hasty remarks. He does not, thus, offer us a science of government, but historical statements respecting their influences and other influences upon them. Thus he says that "suffrage by lot is natural to democracy, as that by choice is to aristocracy." (Book ii., ch. 2.) But this is a very loose generalization, founded on Aristotle's remark relating to a degenerate democracy. Have there not been many democracies where choice and not lot determined who should fill the offices of state? Has any one ever, in the most modern democracies, moved seriously for the lot? Or did all the ancient democracies come into this plan? So his division of governments into three species is exposed to criticism. (ii., 1.) They are the republican, monarchical, and despotic. Here under a republic he classifies both aristocracy and democracy, and yet in the third book, when he comes to his celebrated discussion of the principles of the several forms, he makes the principle of democracy virtue, and that of aristocracy moderation. He

\* Prof. Flint's *Philos. of Hist.*, i., 105.

thus practically makes four classes of forms, but in so doing makes a distinction of species between his monarchy and his despotism. Nor is he, so far as I know, alive to the great importance of the modern distinctions between absolute and free or limited government, or between those where power is centralized and those where it is diffused, or to Aristotle's distinction between the incorrupt and the degenerate polities, or to the peculiarity of city-states as compared with those which spread over a large area. But he is aware that "democratic and aristocratic states are not necessarily free" (xi., 4), and was the first on the continent to urge the model of England upon the French, especially as it respects the division and independence of the three powers or functions of a state. Yet he seems to have no just view of the weight which an independent judiciary has in the constitutional scale. Montesquieu may be said to have formed his politics by a study of English government and history; and his "Spirit of the Laws," by its liberal antidespotic tone, became the bridge over which French thinking passed from the opinions of the age of Louis XIV., to those of the age of Voltaire, Rousseau and Turgot. In Italy Beccaria caught his spirit.\*

\* Compare, as far as Montesquien's method leads him to express historical views, Prof. Flint's estimate of him in his *Philosophy of History*, Book 1, chap. 3, from which we have had occasion to cite a passage. In the preface to his translation of Aristotle, Barthélemy-Saint-Hilaire reviews some of Montesquien's opinions with some just severity. (pp. lxxxii-cvi.) For a more extended history of the opinions of Montesquieu and his school we refer the reader to Paul Janet's *Histoire de la Science Politique*, ed. 2, vol. ii., 416-557. May we be allowed to make the confession that we have sometimes come away from consulting Montesquieu rather with perplexity and doubt of the justice of his historical deductions than with satisfaction? The cause of this perplexity and doubt is, I believe, that he looks at the manifestations of political institutions, rather than at their nature, at the differences of laws rather than at the underlying principle common to all; he is historical, and not enough philosophical. Sir H. S. Maine somewhere makes the remark that he calls attention to the elements of change in political society, as if there were no constant principle below the variable forces. This and the uncertainty of the reader whether he has hit on the right causes of peculiarities in laws

## § 65.

Rousseau, whom Burke saw repeatedly when he was in England, and calls "the great professor and founder of the philosophy of vanity," had a much more marked influence on France than the British statesman had on England. His views are contained in the "discours sur l'origine et le fondement de l'inégalité parmi les hommes (1754);" "du contrat social, ou principes du droit publiques (1761);" and "Émile, ou l'éducation, 1762."

Rousseau had the same inheritance of political opinions which Locke and so many others had received before, of natural freedom limited by contract and of the right to recall transferred power.\* But his peculiarities also were great, and he gave a new shape to political theories as they passed through his hands. The doctrine from which he starts is the inalienability of freedom,—that not only another may not enslave you, but that you cannot lawfully enslave yourself,—contrary to the opinion of Grotius that a man or a state might resign his liberty and be reduced to servitude. This being established, the problem is to find some form of association in which freedom will not be alienated, in which every man, while he obeys the state, obeys himself and is as free as before.† There is no right of the stronger. "Force is a physical power. I do not see," says Rousseau, "what morality can result from its effects. To cede to force is an act of necessity, not of will. It is at the most an act of prudence. In what sense can this be a duty?" "If one must

and institutions, with a method of arrangement which Saint-Hilaire speaks of, are very serious defects in one of the most important works of modern times. Yet no one in the eighteenth century went over so vast a field, or so stimulated political inquiries as he; nor has any French writer in his department retained so much of the respect of posterity.

\* I cite the *contrat social* by book and chapter. The pages are those of the Paris edition of Rousseau's works, 1827.

† Comp. for the critique of Rousseau's doctrine, Ch. Comte, *Traité de Legislation* (4 vols., ed. 2, Paris, 1835) in vol. i., B. 1, Ch. 11, 12.

obey by force, there is no need of obeying from duty ; and if one is no longer forced to obey, he is no longer obligated." (B. i., Chap. 3.) A people can give itself up to a king, says Grotius. If so, it was a people before its submission. Hence we must go to the beginning, and inquire how it became a people, what was the act necessarily anterior to the other, and the true foundation of the society. (i. 5.) "In fact, without a prior convention, where would there be an obligation, if the election were not unanimous, for the smaller number to submit to the choice of the greater ? The law of the plurality of suffrages is itself an establishment due to agreement, and supposes, at least on one occasion, unanimity." (ibid.)

Rousseau assumes a state of nature, and such a condition of things in that state that the obstacles to the self-conservation of men in it have more force than their struggles on the opposite side. As no new forces can be called into existence, their only means of self-conservation is to use their actual powers in concert. Their instruments for their conservation are force and liberty. The problem then becomes this : "to find a form of association which defends and protects the person and goods of each associate with the help of the whole common force ; and by means of which each one, uniting himself to all, obeys only himself for all that, and is as free as before." The social contract solves this fundamental problem. "The nature of the act so determines the clauses of this contract that the least modification would render them vain and of none effect.—They are everywhere the same, everywhere silently admitted and acknowledged, so that upon a violation of the social pact, every one then goes back into his original rights and resumes his natural liberty, while he loses the conventional liberty for which he renounced it." (i., 6.) "The clauses," or articles, "of this pact may be reduced to a single one : to wit, the total alienation of each associate with all his rights to the community. This alienation is equal for all, and is made without reservation. In giving himself to all each one gives himself to no particular person. And as he acquires over every associate the same right that

each yields to him, he gains an equivalent for what he loses together with more power to keep what he has. The essence of the pact then consists in this : “ each one of us in common puts his person and all his power under the supreme direction of the general will ; and we receive it back again, each member, as an indivisible part of the whole.” “ Thus is produced a moral, collective body, which derives from this act its unity, its common personality (son *moi* commun), its life, its will.” (ibid.)

In this pact a tacit understanding is contained that a person refusing to obey the general will shall be constrained to do this by the body ; which means nothing more than that he will be compelled to be free. (i., 7.) “ This passage from the natural to the civil state produces in man a very remarkable change, by substituting justice for instinct in his conduct and giving to his actions the morality which was wanting before. Only then, as the voice of duty takes the place of physical impulse, and right that of appetite, man, who thus far had considered himself alone, finds himself forced to act on other principles, and to consult his reason before listening to his inclinations. Although he foregoes in this state many advantages he drew from nature, he gains instead such great ones, his faculties are so exercised and developed, his ideas so extended, his sentiments so ennobled, his entire soul to such a degree elevated, that, if the abuses of this new condition did not often degrade him below that out of which he came, he would be bound without ceasing to bless the happy moment that drew him thence forever, and which made him from being a stupid and contracted animal an intelligent being and a man.” (i., 8.)

What man loses by the social contract is his natural liberty and an unlimited right to all that tempts him and that he can get into his hands.\* What he gains is civil liberty, and the ownership of all that he possesses. (ibid.) As land would be an important part of a man's goods at the time of making

\* In the edition of 1835 the words are *à tout ce qu'il tente*, etc. But *qui le tente* is found in other editions.

the social pact, Rousseau has to admit some title to land at that time, and somewhat hesitatingly finds it in occupation. (i., 9.) When society accepts a man's alienation of what was his, far from being despoiled of his goods he is assured of their legitimate possession ; his *usurpation* is changed into a real right and his holding of them *de facto* into the right of property. Here we might ask how, if his right was not truly such, his title could be cured by the transfer to society and the declaration of society that it is his, unless society had a right to it before the social pact had constituted society.

It follows, according to Rousseau, from the principles laid down, that sovereignty, which is nothing but the exercise of the general will, cannot be alienated, and that the sovereign who is a collective being can be represented only by himself. Power can be transmitted, but not will. (ii., 1.) In another place (iii., 15) he says that as soon as the public service ceases to be the principal business of the citizens, and they prefer to serve their purses rather than their persons, the state is on the verge of ruin. If a battle must be fought, they hire troops and stay at home : rather than go to the place of public deliberation they appoint deputies in their stead. Thus they leave soldiers to enslave their country and representatives to sell it. In a truly free country, men, rather than get rid of their duties by the help of others, would pay money in order to discharge the duties themselves. Sovereignty cannot be represented for the same reason that it cannot be alienated. It consists in the general will which is incapable of representation. Deputies are not and cannot be representatives. Every law which the people in personal presence has not ratified is null ; it is not a law. " The English people thinks itself free but is much deceived. It is only free during the election of members of parliament ; as soon as they are chosen, it is in slavery, it is nothing. By the use which they make of their liberty in the short moments of their liberty, they well deserve to lose it." (iii., 15.)

Rousseau must conceive of a small state where the people from the remotest districts can be gathered in council at the

centre. In fact he says (iii., 1), that the larger a state grows the more liberty diminishes. By this is meant that the single citizen, in a community of a hundred, has more power than in one of a thousand. (iii., 1, p. 103.) There is thus an antique cast in his theory, which may be accounted for in part by his early life in Geneva. An old city-state with its unrepresented democracy, its jealousy of public offices, its control of the community over the individual, its narrow limits allowing all to gather together,—such was the ideal to which his eye was turned.

Again it follows from the nature of the contract that sovereignty is indivisible, for how can the general will be subdivided, or shared? Whenever this seems to be the case there is a deception; the rights considered as portions of the sovereignty are subordinated to it, and always imply supreme wills of which these rights only furnish the execution. “Grotius”—here we see the fanatic—“a refugee in France, dissatisfied with his country and desirous of making his court to Louis XIII., to whom his book is dedicated, spares no efforts in order to strip the peoples of their rights, and to give these rights over to kings with all the art possible.” (ii., 2.)

The general will of the sovereign people is always right, and tends always towards the public utility, but does not always move in the right direction. The people cannot be corrupted but may be deceived. (ii., 3.) “There is often quite a difference between the will of all and the general will, which regards only the common interests, while the will of all, being the sum of particular wills, regards private interests. If the citizens had no communication with one another,—the body being supposed to be sufficiently informed,—there might be a great number of small differences of opinion, but a general will would be the result. But associations divide a community; the will of the association becomes a general will to its members, and a particular one to that body which is really general. There are thus as many votes as there are associations, not as many as there men. When one of these associations has more sway over minds than all the rest, there



is no longer a general will, but a controlling particular one. It is of importance then that there be no partial society in the state, but that each citizen think for himself. Such was the unique and sublime institution of the great Lycurgus. But if there must be partial societies, their number ought to be multiplied in order to prevent the inequality that may thence arise." (ibid.). A fine illustration of the absurd in impractical abstractions.

The social pact gives to the body politic an absolute power over all its members, and it is this power directed by the general will to which is attached the name of sovereignty. If, as it is admitted, there is an alienation by each one of his power, goods, liberty, according to the social pact, only that is thus alienated the use of which is important for the community; but it must be admitted, also, that the sovereign alone is judge of this importance. The sovereign can load the subjects with no chain that is useless to the community, it cannot even have the wish to do this. The general will is always right, because there is no individual who does not appropriate to himself this word (*chacun*) "*each one*," who does not think of himself in voting for all. This is a proof that equality of right and the notion of justice which it produces are derived from the preference which each one gives to himself, and consequently from the nature of man; and that the general will loses its rectitude when it tends toward some individual and determinate object. (ii., 4.) As the social pact is general, since otherwise it could not establish equality of rights among the citizens; laws relating to particular persons seem to be inconsistent with it (p. 64) and every man can dispose with full power of whatever—whether goods or liberty—has been left to him by its provisions. [his liberty?] So far is it from being true that the pact demands on the part of individuals any real renunciation, that their situation, by virtue of the contract, is found to be really preferable to what it was before. (ibid., p. 66.) (But this might be true and yet there might be a renunciation. The pact makes his gains more than his losses. This is probably Rousseau's meaning.)

But it is asked how individuals having no right to dispose of their own *lives* can transmit to the sovereign a right which does not belong to them. To this question Rousseau replies that every one has the right of risking his life to preserve it. But will it follow that he has the right of risking his life because another tells him to do so, if he verily believes that by the risk he cannot preserve it? But he takes a higher ground. "He who wishes to preserve his life at the expense of others ought to give it up also for others when occasion requires. Now the citizen is no longer the judge of the danger to which the law requires him to expose himself; and when the prince has told him it is expedient for the state that he should die, he ought to die, because it is only on this condition that he has lived in security hitherto, and his life is no more one of nature's blessings, but a conditional gift from the state." (ii., 5.) Very well! But by what right can the prince tell him to die, if he had no right to consent to put his life at the community's disposal. If others die for him, what right had they to do so?

The penalty of death inflicted on criminals he explains on the ground that it is for the purpose of not being the victim of an assassin that a person consents to die, if he should become one. (*ibid.*, p. 68.) But this queer explanation does not seem to satisfy him, for he adds another, "that every malefactor by his crime becomes a rebel and traitor to his country; he even makes war on it, and when taken, he dies rather as a citizen than as an enemy." But we do not, generally, kill our enemies in war when we capture them. War has resemblances to the violent acts of malefactors, but it has some differences also.

Rousseau thinks no one system of government to be absolutely the best. Every form is not suitable for every country. If there were a people of gods it would govern itself democratically, but a government so perfect does not suit men. A democracy will flourish best in a small state, where the people can assemble and know each other, where there is a great simplicity of manners, much equality of rank and for-

tune, with little or no luxury. But a democracy is more exposed to civil wars than any other form. (iii., 4.)

But how is government in general possible under the social compact? "The difficulty is to understand how there can be an act of government before government exists, and how the people, which is either sovereign or subject, can become the prince or magistrate in certain circumstances. Here again we discover one of those astonishing properties of the political body by which it reconciles operations apparently contradictory; for by a sudden conversion of the sovereignty into a democracy without any sensible change and only by means of a new relation of all to all, the citizens, having become magistrates, pass from general to particular acts, and from law to its execution." This may be compared with the practice of the English house of commons, when it resolves itself into a committee of the whole, and thus passes out of the condition of a sovereign chamber, which it was just before. "Such is the advantage peculiar to democratic government, of being able to be established in fact by a single act of the general will. After which the general government remains in possession (if such be the form adopted), or establishes the government prescribed by law, in the name of the sovereign; and thus everything goes on in its order. It is not possible to institute the government in any other manner which is legitimate, and without renouncing principles already established." (iii., 17.)

The executive officer or officers are mere agents of the whole body. There can be no contract between a people and its chiefs, since by the nature of the case the supreme authority can no more modify than alienate its power. Limitation would be destruction, for a general will would cease. Contracting parties must be under the sole law of nature, and without any guaranty of their reciprocal engagements. There is but one contract in the state, namely, that which constitutes the society. No other public contract can be imagined which would not be a violation of the first. (iii., 16.)

There is no necessity of unanimity in legislation under the

social pact. The pact alone demands universal assent. If, at the time when it is made there are those who oppose it, the pact itself is not invalidated. It comes into force, but they are not included. They are strangers among the citizens. After the state is founded, consent consists in residence; to inhabit a country is to submit to its territory." (iv. 2.) But would not the state, on Rousseau's principle, be in relation to such persons and their goods—for he conceives of goods before the social contract—in a condition of nature, with an unlimited right to all that it could lay its hands on? (i., 8.)

The question may be started, however, whether a man can be free, and yet forced to conform to the determinations of other wills. To this Rousseau answers that, when a law is proposed in an assembly of the people, the question put to them "is not precisely whether they approve of the proposition or reject it, but whether it is conformed to the *general will, which is theirs*. When therefore the opinion contrary to mine prevails, this proves nothing but that I had made a mistake, and that what I thought to be the general will was not such. If my private opinion had prevailed, I should have done some other thing than I had wished to do; it is then that I should not have been free." (iv., 2, p. 174.) As if men could know the general will until the votes were counted, or did not intend in voting to prevent those who voted otherwise from becoming a majority.

The violation of the pact is attended with serious consequences. In a passage already cited it is said that each one then re-enters into his former rights and resumes his natural liberty, while he loses the conventional liberty for which he renounced the natural. A violation then, of this kind, must be attended with the most considerable evils, with the general overthrow of order and law through a country. Let a man, for instance, get the supreme power and destroy existing institutions. The social contract is terminated, and a state of nature follows. But in this state of nature the tyrant has an unlimited right to all that tempts him and that he can grasp.

That which, while the contract lasted, was a crime, is now a source of right.\* “If the social contract is not admitted,” says Rousseau, “I recognize nothing as belonging to another, but that which is useless to myself; I owe nothing to him to whom I have promised nothing.”

Sometimes it seems as if Rousseau regarded his social contract only as a basis on which a theory of political relations could be constructed—a kind of political fiction; sometimes he seems to conceive of a state historically founded after the fashion of his contract. Thus he asks (i. 5 end), how, supposing no anterior convention to have taken place, there could be an obligation for the less number to submit to the choice made by a greater; and how a hundred who want a master have the right of voting for ten who do not? “The law of the plurality of suffrages is itself an establishment proceeding from a convention, and supposes, once at least, unanimity.” We need not say that this is an unreality, and for a large country, acting in concert, an impossibility. How on an area like England, or like the state of New York, could a constitution be framed unless by representatives, whom Rousseau will not hear of; or unless those who are absent from the assembly must be regarded as assenting to its unanimous decisions. For such a contract to be conceivable we must make a number of suppositions, among which are these: that a certain territory is marked off from others by definite boundaries, which implies a kind of state life already; that females and children up to a certain age, are not called on for their assent, but are either in a state of nature or a species of slavery; that every new comer into the world within the country must give his assent to the contract or remain in a state of nature; that men at the stage of reflection implied in the state of nature could consent to surrender their wild liberty for the despotical control of society. In its foundations the theory of Rousseau rests on will, not on right; the scheme is

\* This is urged against Rousseau's theory by Ch. Comte, *Traité de Legislation*, i., 180-185.

not to have a wise or a good government, but one to which every soul has given its consent. Those so-called states, that have never passed through his democratic parturition by contract into some form or other of state polity, are in a state of nature, for there are but two conditions, that of nature and that into which the social contract introduces a people. Russia, for instance, is either in a state of nature or has adopted the contract. On the first supposition there is no moral obligation of civic life to be found there, prudence and self-interest being only motives for quiet submission. On the other supposition any constitution would be justified, and the contract would be an unmeaning fiction. In the first case it would contain in itself the seeds of revolution ; in the other it would be an idle addition to old political theories. In estimating the principles of Hobbes, one inclines to say that any liberty is better than his despotism ; when we come to Rousseau we feel that any despotism is better than his liberty. And there is this advantage on Hobbes' side, that a Leviathan, if he is a single man, or a junto, consisting of a few, can be got rid of by a struggle of the people, but Rousseau grinds us down by a "*volonté générale inaliénable*," to which the individual has renounced everything, and from which there is no appeal. And finally, when the contract is violated, it carries everything back into a state of nature where might and right are identical.

#### § 66.

On account of the practical tone running through Burke's writings, and his truly English disinclination, if Burke. not positive aversion, to political theory, there may be a reasonable doubt where he ought to find his true place. Yet as we have no list of higher worthies, in which we may place him according to his deserved honor, we give him a place here. He was a man of brilliant genius and of philosophical power, yet too much under the influence of his imagination. He stands at the head of English political writers as one who, without theory and holding with rigid

conservatism the traditions and precedents of the nation to which he belonged, gains the sympathy of men of every class of political opinion. No statesman of modern times has left such an abundance of wise thoughts in his works; and he who studies them, although he may withhold his assent in some important respects, will feel the highest admiration for this highly gifted man.

Burke was a whig and gloried in the revolution of 1688. Under the influence of alarms roused in his mind by the French revolution, he leaned more to the side of conservatism, left the party with which he had acted, and gave his views to the world especially in his "Reflections on the French Revolution," and "Appeal from the new to the old Whigs." Burke has been charged with inconsistency. In 1770 he published his "Thoughts on the Present Discontents," which are seemingly but not really at variance with his later works. The writing of that tract was suggested by the cabal of the "king's friends," and the alleged plan to separate the court from the ministry and the administration. He holds that such a state of things would justify the refusal of parliament "to support government until the power should be lodged in the hands of persons who were acceptable to the people, and so long as factions predominated in the court in which the nation had no confidence." (Works, Bohn's ed., i., 333.) The favorites who had most authority with the king, whom he calls an interior ministry, making a double cabinet (*u. s.*, 339) wanted to establish the precedent "that the favor of the people was not so sure a road as the favor of the court even to popular honor and popular trusts." (351.) He shows in this tract a great dissatisfaction with the government, and perhaps a readiness to abridge the king's power of choosing his personal friends; but few practical statesmen have been more consistent with themselves than Burke. To this his antagonist Macintosh in the introduction to his *Vindiciæ Gallicæ* bears attestation.

Burke in his philosophy of government did not differ from other whigs. The doctrine of contract as the foundation of

the state he distinctly accepts, as in that noble passage of the *Reflections on the Revolution in France* (vol. ii., 368) where he says, "society is indeed a contract but the state ought not to be considered as nothing better than a partnership in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest and to be dissolved at the fancy of the parties." So also the whig doctrine of a contract between the king and the people he admitted; and regarded the revolution of 1688 as fully justified by the king's breach of his obligation. Nothing, however, save extreme necessity could justify revolutions, and in the "Appeal from the new to the old Whigs" he shows at large that such had been the doctrine of the party to which he belonged. The change consisted in no alteration of the constitution, no violent divorce from the past, but in getting rid of the king who had endeavored to overthrow the constitution itself.

Burke's most characteristic feature is a dread of abstract principles of government, which was carried to an extreme when he saw the miseries under which France was groaning on account of abstractions. "The foundation of government is laid in a provision for our wants and in conformity to our duties; it is to purvey for the one; it is to enforce the other. These doctrines do of themselves gravitate to a middle point, or to some point near a middle. They suppose indeed a certain portion of liberty to be essential to all good government, but they infer that this liberty is to be blended into the government; to harmonize with its forms and rules; and to be made subordinate to its end." "This theory," he says, "is drawn from the *fact* of our government. The whole scheme of our mixed constitution is to prevent any one of its principles from being carried as far as, taken by itself and theoretically, it would go. Allow that to be the true policy of the British system, then most of the faults, with which that system stands charged, will appear to be not imperfections into which it has inadvertently fallen, but excellences which it has studiously sought. Take which of the



principles you please, you will find its operation checked and stopped at a certain point. In the British constitution there is a perpetual treaty and compromise going on, sometimes openly, sometimes with less observation." (Appeal from the new to the old Whigs, iii., 109, 110.)

In the same spirit he taught that there was no manufacturing a constitution to order, that there must be a congruity between a state and a people, that a government abstractly good, with the most cunningly contrived checks and balances, but not suited to a people, is a bad and will prove an unstable government. So also a government or constitution has no self-preserving power. The conserving forces are religion, that is, an established church, aristocracy and the interests of property, together with good political habits and those sentiments, such as reverence for ancestors, allegiance, attachment to old institutions, which rest on historical recollections. "The very idea of the fabrication of a new government is enough to fill us with horror. We wished at the period of the Revolution, and do now wish to derive all we possess as *an inheritance from our fathers*. Upon that body and stock of inheritance we have taken care not to inoculate any scion alien to the nature of the original plant. All the reforms we have hitherto made, have proceeded upon the principle of reverence to antiquity; and I hope, nay, I am persuaded, that all those which may possibly be made hereafter will be carefully formed upon analogical precedent authority and example." (Reflections on Fr. Rev., ii., 305.)

### § 67.

Since the French revolution, which Rousseau's doctrines helped on more than all other causes, except Infl. of French rev. on theories. the great crying grievances of bad institutions, there has been a reaction in the world from theory, and especially from the doctrine of the sovereignty of the people and their right to change the constitution, which under proper limitations is the only true theory and will continue to the end of the world to be the practice. Burke's practical politi-

cal maxims were, if not suggested, at least enforced by that event. To Le Maistre we have already called attention. Von Haller's views are entitled to a brief notice.\* He holds that there is no such thing as state rights; all rights are private rights. Thus the powers wielded by the heads of German principalities were private; they had an absolute right, which could not be taken away but descended by the private right of inheritance. You would suppose that the people must be in a sad case. But no! all their rights are private also, and cannot be taken from them by their rulers. The public powers, like taxation, public roads, and the like, are derived from a multitude of contracts, as if—to borrow the illustration of another—Rousseau's great ingot was melted into small coins. The people as well as the prince, if invaded, have a right to resistance after the barons' fashion in the middle ages. As for the rulers, their original title was the right of the strongest, but actual possession brings right with it. The object for which the theory was constructed was to keep things as they are. But even this is not attained. What is to prevent the right of the stronger, which existed one year, from being overthrown the next by one stronger still.

The restoration of the Bourbons to monarchy in France, with the subsequent transfer of the government to Louis Phillippe and his line, was attended with the formation or modification of certain political theories by some of the first men of France, such as R. Collard and Guizot. The doctrines of this school are chiefly practical, so far as they are distinctive. They may be compared with Burke's views, as indicating an intention to modify theory by historical considerations. With their practical side we have now no direct concern. The legitimacy of a government on their theory consisted in its being the reign of reason, justice and right. But as most governments, if you look at their origin, are founded in might not in right, it is not the origin of actual governments which gives them a just title to exist but the

\* See F. V. Raumer, über die geschichtl. Entwicklung, etc., pp. 188-197.

fact that they are now just governments. To this is to be added the fact that they have endured for a considerable time. Just as legal titles after a certain length of undisturbed possession are regarded as valid, so is it in the case of public right. In this way they reached a historical ground for an existing government, but they fell into a difficulty on their own theory, when the July revolution of 1830 brought Louis Phillippe and his line to the throne. What was his title, according to the very men of whom some entered into office under him? Nothing more than a sort of quasi legitimacy, weak at first, but increasing in strength every year. He was king not because, being a Bourbon, he had a right to the throne, for there were others with a better title, if succession by inheritance gave a title, but because it was expedient for the public peace that a member of that family should be called to the throne in preference to all others. Or in other words, if the revolution was to take the course which would satisfy the greatest number of Frenchmen and make the least break between the present and the past, what they did might be justified, at least as regards giving the revolution this particular course. But the question was one at this point with which theory had little to do. If they could have got upon the English ground of a contract between king and people, the breach of which would justify both the deposition of the king by an act of the nation and the readjustment of the supreme authority, that would have been apprehensible. Such a theory would have based the monarchy really upon the consent of the nation, while it rendered the attempts of the disaffected to overthrow the state very difficult; but so far as I am aware they did not incline to take that position. But there was truth in their doctrine. Length of time implies consent of the nation and also intertwines constitution and laws in various ways with the habits of thinking and acting, to such a degree as to make a change without the gravest cause hazardous, and to render settled order afterwards extremely difficult. But it ought to be remembered that time is fruitful of great though often unperceived changes in ideas,

and in the relation of classes. To take account of such ideas and changes is what leaders of nations have never done, perhaps never will do. And so when time knocks at the door with a long account in his hand, he finds those who should have been ready for him perplexed and helpless.

## CHAPTER II.

### THEORIES TOUCHING THE STATE EXAMINED.

#### § 68.

THE speculations of which we have given an outline are chiefly concerned with the right of the state to exist, with the origin and extent of its powers, with its relation to the individuals within its borders, and its rights to jurisdiction within a territory which somehow or other came to belong to a certain body politic, rather than to any other. No one has doubted that state organizations are a necessary part of the system which provides for the order, progress, and elevation of mankind: yet it is not enough to know that states, fulfilling what seems to human reason to be their end, exist, but the question is still asked by what right came they to start into being, and who gave them their powers? No one, again, can well doubt that the family was prior, in time, to the clan or tribe—whatever the extent may have been of the original family—and the clan or tribe to the state; but the matter of fact revealed by history has not been the point of chief interest: the speculations run back to the right of the state to exist and to hold power,—to a question of ethics and of politics, and not of history. Nor, further, can we doubt that a multitude of historical causes acting, it may be, through ages, have determined the extent of territory where each state should do its appropriate work; but the very important inquiry, How came a state to be where and as large or small as it is, has been shoved into the background for the most part, in order to give room to the question, “What was the process by which the people scattered over a certain part of the earth’s surface came together at some remote period to organize a state within certain territorial limits?”

These speculations may, however, take the shape of *juristic*

*fictions*; their aim being not to derive from any fact but from something in human nature an explanation for the state's existence. But if fictions in law are dangerous as introducing false principles, so fictions of this sort may end in giving a false view of the state and its relations to individuals. And it is worthy of notice that such suppositions seem to impose on those who make them, as being true accounts of expedients adopted by the human race in its infancy.

We proceed to notice some of the errors which have lain at the foundation of theories starting from the individual man, as from the unit in the state's existence. Errors of method. I. *The first* is to select some particular part or feeling of human nature, as the motive for isolated beings in coming into an organized society. Thus Hobbes, as we have seen, conceives of a state of things where all had desires for all things, and no one a recognized right to anything. Hence to prevent universal war, after experience of evil, they created a power which defined right and maintained it. Now, if this were a mere hypothesis to show how society might be explained, it would take a truth of human nature into view, but not the whole truth. Men had something else in them besides desires and fear. The social principle is stronger in man than in most animals, and the social ties infinitely more permanent. This, then, ought to be at least as strong a motive for man's finding his well-being in society, as fear of one's fellows. Moreover, if there were no social nature to be gratified by various forms of unions among men, it is difficult to see how a society formed on the motive of fear and self-protection could be stable; while our present nature with its sympathies and social instincts would grope into the condition of permanent societies, if only the sense of justice with the recognition of rights and obligations were present to keep such communities in order and peace.

2. Again, the method of contract or compact by which society is conceived of being organized will not stand the test of examination. The theory of contract. The contract, as all have equal rights, must first provide for differences of

opinion, and then proceed to secure the engagement, of each towards all or the whole, to abide by the decision of the majority, whatever they may ordain. Dissentients must be presumed to give their consent if they do not leave the territory, or they are outlaws in it. The rights acquired by the state are the renounced rights of the individuals, for no one can give what is not his own. Thus state power arises.

On the social compact, which I have given in a somewhat more general form than that of Rousseau, it may be observed that it is untrue in fact and breaks down as a theory. In regard to its unreality nothing needs to be added to what has been said already. In regard to its theoretical value we remark, *first*, that no contract, as we have seen, can convey what is not the property of one of the parties to the other, nor render that right which was wrong before. Unless their nature makes men to find their highest good and best life in the state, no contract could justify their entering into a political life. If it be said that men would not be likely to think of the reasons for instituting political life after the fashion of philosophers, but would fall into such a life almost without thought, because they were *πολιτικὰ ζῶα*, to this I agree as very true; but it shows that nature and not legal forms led the way into such a condition of mankind,—it shows, in fact, the uselessness of the contract hypothesis.

Again, contract does not explain the obligation of subsequent generations to abide by the contract. A successor by testament can be bound to fulfil the conditions if he receive the bequest; but the binding force of a social covenant spends itself when the contracting parties disappear from the earth. They are partners, and the partnership expires unless new members are admitted by their own free consent. Mr. Jefferson, who embraced this contract philosophy, felt this objection so strongly as to think that, after nineteen years, when the majority of the first framers of a constitution would no longer be living, constitutions ought regularly to be submitted to the people. On this an American writer remarks that he made the life of a state shorter than that of a horse. But he

did this logically. His error lay in starting from the basis of express contract, and in resting the obligations of citizens towards the state on a formal transaction, rather than on the nature of man and the necessity of the state. The man born in the state and continuing there must fulfil the duties of a citizen or suffer the penalty. He has no more choice, if he stays within his native country, than the child has, until he "leaves his father and mother," in regard to submitting to the law of the family. This obligation and not contract demands the continuance of loyalty to the state, while a man is a member of it. The beginning of the obligation lay in birth and not in contract.

Still further, the theory of contract, as the origin of the state, is of no use in explaining the actual obligations of the citizen or subject in many countries, especially in despotic ones. Here, as nothing like a participation of the people in state power; or their free surrender of power to the despot; will be claimed to exist, either there is no contract and no obligation to obey state law; or there is a tacit consent, and so any form of government may be justified. Contract brings in a Leviathan as easily as it sets up the power of a people, and the existing government, whatever it be, contains the terms.

Another disadvantage of the theory of contract is that it Contract fails to explain state-rights. fails to put on the right ground the powers or rights of the state. It is said that men, when they enter into a condition of organized society, surrender their rights or some of them, and that state-rights consist of the surrendered rights of individuals. On this I remark, *first*, that no classes of rights are surrendered which properly belong to individuals, and *secondly*, that states have rights which cannot be fairly derived from this source.

(1.) No rights are surrendered,—I mean no classes of rights, which properly belongs to the individual man. It is true that the union of men even in the most free artificial associations puts a restraint on the power and free exercise of will of the individual members. And what is thus submitted to, when a person joins the union, is submitted to on the very



condition of living in and under the protection of organized society. But it is equally true that no *classes* of rights are renounced under the state, if it be a just state. If it were so, it would imply that it fails to fulfil the end for which its existence can be rationally justified. Society would be a refuge from complete shipwreck which is reached by throwing overboard a part of our valuable freight, and not an institution intended for the protection of all a man's liberty and power, for gaining all the ends for which reason pronounces that he exists. If it be said that in a state of nature he would be his own master so far as to decide for himself in many cases what law in society decides over his will, this would doubtless be true; the right of self-help, which a man attacked by a robber has, would then need to be put forth more frequently than it is under a regular government. If it be said again that he could do many things with impunity for which state law now punishes him, this also is true. But the question is not what his power is, but what his jural powers, his rights are, which, but for the state, might be limited by violence continually. Thus he could do many things under the reign of law which he could not do or would not dare to do in a state of lawlessness; and thus his power is vastly increased within an organized community, above all by the ease and safety of co-operating with other men. Or, again; will it be said that my liberty is actually and jurally restricted by state law, owing to the coexistence of others, my equals, under the same law; this again is true, but it is equally true that my liberty would be far more restricted in the so-called state of nature—unless I were alone away from mankind; and that the same obligations for respecting the rights of others would then be real, although they might not be understood.

*In the second place*, rights in artificial societies, or such as are formed by men for special purposes not directly pointed out by nature, are not derived by surrender of personal rights. Why then should those of the state be? Associations have the power under state law of holding property and of doing various things, as a community, which each of the

members could do for himself, besides others which he could not do. But no man necessarily surrenders his right of property when he associates with others in holding property, nor his right of publishing a newspaper alone by owning stock in a newspaper. He might enter into sundry associations, if there were no state, without renouncing the free exercise of those very rights which he exercises in conjunction with others. And yet as far as certain actions are concerned he can no longer be separate from a part of his fellow-men. It is as with states, which, when they make conventions or treaties, can indeed morally make no new ones inconsistent with those which still continue in force, but have the right of treaty-making in other respects as completely as before. And indeed, not only are no rights surrendered in a state of society which properly belong to man, but only in that state do certain rights begin to be realities or even possible. Without the state the rights of children as against parents would be absolutely unprotected. Without the state the right of association would be of no value, unless one might conceive of it as being instituted for self-protection, thus serving as a rocking-cradle for an infant state. It is indeed true that no association into which men can enter, natural like the family and state, or artificial like the various corporations, can exist without imposing some obligation on each of its members. In this sense even the family relation, which is a necessary one, may be said to be an abridgement of that *conceivable* liberty which men would have, if they had no parents and grew out of the ground. But it is equally true that the state has it for one of its essential objects to secure—not such conceivable liberty, but that which belongs to man as measured by his existing nature, capacity, and destiny. Everything then turns on the sense of natural rights. If our definition of these is the correct one, the so-called state of nature prevents their full exercise, and man is really in a state of nature, only as he is in a state of society,—only then can he exercise fully the powers of action to which his nature points him.

*In the third place*, states have rights which cannot be deduced from rights surrendered by individuals. It does not follow, because A. and B. make a contract, that their special rights and obligations continue precisely the same as they would be, if the two remained entirely disconnected; or that they may not have new ones. Take the case of a couple uniting in marriage. They live together and have children. In this condition new relations, new rights and obligations, most natural, begin to exist in consequence of their connection. Society is not the sum of its members but is something more, and is so for all time. Hence it is not strange that it can do what they, considered as individually apart from society, could not do, or could not rightfully do. Thus society in the state form has a right to hold wild land, but it cannot be made to appear that an individual in a state of nature could own more than he cultivated.\* Society in the state-form has a right over the lives of individuals, so far as, for instance, to punish wilful murder capitally. But the murdered man certainly did not give up his right to punish his murderer. He would have killed him if he could. Nor does it appear that men in general possess, or can give up, a right over their own lives. The right of punishment does not rest on such a flimsy foundation. The trouble that this case gives to Rousseau is instructive. Again the great right of administering justice is not drawn from the judicial prerogative of each wild son of nature, for it is clear that no man can be a judge in his own case. Two must agree if even an arbitrator is appointed. Society, in short, has more wisdom and might than the sum of its members, and much more than contending claimants in a given case. Its wisdom and might qualify it for judgment, and it brings these qualities to bear on all. *The right comes not from renounced power but from the state's being, in the natural order of things, God's method of helping men towards a perfect life.*

\* Here it may be noticed that the contract theory requires that men come into the social compact with their lands and all other property. The fair conclusion for the followers of Rousseau is against community of goods as an original institution.

## § 69.

Another way of accounting for the existence of the state and of civil order is to refer it to the ordinance of God. The state and the magistrate are of divine appointment. This in practice has more or less been used to defend the right of kings, and to justify hereditary right, especially if it has received some confirmation from the ministers of religion. In this there is truth mixed with falsehood; but the truth fails to account for that for which it has been used as a support. If every king were a David, believed to be set up by an express promise as the head of a hereditary line, that would be to the purpose; although the monarchy among the Jews at its introduction was rather endured than welcomed. But even by such a monarchy as that of the Jews in southern Palestine we could still deny that anything general and fundamental was taught us. David did not create the state, nor did his predecessor, but its foundations were laid long before. The will of God is revealed in history and the nature of man, which provide for the state, but do not provide for any particular form of state. The state is thus of God, as all magistrates are. The powers that be are ordained of God so far forth as some powers must exist; and all are equally ordained from the highest to the lowest. A state is of God, but not a bad, unjust, unwise state, as a family is, but not a bad corrupt family. God is in the world working his counsels, but not founding a particular state, in such a sense that the people may not have contributed to or altered or destroyed their constitution; nor bringing an ill-mated pair into the marriage union without unwise choice of their own. The fact that the state is of God, as a general institution is not a bar to the inquiry how a state has a right to exist, nor to the interference of the people, when the magistrates are corrupt and traitors, any more than the fact that marriage is of God is a bar to the separation of a married pair, when one of the two is faithless to their covenant.

Nor, if there has been in the world a theocratic state strictly so called, that is, one in which God was the lawgiver and founder, and in a certain sense the king, would that fact prove that all states must have the same origin ascribed to them. For first, the theocracy might be instituted for a special purpose never to recur again, and then it might be not so much a polity, as a collection of precepts ceremonial and religious, together with an immediate divine presence suited to various kinds of polities.

And, in the same way, we may say that if anything like a Contract, if it existed, only one step out of many. social contract has appeared in history, when men came together to form new instruments of government, the contract was only one form out of many, which have preceded some established constitution of things in the political sphere. Society never began by a contract between men or even families entirely independent, and separate. But in the later stages of society, the political action of the people may have taken a shape resembling contract, which, however, presupposed some existing organization and some political habits. Such transactions would be contracts of a people with a ruler, acceptance of the fact of conquest, union of confederates, colonies left to themselves by the mother country to build their own frame of government. In all such cases men were already under law. The preliminaries relating to what was renounced among the rights of a state of nature and what was retained were not so much as thought of.

It is further to be observed that contract is not necessary to make a government binding on the conscience, nor can the want of it justify revolution, as a matter of course. Dismissing the extended consideration of these topics until we speak professedly on the subject of revolutions, we add here two remarks. One is that the *assent* of the reason and conscience is necessary before any government can be said to have the highest right to exist, and the other that the right of opposing an existing polity and seeking to overthrow it is not justified simply by showing that it contains many bad features,

but other *practical* considerations also must be taken into account.

§ 70.

How then does the state arise? If the question meant how *in fact* can organized society be accounted for, The state's real origin. the answer is that the family supplies the foundation, that the wants of men, their needs of one another, The historical. their social nature, even their fears, keep them together, and that any society of men living together will organize itself by accepting principles of justice, rules of convenient intercourse, and methods of self-protection. These will appear in the form of custom and usage. The settlement of disputes between man and man, and protection of the community against enemies, will give rise to arbitrators or judges and to military leaders, both which offices might be committed in early society to one and the same person.

If, however, the question refers *to the rational grounds* on which we can justify the existence of an organized society, The rational. the answer is found in the nature and destination of men, in their being so made as to seek society, for which they are prepared by the family state, and in the impossibility that society should exist, be permanent, and prosper, without law and organization. The individual could make nothing of himself or of his rights except in society; society unorganized could make no progress, could have no security, no recognized rights, no order, no settled industry, no motive for forethought, no hope for the future. The need of such an institution as the state, the physical provision for its existence, the fact that it has appeared everywhere in the world unless in a few most degraded tribes, show that it is in a manner necessary, and if necessary, natural, and if natural, from God. It is as truly natural as rights are, and as society is, and is the bond of both. It is the means for all the highest ends of man and of society.

## CHAPTER III.

### LAND, SOVEREIGNTY, PEOPLE.

#### § 71.

THAT a state may accomplish its ends it must have adequate powers or rights of action. Its powers may be called rights like those of the individual, and these rights imply corresponding obligations of others whether these others are within the state or are outside of it.

Powers or rights of the state.

Relations to other states. If the state-making instinct is common to mankind, there will be a network of states over the world, which will have some of the same relations, many of the same obligations,—each to all the others,—that exist between individual men. But as individual men may have no intercourse, so it may be with states. And there is no obligation of states to hold intercourse, which is of such strictness that to live within themselves in entire isolation would be a ground for hostile proceedings. Yet mutual wants will, in the end, cause a society of nations, and usage or express contract will define its conditions. A universal society and the spread of all truth and improvement thus become possible. For this, as the parties are equal and under no common jurisdiction, rules embodying the sense of what is due between two or more nations, or conceding mutual privileges, will prepare the way, and thus we reach the possibility of a universal law of nations. But this law, which would define the rights of all nations, and what they owe to one another, although it is properly a part of the theory of the state, will be passed by in the present work, both because we confine ourselves to the nature and constitution of the single state, and because international law is to a great extent posi-

tive, and the result of special compacts, emanating indeed from the justice and humanity of nations, but not always deducible from abstract principles.

Vastly more important are the relations of a state to its To the citizens or subjects. citizens or subjects, than those which it sustains towards foreign powers. Besides these it has a close relation to the territory itself, and to those who are permitted to live within the borders of the state who are not citizens or subjects but sojourners or resident foreigners. These latter classes have a double connection with states, one with the place of their nativity (which has been regarded extensively, until quite modern times, as almost inalienable), and another with the place of their residence, where they are subject to laws, but are generally for a time, if not always, without political rights.

The relation of a state to its territory is not *dominium*, or To the territory. ownership, but jurisdiction and a certain control for objects of public or common good, which in some cases supersedes the control exercised by the owner. Yet always just states of modern times, since the conception of private ownership has become universally recognized, by making a compensation to the owner for the use of his lands or his movables, acknowledge that he is not a tenant at will, but something more. We have already (§ 26) sought to show that private ownership of land has its limits drawn by nature, and that such a claim and power of control give way before another private right, that of passing from place to place. The doctrine that there is a state right of dominion or of ultimate property over all land within its territory is based only on cases which grow out of the necessity of locomotion and of public defence and extreme need.

Yet the opposite doctrine that the state or prince was the ultimate proprietor of all lands has had a wide influence. In Rome, at first, property was conceived of as belonging to the state, and this conception was confirmed by the fact that all conquered territory was actually of this description. Private persons *possessed* it, held it by use, but did not own it. (Comp.



Puchta, inst. i., § 40.) Under the emperors it came to be the jural theory that the emperor stood in the relation of proprietor towards the lands in the imperial provinces and in Ægypt. In fact after the changes in the constitution under Diocletian and Constantine, the distinction between the state's and the emperor's property was quite obliterated.\* But we see this confusion of supreme jurisdiction and property prevailing in feudal times also, where it lay at the bottom of the whole system. The suzerain parted with lands acquired by conquest by and for the nation on condition of military service, and the lands reverted to him when this service could no longer be rendered. He was thus the greatest and highest proprietor, yet the allodial properties, which existed in large tracts in some parts of Europe, show that this doctrine of the suzerain's ultimate ownership was not without exception. No feudal or modern state, I believe, ever in practice, interfered with private titles on this pretext of an original state ownership, except in cases of necessity and with offer of compensation.

*Conquest* itself is, when viewed from a jural point of view, a weak right. It does no justice to any individual rights whatever; at least according to ancient practice, under which the conqueror was absolute master not only of the soil but of all things that could be carried away, and of the bodies and lives of prisoners. Mere superior power cannot of itself be the foundation of rightful government. But, as far as international relations are concerned, third parties accept of an established order of things which does not injure themselves, and conquest is generally followed by the formal consent of treaty-making powers concerned in the question. As far as the people of the territory are concerned, the spoil and prisoners have been looked on as compensation for the wrongs and expenses of a war in which the victor was on the right side, while the remaining inhabitants are usually left in the enjoyment of their property and

\* Comp. Mommsen Röm. Staatsr., ii., 2, p. 1008.

of some political rights, although it may be with heavy political burdens.

Conquest is jurally and morally a weak source of right, which can impose a burden on no man's conscience, except so far as a mere balancing of evils is concerned. The persons affected were for the most part innocent, they had no share in causing the alleged wrongs, they have not been consulted as to the transfer of their allegiance except in quite modern times. Such a source of right ought not to be pleaded beyond the mere fact of giving rise to a new state of things which it is inexpedient to alter.

It is worth while to remark here that in many nations the prince's relation to the territory was quite subordinate to his relation to the people. He was king of Israel or of Judah, king of the Medes, king of the French, or the Saxons, but the land got its name from the nationality and gave no title as first to the sovereign. The people was the prominent idea in the term *state*, and not the territory. Territory pertained to the nationality. The king of France meant at first the king of the country where the Franks lived, but it may have been aided in supplanting the expression "king of the Franks" by the opinion already referred to that the land belonged to the sovereign. (Comp. Maine's *Anc. Law*, ch. iv., p. 100.)

### § 72.

The words sovereign and sovereignty are applicable to persons and to states; moreover from the intimate connection between the state as a political organism and the territory where the laws prevail, the territory itself may be called a sovereignty; or the expression may be explained in the last case with greater reason as denoting something held in sovereignty, a province or district which is not dependent. The first notion in the word was that of being above or higher than others in power and jurisdiction. Thus the sovereign ruler is above all other officers or magistrates and above all the individuals belonging to the

Sovereignty and  
sovereign states.

people. The quality of sovereignty, however, does not necessarily imply unlimited power or unchecked power; much less undelegated power. It can be used of all kingly and imperial power, from that of a chief officer of state who is absolute, to the king who can do nothing without a legislative assembly. It has not, however, if we do not err, ever been applied to the head of a democratic state whose office ceases after a term of years. For the most part, when used at present, it is either a term of dignity denoting the superior person in the state or nation, or else it is used of a ruler who can control the policy of a nation towards other nations in matters of diplomacy. Thus the king or queen of England, although having in matter of fact an exceedingly limited power, is called sovereign to denote the dignity of the office as above all others in the kingdom, or as having constitutionally the power to control foreign relations, a power unchecked in theory, yet practically not expressing the sovereign's personal will.

The abstract conception of sovereignty is thus unfolded by Mr. John Austin in the sixth of his lectures on "the Province of Jurisprudence." (i., p. 226, ed. 3.) "If a determinate human superior, not in the habit of obedience to a like superior, receive *habitual obedience* from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. To that determinate superior the other members of the society are *subject*; or on that determinate superior the other members of the society are *dependent*. The mutual relation which subsists between that superior and them may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection." This definition looks at fact simply and has nothing whatever to do with right. The *habitual* obedience would seem to be absolute, but persons called sovereigns at the present day have no right to require habitual obedience except within a very narrow sphere. *Subjection* is now used, if used at all in politics, of relations that are not personal, the term being

retained while the feudal notion has left it. And again, few, I presume, of the subjects of the sovereign of Great Britain would allow themselves to be called dependants on the sovereign.

But what is the sovereignty of a state, and how does it comport with the sovereignty of a ruler? In the intercourse of nations, certain states have a position of entire independence of others, and can perform all those acts which it is possible for any state to perform in this particular sphere. These same states have also entire power of self-government, that is of independence upon all other states as far as their own territory and citizens not living abroad are concerned. No foreign power or law can have control except by convention. This power of independent action in external and internal relations constitutes complete sovereignty.

This definition of sovereign states would be inconsistent with the claim of sovereignty which has been set up in this country by communities called states, and in the treaty of 1783 with Great Britain called sovereign states; which however, never made a treaty separately with foreign nations, never belonged in their separate capacity to the community of nations, and are incapacitated by the constitution from performing any international act; and which, moreover, by the same constitution are precluded from doing many things within their own territory and in the exercise of state power, which sovereign states do and must do. This use of the word *sovereignty*, and indeed, the use of the word *state*, shows the poverty of political language, but has helped on far greater evils than that of supplying false premises for syllogisms ending in secession.

Is the sovereignty of the state a term emanating from the sovereignty of the ruler, or is the ruler properly called a sovereign only as representing the state?

The state stands for an untold amount of good to be secured to present and future generations by a just and wise government, at the head of which the ruler is placed. He is a means for a great permanent end; he dies and some one

else succeeds to him, and not by his will for the most part but by law of the state. He disobeys the law and seeks to overturn it; another is substituted for him, and all things go on, it may be, better than before. All this shows that the ultimate power in theory rests with the state or the people constituting it, and that the prince is a delegate or deputed sovereign. This of course touches the source of his power and the object for which it is granted. The power itself may be absolute, and the grant may have been made in remote ages. The prince is a vicar of God just as receivers of tribute are "God's ministers, attending continually for this very thing." But he is such because the state and its authority is from God, and because he fulfils the end for which the helm of state is entrusted to him. If some democrats of the French school have talked of cashiering kings, the grossness of taste and want of reverence for old dignities was the result of an ill use of sovereign power. If the French kings had felt that they were created to minister rather than to be ministered unto, that their power, called sovereign, was delegated to them, the outrages of an extreme reaction against their sway might have been spared to the world.

### § 73.

The question can now be asked, if the state or the people of the state is sovereign, who are the people?

What is the people?

The answer will vary with the purpose which dictated the question. If the question is who are the people for whose sake the state is founded or administered or reformed, the answer must be "every man, woman, and child, now living, and all that shall come after them." If, again, it be asked, what is intended by a public act of a people occupying a large territory, as, for instance, the adoption of a new form of government, or the choice of a line of kings, the answer must be that if the people act at all, they act either in masses constitutionally gathered at various points through a country, or by representatives constitutionally appointed, or appointed in some of those rude methods of which history furnishes so

many examples. The people, in this case, will be a much smaller body, as far as active participation is concerned, than the whole. They will be the active citizens, or the *cives optimo jure*, those qualified to do political acts. In general, all political acts which are done by the representatives of the people are popular acts. For the most part even in democracies the *people* are a small body compared with the whole number of inhabitants. In Athens, the *demus* or active people, the assembly of citizens, was never over 20,000, and seldom were more than 6,000 present in public assemblies. Thus slaves and foreign residents, all females and male minors, were counted out. The Roman *populus*, after the *plebs* reached political power, was the mass of citizens able to vote in the comitia. In other governments, where suffrage has been more extended, the people, as a community invested with political rights, will include one quarter, at the most, of the inhabitants, but a smaller proportion generally are found at elections. Then this same people, having chosen their political officers, no longer act in person, but entrust the greater part of the power in the state to representatives; and this is inevitable in all free states excepting such as are confined to a city and its near neighborhood.

There is also a distinction of great importance to be made between the people considered as a mass of individuals, and the people acting collectively in a political community. The individuals are those who have rights, obligations, and wants, who are united in a public body, and from whom public power, in theory or in fact, emanates. Besides these, there is no third political entity such as the people of New York or of Chicago, except so far as municipal powers are given to these communities. It sometimes happens in free states that assemblies of men, gathered together by private persons, call themselves *the people*. But there is no people except the political community and the individual members of the same. All other assemblages for the most innocent purposes have no political voice whatever. They may have a right to assemble, but they can decree nothing, they can only express an opinion.

The state (comp. § 57) must be an existing entity on some part of the earth's surface. If it be really a state, no other body having the same properties of a sovereign state can co-exist with it within the same bounds, or exercise any jurisdiction nor do any political act there except by its consent. It may be limited by its constitution, as to the actions which it can perform within its bounds and its amount of jurisdiction, as well as to the extent of its power in dealing with other like states, but it necessarily is so far supreme in a certain territory, as to exclude in certain things all other power. As for territory and the question by what right does a state exert its state power there and no where else, except in a limited degree on the high sea and wherever external war requires, the theory of the state is entirely silent, just as social contract and other hypotheses of a state's origin are silent. Historical causes running through ages make it easier for men within certain bounds to unite than within certain others. Causes of a violent kind as conquest, others more just as the accident of family inheritance or mutual security against a strong power or assimilation of social traits, bring political bodies together: other causes dissolve political unions. But the fact must be accepted, and the long existence of a government doing its proper work gives it rights, whatever may have been its origin. It has a right to authority in a certain territory because it is in possession and does its work tolerably well.

Relations of a state  
to its territory.

## CHAPTER IV.

### SPHERE AND ENDS OF STATE.

#### § 74.

A QUESTION of extreme importance in the state is, what is the proper sphere within which state-action ought to move? Or the question may be put in a form different in terms but in substance the same, what are the ends which a state or nation ought to seek? Does it exist only to protect the rights of the individuals living within the territory—to defend their bodies and goods, as the expression is; or must it have a wider care of their welfare, reaching to all the interests of education, culture, morality and religion, to the assistance of the poor, to the encouragement of industry and of intercourse? Still further, does the office of the state require it to shield the individual from *impending* evil, or must its intervention begin, when the rights of the individual are invaded? With our view of the extent of the state's sphere, our view, also, of the duty to punish offenders of the law, must vary. If there were no duty but to protect the body and goods of individuals, it does not appear how there could be any criminal law, which contemplates the state or the people as the aggrieved party, because the reparation of the individual is not punishment but payment of due. Thus we have, on one construction of the state, a community watched over in all its interests, a *régime* going far beyond the demands of justice and of security, the perpetual presence of power which may meddle with the affairs of private persons even in the exercise of their acknowledged rights; or, on the contrary, a government where all forward movement must come from single persons or bodies, while the state itself will be as much out of sight as possible, and thereby fulfil



its true office of only seconding and securing such as need its aid.

It is impossible for those who seek to carry out the narrowest view of the state's sphere to make a consistent explanation of what they themselves hold to be necessary. We might ask them why, on their theory, it is not enough to make rights real by opening the courts to the wronged, and helping them to right themselves by the servants of justice enforcing the judicial decision. Why prevent the occurrence of wrongs by any kind of force like that of a police? Or we might ask them whether any government has existed, any code of laws ever been framed, in which "body and goods" alone were the subject-matter of legislation. It is a great thing to allow the individual to develop himself in the community, to cultivate his own individual powers in his own way; but it is of equal importance to mankind, to the progress and welfare of the world, that the interests of the whole body should be cared for. The problem as thus presented seems to combine two opposite tendencies—a care for the whole and a care for the individual. How to adjust and unite these, so that the individual shall not be unduly controlled, nor the general welfare neglected, is a difficult problem, but it must be solved, somehow or other. (Comp. what is said below, §§ 76, 77.)

It may be of use at this stage of our subject to attempt to arrange the different particulars which make up the state's offices or duties, without counting those relating to external bodies or governments.

(1.) First we have the office of giving redress to the individual or family or association which has been wronged. Of this enough has been said, and that this is an essential office of the state will not be disputed.

(2.) It is also properly an office of the state to secure the individual from injury beforehand, to *prevent* the invasion of rights. Otherwise we must say that all force, as far as the individual is concerned, is to be exerted in enabling him to obtain redress and that he ought on a right theory to have no

protection until he is injured. But surely no one can maintain this proposition. The guarding against wrong is prevention of wrong; the sense of security is essential to all steady prosecution of the work of life; if the public force cannot keep off violence but only redress the injuries occasioned by it, what will protection be worth in cases innumerable. Prevention is better than cure. The same force that gives redress can save the necessity of seeking redress.

State action, in all other cases beside these two, does not provide for the just claims of a single individual family or small community, but for the wants or rights of the entire community. Whatever else a state does, may be said to aim at the good of the whole first, but its office as defender of justice aims originally at the good of the personal subject of rights. *In the other work of the state it may do too much or do too little and yet be a state*; in the work of protecting rights it is doing what no state has a right to neglect. *One state* may have no public system of education, another may have a complete one; both are states, if they maintain justice, but one is less perfect than the other, because it fails to make provision for the education of all. *Again, much of the work except the administration of justice may be concurrently undertaken by individuals and by the community*, as will be the policy more or less in all free governments. A person can found colleges, support the poor, cherish the fine arts, and he may do this better than the state can. So that there may be in civilized societies a continual doubt whether on the whole true progress can best be secured by one or by the other of these two agents. But on the other hand the state is the monopolist of the administration of justice, and for individuals to invade this province would be to attempt the state's destruction. *Finally, the state's action in some of these departments may be very limited and dependent on circumstances*. There may be no poor to receive public charity, no sense of the value of the fine arts, and no need of public and connected ways of communication.

(3.) With these explanations we add *in the third place* that

the state's sphere of action may include a certain degree and kind of care of the *outward welfare of the community*, as of industry, roads, health.

(4.) It may embrace all cultivation of the spiritual nature by educating the religious nature, the moral sense, the taste, the intellect. It may enforce moral observances, may protect and even institute religious worship, and may provide for the wants of the needy and the distressed. In other words it may express in action the intellect, the aesthetic feeling, moral sense, religious feeling, and humanity of a community of men. *It may do all this*, I mean to say, without necessarily going out of its own proper province. Whether *it ought actually to provide for*, as well as protect, all these great interests is a point to be discussed in the future. They are named at present as the departments from which by no just theory the state can be excluded. And if there is any need of limitation of state functions in order to protect the individual within his sphere of free activity, it will be considered hereafter.

In order to do its work, the state must have adequate means at its disposal for the purpose of protecting and securing all these interests. These means in general are *armed force* for preventing or redressing wrong from within or without; *taxation* on some just principle, and a *police power* for the purposes of general security. More important still is the state's power of *punishing public wrongs*, which is a different form of justice from that which consists in repairing private wrongs. (Comp. § 17, § 105.)

### § 75.

But before entering into the discussion of the office or sphere of the state, it seems necessary to show Office of the state far wider than to protect individuals. that its protection is required for something more than what may be called the jural interests of individuals or of associations of men. In attempting to show this, we grant that there may be plausible explanations, on the ground of the defence of rights, for many activities of the state, which are often referred to its office of protecting and

promoting the general welfare. Thus its interference in the education of the young may be explained from their right to be educated by their parents who are unwilling or unable to discharge their obligation, or also on the ground that education is a means for securing and preventing infractions of rights. A police at night may be defended by the right of men to have undisturbed sleep and exemption from fear. Sanitary regulations may be explained on the ground of the right of life. Moral legislation may be said to aim at keeping the young or family relations in their rightful condition; and even public religion may be claimed to be the great ægis of rights within the state.

Some of these explanations take the ground that certain state agencies immediately protect individual rights. Others are vindicated because they prevent infractions of rights. But the moment you go beyond that action which directly repairs or redresses injured individuals, you reach such as has no particular person for its object. Thus a preventive police has generally no wants of some special person in view, but the possible wants of a community. This power, then, contemplates a society or a portion of it as a whole, and you must either approve of it as such, or must confess that it goes beyond the state's legitimate sphere. In the same way, sanitary law or police has no particular person or even the present time in view. If individual householders affect or endanger health by throwing garbage into the street, they may commit an offence, but against whom? Not against any person who cannot show that that garbage affected his health. Much more, when swamps are drained and sewers built, no one person's rights are provided for; and it cannot be shown that the state or the municipality created by the state, does an injury to an individual or household by neglecting this part of its duty.

The jural relations of men are fulfilled mainly by *non-interference*. The right of life does not require my neighbor to take care of my life or to cure me when I am ill, but not to kill or wound me. If he owns a swamp which gives me the

malaria, he is not committing an injury in letting the swamp stay as it was when he bought the land ; if he directly propagates disease with his eyes open by foul drains when he could prevent it, he may be amenable, not however for injuring any particular person but for a wrong done to the community.

The needs of human society are far from being fully met by the jural part of legislation which allows an injured party to complain of another. But can voluntary action or association supply the deficiency ? They can do much ; nay, even within the jural sphere they can supersede much of the action of public courts by means of arbitration. But even in societies where this voluntary power has free movement, there is much which it will not do, and only at an advanced state of state-life in free communities do associations put forth their strength. There are many enterprises of importance, which promise no speedy remuneration. There are others which cannot be carried on by associations without the state's sanction or the consent of persons who are not partners. There may be others still too vast or general for any but the state to carry through, or which would confer too great power on private corporations. But for the control of the state over them they would cut it up by conflicting private interests, not having the power, but having all the jealousies of feudal barons.

The state is, in truth, a large association, stretching over a vast territory, acting by itself and empowering others to act, leaving individuals in their freedom, but providing for numerous wants of a whole community, instead of the one or two with the relief of which ordinary associations are entrusted. It can with ease, through its general organization, touch society constantly at a multitude of points, while jural institutions touch them at very vital, indeed, but at single points. If a great association under private control and the jural state were to attempt to get along together, it would manifestly be a failure. Sometimes a single association incorporated by the state, although limited in its range, domineers in modern times over the state itself, until in a conflict it is crushed. It is not conceivable that an

The state is a great association.

association, so vast as that we have supposed, should not usurp power, if an organized state were in existence, or be developed into an organization, if there were none. The interests of men demand unity of law and one power everywhere, in order that life may be on one undisturbed plan, so that a usurper, who would introduce it where it was not, would be submitted to in his lifetime, and be venerated afterwards.

It is hardly necessary to say that these wants in detail cannot be met by individuals whose power is limited and local, or by a multitude of small communities or municipalities. These last may be necessary means for such an end, as servants of the state, but there is need of a power giving unity and bringing all the portions of a territory into close relations, binding them together for other purposes, as the jural state binds them for justice. One organized power must do all, both the jural work, and the work that embraces other great interests. This would tie a people together for all time. It would use its power, necessary for the administration of justice, in securing other great good of various kinds, thus preventing the necessity of two great powers which could conflict. It would or might leave the path open for the action of individuals or associations, in a wide part of the field in which its own agency is put forth. For, as we have said, in a part of its sphere it may act concurrently with individuals or associations, or act through them, or not act at all; and it is no where necessarily exclusive and a monopolist except in the departments of justice and of public force:

It is further deserving of notice that if men are associated in a state and form a community, they will carry Humanity expresses itself in the state. their natural feelings with them, so far as these can be subject to common rules and common action for this community. A union of men for instance will have sympathy for distress far more than men in a savage or semi-savage life, and this impulse may be found to be best met by joint action. The feeling is not that a poor person, or orphan, or widow, has any right to help in the jural sense; but it is a

moral emotion and therefore must move to action according to its strength and the power of the individual to relieve that which appeals to his humanity. The poor man or orphan cannot create obligation by his wants, but the very word *humanity* shows that the motive for action lies in man's nature, which nature, the more civilizing are the influences which cultivate it, will be the more prone to express itself by individual and by common action. The *common* movement may, if one chooses to think so, be a supplement to individual movement, but the fact, that in a highly cultivated christian community it always has expressed itself in usage and law, shows one or both of two things, that an advanced society feels newer and stronger promptings towards such works of humanity than it did at an earlier time, or that it has found out by experience that *the whole* by its superior organization can do some things to which individuals are unequal.

Will it be said that by such state-action individuals are not alike benefited, and so there is a sort of injustice in it? The ready answer is that this is unavoidable, and that no one of these modes of action ought to pertain to society and the state which on the whole does not contribute to the common good. When courts are instituted for the redress of wrongs, multitudes go through the world who may never have been wronged, and yet were there no courts they might have been wronged daily. Public roads are of no direct good to those who never travel. Great breakwaters and a system of light-houses help shippers only in the first instance; and men complain of taxes for such constructions, forgetting that, apart from humanity aiming at the safety of sailors, the prices of imports would be affected by the greater risks of vessels.

But more important still is the consideration that a community, whatever there is of voluntary action in forming it or in it, is a *natural* community called by natural law into being,—and indeed in some sense is a *supernatural* community, since without or against its own will perhaps, and certainly for the most part without precon-

The state or community has rights.

ceived theory, it is formed into a community and into a political life. It has thus a destination and therefore rights as a whole, it must have powers to fulfil its destiny, it has a sphere of action in which not only the individual can develop himself, but there can be progress such as lies beyond the reach of the individual or of associations.

It is impossible, then, to draw exact lines between those kinds of state action which are needed by the individual and those which directly concern society. If in theory they could be separated, in practice they would concur or thwart one another. If any one finds his mind satisfied by the explanation of state-action for the *whole* on the ground that it helps to protect the individual rights, or defends the body and goods by its indirect action, he is welcome to his narrow opinion. We must believe that it is a great function of the state to superintend general objects and interests for their own sake.

The sphere of the state, then, may reach as far as the nature and needs of the man and of men reach. I do not say *must* but *may* reach; and the people, the age, the sentiments expressed in a constitution must decide how far it actually *shall* reach. If it is a need growing out of man's nature that he come into intercourse with his fellows, the state may or must have a constant supervision of those necessities by building roads or having them built, by improving harbors, by coining or fixing the standard of money, by making commercial treaties with foreign states and the like, yet so that freedom of trade in peace may not directly or indirectly be interfered with. If compassion is a part of man's nature, and the people of the state belong to it and to each other as they do not to any other part of the world, the state may, for anything that appears, administer to the wants of the poor, yet so that private persons or unions of persons may do the same. If religion is judged to be essential for the well-being of a community, the state may provide, for any thing that appears, for religious order and worship, yet so that freedom of worship among private persons or unions of persons may not be interfered with.



In those departments of its activity where the state, individuals and associations can concur, as in helping the poor, the state evidently does not do this work instead of individuals, for then their additional help would be superfluous, or to supply what they have failed to perform, for then there should have been an equitable apportionment of burdens on each person ; but because the state is a close union something as a family, having from its compact organization and from its ends the power of doing many things better than any one else can. The rules to govern its action are its ability and the necessity for its action. If so, the duty, depending on its own judgment, is clear.

The state in doing the work thus defined is a means to an end, not an end for which the community exists, nor a means for the ruler to use according to his pleasure, but a means for the community that it may do its appointed work in the world. As an indispensable end, without which the community could not subsist, it has rights and obligations ; its rights, (as of property) it can enforce against its own subjects and foreign countries ; but its obligations it can be compelled only by foreign countries to perform ; it can resist with tolerable impunity just claims of a domestic nature, such as the demands of home creditors. But this is the impunity of power ; every righteous state is bound to provide a way by which all jural claims upon it can be satisfied.

### § 76.

In exercising its power a state may come into collision with the rights and liberties of individuals. A very important point confronts us here, namely, to what extent, if to any, the rights of the citizen must be limited by righteous law, and another, partly theoretical but practical also, of equal importance, touching the limits of state power. These points bear upon one another, for the limits of state power, if fixed at all, must be fixed by taking the rights and freedom of the individual into view. We propose, however, *first*, to consider at some length, some of the departments of

Departments of  
state action consid-  
ered.

state action which have been already simply mentioned, and in connection with them to look at their bearings on personal rights, then to inquire into the limitation of state power, the organization of the state, its punishing power, and to close this part of our work with some remarks on political ethics.

1. Our first branch of state action was that redress to the wronged which is an office the state cannot neglect. Here the creation of courts open to the humblest as well as to the highest is the state's principal obligation. It has a right to try offences against itself or its government, but only in an equitable way, leaving open to the accused every means of defence which can be used between man and man. It is bound to appoint judges who have no biases, and to keep them from biases by all the arrangements of the courts. It is right for it also to provide the poor with a helper or counsel when they can pay for none in all criminal cases. Some of the provisions which belong to this head are what have been called political liberties, and will be considered in another place. (Comp. § 92.)

2. The state *must* aim to secure the individual against invasion of his rights. This is to be done by an armed or a police force ever ready to be put into motion towards any quarter where danger is threatened. But these forces are needed for other objects also, and will be best considered in connection with the power of taxation and other powers by which the state prevents evil or carries out its will.

It may however be observed in this place that such defence of the individual, provided for beforehand, is relatively of far greater importance in civilized lands, than the protection against public enemies by an armed force. The security provided not only prevents all aggressions to which the defenceless would be exposed, but also enables industry to calculate for the future and to feel no concern for its own protection. The same present power inspires the evil-minded with fear, and those who are engaged in their life-work with constant trust.

## § 77.

3. The state *may* provide for the outward welfare of the community or of its members as it respects industry or labor and capital, ways of locomotion, and health or sanitary condition.

3. State may provide for outward welfare.

It may, indeed, be contended with some reason, that in assigning these officers to the province of the state we have not travelled beyond the limits of its *necessary* action. In regard to industry or the rights of labor, it may be said that very much of what is called its protection is the removal of impediments out of the way of labor which the greed of capitalists, or laws made in the interests of the upper classes have created. And on the other hand it may fairly be contended that a protective tariff ought not to be thought of, provided it throws obstacles in the way of all other industries by partiality to one. So it may be said of roads, that they carry out practically the right of locomotion, which would almost cease, if the traveller either trespassed on the lands of private owners or went through woods and over streams without a beaten path or bridges. And again, the care of public health, it may be urged—but with far less reason, except where a man by what he does exposes the health of others—is but a protection of the right of life. But, on the other hand, it is fair to assert that states can do much in the way of clearing the road of industry from obstacles, aside from those provisions which consist in defending the rights of industry against wrongs arising from usage or ancient law. For instance, it is not so clear that the state is bound to do away with the truck-system, so-called, because it interferes with the rights of labor, as because it is inhumane, and a similar remark may be made in many other cases. And often there are concurrent reasons for similar public action. Again, the right of locomotion does not, as I conceive, require the making of roads and bridges whenever the right could not otherwise be realized; and the construction of roads up to every man's door would not certainly be contended for. Sanitary regulations tend to preserve

health and life, but only in an indirect way, and so they are not a necessary part of state-action. It is not evident that a swamp ought to be drained by the state or under its direction by the district for the purpose of diminishing malaria because the right to life requires it, any more than physicians and medicine ought to be supplied by the state because the right to life requires it. The right to life is of another sort ; and it does not say to the state "thou shalt keep this or that man from sickness such as the soil or climate may bring upon him," any more than the rights of property say "thou shalt keep this or that man from poverty occasioned by his neighbor's superior skill."

This return to our discussion on such a point may be tedious, but we plead an excuse for it for two reasons. First, it is dangerous to stretch the limits of the state's necessary action, which would tend to make individuals and associations retire from certain fields where they are at home ; and the second is to show the impossibility of drawing a clear line between the grounds on which particular regulations for the public welfare may be made. The jural relations of man and his other interests may concur, in one case the former pleading aloud and the other acting as assistants, in another case the general interests of a community standing foremost and rights seconding them from behind.

### § 78.

In considering these rights separately, we remark first, in regard to *industry*, that capital needs little more aid than that furnished by the free use of courts and the freedom to change its form and place at will without interference on the part of the state. Prohibitory and restrictive laws are its great enemies ; its principal injuries come from state care and from taxation, which will be spoken of elsewhere, and from the fetters placed upon it by unwise and unjust state policy cherishing one industry at the expense of the rest. Positive care on the part of the state in facilitating intercourse, whenever this requires public action, is

Some kinds of aid considered.

generally for the good of all the interests of a people alike and not peculiar to those of industry. Whether this care ought to extend beyond improving harbors, and making treaties of commerce with foreign states; whether it may build ports or roads or canals, or, if not, may delegate the power to do this to private corporations,—which, in principle, is the same with direct action—will depend on the decision how this can best be done, and how, if the state undertakes such works, this will affect its power and influence, as weighed against the freedom of the people. In general it may be said that public works, either necessary for carrying on the government or for general defence, or, if of immediate advantage to industry, yet surpassing the powers of private persons single or combined, may be undertaken by the state. The last only of these classes of works has any direct connection with the protection or encouragement of public industry. Prohibitory legislation in regard to capital, especially as it respects the maximum of capital or of land which an individual can be allowed to own, is a political measure, and deserves to be considered by itself. The interests of the laboring class need the state's protection, in order that in a strife with capital it may not be oppressed. But no class of persons has any right to the care or aid of the state more than another; the laborer cannot claim it at the expense of the other portions of society; he ought not to *demand* it, even in the shape of work, any more than the shopkeeper to demand customers; but the aid of the state (apart from the duty of humanity), must mainly consist in preventing him from suffering by unequal contracts with his employers, and in raising his condition so that he can know where to get work at a better reward. All this, however, be it observed in passing, is to be set to the account of the general interests of the state and of a humane spirit rather than to the defence of rights. But the oppression of children, by an undue amount of daily labor, not admitting recreation and training in knowledge, is what the state ought to prevent, as being the guardian of children's rights even against its parents.

In other particulars the assistance of the state will be of the greatest use, if not of prime necessity. We give as an example what it can do in aid of the operations of exchange. Communities have been led by their experience of the evils attending the operations of simple barter to search for some substance which by its inherent qualities can serve as a measure of value and a medium of exchange. Such a substance states have had no agency in discovering, and they certainly have no right or power to assign these important functions to any thing which they may please to select. But when a substance, like gold or silver, is by common consent admitted to have uses as a measure of values and a means of exchange, the state can add to its usefulness by certifying its purity upon its face, by giving to it convenient and proportionate forms, and by making it to pass in payments of all debts where some other substance was not chosen for this purpose by the contracting parties. Beyond this a state cannot go without injustice ; so far it must go, or traffic and with it all industry will languish.

Omitting to say anything further of ways of locomotion, we pass on to sanitary laws, which until modern times have not, we believe, had a large share of legislation given to them. What the Greeks did, in the way of training the body by public provision for gymnastic exercises, was dictated not so much by care for health, as by the desire of forming free citizens into strong and beautiful men, fit for war and for a harmonious dignity of life. The modern health laws have it for their motive to diminish the amount of disease, especially of the malarious kind, to prevent the introduction of diseases into a country and to give such instructions to the people, especially to the poor, that they can guard against the avenues of illness. Sanitary laws extend to the prevention of the spread of cattle-plagues as well as of those which attack human beings. The work required by them is chiefly performed where masses of men are packed together ; in the country, where men live separate, they are little wanted. They fall thus into the hands of municipal corporations for

the most part, and run into a multitude of details. As such laws are for the benefit of all alike and as those who are benefited can be made to pay the cost, they are willingly submitted to by an intelligent people. And yet the power to control the construction of tenement houses, for the purpose of general health, is one of the most striking interferences with an individual's employment of his capital.

4. It lies within the province of the state to provide for the intellectual and æsthetic wants, and for the The state may provide for inward or spiritual wants. cultivation of the moral and religious nature of its citizens or subjects. It may also perform the office of humanity towards the poor and the unfortunate.

Here a wide subject opens before us and one full of controverted points. The main questions concern the relations which the state ought to sustain to morality and religion. But even into the subject of education by the state controversy enters. The principal points of difficulty will appear and be discussed under the heads that have been named. We consider first the state's relation to religion.

(a) Here and in what follows our difficulties arise in part State's relation to religion. from the nature of the Christian religion. Being in its essence a religion acting by truth on the believing mind, and by revealed relations of the soul to God on the affections, Christianity provides a cultivation which will naturally bring the intellectual and moral discipline of the young mind under the care of Christian teachers. There has thus most naturally arisen a kind of division of labor between the state and the Church, the former taking care of "body and goods" and the latter of mind and heart. All higher education until the sixteenth century was in the hands of Christian teachers, especially in universities under Christian control, and it seemed to be necessary to train up the young in secular learning, morality and religion together. Thus the field was occupied, at the era when advancing culture originated or perfected a great many sciences, which had nothing to do with religion or morality, and would be true if there were no religion nor morality.

The domains of secular science being enlarged and its importance increasing, it took its place by the side of, and not in subordination to, theological science, and churchmen trained under the old discipline were not fitted for such instruction. A second difficulty grows out of the almost necessary difference of opinions in regard to doctrine and worship which will arise when thought is untrammelled. The theory of religious truth is not filled out in the Scriptures, and men can hardly avoid seeking to supply what is wanting, until a system, partly human, claims from its connection with the revelation to have an almost divine original. Free minds protest against this and give occasion to dissensions, and the dominant party seeks the aid of the state against minor sects, if any alliance between the state and the church is allowed to exist. Or, again, worship and discipline acquire a peculiar importance, as soon as outward unity among Christians is felt to be necessary ; and hence the church claims the recognition of the state for its order and rites against all disturbing innovations. The state may become, in the interest of the church, the oppressor of the individual, by taking away his rights of worship and of free expression of opinion on one great class of subjects. It may go further, and even require of him religious observances, which he is unwilling, or feels himself in conscience bound, not to render. I say nothing of other relations of the state to the church, which consist chiefly in giving to it as to other associations a more or less unlimited right of holding property and other necessary protection.

The same duality which thus appears in Christian states, as far as religion is concerned, will show itself in relation to moral education. The Christian religion is permeated with moral ideas, which reach to the innermost motives of man. It is natural, therefore, with such an agent all ready to act, that the modern state should in a great degree have deserted the ground taken by many antique states, of forming the character of the young by its own institutions, and should leave to a strong power which it respected and felt the need



of, the care for the children of the people, as far as they were cared for at all. This was the more natural course for the state, as the church, in spite of its mediæval independence, did inculcate on the people and on the young, the duty of obedience to the ruler and the law, as long as civil order did not clash with religious.

All this has been modified since the time when the reformation, the rise of religious sects, the spirit of free thinking, free emigration, and free residence of foreigners, have brought all sorts of opinions together in Christian countries, and since knowledge has vastly outgrown its ancient limits.

And yet the state can scarcely fail to have a fixed opinion on these three points, that a corrupt morality dissolves all the bonds of the social fabric, that a moral education of the young is the strictly essential condition of a stable and progressive society, and that religion, by its elevated truths and motives, takes the leading part in forming the character of a law-abiding useful citizen, and with this in view, ought to be one of the prime factors in education. The same opinion must be entertained now which controlled the policy, if not the polity, of the ancient states,—that state order and existence are dependent on the agencies just named; the difference in the two cases being that the relations in modern states, especially to religion, and in a degree the doctrine of individual rights, have taken another shape.

What, then, has the state the power of doing, consistently with its nature and objects; and what ought it to do? Ought it to go as far as its legitimate power can permit?

1. With regard to the state's relations to religion I am free to avow my opinion that it *may*, without going out of its permitted path, not only protect religion in other ways, but may also support an established church. At the same time I believe that, as a practical question for the present in some societies and for the future probably in all, men will come to the opinion that the institutions of religion can be best sustained by combinations of private persons; that the state must protect whatever is of an outward nature in those institu-

tions, such as church buildings, and various endowments, together with the right of fixing a limit to the amount of ecclesiastical property in order to secure its own free action and to prevent an *imperium in imperio*; and that further than this it ought not to go.

On the other hand it is not theoretically wrong for the state to do what the Jewish theocracy did, or what all Christian states have done until comparatively modern times, namely, to provide for the religious wants of the people by some kind of legislation. But this is practicable only where a people is all of one way of thinking on religious subjects. When dissent and infidelity arise they must be felt to have rights, the right of free opinion, free association, and free worship. The positive statutes which have appeared in many codes of laws, requiring attendance at church by a fine, demanding of all grown up persons to partake of the sacrament at least once a year,—as was the usage some time since in the Ecclesiastical State,—or of all members of parliament to do the same—as was long the law in England—these are contrary to the free exercise of private rights; and a state church might exist and flourish with no such legislation to support it, with allowing perfect freedom, opening the doors for the poor to worship, and letting all worship where they will, or not at all.

The practical side of the relation of the church to the state, the opinions of some eminent writers, and the usages of a number of states in different ages and under different religions I propose to consider in the third part of this work.

### § 79.

2. The prominent motive in those ancient states which made a point of educating the children of free citizens was to train up a body of freemen, who by their strength and skill could be serviceable to the state, and by their intelligence could be fit for the higher work of the citizen in official posts or the public councils. In aiming at this a certain idea of what was becoming for the free citizen—the cultivation of a manly, liberal, harmonious and

State's relations to  
education.

dignified character—the opposite of the spirit of the slave—was the guide and standard. The best results of this system, founded as it was, not so much on learning as on æsthetical and bodily development, are worthy of high admiration. Athens could not reach this point of training on account of its political constitution, and as for education in letters, it was little cared for by that democratic state, as a public interest. Nowhere was there, so far as we know, public provision for the education of serfs or of slaves, which would have violated the imagined rights of property and endangered the stability of the republics; the ignorance of the slave's mind being necessary for the servitude of his body.

In mediæval societies, for reasons already given and because a large part of the community for some time were serfs or slaves, as well as because the office of instruction fell to the church, the state concerned itself but little for the training of the young. But the more modern opinion attaches to education the greatest importance, and in a large part of Christendom this opinion is carried out in a system of primary instruction, and special schools, and in what is called the University. That the state has a right, and indeed, is bound to do this, is shown *first* by the vast importance of a right training of children on the state's account and for all general interests, and by the evils coming from an ignorant lower class in all, especially in free, states. The laboring class, for instance, will have no mobility, will be in the power of the employer, will have no hope of bettering its condition of life by change of place, will be given to low pleasures. Crime and ignorance go together, and the prospect for the children of such a class is dark indeed. For the industry, morals, loyalty and quiet of the class, for the safety of all classes, some kind of education is necessary.

Further, as has been said before, since the state is the protector of all rights and the parents may refuse to give to their children all the advantages that are within their power, there seems to be no injustice in compulsory education—that is, in requiring the parents to provide an education for

their children which is regarded as sufficient for the purposes of life, or in making such provision in their place. And all ought to be excluded from the right of suffrage who have no elementary knowledge of the most necessary branches.

How far the state, in the circumstances of modern society, ought to provide instruction for the people, and especially whether it should offer to them the highest learning, are subjects where there may be much to say on both sides, and where practical considerations must rule our decision. Technological instruction, agricultural schools, seem to fall to the state for their foundation and encouragement, owing to their special nature and to the improbability that they who would be most benefited by them would endow them, or send to them their children at their own cost.

The æsthetical cultivation of a people depends so much on the joint action of many and is so costly, that in few states hitherto has there been ability on the part of private persons to make collections in the arts, or to pay first-rate teachers or collectors. It seems that this part of human training must be dependent in a measure on the care of the state. It may be said of all public collections, such as libraries, museums, botanical and zoölogical gardens, as well as of all encouragements to individuals to make discoveries useful to men, that the community must look chiefly to the state to take the lead in these directions.

Whatever the state may do, the individual or the association must be permitted to do. The state ought to have no monopoly here. The liberty of teaching is one form of freedom of speech and thought; and with the exception of the lower and the more technical branches and of æsthetical instruction, the state ought rather to supplement the efforts of individuals than to take the lead at an advanced stage of society.

But wherever the young are trained, a difficulty arises with regard to a conciliation of the claims of the state and of religion. This difficulty, due to causes already mentioned, is met in the case of higher learning by the state's providing re-

ligious instruction, and leaving it to parents whether their children shall receive it or not, and also by higher seminaries founded by religious bodies with the state's consent, and placed under a corporation over which the state has no direct control. But in a country where there is an established church, and by its side other considerable denominations, or where there are numerous and perhaps hostile denominations all equal before the law, how are the claims of religious equality and the needs of instruction in religion and morality to be reconciled. On this point, which, while we write, agitates both England and the United States, the strictness of theory could be propitiated to a considerable extent by one of three methods. Either religion and morality, so far as it is connected with religion, must be divorced entirely from public instruction ; or the denominations that claim the right of doing their own religious instruction must be allowed time in the week to inculcate religious precepts, after their fashion, on the young of their folds in the schools ; or there must be denominational schools supported by the state according to the percentage of population of each body, under the state's supervision. This is not the place to discuss the practical side of this important matter. I only add, therefore, the remark, that the gravity of the subject consists in the number of children who have no moral or religious training at home and are not brought under the influence of any church or moral influence. Here is material for future enemies of political order and invaders of rights. And it is probable that this class, if left to itself, will not by any means diminish, unless a higher benevolence than has yet appeared should do by private effort what the state could best do by a general system. Taking this in view, I would prefer the two last mentioned of these methods ; but the third is entirely out of the question, at least in this country. And I see no plan possible—religious instruction being out of the question—but that of a system of moral teaching such as all the sects can agree upon, and which, by means of appropriate books and in other ways, teachers shall be authorized to follow. Even then a theoretic-

cal objection might be made by certain infinitesimal parts of society. Is not the atheist wronged by a system of morals resting on the doctrine of a holy and merciful God? But there must be some ultimate truth admitted, and *de minimis non curat lex*. Public institutions always act unequally. A school is too far off for some ; if history is studied, it must tell a story of the reformation with some degree of bias ; a Quaker objects to paying a war-tax ; a bachelor has no direct interest in education. If the atheist objects to a God becoming known to children in the school, let him have all possible indulgence, but how can his children be exempted from moral instruction altogether.

### § 80

The state's relations to morals are in part more complicated and in part more clear than any it can sustain towards religion or education. We have seen that obligation, the correlative of rights, is a moral conception. The duties and obligations of the citizens towards the state, and the state's duties towards the citizens are eminently moral. There is a moral element in all criminal law and penalty. In the system of justice the intention affects the estimate of crime ; the moral capacity of the doer of an illegal act is weighed before a jury ; and even carefulness and the want of it, moral states of mind for which few feel much responsibility, will affect the amount of damages. The state being thus imbued in all its action with moral ideas, owing duties also and obligations to other like communities, as private persons owe them to each other, is necessarily a body built on morality, and is instinctively aware that immoral lives and conditions of the soul bring with them disorders, disturbances of rights, insubordination, and political ruin. For the sake of its own existence, as well as from an instinctive aversion to evil in its outbreking recklessness, the state seeks some way of preventing immoralities which manifest themselves in action.

The state, however, has no measure of immorality except by its acting itself out, and indeed it is outward acting that

injure in an open way the outward organism called the state. All states have noticed, and by penalty tried to prevent, such actions, either as affecting the state's safety, or as preventing the fulfilment of private obligations. Laws against obscenity, prostitution and pandering to base pleasures, drunkenness, wasting of property in debauchery, vagrancy, and many other wrong-doings, may be found on the statute books of nations in many respects very unlike. If, then, the question is decided by considerations drawn from the power of the state to say what are criminal acts, or from the importance of repressing them, or from the common sentiment embodied in law, legislation will be justified against some immoral acts, as offences against moral order, which imperil the state and the well-being of society. The offence is an act; it can be defined, as clearly as invasions of private rights can, or as treason and other crimes directed against the state's existence.

But here arises a difficulty. If you make the state a legislator on moral subjects, where can you stop? If you prohibit breaches of morality, must you not go to the bottom of the catalogue with your laws? If you prohibit, may you not in some instances require positive performances? If you prohibit that which indirectly hurts the state, how near or remote must that indirection be—where can you find the limit on one side of which a state may act, but on the other side must abstain from action? And when you have gone so far, have you not reduced the state to an order like that of the family, and left no sphere in which individual choice can move?

An answer to these inquiries runs into the consideration of what are the practical and feasible subject-matters of legislation on moral subjects: and here again the condition of states, their size, the opinions of the people as coinciding with or opposing strict law, and—we add—the means on hand outside of law, whether furnished by religion or the training of the young for preventing evil, must be taken into account. This is not the place to look at the conditions of society which may call for or make impolitic the action of law. We

only add in the briefest words one or two qualifying remarks :

1. Moral legislation relates only to the prevention, suppression and punishment of wrong acts.

2. These acts must also be regarded as hurtful to the general welfare.

3. They must be chiefly public acts. Immorality keeping itself secret is comparatively weak in its bad influence.

4. They must be, in great measure, acts which extend in their direct injury beyond the individual. Yet here, perhaps, we may hesitate to draw a line. Vices that involve a family in ruin, like drunkenness, may be punishable in a man who has a family ; shall we take no notice of similar vices in an unmarried man ? But, on the other side, if we punish practices which are thought to hurt the state, we may go far beyond the rightful limits of legislation. We have to look to the interests of free individual action as well as to the good of the community. It is better to allow men to do a great deal of evil than to restrict individual liberty to such a degree that government and law will be looked on as enemies. The evil, if it be plainly such and yet does not obviously or seriously threaten the existence or the well-being of society, must be endured for the sake of freedom, and be left to society and opinion to correct.

#### § 81.

An object which all modern states have kept in view has been to provide for the wants of the poor and helpless. The causes of this unfortunate condition will of course greatly vary ; some are poor by their own vices ; others through their parents' fault ; others are incapacitated for work by disease or bodily deficiencies ; others by hard times and lack of employment. Some can be helped by family friends ; others have no such source to look to. If the vicious poor are helped, they must not be put on the same level with the unfortunate poor, and it must be understood, in furnishing assistance, that the state does

The state's relations to the poor.



not take upon itself the burden that near kinsmen are able to bear.

Now, that in theory the state *may* provide for the wants of the poor may be argued from that common humanity which men chiefly cultivate in a community where social life is well ordered, and where men feel that they are not isolated but members one of another. But, independently of this feeling which grows with civilization, the welfare of the state demands that a class, which may be tempted to crime by wants, and which ignorance renders comparatively useless to the state, be kept down as much as possible. The chief problem is to prevent the vices and indigence of parents from reducing the children to degradation; and hence the state's rights to provide education, moral and religious instruction, and such a support as will save the poor from disease, all concur on their behalf. The state also, in some instances, is the only agent which is adequate to the great problem of poverty as it shows itself in large towns, and amid the rapid changes of demand for manufacturing products. Indeed at all times there are wants which the benevolent cannot fully supply. If the relief of the destitute were left to them alone it would be too great a burden for a minority of a people to bear, not to say that multitudes of the better classes of the poor would not come within their knowledge.

The method of supporting the poor, without injury to them or to the state, is a subject of extreme importance in a thickly populated and a manufacturing country, but it does not concern us here. I remark on this point only that the able-bodied poor, if aided, ought to be furnished with supplies inferior to those which their own labor could procure; that the money for their assistance ought to be raised by the votes of taxpayers and of taxpayers only; that public charity ought to be so managed as not to extinguish private charity, and if possible, should concur with it on some wise plan; and that it would be well if private charity could take the lead, and public be regarded as supplemental.

Such are the principal departments of action for the welfare

of the community, in which the state and its members may concurrently or separately work. For the state to restrict individual action in such cases is to deprive the citizens of their just power. On the other hand, if the constitution takes away from the state its power to have a special action of its own, or to delegate this to municipalities or districts, it may put the most serious obstructions in the way of the general welfare. The first of these two evils is, in advanced society, by far the greatest. According to the true theory of the state the individual fulfils his end best, when his power of action, consistently with the free action of his equals and with that of the state within its sphere, is most uncontrolled. If the individual leaves everything to the government, if he thinks that the end of government is to support him, to point out to him ways of industry, to lead the way in every enterprise, he remains a dependent, undeveloped citizen; he is not a freeman in his spirit. National character differs much in these respects. M. Dupont-White\* calls attention to the contrast between France and England, in the first of which countries the government initiates everything, while in the other the forward movements in all enterprises proceed from single persons or associations. The first method may have some advantages in regard to despatch and concentration; the other is vastly preferable in educating and strengthening individual character. It is of use also in preventing encroachments of executive power.

#### § 82.

The state acts by authority, that is, by law and constitution, but it is essential that it should have Means for carrying out the state's ends. might, which consists of armed men, and the means to reward services performed for the common welfare. Every citizen, according to his strength of body and skill, is bound to defend the territory and political body when attacked. There is no reason why one should be exempt from this duty more than another; it seems to be fairly inferred from the close connection between the able-bodied man and the state,

\* *L'Individu et l'État*, p. 100, ed. 3.

as from that of the father of the family and the family, that he may be called upon to preserve the state from harm. The duty and the promptings of indignation which lead a man to defend any helpless person from wrong, are here enforced by the immense importance of the state's continued existence and the necessity of the case. There is evidently, also, a necessity that the armed force should be at the disposal of the state, under its control in some way, and prepared by discipline to encounter others who have been trained in arms.

The ways in which the state can best use its armed force will depend on the condition of society. In small states, where injustice is to be repelled, the whole force of men of military age will naturally be called upon, but as this may be a great hardship, especially for artisans, some other way of meeting adverse power will be devised. It may be that lands will be held on condition of military service, or a part of the civic troops nearest the place of invasion will be called out at the expense of the whole ; but in the end all states in an advanced condition of society support troops as a standing army to guard the safety of the people. It is needless to say that when wars become an important part of the business of the government, when the people have lost their military spirit and prefer that others shall do their fighting for them, the consequences to liberty may be exceedingly disastrous, and that various checks need to be devised to preserve it unimpaired. The people who bear the burden of war either by being summoned to the field or by supporting a standing army, and for whose benefit mainly war will be waged, have a right to decide whether there shall be war, and what is to be endured in the shape of taxation for this purpose. Thus these high powers, which necessarily involve them in self-denials, and expose them to the loss of their rights, ought to be attended with rights of theirs against the government.

The English word police, and kindred terms in other foreign languages, are derived from the Greek *πολιτεία* which denotes *citizenship*, or the fact of belonging to a political community, then the *constitution*

Police power.

or *polity* of that community, then the administration. The old sense of the original word is approached by writers, especially in the German language, who distribute administrative power into military, financial, judicial, and a police. They understand by the police power that branch which watches over the public welfare, including in the term, together with other interests, those of religion, morality, health, and art. The French code "des delits et des peines," of 3 Brumaire an. 4, *i. e.*, of Oct. 25, 1795, defines police thus: "Police is instituted to maintain public order, the liberty, property, and safety of individuals. (Art. 16.) Its principal character is vigilance. Society considered in mass is the object of its solitudes. (Art 17). It is divided into administrative and judiciary police. (Art. 18.) Administrative police has for its object the maintenance of public order in every place, and in every part of the general administration. It tends principally to prevent delicts (or misdemeanors). (Art. 19.) Judiciary police searches out delicts which the administration has not been able to prevent, collects the proofs and hands over the authors to be punished." (Art 20.)

This is a narrow definition of the police power, corresponding in some degree with the English notion. In Maurice Block's *dictionnaire de l'administration Française*, the police is made to be that part of the public power which is charged with protecting persons and things against all attacks, against all the evils that human prudence can prevent, or at least can diminish in their effects. To maintain public order, to protect individual liberty and property, to watch over morals, to secure public health—such are the principal objects confided to the police. Then follow subordinate departments of its agency, which relate to almost all the interests of men.

The German writers differ in regard to one important point, to the question where to class what may be called preventive police. Von Mohl separates this from the police power, as he understands those terms, and puts it under the head of justice proper. "Now preventive justice denotes that agency of the state which prevents infractions of the rights of indi-

viduals, or, it may be, of the state. A watchman or police officer who prevents theft, burglary, or arson, or makes the streets safe by night, is thus a minister of justice; and the very men who, in our English parlance, are called the police, would be denied by this very eminent writer to have anything to do with the police function of government. For this he is blamed by Stahl, and, as I think, with reason, on the ground that justice implies injury and reparation. If anything can be called an office of police, as it seems to me, prevention of injuries to individuals deserves the name."\*

But whatever terms are used in relation to the departments of administration, we have a right to say :

1. "That if there were such a department of the state as that of general welfare or of police in the larger sense of that word, it would group together forms of state agency of a very miscellaneous character," as the care of education, public roads and health; "and for this reason would be of little value in the science and practice of government." In the different modern systems of administration different classifications are adopted. Thus the postal system often stands by itself; so does the care of education; or education and religion constitute together a department, and so on. In the English and American system much is done through commissions of different kinds which are independent of one another. Perhaps among us in the United States especially, the system of public officials has not been reduced to sufficient order and is not placed under sufficient supervision. But at all events the rule of dividing departments according to the work demanded seems to be a wise one.

2. But there is a class of officers of an humble kind and unhappily too little esteemed,† who have two offices and may

\* From a paper entitled the Nature and Sphere of Police Power, by the author of this work, in the Journal of the American Association of Social Science, No. 111, for 1871.

† Comp. Bluntschli, Staatsrecht, ii., 175, ed. of 1857, for some remarks on this want of respectability and of dislike to a most useful class.

appear in service on different occasions. One of their offices is that of prevention,—to guard society against disorder and crime, both secret and violent. It is true that every good institution of society *prevents* some evil, as a system of schools prevents ignorance and crime, health-laws prevent diseases, weighers and gaugers—who, however, themselves perhaps may be called a part of the police of society—prevent certain frauds. But this is chiefly an indirect result, whereas a set of officers, according to our English usage called policemen, *prevent* disorder and crime by direct agency, either by the fear of their interference, or by their presence when disorder has begun. The safety, quiet and order of the night, the protection of individuals and families against crimes of single persons or of gangs, the security against fire, and other similar agencies, are put into their hands. They have the nearest resemblance to soldiers, except that they may act and generally act apart. They use force, have the power of arrest, and a certain degree of organization resembling that of an army.

3. As this body of men becomes acquainted, in the course of official duties, with knaves and thieves and the lurking-places of evil-doers, they are best fitted also to ferret out crimes. Thus the *detective* duties of the police grow out of their *preventive*.

4. And as the detective police is auxiliary to the department of justice, so also a police has, in general, an auxiliary power, which can be made to work in the service of other branches of administration. It is auxiliary, for instance, to public authority when sedition has past the line of prevention, by its strength of body and power of arrest, or when arson or negligence has set houses on fire, in putting it out. Indeed it may aid departments of public service alike by preventing and by detecting. Thus the treasury has its police who in revenue-cutters prevent smuggling, or, as detectives, discover the counterfeiters of government paper or the frauds of distillers. This auxiliary power after crimes are committed is, however, only an occasional one. “If it prevents mis-

doing, so much the better ; if not, its action in getting at misdoers is like the action of soldiers in war, with whom days of battle are exceptions. Police officers, when aiding a department, do not properly belong to it, but are a subordinate class."

All civilized states, especially city-states, will have some kind of agents of public order. The police of Athens was but little developed, yet here we find officers having the oversight of buildings (the *astynomi*) ; others who prevented cheating in the market and in trade (the *agoranomi*) ; others who prevented forestalling of corn (the *sitophylaces*), etc. The Scythians, or bowmen, a band of public *slaves*, served as a kind of *gens d'armes* ; they were at hand to aid the presidents of the assembly on the day of meeting. At Rome the police system was more complete. The remarkable power of the censors to search into the private life of citizens, on the ground that good thrift and morals were of benefit, and the opposites of injury to the community—that power which made those officers, as Dionysius says, inspectors and watchmen of everything that took place in houses even to the bed-chamber, was an appendage to their original, chiefly financial, functions.\* Its caricature appears in the anxious vigilance of the police in some European countries demanding minute reports from travellers who stay any time in a place, as if a stranger were a suspected enemy. The *ædiles* of Rome also, as police magistrates, had the care of markets, buildings, ways and games ; but other officers were found necessary to assist the superior magistrates in parts of their work. Such were the curators of the ways, and the firemen, appointed in the year of Rome 568 to watch against fires. In the time of Augustus, the city guards (*vigiles*), divided into seven cohorts and under a prefect, protected the city against fires and crimes by night. Among the Franks and Anglo-Saxons a police force existed in the hundreds for pur-

\* Dionys. Hal. (ed. Kiessling) xx., 13. Comp. Mommsen, Handb. d. Röm. Alterth. (ii., part 1, p. 349). Very instructive are the heads of examinations into the lives and morals of the Romans there given.

suing night-thieves ; and among the latter the tithings were used both for police and for fiscal purposes. The frith-borh or frank pledge, a state institution of the Anglo-Saxons, was the suretyship and mutual responsibility of ten associates for each other's good conduct, and no doubt was efficient in keeping the peace.\* The modern police of continental Europe, as an instrument by which governments afraid of their subjects suppress open dissatisfaction as much as possible, is the proper engine of despotism. Accordingly, nothing is more hated by the subjects than this power. The *political* action of free nations needs little or no aid from a police in time of peace. It is confined for its functions chiefly to the securing of the quiet and order of civic communities, and the detection of offenders.

### § 83.

If the executive of a nation derived its support from state lands or domains, and the lawmakers served State's right of taxation. without fee or salary, if the costs in suits paid the salaries of judges, and soldiers defrayed their own charges, there would be no great perplexity in providing for the other expenses of the state. But nations have generally abandoned such rude ways of bearing public burdens, and have preferred the method of taking a part of the property of each individual or family for this purpose. The right to do this has been explained by the state's being the original owner of the soil. In the feudal monarchies the soil to some extent, and in France almost altogether, was conceived of as having been the suzerain's original property, which the vassals received on condition of military service, and the pecuniary payments, when an heir took the property or it was allowed to be sold to a stranger, were justified on the same ground. But as a general explanation of private property in land the

\* Comp. especially Stubbs, Constitutional Hist. of Eng. i., 98 and 87, and Sohm, Fränk. Reichs- u. Rechtsgesch., 181 et seq. See also Waitz, Deutsch. Verfassungsgesch., ed. 2, Beilage i., on the so-called 'Gesammtbürgschaft.'



theory is not tenable, as we have already attempted to demonstrate. Another explanation of the right is that it denotes the payment due for protection. But protection is owed by the state to every one, whether he can pay taxes or not, and would be just as much obligatory on the state, if it needed no taxes. The true ground is, that taxes are in some shape a vital necessity; none of the functions of the state could go on without a gift from the citizen of a part of the products of his labor. If the state is the condition of all good and cannot be maintained in existence without taxes, and if a very close tie subsists between the state and the citizen; his obligations as a member of the community make it necessary for him to aid the state by part of his property, just as much as by a part of his time and strength in war.

The power of a government to tax its subjects is the most liable to be abused of all the powers which the state possesses. The limits to the exercise of this power will be discussed in another place. Here we remark only (1) that taxation must be as equal as possible, so that labor and capital shall feel it alike, and be unable to shift it off upon one another; (2) that it must not affect any kind of production or branch of business by forcing them to pay for the protection of another branch; and (3) that it must not be within the power of those who pay no taxes to levy them on some one else. The tax-payer ought to give his consent to the imposition in some constitutional way; and the class which pays no taxes should have no power by its representatives to lay them on those who own taxable property.

#### § 84.

The state's right of waging war includes its obligation to defend its territory and individual inhabitants, its right to protect whatever is its own, both its spiritual property of sovereign existence and outward property of whatever kind, and its right, imposed on it by the necessity of having no superior, of redressing injuries as well as of preventing them in the future. As by its system of

State's right to  
levy war.

peaceful justice it renders a great part of self-reparation unnecessary for the individual citizens, so by its war-power it makes useless in great measure the associations of neighbors or of districts for self-defence. This is a prime necessity of any protecting power, but its means to fulfil this obligation must come from the money and muscle of the inhabitants of the country. In theory, then, all able-bodied persons must defend the public interests with their lives and their treasures, so that in a sense they must protect themselves as well as the state, and the state turns out to be the organizing power rather than the force or might. It may happen indeed for the convenience of all that some are persuaded or forced to serve in war while others who stay at home are subject to heavier burdens of taxation than before. And as contiguous nations are always prone to quarrel on grounds of justice or of fancied wrong, or to provide against each other's injuries by striking the first blow, while governments, to a great extent, involve the people in war on their own account rather than for the public good ; this necessary power is the most dangerous of all public powers, especially when the carrying on of war is left to a military class, and when war itself hurts the employments of peace and disturbs wages. All which shows that the power of declaring war ought to be subject to some control of the nation on which the heavy load rests.

## CHAPTER V.

### LIMITS OF STATE POWER.—HUMBOLDT AND J. S. MILL ON THESE LIMITS.

#### § 85.

THE powers of the state thus spoken of, and the formidable means by which it must sustain itself at the risk of the citizen's life and property, may be greatly abused, even in free states. Those powers in particular, which we have distinguished from the jural, as not being absolutely necessary for the existence of the state, may become most galling and tyrannical in their exercise; nowhere else does the folly and the wrong of governing too much appear in so clear a light, so that one is disposed to doubt whether this kind of powers would not with advantage be resigned by the state altogether and be transferred to individuals or associations. It is important therefore to look about for some limits which shall guide public opinion on the state's exercise of these powers, and possibly serve as constitutional checks against governing overmuch. Is not this one of the principal difficulties in the theory and practice of the state,—to find out how far the state ought to go in its legislation, especially in its prohibitory and its moral legislation, and how far it ought to trust to the individual and to leave him to his own responsibility, in the faith that thus he will become more loyal and manly than he would if restrained and watched like a child?

The ancient state treated its people as if they were one family; directing in all things, and leaving nothing which should absolutely pertain to the individual without apprehension of the state's interference. He was born for the state, and the

state must determine how he should live. The modern free state has recognized the duty of leaving the individual undisturbed, within certain limits, in the enjoyment of his liberty; but, although it admits, in theory, that the state exists primarily, not for itself, but for the individual members, it has no exact definition, in constitution or law, of what it ought in right reason to do for him, or for the community of citizens. Or else it prescribes limits which are not consistent with the free movements of individual intellect or activity. Or finally, it may, although this is not common, make so wide a path for him to move in, that there can scarcely be a well ordered and well protected society.

## 86.

Several modern writers, whose opinions are entitled to great respect, have endeavored to contract the limits of state-legislation as much as possible, while aiming to secure the interests of the state and the community. I mention William von Humboldt, the great philologist, whose 'ideas towards an attempt to define the limits of the state's activity,' appeared first in 1851, and in his collected works in 1852 (vols. vii. and last), although written long before; \* John Stuart Mill 'on Liberty' (1859); and Laboulaye, 'l'État et les limites' (1863). Of these writers the great German linguist and Mr. Mill enter most at large into the subject, both to show what the state may do and what it may not do. I can

\* This work, written by von Humboldt, at the age of twenty-five, and during the French revolution, was intended at first for immediate publication, but only small parts of it were then published, and that without the author's knowledge, by his friend Schiller and by Biester. Humboldt delayed giving it to the world during his lifetime, at first, it would seem, from a desire to re-cast some parts of it; but involved in public affairs, he let it lie in manuscript until his death, in 1835. The printed text contains a small lacuna at the end of Chapter I. Whether Humboldt may not have changed his opinions in the course of his life, and for this reason have been disinclined to give them to the world, may be possible, but since their appearance they have had considerable influence. Comp. M. Chrétien's introd. to his transl. into French (Paris, 1867).

only give the merest outlines of Humboldt's theory, with which that of the two other writers in the main coincides. His leading principle is that "the highest aim of every man is the highest and most symmetrical cultivation of his powers in their individual peculiarities, and that to attain to this end freedom of action as well as diversity of situation are necessary." This being so, the action of the state must be such as to leave both the end and the means of development untouched by law, except so far as law is necessary, not to foster or incite but simply to protect and defend. The care of the state can be looked at from several sides. 1. It can aim at the positive, especially the physical welfare of the citizen. *Such care of the state is harmful*, as producing uniformity, weakening power, injuring individuality by general laws, making administration more complicated, and thus creating new evils. We have then this norm for limiting a state's action,—that "it must abstain from all care for the positive welfare of the citizens, and take no step for their security against each other and against external enemies beyond what is necessary. Let it restrict their freedom for no other end." *The means* taken by the state for encouraging physical welfare, whether direct or indirect, are all objectionable. Where the private person can do what the state can, he has a stronger interest to do it advantageously; where he cannot, free associations of private persons can make state action unnecessary.

From the state's positive care the author passes on to its negative care, in which the main office of the state consists. Omitting what he says of protection against outward enemies, we find that, in treating of the protection of the citizens within the country and in relation to one another, he denies education, religion, improvements in morals, to be provinces within which the state ought to act by positive legislation. His leading principle here is "that the state ought to abstain entirely from all efforts, direct or indirect, to act upon the character and morals of the nation, except so far as this is the unavoidable consequence of its otherwise absolutely necessary

measures, and that everything promotive of such action, particularly all especial oversight of education and religious institutions, laws against luxury, etc., are entirely outside of the limits of its efficiency." (vii., p. 98.) To education by the state he objects as cramping the variety of culture necessary for the highest development of the nation, and as not required, because private institutions of education will not be wanting. (p. 57.) This last opinion, as far as the poorer classes of all modern states are concerned, will be thought to be very strange and more than questionable.

To the state's interference in the province of religion he objects, as involving special favor for certain opinions and exercising too much control over the individual man. "The removal of obstacles which prevent acquaintance with religious ideas and the cherishing of the free spirit of investigation are the only means which the legislator can make use of. If he goes further, he seeks to promote religiosity in the direct way or to lead it, or if he even takes certain definite ideas under his protection; he demands faith on authority instead of true conviction, and thus hinders the aspirations of the spirit, the development of the soul's powers. Thus, perhaps, by getting possession of the imagination, by momentary excitements, he calls forth legality of action, but never true virtue. For true virtue is independent of all religion, and inconsistent with religion which is commanded and received on authority" (p. 72). Moreover, the state has no access to the leading cause which produces morality, *i. e.*, to the form in which religious conceptions are received by the mind. For these and other reasons the proposition must be accepted, that religion lies entirely outside of state action, and that preachers, as well as divine service in general, must be left to the communities, without any especial public oversight.

The improvement of morals by state institutions is to be effected, if at all, only by specific prohibitions of acts in themselves immoral or leading to immorality. It may be comprised in checks put on sensuality (p. 82 et seq.). But such restraints only act on the outward conduct; and although

they may produce a society of quiet, peaceful men, they cannot produce a union of freemen, whose ideas respecting their destination and value shall be enlightened, and their wills strong enough to overcome their prevailing inclinations. Thus nothing is gained for true perfection. The office of acting on the morals of a community then does not belong to a state.

There are many actions of men in society which directly affect only themselves. The only reason for police laws and a police system is prevention of injury to others. A man may do things exciting moral disapprobation in others—may commit deeds which, if copied by others, would injure them in their character or good name, and yet not pass beyond the bounds of his rights and freedom. Even the sight of an action, or the hearing of arguments calculated to sap morality or pervert the mind of another, cannot be prevented by law. Yet in practical matters the superior skill of one man may enable him to impose on the ignorance of another, so that he shall freely do what will be to his prejudice. In such a case, of which physicians and lawyers may furnish examples, Humboldt would require a certificate from the state that the persons claiming to have especial skill are entitled to confidence. Yet such control ought to be exceedingly limited. Prohibitive laws should embrace only those cases where, without or even against the will of another, a man in whom he trusts can do him injury by assuming a profession for which he is not fitted (p. 109). A rule for the limits of state action is expressed in these terms by our author (pp. 111, 112): “To protect its citizens, the state must forbid or restrict those actions having an immediate relation to the actor alone, whose consequences injure others in their rights—that is, which, without their consent, diminish their freedom or their goods, or from which these results may fairly be apprehended to proceed. The greatness of the injury to be apprehended, and of the restriction or freedom to be required, by prohibitive laws, is to be taken into account, equally with the probability of the injury that may be done. All restrictions beyond this lie outside of the limits of a state’s [rightful] action.”

There are certain persons to whom the state is bound to afford especial protection on account of their helplessness—children yet immature in their reason, and those who are deficient in intellect. The protection of the former consists (1) in fixing the time of their majority, which may properly be reached not all at once, but by degrees ; (2) in seeing that parents fulfil their duties towards their children—especially that they look out for a calling to be adopted by their children when these come to act for themselves—and that children fulfil theirs towards their parents ; but all choice by the state of a calling for the children, or inducements to lead them to choose one rather than another, are to be carefully avoided ; (3) in selecting guardians for children, when their parents die before they are mature (which selection, however, may by law be left to parents before their death, or to others most interested in the children afterwards) ; (4) and finally, in preventing children thus left from bearing the responsibility of actions done on their own account whilst immature, and punishing others who seek to take advantage of them (pp. 166, 167).

The theory thus set forth in regard to the due limits of state action, Humboldt thinks, “ought to be applied to the real condition of things, so far and with such approximations as possibility allows and no necessity hinders. The possibility depends on this, that a people is sufficiently able to receive the freedom which theory requires, and that this freedom can give forth those salutary consequences which always accompany it unless there are obstacles in the way. The counteracting necessity is this, that the freedom once granted may destroy results without which no further progress is possible, and that even the existence [of the state] may be in jeopardy” (p. 186).

The great abstractness of this essay may prevent the real difficulties in its practical application from being at once noticed. Would the author, for instance, go so far as to say that indecent exposures of the person, the going naked through a crowded street, ought not to be prohibited since



such things do no direct injury to others besides the actor? Or, should the state provide no education for orphans whom the state, as he admits, is bound to care for, or refrain from insisting that parents should send children to school?

But we refrain at present from further comments, and pass on to give an outline of Mr. J. S. Mill's treatise on liberty, which was suggested apparently by von Humboldt's, but is much less abstract and takes a clearer view of the field than that of the German author.

### § 87.

Mr. Mill's object in his essay on liberty is to assert the principle that self-protection is the sole end for which the state, or any individual, is warranted in interfering with the liberty of any other member of society.\* J. S. Mill's views on the limits of state power. "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." He may be remonstrated with, reasoned with, but not compelled. "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself his independence is of right absolute. Over himself, over his own body and mind, the individual is sovereign" (p. 23, Amer. ed. of 1863).

This principle applies only to mature persons, and also leaves "out of consideration those backward states of society in which the race itself may be considered as in its nonage." In such an age "a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end perhaps otherwise unattainable. Despotism is a legitimate mode of government in dealing with barbarians, provided the

\* The reader may compare to his advantage with this exposition of Mr. Mill's views, Mr. Stephen's "Liberty, Equality and Fraternity." (Amer. ed. of 1873.) In my remarks I have nothing to do with Mr. Mill's want of proof of his positions, nor with his occasional anti-religious one-sidedness.

end be their improvement and the means be justified by actually effecting that end \* (p. 24).

The appropriate region of human liberty is that portion of a man's life and conduct which affects only himself. If he does an act positively hurtful to others, he is liable to legal penalties, or at least to disapprobation; and there are many positive acts for the benefit of others which he may be rightfully compelled to perform, such as to give evidence in a court of justice, to do his part in the common defence or in bearing any burdens that can only be borne in common; although to be compelled to ward off evil from others is an exceptional rather than an ordinary obligation (p. 26). No indirect result of what a man does for himself is he responsible for. The liberties included in that part of a man's agency which terminates in himself are liberty of conscience, liberty of thought and feeling, absolute freedom of opinion and of expressing opinion on all subjects, liberty of tastes and pursuits, and liberty of combination to do whatever each of the parties had the freedom of doing.

Liberty of thought and discussion (chap. ii.), through the press or in any other way, can never be rightfully abridged, and is not amenable to punishment, except where it does direct injury to another person. Thus, to maintain the lawfulness of tyrannicide in the abstract is itself lawful; although to maintain it with the view of instigating the murder of a sovereign may justly call for punishment, especially if it can be shown that the act was a direct consequence of the instigation. Neither government nor people has any right to abridge this liberty of thought and discussion. "If all mankind minus one were of one opinion, and only one person of the contrary opinion, mankind would no more be justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind" (p. 35). "The peculiar evil of

\* That is, justified in the view of those who come after. The despot works under an uncertainty as to actual results. Mr. Mill would doubtless allow him the privilege of acting on the highest accessible probability.

silencing the expression of opinion is that it is robbing the human race—posterity as well as the existing generation ; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth ; if wrong, they lose the clear perception and livelier impression of truth produced by its collision with error ” (p. 36). Mr. Mill discusses at length three possible cases. It may be that the opinion which it is attempted to suppress may be true or may be false, or, what is more common than either, may unite elements of truth and falsehood (pp. 36, 68, 88). In all cases discussion promotes the final victory of truth. In the last case a one-sided theory may counteract the effects of an opposite theory of the same nature, and bring back opinion to the fair and just middle ground. Add to this that, without earnest controversy, the meaning of an opinion or doctrine, if true, will be in danger of being deprived of its vital effect on character and conduct ; there will be no growth of heartfelt conviction from reason or personal experience (p. 102). So then, not only the state, but society also, is bound to tolerate and put no obstacles in the way of professing and advocating any opinions which do no direct injury to any one else besides him who entertains them. Nor can any limits be set to the zeal and animosity of discussion, so long as they do not invade the character of an opponent.

The same freedom thus allowed to the formation and expression of opinions must be conceded by the state, and by the feelings of society to action, so long as it is at the risk and peril of the actor. Only when acts of any kind, without justifiable cause, do harm to others, may they be controlled by the active sentiments, and, where needful, by the active interference of mankind.” “The same reasons which show that opinion should be free, prove also that one should be allowed to carry his opinions into practice at his own cost.” It is desirable, in short, that in things which do not primarily concern others individuality should assert itself. Where not the person’s own character, but the traditions and customs of

other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness and quite the chief ingredient of individual and social progress" (chap. 111, pp. 107-109). It is true, indeed, that "in some early states of society individual forces might be and were too much ahead of the power which society then possessed of disciplining and controlling them." "But society has now fairly got the better of individuality, and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences" (p. 117). Men are bowed down under a yoke of usages imposed on them by society; their thinking is done for them; they dare not be independent. "The greatness of England is now all collective; individually small, we only appear capable of anything great by our habit of combining. But it was men of another stamp than this that made England what it has been, and men of another stamp will be needed to prevent its decline."

These remarks on the importance of individuality, or of freedom and courage in expressing as well as in acting out one's own convictions, are preparatory to the inquiry touching the rightful limit of the individual's sovereignty over himself. Where does the authority of society begin? How much of human life should be assigned to individuality and how much to society? (chap. iv., p. 144). The answer is, that "the inconveniences which are strictly inseparable from the unfavorable judgment of others are the only ones to which a person should ever be subject for that portion of his conduct and character, which concerns his own good, but which does not affect the interests of others in their relations with him" (pp. 150, 151). "Acts injurious to others are fit objects of moral reprobation, and in grave cases of moral retribution and punishment." So also "the dispositions which lead to them are fit subjects of a disapprobation which may rise to abhorrence."

But here a difficulty meets us in regard to practices condemned by the moral sense of society, and yet directly injuring no one besides him who is responsible for it. Such

practices are gambling, drunkenness, incontinence, idleness, and the like. *First*, as to the feeling entertained towards such a person. Does it differ from the feeling which arises when a man commits a wrong against the state or a fellow-man. Mr. Mill thinks that "it makes a vast difference both in our feeling and in our conduct towards him, whether he displeases us in things in which we have a right to control him, or in things in which we know that we have [no right]. If he displeases us, we may express our distaste and we may stand aloof as well from a person as from a thing that displeases us; but we shall not therefore be called on to make his life uncomfortable?" (p. 153).—The difference it makes *in our conduct* is very obvious. We have nothing to do with him in our relation of fellow-members of the state, whether he violates the laws of morality only, or does a wrong towards a third person. In either case we stand aloof. But our abhorrence of wrong-doing may be equally intense, and is certainly more unselfish, when a vice or fault does no direct harm to the community of which we form a part, than when it inflicts positive injury on some fellow-citizen. Take the case of cruelty to animals. A humane man is kindled into indignation by an action of this sort; and he is indignant, not because his sympathetic nature is distressed—which only guides him towards the indignation—but because the animal is made to suffer without any reason. So again, immodest exposures of the person would arouse in an incorrupt society the highest degree of resentment, and the feeling has nothing to do with wrong done to society or injury to individuals, but only or at least chiefly with the outrage in itself. That when an injury is done in a society there may be superadded, perhaps, the feelings of alarm and other self-protecting ones, is quite natural, but the moral disapprobation against a drunkard reeling through the streets may be much greater than that against a thief who steals a loaf of bread from a baker's shop. Nay, this feeling is so strong that it leads often to lawless violence, which is justified by bystanders.

Secondly, as to the immoral conduct condemned by the

community. Mr. Mill would adhere rigidly to the principle that no immoral act, in which a person is not led to violate a distinct and assignable obligation to any other person, ought to be prohibited or punished (p. 156). "No person ought to be punished simply for being drunk, but a soldier or policeman should be punished for being drunk on duty" (p. 158). "If a man through intemperance or extravagance becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated and might be justly punished, but it is for the breach of duty to his family or creditors, not for the extravagance" (p. 157). With regard, however, "to the merely contingent or, as it may be called, constructive injury which a person causes to society by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear for the sake of the greater good of human freedom" (p. 158). Moreover "if society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences." "Armed with all the powers of education and the authority which a received opinion exercises, and aided by the natural penalties which fall on those who incur the distaste or the contempt of those who know them,"—"let not society pretend that it needs, besides all this, the power to issue commands and enforce obedience in the personal concerns of individuals, in which, on all principles of justice and policy, the decision ought to rest with those who are to abide the consequences" (p. 160). Add to this a still stronger argument against such interference with personal freedom, that "the odds are that when society interferes, it interferes wrongly and in the wrong place" (p. 161). And this is freely illustrated by various prohibitory regulations, such as Sabbath laws, laws for preventing intemperance, and laws against the Mormons.

In the last chapter of his work on liberty, Mr. Mill offers applications and in a certain sense limitations of his own principles. His two cardinal maxims forming the entire doctrine of his essay are, as we have seen already, "first that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself." Secondly, for actions prejudicial to others' interests "the individual is accountable, and may be subjected to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection" (pp. 181, 182).

Here we have to make the criticism that what are called social punishments are of a very different sort from *legal* ones. It is not society *as a unit* that expresses moral disapprobation, but various classes and portions of society, while it is *organized* society that visits offenders with penalty. And again, as has been said once before, the moral disapprobation is not called forth merely or principally by the instinct of self-protection; it is directed against gross acts of immorality, irrespective of their consequences to the state or to any of its members. But to return to Mr. Mill's maxims. He justly remarks that it will not follow "because damage or probability of damage to the interests of others can alone justify the interference of society, that therefore it always does justify such interference. In many cases, an individual, in pursuing a legitimate object, necessarily, and therefore legitimately, causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining" (p. 182). Thus new inventions may throw old machinery out of use, and laborers out of employment for a time. In the competitions of business one man's success often injures the prosperity of another.

The prevention of crime, again, which is an undisputed function of a government, starts some difficult questions, and is itself liable to be abused to the prejudice of liberty. If a person is discovered in his preparations to commit a crime, neither a public officer nor a private person is bound to look on inactive until the crime is committed (p. 185). So "if a person is seen in the act of beginning to cross an unsafe

bridge any one might seize him and turn him back without any real infringement of his liberty" \* (p. 186). Yet "where there is only a *danger* of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk." In this case, therefore, a man in full possession of his powers ought to be only warned of his danger. The sale of poisons presents questions of interest as it regards the extent of precaution that ought to be used by the vendors. To label a vial or package with some word denoting the character of the contents may be required; while to provide by law that a medical man's certificate should be necessary to authorize the sale would sometimes prevent its use where it was greatly needed (p. 187).

The right of society to ward off crimes against itself by precautionary police, suggests limitations to the rule that misconduct affecting the individual only may not be meddled with in the way of precaution or punishment. Thus while "drunkenness in ordinary cases is not a fit subject for legislative interference," Mr. Mill "would deem it perfectly legitimate that a person who had once been convicted of any act of violence to others under the influence of drink should be under a special legal restriction, personal to himself; that, if he were afterward found drunk, he should be liable to a penalty, and that, when in that state he committed another offence, the punishment, to which he would be liable for that offence, should be increased in severity. The making himself drunk in a person whom drunkenness excites to harm is a crime against others." So, "if from idleness or from any other unavoidable cause, a man fails to perform his legal duties to others, as for instance to support his children, it is not tyranny to force him to fulfil that obligation by compulsory labor, if no other means are available" (pp. 188-189).

\* Mr. Mill adds, as the reason of this that "liberty consists in doing what one desires, and he does not desire to fall into the river." Is not this a little sophistical, and might not our author be asked whether a thorough drunkard desires to ruin himself by drink? Would he stop him?



Again, certain acts directly injurious to the agents themselves ought to be prohibited, "which, if done publicly, are a violation of good manners, and thus come within the category of offences against others. Of this kind are offences against decency" (p. 189).

The cases here brought forward by Mr. Mill are clearly distinct. An idler who does not support a family and a person who exposes his person indecently commit certain tangible acts; but it is only probable that one who has been violent under the influence of strong drink will be violent again, or even, if punished, will drink again. Should a man who has cheated another be deprived of the power of contract, or a man who has caned another in the street be prohibited from carrying a cane? Still further, the probability is that a man who drinks to excess may commit violence. How much probability is needed for such personal restrictions as Mr. Mill recommends? Would not a general law against all drunken persons be justified on these grounds, not to speak of the general evil they inflict on society?

The other recommendation of prohibiting (and therefore punishing) public indecency calls for several remarks. It is a violation of good manners and thus an offence against other people, says Mr. Mill. But in what sense is it such, in which offences by public acts against good morals are not such also? And are not good morals in actions more important to society than good manners? Manners are morals, viewed as usages demanded by general opinion for some moral reason which itself called for the usage and then retired into the background. They are institutions of society, but not of organized society. Why should violations of manners be more punished by society than immoral acts. So far as we can see, by this admission Mr. Mill admits everything. If public exposures of the person are punishable, they are so because what we call modesty is a moral quality; and an extremely gross want of it arouses the indignation of society into demands for the repression or punishment of such actions. Whether the moral feeling, or the grosser immoralities which

it protests against, viewed in their effects on society, furnish the reason for prohibitory and penal law, may be made a question. To us it seems certain that they are inseparable, that a ground for the obligations to be modest lies in the finer feelings of human nature, as called forth in the family; and that the discovery by experience of the evils wrought in all kinds of societies and intercourse by the opposite quality and its actings is an additional, more palpable reason for law and penalty. But however this may be, there is clearly no reason why exposures of the person should be prohibited, which would not in certain forms of society have visited with penalty disrespect to the aged, and in others, a matron's appearing in public unveiled; and which, still more, ought not now to make cruelty to animals in public, or blasphemy or intoxication in public a punishable offence.

An important class of actions consists of such as supply the means of temptation or furnish aid or concealment to misdoers. Can rational legislation control actions such as these? Our author's principle is that "Whatever it is permitted to do, it must be permitted to advise to do" (p. 191). "The question is doubtful only when the instigator derives a personal benefit from his advice." "Fornication must be tolerated, and so must gambling, but should a person be free to be a pimp or to keep a gambling house?" The case lies, says Mr. Mill, "on the exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides." After presenting the arguments on both sides, he says, "I will not venture to decide whether they are sufficient to justify the moral anomaly of punishing the accessory, when the principal is (and must be) allowed to go free; of fining or imprisoning the procurer but not the fornicator, the gambling house keeper but not the gambler" (p. 193). If it be true as one says that "the organization of lewdness is the disorganization of social morality,"\* it is to be regretted that our

\* Dr. Wahlberg in Von Holtzendorf's Rechtslexicon, article Unzucht.

teachers of political science cannot make up their mind on so great a question. It certainly looks strange that a procurer or keeper of a house of ill-fame should be punishable, while the frequenters of such a place and the lewd women are only doing that which they have a right to do,—which law may not attempt to repress.

Mr. Mill further asks whether the state, while it permits, should indirectly discourage what it deems contrary to the best interests of the agent; whether, for example, it should take measures to render the means of drunkenness more costly, or add to the difficulty of procuring them by limiting the number of the places of sale." After weighing the reasons *pro* and *con* he would have the state decide, on grounds of political economy, "what commodities the consumer can best spare, and *a fortiori* to select in preference those of which it deems the use to be positively injurious. Taxation, therefore, of stimulants, up to the point which produces the largest amount of revenue, supposing that the state needs all the revenue which it yields, is not only admissible but to be approved of" (p. 195). That is, there must be taxes and indirect taxes. In laying them the state must select those articles which can be best spared. How *best*? Can the *moral question* fail to come in at this point? The exception to be made to these remarks is that the higher the tax on home-made stimulants, the greater will be the deterioration of the cheapest liquors, and thus a greater increase of disease and drunkenness will follow, since the greater part of such drinks is used by the poorer classes of society.

But ought the state to adopt a system of licenses? To this the answer is that the license should be issued not to restrict liberty of use, but conduct dangerous to society. Offences against public order are more likely to originate where drinks are offered for sale than anywhere else. The power of selling, therefore, should be confined to persons of approved respectability of conduct; the hours of sale ought to be regulated, and the license to be withdrawn if breaches of the peace occur at a certain place, or if it becomes a ren-

devious for concocting or preparing offences against the law. Any further restriction is not justifiable in principle. "The limitation in number, for instance, of beer and spirit-houses for the express purpose of rendering them more difficult of access and diminishing the occasions of temptation, not only exposes all to an inconvenience, because there are some by whom the facility would be abused; but is suited only to a state of society in which the laboring classes are avowedly treated as children or savages" (p. 196).

Passing by the remarks on the limitation of the power of contract and of the father's control in the family, where our author is in favor of compulsory education, but expresses himself against a general state-system of education as a mere contrivance for moulding people to be exactly like one another; we come to cases of state action, where "the question is not about restraining but about helping" individuals. Ought not the government to do or cause to be done something for their benefit instead of leaving it to their own separate or united voluntary efforts. The objections of Mr. Mill to government interference, when it does not invade liberty, are (1) that the thing to be done is likely to be better done by individuals than by the government; (2) that were this not so, they should be left free to do such things as "means of their mental education," "of strengthening their judgment," "accustoming them to the management of joint concerns," and the like; and (3) that it is a great evil to add without necessity to the power of an administration. The advantage of leaving much in the hands of private persons, as is done in England, instead of throwing everything into the hands of officials as in France, is a striking example used both by Mr. Mill and by Mr. Laboulaye in his "*l'État et ses limites*" showing how greatly two nations, both under free constitutions, can differ in the spirit of freedom. The cause of this lies in the tendency towards diffusion of power in the one country and of centralization in the other; both of which may be carried beyond due limits, but the latter is far the more dangerous of the two to the real and ultimate prosperity of a country.

## § 88.

The limitations of state-power, which Humboldt and Mill Some remarks on these opinions. have set forth in their essays as one of the most important among the questions relating to the state, do not seem capable of being reduced to exact rules. Even the discussion of Mr. Mill shows that the particular points of a practical nature which he brings forward are involved occasionally in more or less of doubt. We make the following suggestions on this subject, in the hope of contributing in some small degree to a true statement of the subject.

1. The object aimed at or especially sought for by these two distinguished writers is not the highest within the reach of political science, nor is it of necessity reached through a high degree of political liberty. Their object is the calling forth of the qualities of the individual, his full and free personality, to the greatest possible extent. Now this may be very desirable, but the destination of man with which the conception of rights is closely connected, the cultivation of the moral nature by the discipline of justice, seem to be much higher ends in the scale of true value than the diversifying of individual life, and the encouragement of all the special talents and sentiments which can be awakened in an entirely free individual mind.

But besides this, the highest liberty in civilized society fails to secure this extreme individualism, which is sought for as a good because it exists so rarely. The more liberty the individual has in modern society of developing his moral and political life, the more obstacles he meets from a general or class opinion, which this same liberty has cherished. One great complaint now is that opinion runs in one or two ruts of thought. Originality is in part cut off by the closeness and rapidity of communication. There are some who are aided by the opportunities which freedom gives them in discovering what their talents are, and in striking out into new paths; but opinions are more hampered than they were when men saw less of one another, and thought passes from

one to another like coined money, received by all at a par value.

2. In regard to the amount of freedom it is a rule of the highest importance, which will be admitted, we think, without hesitation, that whatever the individual can do without the aid of the state alone, in this he should receive no sort of assistance from the state; and that whatever associations of individuals can accomplish without aid as well as without trespassing on others' rights, they should be left free to do for themselves. The possibility of such trespass alone requires the supervision of the government. Whether the enterprises thus in the hands of private persons are wise or foolish—this is no concern of the state, in such a sense as to justify keeping individuals or combinations of men under the control of its superior wisdom. Yet we concede, that when an act of incorporation is necessary, a just reason for withholding it might lie in the rashness of the enterprise projected.

3. When the state and private capital may alike originate a work of public use, it is in itself uncertain which of the two parties ought to undertake it. The state certainly ought not to prohibit private persons from doing what it may itself do, on the ground that the enterprise promises a large profit, for the state is not a firm seeking an advantageous investment of its capital; nor on the ground that it will deal more honestly with its customers, which is uncertain, and if it were certain, would rather call for supervision over the fulfilment of private obligations, than be a reason why it should itself assume the burden. Then, only, ought the state to be called upon to undertake great works, when, by the nature of the case, private persons cannot contribute an adequate amount of capital, or cannot hope for sufficient remuneration. But to this it ought to be added that there are states of society in which the principle of association is as yet undeveloped, and there is no probability that men, or companies of men, can or will go forward with great schemes of public improvement. In many political communities the government would be unwilling to allow private capital to undertake such works, if they had the

ability, and thus the habit of association is wanting. There is in theory no objection to the country then taking the first step; and such public enterprises, if successful, may greatly stimulate private combinations in the future.

4. In the great department of repressive legislation, lying outside of the direct protection of human rights, as in that against immorality, obscenity, blasphemy, the state alone can have any control. Again, where public order or health is concerned, no combination of individuals can act unless in a subordinate part and as authorized by public power. So that here the state must have the whole field to itself through its officers or those of some municipal corporation representing state-power. The state alone is equal to works like these.

### § 89.

From what has been said and from the very nature of society as a state in which persons endowed with equal rights exist together, as well as from the necessity of state-power, it may be inferred that a difficulty must exist in reconciling state-power with individual liberty. It may transgress the due limits even in seeking to keep individuals in the exercise of their supposed rights from coming into conflict. The inevitable powers of an armed police force, and taxation, are in great danger of being used to repress individual liberty in its just exercise. In all those cases where the state feels itself bound to avert remote evils from society, or to defend the *status quo* against dangers threatened by changes in society, or seemingly threatened, its vague power of protection and of self-protection can scarcely fail to clash with individual rights. Whether the difficulty of reconciling the two powers, or the union of liberty and order, can be exactly defined in an abstract way is extremely doubtful. We must have strong states, and they may crush individual liberty and enterprise; we must have a free people, and they may reduce state-power to such a minimum that the state can do nothing outside of the narrowest routine, and even may not be strong enough to protect the people from anarchy.

Difficulty of adjusting the limits of state-power.

But let us look for a moment at a state of things which may exist under a strong government,—at the possible invasions or limitations of rights when the constitution is far from being despotic. A government may undertake to limit the amount of property or of property in land which a man or a family can hold, on the ground that concentrated wealth will be politically dangerous or create a proletariat class. It may restrict or prohibit commerce with foreign ports to encourage home industry. It may enact bankrupt laws in violation of contracts. It may limit the power of testamentary disposition in various ways. It may make divorce as easy or as hard to be obtained as it pleases. It may throw obstacles in the way of associations of private capitalists, and seek to do everything by an agency of government in which private persons can be competitors. It may give special privileges and monopolies. It may neglect to protect by sufficient legislation the rights of the press, of religions worship, and of personal character. It may be able to lay the burden of taxation unequally, or without uniform principles, now to benefit one branch of industry, and now another. It may be suspicious of the people and express its feeling by a vexatious petty system of police regulations. It may by its taxes and its wars grind down the people into poverty, or rouse them into calamitous insurrections. And all this can happen under almost any forms, if the government can feel its interests to be separate from those of the people. Even party spirit, getting possession of a free country, under a definite, limited constitution, can within these limits oppress the people more than despotic administrations would dare to do, since it can calculate on the support of a powerful party.

#### § 90.

In view of the necessary liability of governments to overstep their power and of the proneness of political communities to lodge too much power in the hands of their governments, we proceed to consider very briefly:

Limits of rights  
and state power.



1. What are some of the just limits on the exercise of individual rights ;
2. What are some of the limits that can be put on the powers of the state and the government over the people ;
3. Are there any liberties or special rights under the constitutions which can serve as guaranties of freedom and as checks against power.

These points will not be considered at large, for the details at least belong to the practical side of politics, and the general outlines themselves have only been reached by favored nations after long experience.

1. Private rights are in great measure suspended only when the preservation of the whole community, or the necessary use of the state power for the defence and protection of the people, demands so great an interference with liberty. But it is necessary that the just state should restore the normal state of things as soon as possible. And to this it ought to be added that no crime is justified by any extremity of self-preservation, such as forced change of religion, or the sacrifice of an innocent man, or the distribution of losses so that they shall not fall as far as possible on all alike.

Private rights, as we have seen, do not allow to the individual to use his rights in an immoral way. (Comp. § 81.)

The punishment of crime requires the suspension of one or more rights as long as it continues. (Comp. § 20 and § 115.)

The prevention of crime cannot but interfere with the perfect liberty of the innocent person, as long as he happens to be under suspicion ; and general rules for the safety of the community make it necessary to restrict the actions of individuals at particular times or in certain places.

In most other cases, where attempts are made by governments to meddle with the rights without which the work and intercourse of the world cannot go on, the government ought to be able to prove that there is an imperative reason for such a restriction.

2. The limits upon state power, to prevent its tyrannical action on individuals, or its partial and unequal action on classes

or portions of the people, are to be found chiefly in constitutions, of which we intend to speak in another place. The limits will consist mainly in making certain actions unlawful and giving the right of prosecution to those who are maltreated; in distributing and dividing up power, so that it shall not be excessive at any one central point, and self-government shall prevail all over a country, with a certain proper subordination of local to higher officers; and in those liberties of the people or of the active people, which will be mentioned under the next head.

Methods of checking the central power, or of having instead of one supreme officer a great number, each confined within a small circle of duties, as at Athens and other small republics, in order to make tyrannical usurpation of power difficult,—such methods belong to practical politics, and are suggested by the great necessity of limiting the powers of government in favor of the people.

### § 91.

3. The liberties and securities to which a private person has a title, and which no just government will withhold, are such as these:

Liberties or rights of the citizen in a just state.

(1) The equal and righteous administration of justice. All the members of the state ought to have the same rights before the courts, because justice in its essence is no respecter of persons. They ought to have the same power given to them to plead and maintain their causes in the courts of the country. It is essential that these courts should be such as to provide for impartiality in judging of law and fact; that the government must have no influence in any way on the decision; that in criminal cases, the inquisition of a grand jury, and the presentation of a man for trial before a court by a state-officer, shall mean only that the evidence gives good ground for trial but carries with it no presumption; that there should be in such cases a positive verdict; that, where the government is interested, as a party separate from the state, all provision be made for a fair trial and for all helps to

the accused to make his defence ; that no new trial shall be possible without new and important evidence ; that the power of arrest shall be limited, and the arresting officer be responsible. Before trial the freedom of the person must not be abridged by detention in a place of confinement, if bail can be furnished, except in those cases where the forfeiture of bail would be an inadequate measure of the alleged crime ; and the time of detention before trial must be reduced within very narrow limits. After acquittal no accusation or suspicion ought to affect the rights or *status* of the person accused. The reasons for these maxims of justice would readily suggest themselves, if they were not enforced by history. A single instance of what could happen in the criminal procedure of one of the most just of nations will show how much need there is of such securities for accused persons. Down to the reign of William III. no counsel was allowed in England to persons *indicted* for high treason, nor to persons *impeached* for the same crime by act of parliament until 20 Geo. II. ; nor for persons accused of felonies (except on collateral facts) until 6 and 7 William IV. (Comp. Christian's and Stewart's notes on Blackst. iv., 356.)

The security of the people against wrong judgments of courts implies in theory as well as in practice the removal of all dependence of judges upon a government or a community. They must form a separate department removed from all control of executive officers, and capable of putting a stop to illegal stretches of executive power. This arises from their very nature of an impartial body, appointed by some political body, and called to judge—if a country is to have its rights preserved—over the heads of political bodies and without regards to politics, in questions of fact and law, where any bias would be a crime.\*

It would seem also that if the state is bound to provide for the administration of justice, this public justice ought not

\* Most of the subjects touched upon in this section, are discussed at length in Dr. Lieber's *Civil Liberty*. See the third ed., edited by the author of this work.

only to be unbiassed and impartial, but to be rendered at small cost, unless it should appear that under the form of justice the complainant gratified a malicious spirit.

(2.) It may be asked whether there are no exceptions to this equal and unbiassed distribution of justice. Seeming excep-  
tions; bankrupt  
laws. Thus if the conception of a claim against another for money due never in itself wears out, what shall be said of the justice of bankrupt laws and of statutes of limitation? As for laws relating to bankruptcy, the doubt is not whether a person who has been unfortunate may not begin anew, free from his old load of debt, after obtaining the consent of his creditors, but whether the law in spite of reluctant creditors may set him free from obligation, not only for a time but even after his ability to pay his debts may have been recovered. In the United States the constitution gives Congress power to pass uniform laws on the subject of bankruptcy throughout the Union; but it has been ruled that the States also can legislate on this point, until their laws be superseded by a general one. Such a law may have or not have future conditions; it may provide for a full, or a temporary and contingent, discharge of the creditor. A small provision for his family is in accordance with the principle already laid down that the family has a certain claim on the property of its head. But to give a full discharge and leave future payment entirely to the debtor's conscience is a very questionable proceeding. How a state ought to act in extreme cases is another question. The *σεισάχθεια* or "shaking off of burdens" in the time of Solon may have been inevitable. The Athenians were far from regarding this as a precedent, if we may judge from the Heliastic oath in Demosthenes (c. Timocr., § 179), that they "would not consent to the cutting down of private debts nor to the dividing up of the land or houses of the Athenians." It seems probable, however, that when a debtor there gave up his property, he was entitled to a release from his creditors.\* At Rome, on the other hand, the most stringent law of debt prevailed,

\* Comp. K. F. Hermann, iii., § 70, note 3.

giving at one time even the debtor's person to the creditor ; nor does there seem to have been any essential change, until, under the Roman emperors, a cession of property to creditors exempted the debtor from imprisonment. In English legislation the debtor's property, if he is a trader, is put into the hands of commissioners ; if he has not been fraudulent or grossly careless, he is allowed at least to go at large and to be able to enter into a new business, and his entire property goes into the hands of assignees. If he obtains a certificate of conformity to the law, he is entitled to a certain amount of the proceeds, after two or three dividends have been paid to the creditors.

It would seem fair and just that, when fraud or gross negligence of his creditor's interests does not enter into the case, the bankrupt's family ought to have some allowance for their needs, and that no final discharge ought to take place without the consent of the creditors.

(3.) Prescription is a means "whereby in the course of Prescription and limitation of time as to bringing suits. time and under certain determinate conditions, a person acquires a right or is freed from an obligation." Statutes of limitation, after a certain time, prevent a person formerly owning or possessing the same thing from bringing an action against the present possessor. The limitations in criminal law, which are analogous, by which prosecutions or a criminal charge cannot be brought after a certain term, do not concern us here. Now what is the justice of prescription, especially as it relates to the title of land? We may find a reason for such a rule in the difficulty of gaining evidence, after adverse possession, for a length of years, and the greater liability to deception in regard to old titles. But this does not apply to the limitation of the right of action in respect to notes of hand and book debts. The common ground for all limitation in private right is a practical one. The unlimited or timeless nature of rights comes into conflict—to use the language of another,—with the existence of men in time, with the constant change of their relations and the finite character of their knowledge.

Thus it is necessary even in rights which are in themselves unlimited as to time, to carry through the principle that time controls the concrete practical system of *jus*, and can give rights as well as take them away. The Roman law had no general notion of prescription or superannuation of rights, but introduced it in special cases of great importance.\*

(4.) Another seeming violation of private rights is the taking of land for public purposes. An explanation of this in ordinary cases has been attempted already in this treatise. (Comp. § 26, 1.) Extraordinary circumstances, as imminent danger, justify another treatment of private property, that of the destruction of edifices in war for stopping a fire. But wherever a community is benefited by a private loss, the private person ought to bear only his fair proportion, as one of many.

#### § 92.

The right of petition is so universally acknowledged even in despotic countries—at least in its most harmless forms—that it seems at first view hardly to call for remark. It is without question a right. It is needed especially under arbitrary governments, where those who seek for redress have no representatives to intercede for them; it is needed in constitutional representative governments, because opinions change, new wants arise, and the representative may act on the base principle that he represents a party only. All the people in all countries, citizens and foreigners, ought thus to have free access not only to courts but to legislatures and magistrates, either in reference to public affairs or to such as affect their own industry or calling. Thus, let a person know of the misconduct of a subordinate official, he has a right or it is even his duty to disclose it to the head of the department; or let there be a ruling of the chief finance minister in regard to duties, the merchants concerned ought to have the right to make representations touching it. In

\* Comp. Bruns, d. heut. Röm. Recht, in Holtzendorf's Encyclop., 282.

our country the citizen may go farther, and remonstrate against an existing grievance, or a contemplated appointment ; and nothing is more common than petitions in favor of candidates for office. But the right of petition is generally exercised in urging the legislative department to pass or not to pass a certain law or bill, whether referring to private and local affairs or to measures of general legislation. Petitions may take the form of remonstrance or of request ; it makes no difference whatever the color of the addresses or declarations may be, when they are sent into the legislature ; if respectful in form, they are presented by some member and form a part of the business. In some few cases petitions have been sent in—the propriety of which may be questioned—to the chief magistrate to withhold his signature from a certain bill.

Petitions have less weight in this country than in some others—although the right is secured by the first amendment to the constitution—*first*, because the representatives think in all important measures that they understand the opinions of their districts better than the petitioners do ; *secondly*, because all such measures are judged of from the standpoint of party and not from that of public interests ; and *thirdly*, because the petitions themselves are known to be often signed without much reflection, on the solicitation of interested or zealous persons.\* There are in fact so many other ways of knowing what public opinion is, that this way has not the relative importance which it once had in affecting legislation.

Petitioners have no right to appear in person before a legislature ; their rights end when they secure a member of the body to present their requests. In the first years after the French revolution, petitioners were not confined to the presentation of their requests by a member of the assembly, but were suffered to come in person within the house, until disorder

\* Comp. Dr. Lieber's Civil Liberty and Self-government, ed. 3, p. 121 and onw. See in R. von Mohl's Staatsr., Völckerr. u. Polit., i., 232-280, an essay entitled "Contributions to the Doctrine of the Right of Petition in Constitutional States," which contains much valuable matter.

and even crimes were committed by persons who pretended to appear before the assembly for this purpose. In the French constitutions of 1795 and 1799 this evil was checked by the provision that only single persons, and not societies, should appear on such occasions. The clause in the constitution of the last-named year "*toute personne a le droit d'adresser des petitions individuelles*" was interpreted to mean not only that the signature of more than one person was not to be affixed, but also that the petition was to be addressed and not handed in by the signer.

Freedom of expression of thought and that of meeting in assemblies for this purpose, are two other necessary liberties of a people. This is a wide subject, which we cannot expect to exhaust. There is a general agreement that liberty both in speech and writing is to be respected, and that some restrictions on it are necessary. When it is asked, however, what those restrictions are, there will be a divergence of opinions, occasioned partly by the condition of the state—whether the government fears free censure of its measures or has no such fear, whether the times are revolutionary or quiet, whether there is a state of war or of peace—and partly by the difficulty of balancing the good and the injury of free expression of opinion. We will look for a moment at several points.

Public gatherings, for any purpose, political or other, are defended by the rights of individuals to express their opinions and act in concert. Cases may occur of processions blocking up streets and preventing the ordinary passing. Here the authorities of cities have a right to confine a procession within such bounds that it shall not entirely obstruct the way. Public meetings in the open air are not to be prohibited, unless there be danger, imminent and unquestioned, of riot; and even then, an increase of a police force, and other measures of security, are better than that the elements of disorder should be a plea for preventing the exercise of an undoubted right. Street and field preaching, again, may claim protection from public authorities, and ought not to be prohibited



on the ground of exciting the ill-blood of a denomination. The wise course for public authorities, in all cases where exciting questions are discussed in the open air, is to allow any degree of intemperate feeling which expresses itself in words only, and to be ready to prevent all acts of violence.

The liberty of the press is sacred in all free countries, as a corollary from the rights of free speech and opinion. It is placed under the same responsibilities with the right of speech, in regard to injuries done to a man's reputation, to incendiary appeals against a government or a public official, and to obscene or blasphemous publications. Private rights and public order can no more be injured with impunity by printed than by spoken or written words; nor ought there to be any more license given to a political newspaper to charge an adversary with crime than to a speaker in a ring. Indeed the wrong in published words is more deliberate and more easily proved than in spoken ones. Here we remark, *first*, that mere ridicule, the putting of a person's arguments or words in a ludicrous light, or charging him with discreditable feelings, like bigotry, infidelity, or hostility to religion, although immoral, are not in themselves, without evidence of a particular malignant purpose, technical injuries, for he can find the support of others who think with him and will defend him. We recall, *secondly*, a remark already made once before, that it is rational that the truth should be adduced in defence against prosecutions for libel, for it is often of great importance that a man's private character should be known, and the amount of confidence ascertained which the public ought to repose in him. On the other hand, this must be done by the publisher with a rope round his neck, so to speak. He can so easily spread a slander which a good life cannot easily put down, as to require him to show that he had no malice in issuing the report. *Thirdly*, sober assaults on Christianity ought to be as free as sober controversies on any philosophical questions. It has been attacked continually since Christ appeared in Judæa, and has spread, notwithstanding, by its inherent spiritual power. Why should any believer be such a coward as to fear for it

now, and why should he justify it for vigorous assaults on heathenism and infidelity, while he forbids its foes even to stand up in their own defence. The same may be said of the advocacy of immoral philosophies, of socialistic vagaries, of extreme rights of revolution, and the like, if undertaken in the sober way. *Fourthly*, obscene pictures, engravings and publications ought to be prohibited, on the same grounds that obscene exposures of the person and that houses of prostitution are prohibited. See § 80. *Fifthly*, there ought to be an offence of a public nature, some publication, before any restriction is applied. A censorship, even if so restricted as to touch only dramas that are offered for the stage, rests on a false principle. The true principle is that a person may publish but must take the consequences; the false principle is that the consequences, being possible influences of an immoral sort on the minds of men, are to be prevented by measures which would destroy liberty.

There is, however, we admit, a point of considerable difficulty just here, relating to instigations through the press of criminal attempts on life or appeals against obnoxious laws commending their violation. Mr. Mill (*Liberty*, chap. ii., beginning) rightly finds no reason for interference when an ethical philosopher justifies tyrannicide in a calm way, but he holds that the instigation to it in a specific case ought to be punishable, if an overt act has followed and a probable connection with the instigation can be made out. A similar case would be the exhortation of a violent free-trader to evade the provisions of a protective tariff, which can be shown to have led a smuggler to the killing of an officer of the revenues. Must we not lay down this principle, that no calm, fair discussion, however atheistical or immoral or revolutionary the side it takes, ought to be either forbidden by law, or be charged with any consequences, which may indirectly and without the writer's intention have proceeded from an unsettled brain. There seems to be no other rule possible unless we make men legally responsible for all the 'indirect damages' which their opinions or examples or even silence may have helped on.

Just and equal taxation to which the tax-payer can give his assent through his representative in the legislative assembly, and in the town or municipality by his own vote, is one of the most vital of all liberties in the state. Taxation without representation, in the Anglican notion of liberty, as expressed in the Magna Charta and other political instruments, is a gross violation of rights. The danger, also, of inequality of taxation is very great, greater in a democratic country than in almost any other, greater where universal suffrage has gained a footing than in other democracies. We have referred in another place to the dangerous and arbitrary power of legislatures, which is so common, of levying and appropriating taxes, borrowing money, helping public works, and the like, without any check. There are communities in the United States where one-half or even more of the income of taxable property is necessary to pay the taxes. In view of the various abuses or opportunities of oppressing the taxpaying inhabitants of a state or town, we *first* repeat a remark already made, that it is contrary to the spirit of our liberties, that those who have no taxes to pay should have the right of voting on the budgets of towns or cities. This would be in times of corruption a most terrible weapon in the hands of demagogues for revenging themselves on the wealthy and getting the aid of the lowest people. *Secondly*, there ought to be limits of rates beyond which no city authorities or town-meeting should have power to go without at least special permission of the legislature; and limits, also, beyond which a legislature should have no power to enhance the state-tax without a very decisive vote, say of three-quarters of the members. A necessary adjunct to this limitation would be the check on the power of borrowing money. Again, *thirdly*, it is still more just that there should be no exemptions, no untaxable property,—a rule against which numerous offences in time past have been committed. Thus it has been not unusual to charter a bank paying a bonus to the state, to put the rate of taxation on bonds of railroad companies lower than on other property in order to

encourage the construction of such works, and to exempt funds given for eleemosynary purposes, church property, the funds of academies, etc., from taxation. This last exemption is far more defensible than most others, as it relieves the poor from a considerable burden, and for the most part only changes the list of articles taxed, while the same persons upon the whole pay the same amounts. But perhaps the rule of taxing all property except that owned by the government or minor communities would be most just and advisable.

There ought to be no other exemptions or impositions of a special nature, as from military service, or from serving on juries. If age is to bring relief, it should apply equally to all. To remove public burdens from one rank that they may fall the more heavily on others—as heretofore in several countries the lands of the nobility were free of taxation on the ground that they were held to expensive military service—is to reduce the peasants to slavery, not to say that those who are least protected and least able to bear the load put on them are most of all oppressed. And so where there is a necessity of laying special burdens on a community, they ought to be equal as far as may be, and regulated by law in such a way that they cannot be made oppressive on political grounds. The power of quartering troops upon the inhabitants of a town or district is one of those which has figured largely in the history of English liberties; it was one of the principal grounds for the petition of right in 1627, after the southwestern countries had been punished in this way by the court. It was regulated by an amendment to the constitution of the United States, after the English precedent.

So also difference of privileges in regard to the tenure of land or the marriage condition, in regard to the use of courts and modes of penalty, is, to say the least, questionable on the ground of justice, and ought to be done away. Most of these, where they exist, come down from feudal times, and once had some political reason to justify them, which has now in most countries become ob-

solete. Thus, entail ruled in respect to some land, with succession to the next male in the kin, while in respect to other land free testament or distribution among all the children was permitted. The prohibition of marriage between persons of different ranks in order to keep the blood of a nobility pure, to preserve a distinction between orders and to prevent confusion of rights, is an old and natural device. The overthrow of a separating wall between the orders was one of the leading steps in Rome by which the wealthy plebeian families came to a level with the old patricians, and the governing class was essentially modified. The same separation has run through the law of some modern states, and was strictly enforced, especially in Germany, leading to morganatic marriages and immoral alliances.\* In several of the United States a prohibition of marriage between whites and persons of color, so far as it had any effect beyond the natural disgust at such a mixture, produced similar licentious connections. The laws forbidding marriage with foreigners were intended either to prevent citizens from being injured by foreign influences, as at Athens, or proceeded from the old feeling of race, which is still seen in a multitude of inferior tribes, and gives rise to similar regulations. Differences of courts and of penalties for the noble and the common man were not intended to shield the nobleman, but sprang simply out of aristocratic feeling. All those distinctions are unreasonable and unjust.

### § 93.

The immense power given to individuals by combination, and the range of which associated action is capable, if allowed to have full play, render it an object of just dread lest it should interfere with the functions of governments and even with the powers of states. It needs defence under the laws from the suspicion which may grow up on this account; and the state must have some control over it, lest it become an *imperium in imperio*. It

\* Comp. Göhrum, Ebenbürtigkeit, Tubing., 1846.

may also interfere with individual action and oppress its weaker competitors. We remark on these points, *first*, that what individuals may do in any of the industries of life, associations ought to be permitted to do also ; and that the facilities for encouraging joint stock companies, which the laws of most modern states supply, are not unjust to single individuals engaged in the same branches of industry. If the associations can make their products at a cheaper rate, they will supplant individuals ; if otherwise, they must give way themselves.

*Secondly*, there are some results of labor which the single capitalist will find beyond his means or beyond the risk which he ought to incur, or which reach over a great extent of territory. Here associations are almost necessary to effect the object. Submarine cables, Suez canals, railroads to the Pacific, would have waited long for their construction, if they had been left to individuals or even to governments. The endowment of schools of learning, the foundation of learned academies, the building of churches in such a country as this, with many other public societies, demanded the effort of many acting in concert.

*Thirdly*, associations must have legal powers and responsibilities, either under general laws like most partnerships in trade, or like manufacturing companies with limited liabilities of stockholders, or with special acts of incorporations. There are also powers such as those needed by companies for building roads or improving harbors, which a state alone can grant. The right of the state to give grants authorizing the passage of roads or canals across private land is explained by the companies acting with delegated powers, and they are bound to give all reasonable compensation, as the state would be bound, if it had done the work for itself. We add that no such company ought to have any privilege by which the just claims of any creditor, whether public or private, can be evaded.

Fourthly, *secret* associations, especially such as have passwords, initiations, oaths, and can easily be converted into in-

stitutions hostile to the government or constitution, may rightfully be placed under especial surveillance. There will be the greater need of this, if they are spread in various branches over a large territory and can act in concert for gaining political objects. It is easy to understand that a government not secure or confident of the attachment of the people will not endure them ; and nowhere in a time of war or civil strife ought they to be endured. The most free countries can claim thus much—that, when called upon, the officers of such clubs shall give an account of their proceedings or that officers of government shall have admittance. A club or society, which has life and continuance and is suspected of political objects, makes itself an enemy to the country by its secrets, and may be treated like drinking saloons—be required to give bonds for good behavior or to open its doors to the police.

#### § 94.

It has taken ages for the most civilized nations to come to the conviction that the state ought not to meddle with individual and family belief and divine worship, and that it is iniquitous to prevent public worship of peaceable and orderly citizens. The great importance attached under Christianity to doctrine and personal convictions, tended to produce definite forms of faith and worship ; but the same cause acting on individual minds made them investigate truth for themselves, and the spirit of religion led them to hold on to their opinions and forms with unyielding tenacity. If uniformity could be produced by law, light would be excluded from the individual mind ; all thought would be in fetters, not only in theology and religion, but in all departments in which the doctrines may conflict with those of religion ; and all religious institutions would be after one pattern. But individual minds rebel against such bondage, and hence the alternative of persecution even to death, or of forced hypocritical conformity. It is the conviction that the world will not bear such tyranny over thought, the protests of persecuted minorities, and the evident impotence of laws securing uniform

faith and worship, that have nearly broken up this system. But its injustice was long unfelt ; and sundry plausible arguments for it, especially of a political kind, triumphed ; until the divisions between Protestants and Catholics ceased to influence international relations, and within Protestant states kindness of feeling or indifference to religion broke up the feeling that dissent ought to be put down by law. At present, when it is agreed on all hands that the state ought never but in extreme cases to require of the individual that which his faith and conscience condemn, this war between law and conscience is in great measure done away. This change will not necessarily involve the disestablishment of a national church, provided full religious liberty is conceded ; and it may even be found that churches which are established will become the gainers, by reducing their privileges within a very narrow compass, and by the entire abolition of laws prohibiting in any degree religious freedom ; for a sense of wrong without doubt has intensified dissent.

The securities for this liberty of worship and of conscience are worthy of being engrafted into constitutions, but at all events must be embodied in the laws of a free nation.

It is not enough that the inhabitants of a state are secured in their rights by law as single persons are, or even as associations ; the keystone to this system is found in municipal franchises, which are at once political and private. That is to say, if secured by charter or constitution they unite a body of the people under a self-governing power to the state, and yet protect the same body against the state. Power is given to the people in a righteous system to resist unjust taxation and even to decide what the taxation shall be, while at the same time they are obliged to bear their burdens. Somewhat so the municipality unites them to the state and defends them against the state ; it gives them protection at home and the power of managing their affairs, enables them to act officially in concert, educates them to serve the state and to understand public affairs in the wider sphere, stimulates public spirit, secures distribution of power without destroy-



ing unity. Nor ought self-governing powers to be granted to places only where large masses of men are gathered together ; but scattered communities and villages ought to have them in a form suited to their peculiar wants. And there is especial need that they should have security by law, because with them combination is difficult ; so that a grasping government could more easily strip them of their franchises than they could larger towns.

## CHAPTER VI.

### THE ORGANIZATION OF STATES.

#### § 95.

It is conceivable that a society of human beings should remain for some time in an unorganized condition. Desire of the organization of the state almost instinctive. If the members of it had all reached the measure of Christian manhood, intercourse would be without suspicion, life and property would be safe, the social virtues would all flourish: and, as far as the wants of the society itself were concerned, there would be little need of political institutions. Something better than the absence of crime and of fear, the positive control of kindness, justice, unselfishness, would be brought about by a higher law. But even then, we may suppose, there would be a craving, a sort of instinctive longing for political order and unity. It cannot be mere fear which makes constitutions and states to be accepted; mankind crystallize into *forms* of life, as substances mingled together obey a law and take a certain arrangement among their particles. Nor can it be the social instinct only; for this is a blind tendency, a sense of loneliness and unprotectedness outside of a life in society. With the tendency, the means to secure the end, derived from the simple forms of existing life and improved by experience, suggest themselves. In the infancy of society, the family and its offshoots determine what this arrangement shall be. When men are used to political forms at a more advanced period, they build states as readily as the beaver builds his dam. The settlers in one of our new territories, although neither homogeneous nor well instructed in politics, will have a government, if it is not furnished to them, and will, for the most part, copy forms with which they have been familiar.

The organization of a state consists of those means or agents by which the work or office of a state goes on in its course, in conformity with a certain constitutional idea. In a living organic body, the system of organs is for a certain end or ends ; the parts are for the whole, and are also means and ends for each other ; and certain leading parts control or regulate the other parts. The *moral* organism of a state differs from *natural* organisms chiefly in this—that the parts have a free agency, as well as certain definite ends and relations to one another by their nature, which ends however they may neglect or wilfully refuse to fulfil. No such organism, moreover, can subserve its true end, unless it also subserves the end aimed at in the creation of the individual man. States have not, like natural organisms, reproductive powers, but they aim in their natures at permanent existence—they do not provide for successors. But as individuals, communities, relations of property, religious beliefs, and other causes affecting the individual or social interests of man change, the organization of a state cannot remain unaffected, but must either submit to partial modifications or to a complete overthrow. In either case, as law and institutions generally continue and bind the people together, it cannot be said that even in times of anarchy the state suffers a complete dissolution.

There must in every state be some leading principles according to which the relations of the organs and functions of the state are adjusted : work is distributed, powers are assigned in such sort that there shall be as little interference as possible, and all the active powers of the state shall know their places. There must also be some understanding as to what are the relations of the governing parts to the governed, and what may be done in the exercise of lawful authority. There will of necessity, therefore, be some limitations on the action of the several organs, and some rights guaranteed to the people. If the judges could make as well as interpret laws, or the chief magistrates levy taxes at discretion, or decide cases in which private persons had com-

Constitution of the  
state.

plaints against the government, there would be complete confusion of functions; and absolute power within certain limits would belong to one department, or at least it would be easily usurped.

The collection of principles according to which these powers of government, rights of the governed and relations between the two are adjusted, is called a *constitution*. This may be a written instrument, or may exist in the shape of a number of laws of the first importance, or it may have no outward form or expression further than is given by precedents and habits of political acting, which have a sacred character in the minds of the nation. The first of these forms is, in matter of fact, the most modern way of adjusting relations and securing liberties. The second is of greater antiquity. Such a constitution may be called, as being not distinguished from the laws in its form, an uncollected, or—as growing by successive additions, according as it was necessary to secure some point against the chief executive—a cumulative constitution.\* Thus the petition of right, the declaration of right, the habeas corpus act, may be said to be new statements of rights conceived to have existed before, without clear definition or enactments of new rights by the English parliament with the consent of the crown. But they resemble ordinary laws in this that they can be repealed, without resort to the community, by some representative power. Instruments of government in a collected form, like our constitution and many of the newer ones of Europe, are generally more difficult of alteration than ordinary laws. Our constitution is defended against hasty alterations by two provisions—the first, that amendments shall be proposed by two-thirds of both houses, or by a convention, called by Congress on application of the legislatures of two-thirds of the several states; and the other, that such amendments shall be valid when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths of them.

The third plan would, by some, scarcely be called a consti-

\*This is Dr. Lieber's term.

tution, and it belongs to nations where law, as distinguished from custom, hardly exists. But if, in the mind of the nation, certain customs cannot be violated without peculiar guilt, and the attempt would excite great commotion with the probability of being resisted, there is even here a constitution to all intents and purposes. It is like family regulations which have never been written out, some of which have a trifling character, others of which are regarded sacred and inviolable. We shall have more to say of such constitutions, when we come to the third part of this work.

If a constitution, to whatever class it belongs, can be interpreted at pleasure by the executive or the law-making power of a state, it scarcely differs from any other law, it is substantially modified by such interpretation. But cases come up where the question of its meaning must be determined. Here the safest way of proceeding is to invest the supreme judges with the same power which they have of deciding what the lawmakers intended by the expressions used in any subordinate enactment.\*

\* Judge Cooley, in his "Constitutional Limitations," quotes the following passage from Hurlbut's *Rights and their Political Guarantees*: "What is a constitution and what are its objects? It is not the beginning of a community nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause, but the consequence of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of their political government, and necessarily based upon the pre-existent condition of laws, rights, habits, and modes of thought. There is nothing primitive in it; it is all derived from a known source. A written constitution is, in every instance, a limitation upon the powers of government in the hand of agents," etc.

A constitution in free states must, indeed, be generally a limitation on the departments of government; but can we not conceive of a constitution introducing despotism, or introducing some wholly new provisions, like that of a responsible ministry in the modern constitutional governments of Europe—new, that is, in the particular state in question. The idea of a fundamental law is perhaps that one which will form the leading part of a definition of a constitution.

## § 96.

We come now to a question of political morals which this seems the most fit occasion to discuss. Is any formal assent of the individual necessary before he is morally bound to obey the laws and conform to the constitution? Or what is meant by the maxim that government depends on the consent of the governed. Does it mean that a single person, when he comes to the age of reflection, is free to renounce his allegiance to his country while he remains within its borders? If by allegiance we intend obligation to obey the laws, this obligation certainly can never be refused, unless there is some higher obligation requiring disobedience, for to admit such a rule would destroy all order and confidence. The society would not consent to it without ruining itself, and this consideration alone ought to make the individual feel that he cannot, in this respect, act as he chooses. Or is it said that a man may leave his country to avoid a bad or hated government, without opposing the law of duty? This may freely be admitted. "When they persecute you in one city flee into another." But of what use is this as a general principle? Ninety-nine out of a hundred are tied up in the community, and cannot leave it if they would. Or, again, is it meant that, as I have given no express consent—having taken no oath of allegiance, or freeman's oath, as we call it, to the constitution and laws, there is nothing but expediency to determine whether I shall obey? I am under no moral rule. But this will not stand in ethics. Unless I have made up my mind that the government or the state ought to be destroyed, that I ought to attempt a revolution, the duty to obey the laws continues, whether I have made a formal promise so to do or not. It is the obligation that calls for the promise, not the promise that creates the obligation. Or, again, will it be said *of a whole people*, that a constitution which they have had no hand in making imposes on them no obligations, unless they give each one for himself a voluntary adhesion to it? This is the form which

Is the consent of the people necessary to give validity to a constitution?

the maxim under examination perhaps most frequently takes. It would logically follow, from the dogma that the validity of a constitution depends on the consent of the people, or of a majority, that when a majority of those who first gave their assent should have ceased to live, the question should be submitted again. (Comp. § 68.) It would follow also that the common provision of our American constitutions, requiring a two-thirds vote to change them, is against the sovereignty of the people, who have no right to impose such a restriction on their successors. It might be that a majority wanted a change, but not two-thirds, and so, until the end of time, the prevailing will might be constitutionally defeated. It would follow, further, that wherever there has never been a submission of the constitution to the people, as in Russia, and indeed, probably never will be, as long as the form of government continues, no allegiance ought to be demanded, because the moral premises for it have failed. A theory that would unsettle all governments, the most popular as well as the most despotic, must have some flaw in it. The supreme importance of state law and state authority must impose an obligation, whether special assent is asked or not; must impose this on the foreigner while he resides in a country, and on the young man before he enters into the civil relations of life. The necessity of the state, the ends aimed at by the state, are so essential for all order, that whether I like the form under which I live or not, I must obey the law and defend the state. This must continue until things get to be so bad that in the deliberate judgment of the community, as far as can be ascertained, or at least of the wisest and best members of it, it will pay the cost to attempt a change by persuasion or force. Then, if ever, is the time for incorporating into the form of the state the principle of popular sovereignty. The ethical question of the right of revolution we intend to consider by itself ere long. Meantime we may lay it down as a sound moral rule that the right of a state to act as a state does not depend on its being a constitutional state or having any particular form of polity, but on its doing the

work and fulfilling the ends of a state in some tolerable measure.

§ 97.

What the form of government must be in order best to secure the ends of government, to establish the political rights of the people, to give to the executive the requisite strength as acting for the people, and to put such checks on the executive as they cannot evade, it is not the province of a theory of the state to determine. The theory requires that there be an organized power capable of resisting, in a constitutional way, the growth of the power of the executive to the loss of popular liberty, but how this shall be brought about, it is unable to tell. Theory requires that there shall be as few clogs on individual development as possible consistently with national strength, but leaves particulars to experience ; and experience itself gropes and blunders, until it gains from knowledge of the past sagacity in judging of institutions. Theory, again, begins to turn into well-digested science, long after states are moving on their track under the control of unobserved historical causes, when already practical problems are mixed with theoretical in such a way that theory alone would be a very unsafe guide. Again, a people has been unused to self-government, it has a very obscure idea of what it wants, and is not aware how much it ought to claim ; how obvious in such a case is its incapacity to assert its rights and liberties, or to demand liberties and securities from a government. A people, also, will have institutions, under which it has grown, and to which it is attached, which are not all consistent with public liberty. Here, for a time, theory cannot be applied, because it would provoke the resistance of a strong force.

In accordance with these remarks the question of the form of the government is to be debated outside of the region of theory, and to be decided chiefly upon practical considerations. A government which might be the best in an intelligent society, where there was but little inequality of life, would have no stability under conditions of another kind. The



point that ought to be kept in view is not what is absolutely, but what is relatively, the best form of the state ; and when changes are contemplated, men ought to ask not whether these will lead towards a constitution framed on approved rules, but whether they will remedy and provide against evils tangible and actual ; whether there is anything in the institutions, such as ranks and tenure of property, or in the local divisions, in the national feeling, in old habits and existing religions, which will thwart or overthrow changes otherwise desirable. We have said in another place that even rights, which in themselves demand immediate and perpetual recognition, may have to wait for their full establishment until the spirit of a people shall comprehend them better. So it is with the chief power in the state, with ranks and orders—as far as they are consistent with liberty—and the removal of some abuses. In regard to kingly government there are few thinking men in this democratic country who would go so far as to say that it is bad in itself, or may not be the best form for a certain people in a certain age. We can look on a nobility as capable of being a breakwater against the arbitrary power of the sovereign, and can acknowledge that the nobles in the land of our fathers secured freedom for the untitled citizens as well as for themselves. We look on our own government as a necessary historical growth ; without a noble class, removed from the king and governing ourselves with the ultimate appeal to the sovereign in council, distributed among a number of colonies acting apart, we were led, almost of course, into a confederation of democratic states ; and this is the strongest plea that can be made for our right to exist as a separate people. But we freely admit that others might not be able to follow us without incurring more risk than we took on ourselves ; nay, further, that a change towards democratic self-government may be a great curse for some nations, as leading inevitably to a tyranny. But with these practical persuasions we claim that every unjust institution, all inordinate power everywhere, everything that makes social life and private liberties insecure and precarious,

ought to be done away with in the utmost haste that is consistent with national peace and the maintenance of the reforms themselves.

Another remark relates to the sway that theory itself may come to have over the national mind. The earliest governments grew up to a great extent without reflection on the people's part, and with no idea of national destiny. But as time runs on, a theory of personal rights starts up and obtains a hearing from multitudes, so that it may, through the means that opinion has in modern times for diffusing itself, get firm possession, at length, of the controlling forces in society. This faith, which lay outside of the political causes appreciable by ancient philosophers, must be taken into account now. What are the political sentiments—we have to ask—which are moving among a people? What is their doctrine, true or false, touching political rights, and their estimate of their present institutions as affecting their rights? Have they any historical ties to old institutions, or have old habits given way to a philosophy, so-called, which brings abstractions into the place of the political sentiments held by their fathers? Such new causes in the world as these must be weighed and watched; but the question here is not the truth of the theory, but whether, becoming a faith, it will of itself lead to new political demands from a people, or will help a sense of political wants towards some definite goal.

#### § 98.

Dismissing, therefore, the subject of forms of government, Departments of government. as not determinable by theory, we pass on to say that, as it seems to us, the division into somewhat independent departments is demanded by theory as well as by practical considerations. Of one department and the necessity for its entire independence and removal from all biases—the judiciary—we have spoken already. Nor will our conclusion be overthrown by the fact that in many nations justice has been put in the hands of the chief ruler, and in democracies has sometimes been regarded as emana-

ting from a body of citizens who brought all their political feelings into the court-houses. Supposing the king or the people ought to have the power of appointing judges, this is far from proving that either of them ought to judge in person ; and the probability that they would step aside from the law and facts of a case shows the danger of entrusting the administration of justice to the leading element in the state. And yet in small communities, where usage and precedent decides everything, there can be little harm in this, for all trials are public, the relations of life are simple, and injustice is likely to meet a speedy rebuke.

For a special department, the function of which is to make laws, there was no need in the early stages of human society, where the natural sense of equity was expressed in customs and usages, where for ages there may have been little change in the relations of human society, and no new opinion demanding change ; and where usage itself must often have yielded to equity, as determined by the circumstances of each particular case on which the king or judge was called to decide. We may lay it down as nearly certain through a long period for a distinct law-making department to exist ; the knowledge of the law was in the hands of a ruler and his councillors ; the people or elders decided cases under their advice. The codification of laws, which history discloses to us in different parts of the world, seems to mark an epoch when society had begun to be complicated in its relations, when the old rude justice no longer sufficed. In later ages the function of law-making has been seldom assigned to a distinct body over which no control of some other power of the state was not exercised.

In modern times the legislative power is eminently that which represents the people of the state and keeps the magistrate within the constitution. This power it has acquired in nearly all Christian countries, and, while aiming to secure the liberties of a people, has need itself to be under the control of a constitution. A legislature that is omnipotent, with no active check of a king or chief magistrate upon it, threatens

to become an aristocratical or demagogical assembly of tyrants. Kant, in his *Rechtslehre* (§ 45), regards this as the supreme power in the state. "Every state," he says, "contains in itself three powers, that is, the general will united in a threefold person (a *trias politica*); the sovereignty (*herrschergewalt*) in the person of the lawgiver; the executive power in that of the ruler (according to the law), and the power of administering justice, or the assignment of his own to each one according to the law, in the person of the judge; the *potestas legislativa, rectoria, et judiciaria*," which he fancifully compares to the major, minor, and conclusion of a syllogism. It is true that, in a government by law, the law is the supreme moral force, and so the legislative power the supreme authority, as far as the moral sway of the law extends; but if we measure power by capacity to effect purposes and carry out will, the executive chief, if he be a monarch, is more deserving of the name of supreme in the state than the legislature. For the executive generally has a check on the passage of laws; he or it is always at the post of active service, while the legislature sits but part of the time, and has at its control no armed forces. A judiciary, except in the province of explaining political laws and trying cases when the state is a party, is less of a political body than the two other departments.

Law being the rule of action for all, must be known to all. Yet it is impossible that all should know it or fully understand it if it were made known. The rule *ignorantia legis neminem excusat* is just only where it can be shown that a person, with proper anxiety to discover what is his duty, had made no attempt to do this, or where his own moral sense should have taught him that the act in question was one which injured the community. Where small trespasses are committed and it could not be presumed that the offender would have the requisite knowledge, all due allowances ought to be made.

To a great extent laws when passed are left to some executive officer to be enforced. It ought to be their business

to give information or warning before small offences are noticed, and the same is true when an obsolete law is revived.

Laws passed after the offence which they punish, *ex post facto* laws so-called, which are to be distinguished from certain other retrospective laws, seem to violate plain principles of justice. The power to pass retroactive laws, except for remedying unjust legislation, ought to be limited; and that of suspending the action of law is a dangerous one to be given to an executive. It would seem, from the means which an administration has of knowing the need and the results of legislation, that the veto (qualified or suspensive) or some similar constitutional check is demanded in the interests of legislation itself.

It is plain that a legislature or body occupied with passing laws cannot execute them, and that the two Executive department. functions of government ought to be kept distinct. The office of the judge considers law and penalty as already existing, and looks at infractions as having taken place. That of the lawmaker is concerned with making laws which are to regulate all conduct within the sphere of law for the future. Whether a law already exists or not, what its meaning is, it is not their province to find out. The executive department looks at law as existing both for the officials and the people, and its work is to preserve the law from being broken in individual cases by such active measures as they, under the constitution or by the law, are required to take. This department is eminently political. The judiciary is in the main jural. The legislature has to do with all the interests of the country of every sort.

### § 99.

Multitudes of small states have existed where citizens invested with full rights met in mass for political A representative government. purposes; but a large state cannot secure the interests of justice, freedom, and union, without a system of representation. If a city or centre of population collects the people there in a popular assembly, the outlying districts,

having no active share in the government of the state, will be apt to fall into the condition of serfdom, or at least, while enjoying municipal rights, to be shut out from the larger political sphere. The ancients never fully reached this thought of political representation, which brings with it various other improvements in the framework of a state, and is indeed the most important political device of modern times. A representative carries with him the political rights, powers, and duties of those who have constituted him such. He differs from a deputy who is assigned to do certain specific duties for his principals, and cannot rightfully deviate from his instructions. He is thus untrammelled in theory by any orders from his constituents, and *can* act at his discretion according to the light which he gathers in an assembly composed of similar persons. It is evident that a legislature so composed implies a certain degree of union already in a country, and is a means of cementing it further. It could not exist in a loose confederation (a '*staatenbund*') nor in the feudal kingdoms, where the barons, bishops, and towns had legislative power, to a great extent, within their respective territory, where they met the king by their emissaries for certain specific purposes, where they were estates while as yet there was no *state*. The idea of the political representative may have come from gatherings of clergy in the districts or dioceses of the early church; for the feeling of unity, and of common interests was there rendered necessary by the nature of the Christian religion, as yet one in its outward form.

Some of the benefits of a representative system, besides that great one of making large free states possible and promoting union among the parts, are *first*, that legislation is more orderly. In the city-states the people could meet together for a short time only, many could not be in the ecclesia or comitia at all, and these were generally such as were most needed there, the men of business, the political officers abroad on service, the people outside of the city walls. It was necessary, in order that the work of the day should be finished, that they should be in a hurry. What we see in

representative systems, that a great deal of time is given to talking, was true there without time enough to do the talking. So, perhaps, men were tired out and went away before the decisive action took place. Æschines says that Demosthenes contrived to have a most important preparatory ordinance of the Athenian senate brought before the ecclesia, "when it had already risen, and when Æschines and most others had left the meeting"—an exaggeration or a falsehood, perhaps, but like the truth (in Ctes., § 40, p. 412, ed. Taylor). Add to this the excitement, often intense, that prevails in a thronged assembly, especially when party feeling runs high. Still another advantage is that the representative, having a trust committed to him, feels his responsibility far more than the citizen would in the primary assembly. And yet again, the wisdom of the community is best represented in the legislative halls, and, on the whole, a superior class of men will be sent there than those are apt to be whose peculiar talent consists in governing a popular meeting.

If all the active citizens of a country could be collected in a political assembly, the right of deliberating and of deciding would belong to all; and all, severally, would be morally bound to decide according to their judgment as to what the greatest common welfare of the political body demanded. When representatives meet in a body, they represent these same powers of deliberating after discussion, and of deciding in conformity with the good of the whole. The system then is not a device for finding out what the separate interests of each district returning a member is, but mainly for finding out what the good of the whole state is, and then, in subordination to the general good, of promoting that of each part. Each representative is to consider the whole state first, and then each part of the state as far as its apparent welfare does not collide with that of the whole. He can, therefore, lawfully place himself under no pledges nor receive any instructions which are binding upon him; for to do so would imply that he is bound, after being convinced that the general good requires a certain course, to

Relation and duty  
of a representative.

take directly the opposite. It would place the citizens, who cannot know the reasons which appear after full deliberation, in the position of giving orders to one who has carefully listened to the deliberation, and of controlling his actions, although they ought to be of the same mind with him, and although he was sent to the assembly to find out what was best and to vote after deliberation upon that conviction. It would, in fact, be deducible from the same premises that the representative is bound to follow the will of his constituents in all cases whatever, only with more certainty when they give him direct instructions, with less when they do not. And thus it would follow also that deliberation is a mere farce, and that the great power actually put into the hands of the representative to vote as he thinks best ought to be abridged. Considerations drawn from the welfare of the whole country ought not, it would logically follow, to be urged in such assemblies unless for the purpose of referring them back to the constituencies, and the main point for each member ought to be to persuade his fellows that the latter misapprehended the wishes of those who delegated them. Thus this theory of the relation cuts up a state into atoms, puts will in the place of conviction enlightened by argument, and, if its principle were carried out, would make constant reference from agent to principal necessary. Hence it is the duty of the representative, as derived from his responsibilities and powers, at times, to oppose his constituents' will; and to do so may be the highest act of political integrity, since the temptation for him is to do just the contrary, that is, to keep their favor by following and not by leading them.

By what rule should representation be apportioned? The ordinary answer, from which I should not dissent, would be according to territory, that is, not by any rigidly mathematical rule, but so that all parts of the territory may have some responsible voice to speak for them in the national assembly. In carrying out this rule it would probably seem more just to give dense populations less, and sparse ones more, than their arithmetical share. For the

Representation,  
rule or principle of.



latter, consisting ordinarily of tillers of the land, are less able to unite, and to bring a force to bear on the general assembly.\*

A theory of the representation of interests was advanced by Mr. Calhoun, the motive of which is sufficiently apparent from the political course of that distinguished man and from the essay itself (Calhoun's works, i., first part). The thoughts may be put into a general form, thus: In extensive countries there will be predominant interests, confined to particular parts, which may be made seriously to suffer from rival interests confined to other parts. Thus, agriculture will suffer from the laying of a protective tariff, foreign commerce from the same cause. The prevailing interest will control the government, appoint the judges, interpret the constitution, and strengthen itself by government resources more and more. Against this oppression some kind of protection is needed, so that a part of a country shall not wither by means of law made for the benefit of another. Thus, in England there was a jealousy between the manufacturing and the agricultural interests, which latter, by the legislation on the corn laws in 1846, finally ceased to be the leading and favored interest of the country, as among us the domestic manufacturers have secured for themselves protection at the expense of all consumers. It is reasonable and right that all parts and interests should be protected alike, and this rule would properly overthrow all protection by discriminating duties altogether. But I cannot see how any great interests that are not local but diffused, or how such smaller interests as employ great amounts of capital and labor within a narrow territory, could be provided for in representation, especially if a country had not reached a tolerably fixed industrial condition. Nor could the still smaller interests, so numerous yet independent, be taken into account. The result must be a compromise between one or two local industries, which would satisfy no theory and raise discontent in the unprotected.

\* Comp. Mr. E. A. Freeman's *Histor. Essays*, 2d Series, p. 265, note.

The rule that the majority shall govern is taken by some as a maxim of essential justice, whereas it is simply a means of making business move forward. As we have before remarked, the rule requiring two-thirds for various political ends—as for making or altering constitutions, overcoming vetoes and the like—does prevent a majority from carrying its points. The philosophers, who build up society on a social contract, make the social pact unanimous, but determine everything afterward by the rule of the majority. We never can be sure whether all the members of a community who do not or cannot vote would side with the majority or not. In elections, where majorities are required in each district, the candidate of the minority on the whole may be elected. Thus any legislature may not represent the majority of actual voters at the time, and a president chosen according to law may not be elected by the greater number of votes of the whole people. Thus an actual major vote is no certain proof of an election by a majority. On the other hand a two-thirds vote for officers and laws would express more wisdom—which is the principal need—than a bare majority, but a rule prescribing this would render elections impossible in many cases.

While a majority carries its points, a minority can fail to get its share of influence in a legislature in nine cases out of ten. It can easily happen that in an election for a legislature of one hundred and fifty members, one hundred may be elected by majorities which all together would not be equal to the minority in a single district. This consideration seems to show that the majority rule gives a party more than its just share of power; and for other reasons, especially for securing men who would not otherwise be elected, for tempering the violence of the majority, for bringing forward independent thinkers it is very desirable that minority representation should have a chance to be tried. Many plans have been suggested, some few experiments have been made, and the subject is too important, as well as appeals too strongly to the love of fairness not to be pursued, until, in the freest

countries, it shall be introduced as one of the institutions of society. The plans will be examined more at large in the last part of this work (Vol. ii, § 219).

### § 100.

We are now brought to the rights of suffrage and of holding office. Before we look at them, however, <sup>Rights of suffrage and of holding office.</sup> we may ask what is the meaning of the term "right to office?" Is it not simply this—that if qualified citizens choose me, I have no disqualification which will prevent me from discharging the duties? It is not intended that I have an absolute right to office, a right to take my turn in some public employment. If I had the right to office in such a sense, the vote of others would prevent me, it might be, from exercising that right. By consequence there ought to be no suffrage in my way; and the only just method of deciding between my claims or desires and those of some thousands in the same condition would be to commit the matter to the lot. Offices, moreover, ought to be held for a very short time, in order that every one may have a chance; and the power of re-election should be abridged, that the turn of each may come round as often as that of every other. The Athenians carried out the democratic principle rigidly—although other reasons concurred with or were stronger than this principle—when they cast lots for as many as wanted a chance to obtain some public place, as well in many of the magistracies as in the council of four hundred and the heliastic courts. But they were wisely inconsistent, when they trusted their own will in electing certain high functionaries more than they did the lot.

Why, now, is selection by ballot or show of hands or word of mouth, rather than by lot, adopted almost universally? Is it not to prevent persons from getting into office who are unfit for it, or, in other words, in order to obtain the best officers? But the persons best qualified to choose will, in the long run, select the best officers. Why not then apply the same rule in this case as in that of holding office, and give the right of

suffrage to those who are most likely to exercise it well? Persons are excluded from the power of holding office by age, or sex, or some other condition; why may they not be excluded from voting also by certain disqualifications? Why, for instance, is a child of fifteen years of age denied this right? Not because he might exercise it to his own injury, which is the reason for denying to him the right of making a valid contract, but because he could not do it intelligently, and he would also represent in his vote his parent's wishes or be otherwise biased. Why, on the other hand, is a man under the age of twenty-five incapable of becoming a member of the House of Representatives of the United States, or under that of thirty, a senator of the United States, or under that of thirty-five, President, and not even then, unless he be a natural-born citizen? Is it not for the purpose of excluding, by a general rule, inexperienced persons or such as are not likely to have the tact or the spirit of indigenuous life? The rule may bear hard on a few precocious geniuses, as even what is called universal suffrage may bear hard on some under one and twenty, but it is made for the purpose of keeping out as much want of political wisdom as any rule can.

We must say, then, that the electors in a community are a kind of committee to act for the whole, and that there is no natural right belonging to every citizen to give his vote as one of such a committee.

But it is said that as the natural or private rights are given to all, and are liable to invasion, and the invasion will often come from some state power, hereditary or elective, all grown-up males need a protection against the magistrate or the law-maker, and that this protection is only exercised through the ballot-box. If this were so, we must logically give the suffrage to women also; and I would go further still, I would make the number of votes to be cast depend on the size of a family, the suffrages being collected from house to house to avoid the necessary contact with the coarser exhibitions of life to which women, going to the polls, would necessarily be

exposed. But the argument may be turned back against itself. For if there is to be a limitation of suffrage apart from the consequences of crime, it must depend either on want of property or of intelligence or of character ; or as now almost everywhere in this country, must be confined to males over twenty-one, born or naturalized. The question now is whether the classes excluded by the three first of these limitations need protection against those who can vote, or the latter against the former. As the classes excluded by sex or minority follow the condition of the families to which they belong, there can be *in general* for them no want of protection. Suppose now the classes without intelligence or property or character to have the suffrage and to be predominant in society, will the elections of local or of more public officers be made more intelligently than if they had been excluded ? Is it not quite conceivable that such an element among the voters would give rise to a class of demagogues, whose means of gaining power would be to produce a division between classes, and to array the poor against the rich ? It is moreover a maxim of English liberty, on which the American colonies insisted at the time of the revolution, that taxation and representation should go together. But with a universal suffrage there is danger of electing persons who will not respect this principle ; and especially when municipalities lay their own taxes, there is great danger that they who pay nothing will outvote those who pay everything. So in choosing magistrates, if police judges and the members of a police are chosen by the votes of those members of a community who have an interest in being screened from punishment, how can the interests of society be safe in the hands of such officers ? But it is not difficult to make such elections in those large cities, where all are admitted to the polls. Nor is this all. If the classes of the community in question were entirely honest, their situation in life prevents them from taking large views of public policy, and thus they will cast their vote for small men, they will misjudge the character of candidates for office. On the other hand, if the possession

of a small amount of property brings the reward of sharing in political power, it encourages thrift, industry, morality. Property, however, is only an index; and if suffrage is not thrown open to all, it ought to be confined to such as can read and write, who have also some interests at stake which make them desire good government. The franchise ought to be taken away also, not from those who lose their property, but from those, whether rich or poor, who lose their character by any serious offence against the laws. Civil ignominy would become a punishment severe and much dreaded; but recovery of rights after a term of good conduct ought to be possible.

## CHAPTER VII.

### LIBERTY AND EQUALITY IN CONFLICT, OR COMMUNISM AND SOCIALISM.

#### § 101.

IN the preceding discussion we have felt ourselves obliged to maintain that an exact equality of political condition, as it respects the right of suffrage and the right of holding office, cannot be justly claimed by every citizen of a free country; that universal suffrage does not secure the government of the wisest nor even secures the liberties of a country placed under such a democratic constitution, much less secures its order and stability. But in such a country liberty and equality are not necessarily in conflict. It is possible to conceive of the same political rights being open to all; that is, that justice and right should be equal, while yet in outward circumstances great inequality prevails. Indeed, that is the state of all free societies. But equality may be taken in another sense; it may be made to mean equality of condition or possession, and here it must come, if a state is founded on such a basis, into direct hostility to the rights which are included under the term liberty; especially the rights of property, of free industry and of free transmission of property. The state, in such a system of things, or some community under the state, is looked to for the exercise of a control over these rights, which would be, if realized, more tyrannical than any under which the citizens of antique republics ever suffered.

It is our purpose in this chapter to consider first the inequalities which grow up in society from the unrestricted exercise of the rights of property and inheritance, and then the

schemes ending in modern communism and socialism, which have it for their object to prevent or remedy such inequalities.

Let us conceive of a community which knows nothing of differences of classes or of political disabilities among the citizens, and has divided up the territory in equal lots among the inhabitants, giving them the power, however, to retain or dispose of those lots at will. In such a free society equality of condition would not long continue, if there were any industrial progress. Inequality inevitably springs out of differences of vigor of mind, of intelligence, of sobriety, of number of children, of thrift, and of economy. The law of inheritance—that law which is the great stimulus to industry and the great civilizer of mankind, only perpetuates differences of condition. The advantages obtained by the father might be retained and increased by the child. Division of labor, inventions kept secret at first and thus benefiting certain persons more than others, various superiorities of soil, climate, or situation, would add to these inequalities, and give a still more favorable position to the strongest.

But, still further, the movements even within a community where all were free, would tend to create and perpetuate strata in society, so that instead of one community there would be a number of social layers, or fractions, or cliques, the members of which would be brought together by wealth or poverty, culture or the want of it, or some other cause which would unite equals only, and divide one body into separate parts. There can be no society in a state under the best possible laws, where there will prevail a uniform sympathy, where some will not be innocently estranged by circumstances from others. Nor can we expect, as human nature now is, that the inequalities of condition, manifest in the world, will not lead to envy and discontent, or will not depress some kinds of dispositions as much as they fill others with eager longings. At all events, the strata of society will misunderstand one another, will have often a bitterness toward one another, which freedom itself, and a sense of equality must



only intensify, which is not found to the same extent in a community where the lower class consists of slaves.

If in such a society capital and labor join in production, and if the law of family inheritance is preserved intact, the strata of society might be continued from age to age. This, indeed, would not be absolutely and without exception true, as the history of industry and of invention makes clear, but it would be in the main true, and it would become more manifestly a law of society with the introduction of labor-saving machines, which, being expensive in themselves and in their repairs, must be owned by the wealthy. There will arise also a necessity that a capitalist should be on hand to pay the laborer his wages, during the progress of his work and before it is offered for sale. And if there should arise a class of capitalists who lend money to employing producers, the system is only so much the more complicated; it is not altered in its essential features. Modern production, moreover, is so unrelenting, that it has destroyed in great measure the competition of individual laborers. The woman at home, in her cottage, can no longer work during odd hours at spinning or weaving; the man, for the most part, can no longer give part of his time to manufacturing, and spend the rest of it in labor on a garden or field. Alas! in some countries he has no field and no cottage of his own; he must say, "This one thing I do; I toil ten hours a day in the manufactory, liable to lose my work in any change which diminishes demand for the products which I help to create."

The growth of a feeling of liberty and of equal political rights only aggravates the evil working of this necessary state of things. Very different in many respects is the condition of the workman, in the productive countries of the present, from his condition in the old world and in the middle ages of Europe. We refer not to his treatment by his employer who was then his owner also, but to the effect which the emancipation of the serf and the admission of the peasant to political rights must necessarily have on his mind. Slavery brought with it to the old political writers its prob-

lems, and the risings of slaves in many places, as in Chios and in Sicily,\* put these in a fearful light; but the political evils of this institution were not felt in an equal degree with the social. The same is true of mediæval Europe. There serfdom was bad enough, but, all, both masters and serfs, belonged to one church and were equal members of it; on the fief the serfs formed a kind of community as the slaves on a plantation do now; the world without was an unknown thing which excited but little of curiosity in the farm-laborer's breast; and if discontent or some other motive led him to flee from his home to a town where, after a concealment of a year and a day, he became a freeman, he belonged to the landless mass of civic operatives. Yet in the middle ages themselves the Jacquerie in France (1358), the rising of the English peasants a little later, and the German peasants' war after the breaking out of the reformation, show what ferment can arise from changes in the condition or feelings of the laborer on the soil.

In later times, when capital became well organized and strong, and when the laborer began to acquire new powers of political action, theories of political equality could not fail to make their appearance, in which it was taught that the human personality itself gave a title to a share in the government. After this, and especially in times when a decrease in the demand for products made capitalists unwilling to pay the same wages as before, the laborers in the manufactories were ready to listen to any theory which promised, by the hope of reforming the relations of society, to raise them to an equality with the capitalist, to remedy, by law or otherwise, evils which contract between employers and the employed could not remedy. "We and ours must live," they could say, "only by submitting to the terms which the capitalist

\* Plato, in the *Laws*, vi., 776, B. and onward, a passage once before cited, shows his sense of the troubles which slavery brings with it. For the rising in Chios, comp. Athenæus, vi., §§ 88-90, p. 265, D. For the age of this rising, comp. Müller, *hist. Graec. frag.* vol. ii., p. 378. For the Sicilian risings, see Mommsen's *hist. of Rome*, iii., 100, Amer. ed. of transl.

offers. The suffering will fall inevitably on us, while he with only a temporary loss can wait for better times." And it were well if the new wine of political rights put into old bottles, if political privileges to which they were unequal, if the feeling of political equality with those whose equals they were far from being socially or intellectually, did not make them discontented, enemies of existing order, disposed to find fault with every conserving force.

§ 102.

The *state of things thus* indicated, demands some kind of reform. All reform must proceed from society Methods of equalizing conditions. or from law. As for those projects which depend on association of laborers, or "organization of labor," which, without overthrowing any institutions, can make the same men laborers and capitalists at once, and may, by stimulating industry, thrift, sobriety—through the feeling that each partner has a personal interest in the greatest amount of product—end, when tried, in the best results,—we wish them well with all the heart. It may be that they can reform the laborer and give him such activity, that in the end all work that requires numbers to be engaged together shall take the shape of association on equal or nearly equal terms. But as this would call for no new law, would interfere with no rights, and is simply a social question, it does not concern us here. We confine ourselves to such schemes as call for the protection of law against capital or overgrown capital, or which in some way limit the free use of the rights of property, or interfere with family power. The principal point in our enquiry will relate to the justice of such plans; their influence on the general interests of a community will be a subordinate consideration.

Here first we may look at those plans which seek to limit the amount of capital, especially of capital in land, which can legally be owned by one proprietor. The agrarian laws of Rome were, it is now admitted, no such attempt at limiting the gross number of acres, but they related only to the pub-

lic land which some of the *optimates* had managed to get into their hands, without purchase in the proper sense of that term, and even without authority of any kind. There can be no doubt that a state owning wild land can divide it up into small parcels for the sake of the equal benefit of all, and may even prohibit any single person at the outset from buying or leasing more than one parcel. But what shall be said of the justice of limiting property in land in general to a definite amount, to five hundred acres for instance, or to an amount having a certain money value? Whatever is to be said, the same rule ought to apply in other branches of business, to capital in money, or stocks, or houses, or ships. For although, politically speaking, it is desirable that as many acres as possible should be distributed in fee simple through society, it does not appear that the independence of a tenant of a farm need be more injured by such a relation to another person than that of the tenant of a house. The importance of landed property in political science is relatively less, as a country grows older; the other shapes in which the gains of labor can be put, become more numerous and more important, while land remains the same in quantity and increases but slowly in value. The lessees of farms are freer and more intelligent than the workmen in manufactories. The question then becomes a general one; shall wealth, of whatever description, in single hands, be limited? Such a limit is gross injustice, unless the existence of a country depends on the limitation. The principle of inheritance according to just laws of descent will continually cause subdivisions of estates, unless population remains stationary from one generation to another. If a limit to the amount of property prevailed so as to include all kinds, it would act to the prejudice of exchanges and greatly embarrass business. If only land were affected by such a limit it might not be difficult to evade the law by dividing property among the members of one family.

On the other hand some nations have endeavored to prevent the alienation of landed property from families, by placing the land out of the disposal of the present occupant. It

is possible to justify this on the ground that the community, having obtained a title to the soil by conquest, leases it perpetually for services to be rendered, allowing possession to pass in a certain line of descent, with reversion to the state (or the suzerain) when the line fails. The land may be given for ecclesiastical or military purposes. The plan of putting properties in the hands of *militēs* is that of the feudal system. It approaches the system of castes, and makes necessary an order of nobility devoted to the defence of the country. But when this duty had ceased to be rendered in person, and the community was taxed for the services of the military nobility, there would have been no injustice, as it seems, in taking from such proprietors their landed estates, since personal service in war was the condition on which the lands were held. But in the present day, when large tracts of land must have gone from such original owners or their successors in the family to other proprietors who paid money for them, such alienations would be attended with great hardship if not great injustice. Entails, however, which prevent land from being alienated or divided up, and may make a large part of a nation landless; which injure a country politically, and are a kind of monopoly, so far as they hinder the free investment of capital accumulated in active business; may without injustice be abolished by law.

There is another system of land-tenure settled by law and intended to be perpetual, which was seen in the institutions of the Israelites and the Spartans. In both cases the aim was to keep estates in the families to which they were assigned after an original conquest, with the necessary arrangements consequent upon it. Among the Israelites the lots were at first nearly alike; the settlers could alienate them for, at most, a period of fifty years; and the price paid was calculated on the value of the usufruct until the next year of jubilee. Houses in walled towns (Levit., xxv., 30,) which might be occupied by artisans, and ground plots devoted to sacred uses (*ibid.*, ch. xxvii.), if they belonged to a family lot, were exceptions to this rule, and might be subject to perpetual

alienation. It would seem that this institution was neglected during a considerable part of the Jewish history.\*

If the tradition received by ancient writers and by most modern scholars is to be relied upon, that the Lycurgan constitution made an equal division of land among the Dorians of Sparta;† there was, at least, no sufficient guarantee of the permanence of this practice. In the time of Aristotle (*Polit.* ii., 6, § 10), there was a great disproportion between the landed estates, and the soil had come into a few hands. Two-fifths of it belonged to women. This shows thus much at least, that a state which, by laws like Sparta's, seeks to keep out all change and all disorganizing influences by discouraging trade and other intercourse with foreigners, cannot long maintain its first condition. The Jewish institutions also, which were far better fitted to preserve equality of condition and family life, had no permanent success. Admitting, then, the justice of an equal partition of lands among the conquerors, we find that such institutions can by no means maintain their ground against the changes, that is, against the natural laws of society.

Among the Greek devisers of artificial institutions of society may be mentioned Hippodamus, of Miletus, who lived a little before Plato. He divided the inhabitants of his city into three classes, artisans, agriculturists, and soldiers, and the land into sacred, public, and private. All classes were free and chose the public officers. Aristotle (*Polit.*, ii., 5, §§ 5-7) criticises his plan as being unable to maintain itself. If, says he, the soldier class is numerous, they will be sure to engross political power. If they cultivate their own lands, they will not differ from the farmers. The armed men will easily make the artisans, who have neither arms nor land, and the farmers, who have no arms, their slaves.

Another theorist mentioned by Aristotle, Phaleas, of Chal-

\* See Winer's *Realwörterb.*, Art. *Jubeljahr*, and Saalschütz, *Mos. Recht*, chap. 13.

† See Grote, ii., 528 onward, who denies the existence of such an early usage, and Schömann de *Spartanis Homoeis*, who examines Grote's positions at length.

cedon, wished for equality of property among all the citizens of his commonwealth. This would be easy enough at the foundation of a new state ; but he thought that the difficulties of introducing it into an old one could be overcome by a law prescribing that the rich should give marriage portions to their daughters and take none for their sons ; while the poor should take without giving. Aristotle remarks that those who determine the amount of property ought to determine the number of children also : otherwise equality is disturbed. (Polit., ii., 4, § 3.) Thus one shackle on natural freedom necessitates another.

Plato in the republic, in order to prevent selfishness and promote union, proposes to have wives and children so far common that the parents in the guardian class shall not know who their children are. The class is to be supported out of the public treasury without being allowed to hold property, or to have any use for money. (Repub., esp. v., 460 B—461, E. and iii. end.) That this was not merely a dream of the imagination, which this great idealist would have rejected if it had been realized, seems to be shown by a passage in the Laws (v., 739, C. and onward), where the best polity and laws are said to provide for a community of everything among friends. “ Whether there is now or ever will be this communion of women and children and of property, in which the private and individual is altogether banished from life—and things which are by nature private, such as eyes, and ears, and hands, have become common, and in some way men see, and hear, and act in common,—whether all this is possible or not, I say that no man acting upon any other principle will ever constitute a state more exalted in virtue, or truer or better than this. To this we are to look for the pattern of the state, and to cling to this, and as far as possible to seek for one which is like this.” \*

We will not stop to consider those communistic institutions which religious fanatics have attempted to set up. It is re-

\* Jowett's transl.

markable that the fanaticism which has dictated such movements tends to cast off the restraints of moral principle, to maintain the indifference of outward actions, and to prepare the way for gross licentiousness.

§ 103.

The communism and socialism of modern times derive their importance from the classes of society where Modern communism, and socialism. they most prevail, and from the political notion of equality which gives them their chief energy. It is in France that they have hitherto played their most serious part. Mably, in his work "on legislation or the principles of laws," following in the steps of Plato, as it regards the fundamental importance of virtue in the state, finds the great source of evil to lie in unequal amounts of property. Equality unites men, and inequality of wealth separates them. If it should be objected that equality could only last for a little while, Mably's reply would be that the Spartans lived during centuries in the greatest equality. The true remedy for inequality is to take away the property in land from the individual. But the fact which Mably states is, as we have seen, not true. The equal partition of land not only seems a hopeless and unprofitable point to be maintained by constant interference, amid inequalities in the size of families, but demands also a power on the part of the government superior to that which the most tyrannical of states have exercised. The strongest, he goes on to say, till the ground, the others practise the mechanic arts, and the magistrates distribute to each family their necessary supplies. But would not idleness break up the whole system? As a preventive of this radical fault he would give honorary rewards to the industrious. And should the productions of the soil be less abundant, would it not be better, he asks, to have more virtue in a society than larger crops? To carry out his system, Mably would put the political power in the hands of deputies chosen by orders, but not in the hands of a capricious, pilfering, and tyrannical democracy, which would make laws only to despise them. In carrying the scheme



out we must, in fact, establish a tyranny, which would have control not only over the constantly recurring partition of lands, but in the end over marriages and families.

Morelly, a little before Mably, in his "Code of Nature" (1755), had laid down three fundamental laws, the first of which is the abolition of all individual property, except in things needed for direct use; the second that every citizen is to be supported and occupied at the public expense; and the third that every one must contribute his share for the general utility. Nothing is to be sold or exchanged; every one who needs eatables or clothes can go to the market or magazine and take what is needful, as he would gather fruit from a wild tree, or dig up clams along the seashore. Should supplies fall short, the quota of each must be reduced in quantity; but measures must be taken that the necessaries of life be procured in sufficient abundance. Morelly's plan of organization suggested the idea, says Paul Janet, of the plans and systems of the French socialist reformers.\*

We come down to the more modern attempts to reorganize society on the principle of equality of possessions.

Communism.

The progress of the communistic and the socialistic theories may be viewed according to an eminent authority, M. Laurent von Stein, professor at Vienna, in his history of the social movement in France (i., cviii., Leipz., 1850), at three successive points. The first is the negation of personal property, on the ground that it involves, of necessity, the dependence of the non-possessor on the possessor. Property, being limited, must confer a power over the freedom of those who have it not. But men need products; production needs material; material needs work; and work, if the individual

\* *Histoire de la science politique*, ii., 705-706, ed. 2, 1872, a work crowned by the French academy and by that of the moral and political sciences, and which I have freely used in relation to Mably and Morelly. Taine (*anc. régime*, p. 230, Am. ed. of transl.) calls these two men, with Naigeon and Sylvain Maréchal, "fanatics that erected atheism into an obligatory dogma and into a superior duty."

does it for himself, will at once create property. In order to prevent the existence of this source of dependence and unfreedom, the work must not be done for the individual, but for the community. The community receives and distributes the products, and in this way alone can equality be kept up. The name of communism is given to the systems of life based on the fundamental thought of the non-existence of private property and of a community of goods in a society.

But all communism contains a contradiction in itself. For as individuals must do the work when property is common, as well as when it belongs to a single person or family, their power of choosing their work and of distributing the products must be taken away. It passes over to the community, which can only do its task through officials. Thus a new dependence arises, a veritable slavery, which is opposed entirely to the idea of equality. "This contradiction communism cannot solve, and must fall to pieces, as soon as this is pronounced; it becomes clear that every kind of communism would put a new and more intolerable loss of freedom in the stead of social dependence; and the idea of equality turns away from it to enter upon another path." (Stein, u. s., p. cix.) For it differs from the operations of capital in a special form only in this particular—that capital in private hands competes but here has no competitor; the workman may go in ordinary society from employer to employer, and even may combine with other workmen against all employers; but here the property in the country says to the workman of the country "thou shalt work as I direct, or go to the house of correction."

If, then, there is any remedy for this slavery, it must consist in making *capital subject to work*. This is the office of *socialism*—the second of the three systems for realizing the idea of equality in society. Socialism may be said to reason thus; as the value of materials comes from work, and capital is the accumulated value of work, all work ought to give property to the workman; and it is opposed to the nature of work that the property produced by it must go to the capitalist rather than to the work-

man. The sway of capital over labor, then, shows itself to be unnatural, in that it separates work and possession, which naturally belong together. Such separation opposes freedom. "Work and freedom are identical. But if this be so, an arrangement of society ought to exist by which the idea of work and the right of possession are realized." (Stein, u. s., cxi.) Socialism includes all the systems, and all the thoughts and enquiries, which raise work to the dominion over capital, —present work to the dominion over past work,—and make work the principal thing, the regulating principle of society. Thus it stands, in all its forms, far higher than communism. Its foundation is work and individuality. It seeks not to realize the abstract individuality of men according to its conception, nor to abolish the individuality of the person. For how can this be done where the principle is acted upon that every one is to have a share in the product according to his capacity, his labor and his amount of capital? While therefore communism aims at a state of things in which there is no distinction between the single persons, and no society or order in the whole mass, socialism seeks for a society built on the bare organization of labor independent of possession. (Stein, u. s., cvii.)

But socialism "contains within itself a contradiction, which is the proper and hopeless cause of all its special perversities and its general incapacity to make itself a living reality. This radical defect must be ascribed to the sway of work over capital. In this control of actual work, at the time being, over the collected surplus of past work, without which present work would lose a great part of its productiveness, the claim of a fair gain from capital as well as from work is disregarded, capital loses its motive for accumulation, and becomes a foe to labor. And hence socialism finds itself forced to a series of projects which all, more or less, contemplate the abolition of private property. Thus it falls back on communism, and shows its own want of a self-subsistent power. Its tyranny over capital is not enough; it must seek to destroy capital" (cxiii.).

The third of the three systems of social equality, according to the author whose views we have expounded, is a democratic socialistic state, the problem of which is the elevation of the lower classes. But we can pursue this subject no farther than to show by a single example what communism in France has in one instance actually proposed to itself, in an attempt at a revolution during the time of the Directory, when the conspirators met their ruin at the hands of their earlier democratic allies. We refer to Babœuf's conspiracy in 1796. From a fragment of a "Projet de décret économique," which Stein cites from a work of Buonarotti, one of the leaders of the conspiracy and who suffered exile while Babœuf and Darthé were put to death, the following articles deserve mention. (Stein, u. s., i., 184, and onw.) In the republic a great national community of goods shall be instituted (Art. 1). Intestate and testamentary right are abolished. All property now owned by individuals shall, when they die, lapse to the national community of goods (3). These goods are to be managed by all the members in common (8). The members are to be supported in a condition of equal and honorable mediocrity. The community gives them all that of which they have need (9). No man is to have a civil or military office who is not a member of the community. (From this it appears that force for compelling people to join the great national community was not contemplated.) (11.) Every member is obliged to work for the community on the land and in useful arts in which he has been trained, excepting persons who have reached the age of sixty, and the infirm. (Art. 2 of the second rubric.) The citizens in every commune are to be divided into as many classes as there are useful arts, and every art consists of actual practitioners. Magistrates elected in every class by its members conduct the work, watch over its equal distribution, execute the orders of the communal government and give the example of zeal and energy. [!] The highest administration can furnish the communal board with machines, can transport workmen from one commune to another, if occa-

sion requires, and can impose forced labor on the lazy and irregular of both sexes, whose property then lapses to the national community of goods. [This is in the transitional state, before the great community becomes sole proprietor.] The class-heads deposit in the community's magazine such fruits of the soil and the arts as will bear keeping. Respecting the distribution of products, it is said that no one can use anything which is not given out by the magistrates. Every member who receives pay or keeps money will be punished. All private trade with foreign countries is forbidden, and wares so imported are confiscated. Of course all trade is carried on by the administration. Transport and transporters are to be under the direction of magistrates. Taxes are payable in kind. For all Frenchmen the national debt owed to them is extinguished, but debts to foreigners are to be paid. No money is to be coined, and such coined money as comes to the national community is to be used to buy needed objects from foreign nations.

Thus much is enough to give an idea of the communists when they strove to become a political power in the seething pot of revolution, in an inexperienced and misgoverned country. Without question, the evils of the old régime intensified the desire of equality; but we can well conceive that under the freest institutions, where the efforts of the citizen to acquire property were entirely uncontrolled, the same demands for equality of condition and the same confusion of equality of rights with equality of possessions might arise, and the capitalists, the engrossers of land, the great merchants, be looked upon with the same hatred with which the hordes of laborers in France regarded the upper classes. As we trace the feelings of the communists further, and especially in later years when they have come to be more distributed over Europe, we find them hating priests and the Christian religion as a conservative power; opposing the family because it is an independent institution, sustained by affections and motives of its own, requiring private property for its existence; and opposing the succession of property

in the family because it is the support of the family and of most of the inequalities in society. We find them advocating the most immoral principles in regard to sensuality and the overturning of society, and increasing in their tendency to spread through all civilized nations. We find them, and generally the least sober and industrious of them, demanding support from the government or the municipality as a right, and thus in fact confounding the spheres of government and society. We find in the earlier systems that as all are workers there can be no literary class, no self-moved artists or religious teachers. Babœuf, it is said, wished to confine knowledge to reading, writing, arithmetic, and some acquaintance with French geography; and declared all science and art to be evils.

The manifestation of communism at the time when the Orleans dynasty was overthrown, in 1848, deserves a few passing words; the more, as the dangers to which property was thought to be exposed from this source seem to have been the leading cause why the middle class in France supported the second empire. M. Guizot, in a brochure entitled "de la démocratie en France," gives the following summary of the system of the well-known Proudhon. "All men have a right and the same right, to happiness. Happiness is the enjoyment of all the good things existing or possible in the world, whether natural and primitive, or progressively created by the intelligence, and the labor of man. These things, or the means of procuring them, are become the special and perpetual property of certain men, families and classes. Such a diversion of a part of the fund common to mankind for the advantage of a few is essentially contrary to justice. Therefore all special and perpetual appropriation of the good things which confer happiness and of the means for procuring these good things must be abolished, in order to insure the universal enjoyment and equal distribution of them among men and among all successive generations of men." But how is it possible to abolish property, or at least so to transform it, that, as it regards

its social and permanent effects, it may be as if it were abolished? Here the leaders of the social republic differ greatly among themselves. But all the schemes originate in the same design and tend to the same result—to the abolition or the nullification of personal, domestic and hereditary property, and of all institutions, social or political, which are based upon personal, domestic, and hereditary property.

The theories of such philosophers as Proudhon, the experiments of Cabet, and even the political risings of a Louis Blanc, might be looked on without dread in the assurance that society cannot be moved off its old basis; but when such theories are translated into the threats of associated workmen demanding a reconstruction of society, they mean something immediately serious. The “International association of laborers,” founded in 1864, arose through the impression made on delegates of workmen from continental countries visiting the exposition at London in 1862, and noticing the comparative comfort of the English laborers. It was suggested apparently by the trades unions, and had for one of its objects the abrogation of the laws in different countries against associations and coalitions. This was the first time, we believe, when laborers began to act together on a large scale outside of their own nationalities. The congress of Geneva (in Sept., 1866) had some commendable objects; and endeavors there to attack the right of property were put down by the French delegates. At the congress of Brussels in 1868, to which the French official delegates were not sent, the “*collectivity*” of property was voted, and in consequence of differences among the members of the congress, the extreme wing formed a separate society called the “international alliance of the socialistic democracy,” “founded on the basis of atheism, communism, the negation of patriotism, and the universal republic.” At the congress of Bâle (1869), under the influence of Karl Marx and others, extreme opinions were in the ascendant. The programme contemplated “the abolition of landed property; the expropriation of actual proprietors by

all means ; the solidarization of the communes, the destruction of all national and territorial states." \*

When, after the defeat at Sedan and the captivity of L. Napoleon, the commune reigned for a time at Paris, and the scenes of the old revolution were acted over again on a small scale and with less fanaticism, the communists had no opportunity, if they wished, to put their ideas into a practical shape.

#### § 104.

The system of a community of goods under a central power is very much like slave-labor organized under drivers on a plantation, only that the slaves would occupy little patches of ground where they could raise something for their own particular use. In both cases the right of property, the right of contract, the right of free locomotion, the right to use some of their time in gaining instruction, the right to make a will—the right even of flight from the place of enforced work, are taken away from the individuals who come into this condition by the force of society or their own free consent. If the latter, we have the self-surrender of Rousseau almost complete in the generation which institutes such a form of society, and their descendants are nearer still to slavery.

Would the amount of productions be increased under such a system? What Aristotle objects to Plato's theory of common goods (*Polit.*, ii., 1, § 10,)—that a thing receives the less attention the more persons hold it in common, because people think more of what is their own and less of that which they hold jointly with others,—may not always be true ; we may conceive of forms of association where production goes on most prosperously on account of the managing skill of some of the leading members ; but can we avoid believing that the ennui and sense of monotony in having to remain on the same spot, the positions of many of the workers ill-adapted to their

\* Comp. "la Commune à travers l'histoire," by E. Bourloton and E. Robert, Paris, 1872, especially the chapter entitled *Socialisme*.



tastes and capacities, the carelessness or unskillfulness of the managers, the discontent of the restless who would sigh for an open world,—that such causes, to say nothing of more properly industrial ones, would greatly abridge production; and that the power of self-recovery after disasters would be wanting to a great degree in such a system, because there could be little of reserved capital?

And when we take into account the loss of the motives derived from personal and family desires, we cannot avoid finding another cause for the ruin that would inevitably attend on communistic institutions. The personal rights may lead to self-interest, but that self-interest is the active source of a vast amount of good. The family separates its members from the world, but who can doubt that motives drawn from the family will give a stimulus to activity the most efficient in degree? Production, then, must be greatly diminished by anything which takes away these incentives founded on affection and kindred; and puts a great community of goods with enforced labor into its place.\*

But especially does the hostility to the family, which some of the communists of our day manifest, and the tendency to regard marriage as a convenient and transitory arrangement between a man and woman, reveal their moral tone and read their condemnation. This is a rock which has stood since the world began, and without question, in the attack on this most conservative and sacred of all social institutions, the world, in general, will side with the family against the communists even to the destruction of the latter, if they should force on an encounter.

\* Compare what Mr. Bancroft says (*Hist. of the U. S.*, i., 145) of the establishment of private property in the colony of Virginia, instead of holding a share in a company. When this change was made in 1611, the most marked effects followed. "So long as industry had been without its special reward, labor had been reluctantly performed, and want had as necessarily ensued. A week was wasted in doing the work of a day, and thirty men laboring for the colony had accomplished less than three were now able to perform for themselves."

The atomistic character of communism condemns it as being contrary to nature and man's destiny. If a man were like an animal, with no continuous and progressive existence as a race, with no free aspirations, and willing to be guided by a master who doles out to him his rations of food, and gives him his lodging place and clothing, only forcing him to work; the force and inability to change his position would suit his nature. But a being like man could not long be contented in such a condition, for his real freedom, his power to choose his ends and change them, his power to go from place to place would be taken away. There would be no true unity in such a state of things, no enterprise, no intercourse with a country or with the world, no history, no forward movement toward a common goal of mankind.

The communistic theories are built on the tyranny of society over its members. No authority in despotic states over their subjects goes so far; no authority in states of the antique pattern could have crushed individual rights to an equal degree. Liberty is destroyed, that equality of condition may take its place. Equality of rights is divorced, as far as it exists, from personal freedom. Property is placed out of the reach of the individual, and yet, as between communities or between states, property must still be recognized. But there will be no battles *pro aris et focis*.

Yet the experiments of these new despotisms, which crush individuals and their rights, are far from being without useful results. They reveal to us that the selfishness of modern capitalists and landholders may be in part responsible for strifes in which the existence of governments will be in jeopardy; they open our eyes to the unfaithful stewardships of the upper classes. They show that unless states are cemented together by something outside of and above law and rights, society may fall into confusion; that kindly feeling and sympathy are necessary for social union, but may be wanting and cannot be supplied by constitutions and political reforms. They show especially the importance of the thrice old institutions of property and the family, the very attacks against

which prove that they belong to the necessary development of mankind. Nor can we doubt that a revolution abolishing or even weakening them would be short-lived, and its authors be held in abhorrence through all the periods of history.

“ Quid fas  
Atque nefas tandem incipiunt sentire, peractis  
Criminibus. Tandem ad mores natura recurrit  
Damnatos, fixa et mutari nescia.” \*

\* There is an extensive literature relating to the subject of this chapter with much of which I am not familiar. I may be allowed to refer to the works of Dr. Eugene Jäger, *Der moderne Socialismus*, of Karl Marx, Berlin, 1873, and to his *Geschichte der socialen Bewegung u. des Socialismus in Frankreich*, Berlin, 1876. The work of Baron Joseph Eötvös, “*der Einfluss d. herrschenden Ideen des 19. Jahrhunderts auf den Staat*,” translated by himself from his own original Hungarian, although by no means confined to the subject of this chapter, bears upon it by showing the conflict between freedom and equality.

## CHAPTER VIII.

### THE PUNITIVE POWER OF THE STATE.

#### § 105.

THE punishments inflicted by the state differ greatly from <sup>Punishment and redress.</sup> the reparation or redress which the state provides for individuals. Yet it often happens that the same act of a wrong-doer calls for the sentence of the judicial power on both accounts. Thus, suppose that a man has committed a theft or has assaulted another: he may be viewed as having violated his obligations correlative with the rights of others, and also as having injured the state. For his treatment of a specific person he might not be punished, but only be obliged to put him in as good a situation as before—to repair an injury to a fellow-man. But the act, if repeated—that is, unless some motive presented to him or to others kept them from committing it in future—would tend to make existence in the state less desirable, to fill society with alarm, and to cause something like a state of war perpetual. If there were an army of invading foes on the borders, all ready to make an attack, the longer the time before the attack the more distressing. So the constant expectation of wrong from foes of social order is a destruction of public peace—a single act of violence is a breach of the peace.

There are various wrong acts which excite no apprehension in society that the interests of the whole are in jeopardy. Such are breaches of contract, and many wrongs done in the way of business. On the other hand there are wrongs done to society which do not affect any individual in particular. These rise in importance from petty disorders which a single policeman can control, through all the grades of evil to high treason or the attempt to destroy the very existence of the state.

It is plain from this exposition that, in different states, quite different opinions may prevail in regard to the incidence, so to speak, of forbidden actions, *i. e.*, whether in particular cases they affect individuals only or a community and individuals, or a community only. There are imperfect states, where the feeling of state existence is not strong, but family life, or life in a small community of kinsmen, takes the place which is given to the state elsewhere. It is not strange that in such communities a crime like homicide is estimated chiefly in its consequences to the family, and that it falls to the avenger of blood to pursue the offender even unto death. And hence when a money payment took the place of requital from an injured party, the composition for homicide belonged to the family of the slain man.\* Nor is it strange that penalties should be variously assigned to wrong-doing in different states, where the state feeling is more pronounced; that in one the individual, in another the body politic, should be conceived to be principally injured by crime; that punishments should vary greatly in degree according to the nature of the state; crimes against property, for instance, being more severely visited in a society where an aristocracy made the laws, than where the people made them; and that they should change with new experience, with increasing humanity, and increasing proclivity to criminal actions.

A single instance will show how differently offences may be viewed by different nations. In the case of theft (*κλοπή*) at Athens it was in the power of the injured person to prosecute; but there was also a public prosecution for this same offence. If the private accuser got his case, he could recover twice the value of the thing stolen, in case the thing itself came back into his hands. Otherwise it is said, he might

\* It seems to be altogether just, that the reasons for compensating a man for an injury brought upon him by the carelessness of others, should be applied for the benefit of his family, when he is killed not by carelessness but by violence. The wrong-doer ought to be punished and be compelled also to make reparation to those who suffer by his evil deed.

recover tenfold, and the criminal, at the end of the same suit, as an additional penalty inflicted by the court, might be kept in the stocks for several days and nights. Here the payment of tenfold the value of the object stolen is more than a reparation.\* It looks like confusing public and private law. At Rome theft was looked upon as a breach of an obligation, and the penalty or sum paid to the injured person was fixed, besides restitution of the stolen object at two-fold, or, it might be, at three or four-fold the worth of the thing stolen. By the law of the twelve tables for a *furtum manifestum* the penalty was *capital* (in the Rome sense), but afterwards, punishment, properly speaking, ceased, and four times the value of the stolen property was allowed to the injured party. Here again we have, if not a confusion, a blending of the public and private purposes of law.†

But turning from these cases where a private person sustains a direct injury, while the public welfare is conceived also to be attacked, let us take a case where no individual suffers, as for instance where an obstruction is put on a railroad track, and the wrong-doer is taken in the act before any harm is done. Here is an attempt to commit a crime, which might, if successful, bring upon multitudes a horrible kind of death. Why is this act punished? No injury is done. The infliction of evil then is not the only reason why men feel that punishment is due. The intention also is taken into account. But no intention of injuring an individual, if unexecuted and merely mental, could ever be conceived of as furnishing reason for *reparation* from him who harbors the guilty purpose. Nor need there have been, in the case supposed, an intention to injure any one in particular, so that whatever crime there was it did not reach a specific person. On the other hand, whether a person intended or not to cheat another in a private transaction like a contract, he is equally bound to pay damages for non-fulfilment; his inten-

\* Comp. Meier u. Schöm., Att. Proc., p. 358.

† Comp. Gaius, Instit., iii., 190.

tions here are not of course taken into account. We conclude that estimate of intention belongs mainly to crimes or public wrongs, and not to private injuries.

By this is not meant that crime, for its existence, requires a malevolent affection of some sort. Another state of mind also is a fruitful source of crime—that which pays little attention to the results of actions, which, while it is in the power of the person concerned to judge what may follow, takes no account of the obligation lying on us all to do nothing out of which injuries to others may grow. Intention to do evil and criminal negligence are the two states of mind, without one of which crime cannot exist. Negligence, however, is a negation of carefulness; it may be gross or it may be slight. *Culpa lata* and *levis* are the two degrees in Roman law, and each of them can have its degrees also. To throw a heavy body from a roof overhanging a public highway in the busy parts of the day, without giving notice by a cry, would imply gross negligence, and would show that a person was indifferent to the lives and limbs of his fellow-men; but to blast a rock without notice in a private field would be slight negligence, if any at all, because no one is expected to be in the field.

Hence no crime can be committed by brute animals, by little children, by insane or half-witted persons. We kill the animal that gores a man, we shut up the insane and the idiotical, but never call it punishment or conceive of it as such.

It is unnecessary here to enter into the classes of offences against the state or the public welfare. It is enough to say that besides *mala in se* or those which ordinary moral judgments pronounce wrong, *mala prohibita* also are included in criminal legislation, together with the intentional failure to do that which is required. The state, being a permanent body possessed of long experience, has alone the wisdom to judge what ought to be done and left undone. The observance of law is a necessary duty of the citizen. When he fails of this duty he does that which would, if allowed to go unrebuked, make law nugatory and greatly injure society.

## § 106.

All we have said is but preparatory to the enquiry into the grounds and the right of punishment. After Punishment and chastisement. finishing that enquiry we shall consider punishment in its forms and its results. We remark, *first*, that all physical evil inflicted for a fault or a want of subordination, on an animal or on a child in a family, has in view, at least the end of impressing on the memory the evil which is connected with a certain action, and so of preventing the repetition of that action. There is no other way of managing a horse, save by an occasional use of the whip. The driver knows what he intends, and the horse knows just as well. Here we may be asked what right is there in a man to inflict physical pain for a good end, either on a child or on an animal? In the case of an animal, a being is to be considered which at once is property and is capable of enjoyment. It is assumed that animals may, according to the arrangements of nature, that is of God, be made subservient to the reasonable ends of the human race. But the domestic animals cannot fulfil these ends without a certain government by means of a limited number of motives, which appeal to their sense of pleasure and pain, and which they can associate with particular past actions of their own. If there be a right to use them for human purposes, there is a right to train them by such motives for the best accomplishment of these purposes. This is not a provision—if it be a natural provision—of a one-sided character, but the good of both the animal and the man are secured. The animal, it can scarcely be doubted, has far higher enjoyment of life, on the whole, than he would have in his wild state; the number in the species is increased; the young are better off; for it is for the owner's interest that his beasts be well taken care of, if he is not otherwise interested in their physical good. Thus the relation of man and of the beasts which he governs by motives is both founded in their nature and in benevolent purpose, and could not exist without the moral propriety of some kind and degree of discipline. The



prohibition of cruelty to animals, which has been noticed for another purpose, shows that mere or gross infliction of pain is regarded by society as a moral evil.

The child is put into the hands of those who will love him most, not as a possession, but to be trained up for all the good within the reach of a human soul. At first he is an animal with feeble moral perceptions, differing from brutes in this chiefly—that for his sake mainly, and not for the parent's, the relation is instituted. He must be governed by the superior wisdom and strength of the parent, in order to make him subordinate, to associate in his mind wrong and the desert of evil, to teach him what is right, to form his habits and character. In the early part of life it seems to be impossible to control children and make them wise without some kind of punishment or correction. They have commands given to them. If these are disobeyed, how is the evil of wilfulness and unrestrained self-assertion to be kept down, except by the joint action of moral teaching and penalty administered by those that love them best. It is found also that penitence, an humbled, subdued spirit, never appears in a child so decidedly as after kind parental correction.

Here the only end is *correction* or *chastisement*—words whose derivation illustrates an intended effect of punishment—the one denoting originally the act of making completely straight, of bringing into a condition of rectitude, and the other that of making the subject morally pure, or innocent.\* But it may be asked at this stage of our discussion, whether the right of the father to inflict pain is fairly accounted for by his superior wisdom in judging of what is best for the child, or by his parental relation and that which is included under it; or how we are to explain a right which all concede to be vested in him. Superior wisdom, certainly, would not authorize any stranger to correct another man's children. What is there in the parental relation which gives this right? The answer depends on the nature of moral government, and

\* *Castus* in Latin has a far wider sense than its derivative *chaste* in English.

will be most conveniently answered when we come to consider the grounds for punishing on the part of the state and its right of punishing.

§ 107.

The principal reasons for the state's being invested with this power that have been brought forward, are the following:

Why should the state have punitive power?

1. That by visiting the transgressor with some deprivation of something desirable, the state brings him to reflection and makes him better. The main end is *correction*.

2. That it is *necessary for the state's own existence* to punish, in order to strike its subjects with awe and deter them from evil-doing.

3. That to do this is necessary for the security and protection of the members of the state. These two reasons are in principle one and the same.

4. That the penalty is an *expiation* for the crime.

5. That the state receives a *satisfaction*, by penalty, from the wrong-doer, or is *put in as good a situation as before*.

6. That in punishment the state renders to evil-doers their *deserts*.

The theory that correction is the main end of punishment, will not bear examination. In the first place, the state is not mainly a humane institution: to administer justice and protect the society, are more obvious and much higher ends, and the corrective power of state punishments has hardly been noticed by legislators, until quite modern times, as a thing of prime importance. In the second place, the theory makes no distinction between crimes. If a murderer is apparently reformed in a week, the ends of detention in the reformatory home are accomplished, and he should be set free; while the petty offender against order and property must stay for months or years in the moral hospital, until the inoculation of good principles becomes manifest. And, again, what if an offender should prove to be incurable? Should he not be set at large, as being beyond the influences

Various ends of punishment considered. 1. Correction.

of the place? Still further, what kind of correction is to be aimed at? Is it such as will insure society against his repeating his crime? In that case, it is society, and not the person himself, who is to be benefited by the corrective process. Or must a thorough cure, a recovery from selfishness and covetousness, an awakening of the highest principle of the soul be aimed at; an established church, in short, be set up in the house of detention?

2. The explanation that the state *protects its own existence* by striking its subjects with awe and deterring them from evil-doing through punishment, is met by admitting that, while this effect is real and important, it is not as yet made out that the state has a right to do this. Crime and desert of punishment must be presupposed before the moral sense can be satisfied with the infliction of evil. And the measure of the amount of punishment, supplied by the public good for the time, is most fluctuating and tyrannical; moreover, mere awe, unaccompanied by an awakening of the sense of justice, is as much a source of hatred as a motive to obedience.

3. The same objection lies against the reason for punishment that it is needed to *protect the innocent inhabitants of a country* by the terrors which penal law presents to evil-doers. The end is important, but certainly great wrong may be done in attempting to reach it. The inquiry still remains why, for this end, should pain or loss be visited on an evil-doer.

We notice here, however, another objection against the sufficiency of these two last explanations, which seems to be itself weak, if not sophistical. The ends named contemplate future crime. Now it is said, Why should punishment be inflicted, not on account of the evil of an act already done, but on account of another evil act that may or may not be done in the future? In this way we go on with our work of punishing in view of a future condition of things and not of the present. To this objection it may be replied, as Hartenstein has done (*Grundbegr. der ethisch. Wissenschaften*, p.

263), that it contains a confusion of the *motive* for threatening penalty in the law with the *object* of the punishment. The motive is to guard against possible future transgressions ; the object is the crime itself. Moreover if it be right to punish at all, and right to protect society against evil-doers, why may not both be united in the same act? If it were not felt to be right to punish, there could be no preventive and exemplary power in the threatened penalty.

This end, then, the protection of the state and of the people by the fear held out in the law, is a right and proper end, when once the power of the state to inflict penalties is justified on other grounds, but not before.

4. Another end of punishment that has been put forward takes a more religious form than those that have been already considered. It is to be regarded as an *expiation* of the crime, made in order that divine wrath or punitive justice may not fall on society. The solidarity of a nation involves the whole in the guilt of an individual member, and it is necessary by an expression of common feeling, which shows that the body does not sympathize with the sinful member, to clear itself of defilement, to save itself from being obnoxious to vengeance, or from evil viewed as the result of divine displeasure. This feeling was awakened in some ancient peoples when great crimes against man or divine majesty were committed. We see expressions of it in the Jewish scriptures and in pagan literature, especially in the writers of the best Athenian age. "The voice of thy brother's blood crieth unto me from the ground, and now thou art cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand" (Gen., iv., 10, 11). After mention of gross immoralities we find in Leviticus (xviii., 24, 25) these words: "For in all these the nations are defiled, which I cast out before you, and the land is defiled: therefore I do visit the iniquity thereof upon it, and the land vomiteth out her inhabitants." So when a grievous pestilence afflicted Thebes, it could be expiated, or the people be freed from the guilt of it, only by finding out

the murderer of Læius. When found he must be sent into exile, or blood be repaid with blood ; “ because this blood-guiltiness is like a storm afflicting the state.” (Soph., Oed. Tyr., 101.) So also Aesch., Choeph., 394-396, says that “ it is the law for bloody drops spilt on the ground to demand new blood.”

These antique expressions of the moral sense, common to men, connect divine and human law together, but no especially new rational basis of punishment is disclosed by them. Punishment was demanded, for so great a crime as murder, by divine righteousness ; the guilt or liability to suffer the consequences of the crime, rests on the land, and the nation must do what it can to remove that guilt from itself by discovering the individual criminal ; or in some way an expiation, a placular sacrifice, recognizing at once divine righteousness and placability, must be made which divine justice will accept. One may say that the state, according to the conceptions of ancient times, was involved in the guilt of crimes committed on its soil, as indeed it often is in fact ; but the rites expiatory of guilt simply imply a desert of the punishment, which the state derives from the crime of the criminal.

5. Nor can it be regarded as a sufficient explanation of the state's punishing power, that in this way the state is *satisfied*, or is put in as good a situation as before the crime. Satisfaction may mean fulfilling the desire of a person, or making him a compensation equivalent to a debt or a wrong. In the first or more subjective sense it is fluctuating, and no explanation of the ground of punishing can be derived from the fact of its satisfying a spirit of vengeance or of wrath. Still less is there any measure to be derived, even from the nobler moral sentiments, to determine the proper wages of evil-doing—how much suffering ought to be a satisfaction for a certain kind or degree of crime. In the other sense, the objective one, there may be important truth couched under the expression of paying a debt of justice to the state ; of satisfying the claims that the state has against the transgressor ; or, under the expression that the penalty

suffered for crime has put the state in as good a condition as it was before. The crime was an injury to the state. But why was it? Because it impaired the state's authority in the minds of other subjects, or manifested its weakness, or tended in some other way to encourage the evil and discourage the good. But now the state, by an assertion of its power over the individual, has rehabilitated itself. This may be true, but what is this except the deterring of evil-doers, the making of one an example for the benefit of the many? And the question still recurs, whether the state has such a power, and in the exercise of it what the state may do.

6. The theory that in punishing an evil-doer the state renders to him his deserts, is the only one that  
 6. Retribution. seems to have a solid foundation. It assumes that moral evil has been committed by disobedience to rightful commands; that according to a propriety which commends itself to our moral nature it is fit and right that evil, physical or mental, suffering or shame, should be incurred by the wrong-doer; and that in all forms of government over moral beings there ought to be a power able to decide, how much evil ought to follow special kinds and instances of transgression. Or, in other words, the state has the same power and right to punish which God has; it is, in fact, as St. Paul calls it, a minister of God to execute wrath upon him that doeth evil. But it takes this office of a vicegerent of God only within a very limited sphere and for special ends. It looks only at the outward manifestations of evil; it has no power to weigh the absolute criminality of actions; and if it could measure guilt in purpose or thought with accuracy, this would not justify its going beyond positive acts hurtful to society; because, even in God's administration, this is not a world of retribution. Its province is confined to such actions as do harm to the state or to interests which the state exists to protect. As the head of the family has a chastising power only within his family, so the state is not called upon,—is even forbidden,—to exercise a general moral government over the world. I would not say that, within these limits of actions not

simply wrong but hurtful to the state's interests, it is always *bound* by duty to God to punish, but only that it is *permitted* to punish. There is nothing wrong, but something right, in its sanctions, judgments, and inflictions. It is presupposed that punishment is put into its hands and may be rightfully administered ; but its object in punishing is not, in the first instance, to punish for the sake of punishing, because so much wrong demands so much physical suffering, but to punish—punishment being in the circumstances otherwise right—not directly for the ends of God's moral government, but for ends lying within and far within that sphere. It is, in fact, very restricted in its sphere. It punishes acts, not thoughts ; intentions appearing in acts, not feelings ; it punishes persons within a certain territory over which it has the jurisdiction, and perhaps its subjects who do wrong elsewhere, but none else ; it punishes acts hurtful to its own existence and to the community of its subjects ; it punishes not according to an exact scale of deserts, for it cannot, without a revelation, find out what the deserts of individuals are, nor what is the relative guilt of different actions of different persons.

It may be asked why, on this retributive theory, there should not be retributive rewards as well as penalties. The answer is that every citizen is rewarded for his obedience by the security of his rights, and by a participation in the general welfare, as every detected wrong-doer is shut out from these benefits. Still further, every criminal punished increases the security of the loyal citizens ;—so that we see that the criminal is not paid back so much pain without respect to the observers of righteous law, but in the complex of reasons for punishment the righteous get their benefit, while justice is done to the evil.

We add here, that criminal laws, apart from these effects, set up a moral standard of social morality and justice, which is an education into reflection for many who otherwise might be reckless and unthinking. As a testimony against evil within a certain sphere, they have great use. But they could not preach righteousness by simply affirming a thing to be

wrong or unjust, for our natural measures of wrong always connect with actions a desert of evil.

Laying it down thus, that the state can punish evil because evil deserves punishment, we are able in a theory of state punishments to include a variety of purposes which the act or mode of so doing may serve. A wise criminal code and its administration will aim at the correction of offenders, and in the process of chastisement, at such an exhibition of justice and kindness united as may subdue the hearts and affect the life of offenders. But if there were absolutely no hope of their improvement in particular cases, the punishment ought still to go on, and with the more reason. So again penal law ought to aim at deterring from crime those who are not as yet guilty of crime. It declares the difference between good and evil within its sphere, and treats the two differently, so as to present motives to the whole society. But if, by making examples of offenders the state does not diminish their number, that is no reason for ceasing to punish. Its very existence and the existence of all the interests it superintends are at stake, and it must keep up its moral government until it overcomes wrong-doers or succumbs to the power of evil.

Here we may add, by the way of supplement, that the social contract shows its weakness, especially in its explanations of the right of punishing, as vested in the state. For Rousseau's explanation of the penalty of death see § 59. An eminent and humane writer on criminal law soon afterwards took the same ground with Rousseau. The *contrat social* appeared in 1754; the "*dei delitti et delle pene*" of the Marquis Beccaria, first saw the light ten years afterward. In this book, which has done more to reform criminal laws and methods than any other, the author says (§ ii.) that "no man has made a gratuitous gift of part of his own liberty in view of the public good; this chimera exists only in romances. If it were possible, each of us would wish that the pacts that bind the others did not bind us. The laws are the conditions under which independent and isolated men unite in society, weary of living in a continual state of war,

Social contract fails to explain punishment.



and of enjoying a liberty rendered useless by the uncertainty of preserving it. The sum of all these portions of liberty, sacrificed to the good of each, forms the sovereignty of a nation, and the sovereign is the legitimate depository and administrator of them; it was, therefore, necessity that constrained men to yield up a part of their own liberty. It is then certain that each one wishes to put in the public deposit only the least portion possible, so much only as can be sufficient to induce others to defend him. The aggregate of these smallest possible portions forms the right of punishing. Everything beyond is abuse, not justice; fact, not right." (Comp. § iii. end.)

This theory has many vulnerable points. Thus the power supposed to be resigned by the individual, is the power of punishing another for invasions of his rights. But what surrender can explain punishment, properly so called, in an organized society; that is, the power of visiting with evil not the invaders of personal rights but the disturbers of the public peace and welfare? This did not and could not exist until organized society existed. As for the penalty of death, we have seen that this has its special contradictions of the theory in question.

### § 108.

We now propose to ourselves to append a few other opinions of the ancient world and of modern thinkers in regard to the nature and design of punishment in the state. It will be seen that the ancients never questioned either the authority or the duty of the state to visit transgressions of state law with some kind of evil; that they did not always draw the same lines with modern legislation between public and private wrongs; and that the same ends of penalty which we have advocated appear in their works also. The modern opinions are much more at variance with one another, being conclusions from divers political and ethical principles.

It is worthy of notice that in the Hebrew Scriptures a variety of ends to be subserved by punishment are spoken of. The *religious* view that a land or a nation is involved in the crimes of individuals, and that guilt rests on the community, unless it is removed or expiated by the punishment of the offender, appears in passages already cited, and in many others. Thus through the whole of the twenty-second chapter of Ezekiel there is a most vivid picture of wide-spread and frightful immoralities, which bring down divine judgments upon the whole community. The prophets, the priests, the princes, the common people, each class has its own peculiar corruption (vv. 24-29). God in vain seeks for a righteous man, who could stand in the breach, and by his intercessions save the land from destruction (v. 30). Again, the *disciplinary* or corrective effect of punishment, God's fatherly treatment both of individuals (Prov., iii., 11) for their good, and of the nation or of the better parts of it, is more than once emphasized, especially in the prophets. "Behold, I have refined thee, but not as silver. I have chosen thee (or proved thee) in the furnace of affliction." (Isaiah xlviii., 10.) In fact, passages in the same strain abound in the later books. The *preventive* or exemplary force of punishment, as dictating the criminal laws, is set forth in such passages as Deut., xiii., 11, "and all Israel shall hear and fear and do no more such wickedness" (where the penalty for idolatry is spoken of), and in other places of the same book, where the heavy penalties for perjury, gross depravity, disobedience of children, and insubordination towards the Supreme Judge are mentioned. The aim, or one aim, of punishment in civil society, whether the society be heathen or not, is explained in such passages as the noted one in Rom., xiii., 4: "He (the ruler or power) is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain; for he is a minister of God, a revenger to execute wrath (an *ἔκδικος* or executor of justice *εἰς ὄργην* so as to express divine resentment) "upon every one that doeth evil."

Plato in two remarkable passages of his *Laws* (ix., 854 D. E. and 862 C.) gives us his view of the ends of punishment. “He who is taken in the act of robbing temples, if he be a slave or stranger, shall have his evil deed engraven on his face and hands, and shall be beaten with as many stripes as may seem good to the judges, and be cast naked beyond the borders of the land. And if he suffers this punishment, he will perhaps become better by chastisement; for no penalty which is inflicted according to law is designed for evil, but generally makes him who suffers either better or not so bad. And if any citizen be found doing anything of this sort,—I mean to say if he be guilty of any of the great and abominable wrongs, either towards the gods or his parents or the state, let the judge deem him to be incurable, remembering what an education and training he has had from youth upward, and yet has not abstained from the greatest of evils. Death is to him the penalty, as the least of evils; and others will be benefited by his example if he be dishonored or despatched beyond the borders of the land.” To which Plato adds that he would not have children suffer for their fathers’ crimes.

In the other passage, he declares it to be the noblest work of the law to make a man hate injustice, and love or not hate the nature of the just. “But,” he adds, “if the legislator perceives any one to be incurable, for him he will make a law and fix a penalty. He knows quite well that to such men themselves there is no profit in the continuance of their lives, and that they would do a double good to the rest of mankind if they would take their departure; inasmuch as they would be an example to other men not to do wrong and would relieve the city of bad citizens. In such cases, and in such cases only, the legislator ought to inflict death as a punishment of offences.” With these the passage at the end of *Gorgias* (525 B. C.) may be compared. “It belongs to every one who is under punishment, when he is rightfully punished by another, either to become better and be profited, or to serve as an example, that others seeing him suffer

whatever he may suffer, may through fear become better. Now there are those who receive advantage when they suffer penalty at the hands of gods or of men, such namely as may have committed curable sins. But still the advantage comes to them both here and in the realm of Hades through pains and griefs; for it is not possible to get rid of unrighteousness in any other way. But such as have committed extreme sins, and on account of such unrighteousness become incurable, out of these the examples are taken. And these themselves are no longer benefited, since they are incurable; but others are benefited, who see them on account of their sins suffering through all time the greatest and most painful and most fearful sufferings; simply as examples hung up there in Hades' realm in the prison, as sights and warnings for the unrighteous who may at any time go thither."\* In all these passages Plato divides wrong-doers into two classes, the curable and incurable. The penalty to the first class is corrective, to the second it is for the benefit of others as a motive appealing to their apprehensions. But he would no doubt have regarded example as well as correction to be a result of punishing curable offenders.

Aristotle's works, as we have them at present, contain no extensive or consecutive theory of punishment.

Aristotle.

At the end of the *Ethics* (*Eth. Nicom.*, x., 9, § 4 et seq.) he passes from the educating or chastising function of the state to the necessity of legislation and of the science of legislation, of which latter he promises to give a new foundation. That nothing on this subject or on punishment is contained in the *Politics* is due, perhaps to their incomplete form. †

Aristotle considered it the great end of the state to train up its citizens into virtue. The moral virtues, he held, were cultivated by pleasure and pain. For the sake of pleasure

\* Comp. *Protag.*, 324 A.

† Comp. Hartenstein's *Gesch. d. Rechts-u-Staats philos.*, i., § 60. I have derived great aid from this writer, while examining all the passages that I could find, bearing on punishment.

men do evil, and to avoid pain they neglect or forsake good. On this account there must be habits formed, such that pleasure shall be associated with good, and pain with evil. Punishments (*κολάσεις* which differ from *τιμωρίαι*, the former being for the sake of the sufferer, the latter for the sake of the doer or inflicter, that he may be satisfied) exist for this end. "They are healing processes, and healing processes are wont to be brought about by their contraries" (Eth. Nicom., ii., 4, p. 1104); that is, crimes the motive of which is pleasure, must be cured by pains. For passion yields not to the word of instruction but only to force (x., 10, 9-23, p. 1179). "The multitude hearkens to force rather than to words, and to punishment than to the morally beautiful. Hence some believe that the lawgiver ought, above all, to prompt and urge men into virtue by reasons drawn from the morally beautiful; because those persons give ear to such promptings, who through their habits are already advanced in virtue. On the disobedient and the duller natures the lawgiver must impose chastisements and penalties, while he must drive the incurable entirely out of the society. For the good man, he who lives in conformity with the morally beautiful, will follow reason; but the bad, who aim, at pleasure, must be checked by pain like a beast of burden. Therefore they say that those kinds of pains ought to be selected for penalties, which are the most complete opposites of the pleasure desired by the transgressor of the law" (u. s., x., 10, p. 1180).

Here we find united, as in Plato, correction regarded as the principal end of punishment for the curable, and banishment, for the sake of security in the state, for the incurable. No one reason for punishment satisfies even Aristotle's single theory.\*

\* For the need, kinds and degrees of punishment, comp. Eth. Nicom., x., 9, § 3, and especially Rhet., i., 12, 8, and i., 14; and Polit., vi., or vii., 3.

## § 109.

Of Beccaria's explanation of the right to punish from the social contract, we have already spoken. The Modern opinions.  
Beccaria. end of punishment he defines to be not torment nor to undo a crime, but simply to prevent a criminal from committing new wrongs against his fellow-citizens, and to deter others from doing the like. Of correction, as an end, I believe he says nothing. (Comp. § xv., *dolcezza delle pene*.) That a punishment may have an effect, it is enough that the ill from the penalty exceed the good expected from the crime. In this excess of evil to be suffered ought to be reckoned the inevitableness of the penalty and the loss of the good procured by the offence. More than this amount of punishment is superfluous and tyrannical (*ibid.*). Beccaria has many humane observations on criminal law which, as far as they are true, have had a practical influence on legislation. The laws alone, he thinks, ought to decree the punishment of crimes; the police should have no arbitrary power in this respect. The sovereign ought not to judge; the reason for which, as he gives it, is that the sovereign, representing society, charges a person with violating the social contract, and the person denies it. Hence, for the former to decide would be the division of society into two parts. It is thus necessary that a third party, a judge, have the case committed to him (§ iii.). The power of interpreting the criminal laws, he strangely thinks, ought to be in the hands not of the judge, but of the sovereign or depository of the actual wills of all (§ iv.). How, then, if the interpretation should be concerned with a law against state-offences? Would not the sovereign have more bias than any other person? Nothing is more dangerous, he says, than that the spirit of the law should be consulted. The judge's only business is to examine facts. Beccaria would do away with arbitrary arrests, since imprisonment itself is a penalty, like torture or the penalty of death (§§ vi., xii., xvi.). There should be a proportion between crime and penalty. "If an equal penalty is destined for two crimes

which unequally injure society, the obstacle which men find in the way of committing the greater crime will not be greater, if with it they find united a great advantage. Whoever, for example, perceives that the same penalty of death is established for a man who kills a pheasant, and for one who commits assassination or forges an important instrument, will make no difference between these crimes; and thus the moral sentiments will be destroyed" (§ xxiii.). "The true measure of crimes is the injury done to society. This is one of those palpable truths which, though they need no quadrant nor telescope for their discovery but are within the reach of any moderate intellect, yet, through a wonderful combination of circumstances, have not been acknowledged with decisive assurance save by a few thinkers through all nations and ages" (§ xxiv.). "Those who hold the intention to be the true measure of a crime are in an error; for intentions are variable and depend on changing impressions, and a code for each man would be necessary. Sometimes men with the best intentions do the greatest evil to society, and sometimes men with the worst intentions will do the greatest good" (ibid.). But if intention and act must both be considered where a person is charged with guilt, and bad intention is regarded in law as intensifying ill desert beyond mere *culpa*; and if, also, these are capable of being estimated to some extent; it cannot be an injury to society in a particular case that intention should, in part, measure the penalty. After treating of special crimes (xxv, and onward) Beccaria asks how crimes can be prevented (xli.). His recipes are such as these: to make the laws clear and simple, and that all the nation's power be condensed in defending them; to see that the laws favor in a less degree classes of men than men themselves, and that men fear the laws and these only; to unite light and liberty; to interest those who execute the laws in keeping them; to recompense virtue as well as to punish crime; to make education perfect. On the point of offering rewards for virtue, all law until now, as he observes, holds entire silence. But why should not such rewards multiply virtuous actions, just as

scientific premiums stimulate discoverers of useful truth? The coin of honor is always inexhaustible in the hands of the wise distributor. To this it may be answered that certain kinds of noble actions, such as to risk one's life in order to save others, may well be rewarded; but that virtue in the wide sense of the term, admits of no human measurement, and is purer without than with human recompenses. In § xlii. Beccaria sums up all in this axiom: in order that any penalty be no violent act of one or of many against a private citizen, it ought to be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes pronounced by the laws.

Although Beccaria's short work is full of humanity and enlightenment, we cannot help seeing a certain flatness and want of depth in it, with which his explanation of the state's right to punish, and his exclusive reference to the public good, without appealing to the moral sentiment, accord.

#### § 110.

In his treatise *de jure belli et pacis*, Grotius devotes a long chapter to the subject of punishment (ii., 20).  
Grotius. He defines penalty as "the evil of suffering which is inflicted on account of the evil of doing" (§ i., 1). Is punishment ever right is a question to be settled by natural feeling: "among those things which nature herself dictates as being permissible and not unjust, is this,—that he who has done evil must suffer evil." As to the amount of penalty he thinks that the first thing to be looked at is equality between the fault and the recompense (§ 2, 1). It is not *justitia assignatrix* but *expletrix*, that is, not that justice which assigns to us according to our claims, but commutatory justice, which is exercised in penalties; yet it is commutatory in this sense, that he who transgresses by a kind of contract obligates himself of his own will to suffer (§ 2, 3). He denies the absolute necessity of punishment "for men are of the same blood, and ought not to hurt one another unless for the sake of obtaining some good" (§§ 4, 5). The *end* or motive of



punishment can lie in the utility of the wrong-doer, or of him who has been injured, or of persons in general. No one of these three reasons ought to be looked at by itself. "All of them ought to be wanting in order that punishment may not have place (§13, 1). The question what actions are punishable he decides by saying that all vicious acts ought not to be so treated. Thus internal acts ought not to be punished by men, although they may be made use of in estimating the quality of such as are external (§ 18). So acts unavoidable for human nature (§19), such as neither directly nor indirectly respect human society or any other individual, ingratitude also, ought not to be visited with penalty. But Grotius would have those who deny the existence or the providence of God, subject to penalty; and as to extending the catalogue of crimes against religion farther he is somewhat in doubt (§§ 45-47). Pardons he defends against those who deny that law can be relaxed in no case whatever. Pardon is a suspension of the law in a particular case: such suspension can be permitted, if it be allowed to abrogate the law altogether (§ 24, 3). The causes of remitting the penalty are the intrinsic and the extrinsic one; the former finds place when the punishment is severe compared with the fact; the latter, when some merit or other thing commends the criminal to mercy and when there is great hope of him for the future. When offences are committed through ignorance, there is especial reason for release from penalty. Grotius thinks that even the injured person may punish for the wrong committed against himself (§ 8, 2); and were there no courts, the people might do this for their own protection (§ 8, 5). But because we are misled by self-love, courts are constituted, to whom was given the sole power of avenging the injured. And moreover, "since the proof of the fact requires great care, and the estimate of the amount of penalty great wisdom and equity, those have been chosen for this purpose who were judged wisest and best" (§ 9, 4).

Grotius, on the whole, shows great good sense and moderation in discussing the subject of state penalties. He then

goes on to discuss the subject of religious wars, and in another chapter the punishment of accessories and persons in some way connected with the principal offender.\*

In the modern systems of jural and ethical philosophy, the meaning of punishment has been extensively  
Kant. discussed. Kant, in his *Rechtslehre* (*Werke*, v. 127, ed. Leipz., 1838), gives his theory as follows: "The bare idea of a state constitution among men carries with it the conception of penal justice, as belonging to the province of the supreme power. The only question is whether the kinds of penalties are a matter of indifference to the lawgiver, if only they conduce to the removal of crime, considered as impairing the security furnished by the state to the individual in possessing that which is his own; or whether also regard must be had to humanity in the person of the wrong-doer, *i.e.*, to the [human] species, and that simply for jural reasons. For I consider the *jus talionis*—as far as the form is concerned—to be after all the only a priori determinative idea, as a principle of penal justice; and do not regard it as derived from the experience of the means most effectual for that end. But how, one may ask, does the case stand in regard to crimes that admit of no retaliation; where retaliation is either in itself impossible, or in order to be carried out would require the commission even of a punishable crime against humanity in general, as rape, buggery, or sodomy, etc." In another place (p. 166, onw.) he treats more fully of the kinds and degrees of crimes. He is decidedly in favor of the death-penalty (p. 168). "If a man has committed a murder he must die. There is no substitute for this that is able to satisfy justice. There is no likeness in kind between a life ever so miserable and death; and thus no equality between the transgression and the recompense, save through a death inflicted in the course of justice, and yet unaccompanied by any such cruelty or outrage as could render human nature in the person of the sufferer an object of horror." The cases

\* Comp. for this summary of the opinions of Grotius Hartenstein's *Abhandlungen*, pp. 195-206.

of wilful murder, infanticide, and death in a duel he finds perplexing. In speaking of the second, he makes the strange remark that the illegitimate child came into the world against the law; it is outside of the protection of the law; it has, like prohibited goods, been smuggled in; so that the state may ignore its existence, and consequently its being put out of existence. But if a smuggler brought a child from a hostile state into the country and murdered him, would it be a palliation that it was born outside of the state's protection?

Hegel's explanation of punishment seems to start from looking on a wrong as a negation (*a nichtigkeit*).  
 Hegel. The force used in a wrong is abolished by a counter-force, *i. e.*, by a superior power of the state. Punishment is a "zweiter Zwang, der ein aufheben eines ersten Zwang ist." (Philos. des Rechts, § 93.) How crimes are to be punished "thought" cannot determine, he says, but positive determinations [*i. e.*, of experience] are necessary for this end. With the advance of cultivation, milder views of crime have come in, and now punishments have lost much of their ancient severity.

### § III.

Herbart and his school derive the right of punishment from the idea of requital (*vergeltung*), and Hartenstein, one of them, has well expounded their view (Grundbegriffe d. eth. Wiss., 260-274).<sup>\*</sup> Good and evil actions demand retribution or requital, not on the principle of *talio* but on a scale determined by the amount of wrong done, according to the law of equity (*billigkeit*) or fitness. The kind of punishment is dictated by the social and political ends to be subserved, and by the law of benevolence. Intentional wrong deeds, which are also violations of jural order, are objects of punishment. The state utters its threatenings against such deeds in the form of criminal law, and the

<sup>\*</sup> Comp. also a brief statement of it by Prof. Geyer, of Innsbruck, in v. Holzendorf's Encycl. d. Rechtswissensch., i., 499 et seq., in his chapter on *Strafrecht*.

threats have the effect of deterring ; but if to deter by fear (abschreckung) were the sole aim of punishment, it might happen that slight offences into which men were easily led by temptations, would need to be punished more heavily than great crimes, and that the punishment might exceed the measure of the crime. "The conception of a moral order in the world, in which the ancient conception of a Nemesis is ennobled into the conception of a holy and righteous rewarder, is not based on jurial conceptions but immediately on the idea of equity (billigkeit) ; and no man waits for a law to be enacted in order to find intentional badness to be worthy of punishment" (p. 260). "That the evil-doer deserves punishment simply because and in the measure that he has transgressed is an ancient thought, which gives its testimony for the peculiar import of the idea of requital ; and Hegel remarks with reason 'that the general feeling of nations and individuals on the commission of crime is and has been that it deserves punishment, and that the transgressor ought to receive as he has done'" (p. 266). It may be thought that to requite evil deeds for the sake of requiting them is something like malevolence. That this may happen is admitted ; and in order to prevent it, blood-revenge with other kinds of personal or family vengeance are done away with, as far as possible, by the laws of civilized society. But there is no necessary connection between penalty and vengeance ; and general laws, courts above the influence of private motives or personal feelings, are intended to prevent the sense of injury from running over into wrath and malice (pp. 269-270).

If this be so, there is no real contradiction between the absolute theories, viz., that penalty is an end in itself, and the relative theory, viz.: that it is for the purpose of preventing, deterring, correcting, etc. "Admit that requital on its own account is a moral task incumbent on a community: this does not shut out the possibility of keeping before the eye other ends, among which the protection of justice will always continue to be the most important" (p. 271).

This view approaches near to that which we have been led

to adopt, namely, that we must assume the wrong and desert of punishment of certain actions in order to have any punishment at all. Herbart's and Hartenstein's notion of requital, however, like the *talio* theory, labors under the great difficulty caused by the limitation of human intelligence and the danger of partial feelings. Laws defining and punishing crime must be general. But the differences of absolute blame-worthiness and desert of suffering are infinite. How can evil, inflicted on a wrong-doer by the state, be a fair requital, if a group of actions, identically the same, can in degree of criminality be as far removed from another as possible. We punish certain wrong actions because they are wrong, yet are unable to tell the degrees of wrong; and, if it were not a case of life and death for society that the state should have such a particle of divine justice put into its earthen vessels, we should not punish actions any more than thoughts or unexecuted intentions. The best thing for the state in these circumstances seems to be to fix the penalty within a fair estimate of the ill-desert of a given transgression, and to put the discretion of lowering it in special cases in the hands of judges.

Stahl closes his "Philosophie des Rechts" with a chapter on the administration of criminal law, which contains much that is excellent. I can only give his explanation of the meaning of punishment (§ 140). "As the moral kingdom of the state in general is only an external one, so also is its punitive justice. Its order and dominion is injured only by outward act—by crime; and is, therefore, restored only by outward penalty inflicted outwardly on the body. But this outward punitive justice can in its nature be no other than all punitive justice in general; it must rest on the same idea of righteousness with the [divine] idea of righteousness, although having another application. It is the restoration of the kingdom, that is of the glory (*herrlichkeit*) or majesty of the state by the destruction or the suffering of him who revolts against it. By transgression the doer of the deed makes himself a lord over the state and its order, he builds up another kingdom of his own within him; for this reason

the higher might of the state must manifest itself in his case, as well to the outward world, as to the consciousness both of human society and of the transgressor ; it must crush him, or otherwise make him feel its weight, must prevail over his will by depriving him of that which he by his power of will wills : satisfaction of desire—, and by inflicting upon him what he does not will : pain, limitation—in order that its sway, and none else, may subsist :—this is punishment. It is not the law of the state that must be maintained or restored by punishment—this would be impossible, its violation is irrevocable—but its majesty. Righteousness, according to its conception, does not demand that no violation of law shall take place, it demands only that no will contrary to law shall keep its ground, and get the victory in spite of higher order.” “ But how can a restoration of violated order consist in inflicting evil on the violator ? for such undoubtedly is punishment. By the coming of a second evil into the world the contradiction contained in the first is not done away. But righteousness, in the objective sense, does not consist in the fact that no evil comes into the world, but in this—that the majesty of the moral power (of law and of the magistrate as inseparably united with law) is upheld inviolably in the moral kingdom.” He goes on to say that every action has a lordship in it; and if a man acts against the law, he sets up a lordship, or assumes a sway, which is opposed to moral power. What now righteousness demands is, not that the action shall be undone, but that the majesty or superiority to the law of moral order shall be annihilated. This is done by turning the offender into something lorded over and passive, which, instead of acting, is subject to the action of the law and its ministers, to suffering, to pain, or death.

This explanation of Stahl's reminds us of theological explanations of punishment in the kingdom of God, as being vindications of the honor of the righteous law. But one may ask why this necessity ? Is not righteousness just as pure and glorious in itself, when an unrighteous act attempts to oppose moral order, as if no world of transgressors were in

arms against it? The necessity of punishment, then, must exist for the subjects of law, it must be relative to their wants, must have in view their moral training, must confirm them in obedience. Stahl then does not avoid falling down into the relative theory.

Richard Rothe (Christ. Ethik, iii., pp. 874-900, §§ 1, 153-1, 156), looking at the state as built on the moral idea, holds that "the state not only *may* but *must* punish if it do not prove false to its holiness and its exalted calling; and thus in punishment it reveals most clearly its moral majesty. And as a Christian state, it is most indubitably obliged to punish; for on the basis of the complete settlement of the conflict between the interests of holiness and those of grace, which is effected by Christ's redemption, love can no longer hold back the arm of punitive righteousness, but must expressly move it to action in the interest of love itself" (876-877). The idea of requital (*vergeltung*) must be the principle of punitive justice in the state, and "punishment can be used as a means for no purpose, beautiful as its name may sound, alien from the conception of an efficient reaction against evil, as attacking eternal moral order" (877). "It must be strict requital; that is, the infliction of a mass of evil on the sinner, corresponding with the mass of his sin" (880). To measure this proportion two processes can be used, that of injury and danger to the community, and that of the sinfulness. "The object to be kept in view on the part of the state is to requite a definite measure of moral badness in a wrong deed by an accurately corresponding measure of evil. Thus its principle of government is the *jus talionis*, which is the only really objective, not arbitrarily conventional, principle of punishment." And yet this principle must not be applied in its abstract external form, in which certainly it is a barbarous principle of justice. There must be an equality between crime and punishment in the sense of the "moral value of the evil deed on its outward objective side as measured by the evil suffered; and, again, what is more important, as measured by the criminality of

the person doing it. As with the progress of moral culture the *jus talionis* is becoming better and better understood, the judgments concerning crime and the penalties for it are becoming milder" (882). These principles of our author, if acted upon in criminal law, would require discernment like that of God, and a diversity of punishment such as no criminal law could express; or, in other words, an arbitrary power on the part of the judge rendering all specifications of punishment in the land useless. If all judges were as estimable and noble in character as Richard Rothe was, perhaps that would do less harm than it would now.

#### § 112.

We close our sketch with a reference to Jeremy Bentham's "Rationale of Punishment", which appeared in Bentham. an English dress in 1830, after Dumont's "Théorie des peines et des récompenses," published at Paris in 1811, and with consultation of the author's MSS. At an earlier date Dumont had published at Paris a work by Bentham embracing criminal law, "les traités de législation civile et pénale" in 1802.

Bentham's view of the ends of punishment is what might be expected from his philosophical starting point. Two points, he says, will be looked at by a wise legislator, when an act attended, or likely to be attended with undesirable consequence is committed; he will desire to obviate the danger of like mischief in the future and to compensate for the mischief already done. The mischief likely to arise from similar acts may proceed from the person who has already been the author of the mischief, or from others with motives and opportunities to do the like. Prevention thus divides itself into *particular* prevention which has respect to the cause of the mischief, and *general* prevention which has respect to the whole community. Pleasure and pain are the means of prevention. If the value, *i. e.*, the proximity, certain intensity and duration of the pain, is greater than the apparent value of the pleasure or good expected from the



act, he will be prevented from performing it. Thus also the mischief consequent on the act will be prevented. As far as the offender is concerned, the recurrence of his offence may be prevented by depriving him of his physical power of offending, by taking away the desire, and by making him afraid. Thus punishment has three objects with regard to a particular offender, *incapacitation, reformation, intimidation*. General prevention is effected by threatening and inflicting punishment, which thus serves for an example. General prevention ought to be the chief end of punishment, as it is its real justification. If an offence were an isolated act, the like of which would never occur, punishment would be useless. But as an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities, punishment inflicted on the individual becomes a source of security to all. "Thus it is elevated to the first rank of benefits, when it is regarded, not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety" (Book i., chap. 3).

Bentham's great division of punishments is into corporal and privative; the former including such as give bodily pain, such as confine or banish, and death; the latter including forfeitures, from simple fines upward to forfeiture of reputation, of condition and of protection from the law. He does not condemn absolutely the death-penalty, although he gives strong reasons against it. As it respects pecuniary forfeitures, he seems to have no objection to fines for a given offence proportioned to the property of the offender (p. 354).

Bentham's treatise abounds in well-considered and enlightened remarks on various aspects of punishment, and there were probably few discussions of this subject, before his, of equal importance.\* But the cardinal doctrine,—that the *motives* to be set before the criminal are simple pleasure and

\* Other jurists, as Feuerbach, in his treatise on penal law, take the same ground with Bentham.

pain, and the *end*, prevention,—by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the amount of punishment, except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering.

This, also, I suspect, has not been sufficiently taken into account,—that the criminal's mind having been acted upon by his course of life, he becomes in many instances more confident of impunity than probabilities will warrant, and more chained to his crimes and less able to rise, owing to his increasing separation from the better part of society. Thus preventive fear is in part taken away, and reform is beyond his strength. The threats of the criminal law do not deter the degraded or hardened criminal from evil. In this way the *corrective* power of punishment is lost, and the threats of law only make him worse. This being true of the greater part of criminals, while the great end of society in penal law is to protect itself, it has another great object before it, for its own sake and for that of humanity, in the reformation of the criminal through a wise and kind process of punishment.

On the whole, since the state must deal with crime as the upholder of moral order, and as recognizing the culpability as well as the harm of wrong actions opposed to moral order, it is obliged, for that reason as well as for others, to inflict punishment. But it is bound also, in its method and kinds of punishment, to choose such a system as will tend to repress crime, to strike fear into those who are tempted to it, to correct those who have committed it.

### § 113.

Crime and the penalty paid for it ought to be in some measure correspondent. There is a reality in the use of the word *satisfaction*, which denotes the doing of not less nor more than enough to meet the desires or expectations of another, both when it is applied to the payment of a debt or the reparation of an injury, and also when it is spoken of as a penalty which meets the demands

Relative greatness  
of crime.

of justice. In the Catholic notion of satisfaction, justice having been satisfied by Christ's death as far as future penalty and as far as the guilt of sins committed before baptism are concerned, the temporal punishment of subsequent sins is removed by *confessio oris* and *satisfactio operis*. This satisfaction was probably only an expression of repentance at first, and implied no necessary equivalence of the wrong and the penance; nor could it do this, because forgiveness was at work with the penance. But in this case, as well as in payment of debt and in suffering for wrong done to the community, offences of different grades were measured rudely by their magnitudes. There is no possibility of an exact measure, because the subjective state of criminals committing the same deed varies endlessly, because the relative magnitude of crimes can be reduced to no exact scale, and because the crime and the punishment are unlike quantities. What, then, is meant by the words that a great crime deserves a great punishment, and that wrong and pain must be proportionate. The meaning, as far as I can see, is this: that the impression produced by the punishment ought to be equal in some sense to the crime—that is, the impression made on the community. This is required both to *satisfy* the sense of justice, and to teach the unthinking the demerit of the crime. If a cold-blooded murder were punished with imprisonment for three months, and the stealing of a chicken with cutting the thief's ears off, in both cases the moral sense of the community (as I must call it, for I cannot ascribe it to the demand for security alone,) would be shocked, and punishment would have no such effect as it ought to have. Again, suppose so great a crime to be committed as the murder of a husband by a wife, with no provocation, and with the motive of concealing an adulterous intercourse; there might be very little fear of the recurrence of such an atrocious deed, but the highest penalty of the law would be demanded by the moral feelings of mankind.

It is easier to make a gradation in crimes than to produce an equipoise between them and punishment. And yet, in

measuring crime apart from the subjective state of the criminal himself, public opinion is changing and fluctuating under various influences. In a mercantile country, frauds, in an agricultural, horse-stealing—in all countries, the frequency of crimes of one or several sorts will demand a punishment disproportionate to the apparent bad disposition of the criminal, or the actual injury, on the whole, to society. Hence, there will be several standards in the same country; and in different countries, crimes, from national temperament or the constitution of society, will seem more or less heinous, more or less deserving of punishment. Aristotle in his rhetoric (i., 14) gives us several criterions, but expresses no opinion of his own, since his object is to treat of forensic arguments. One is that “greater crimes proceed from a greater spirit of wrong-doing, as when an Athenian was accused of cheating the builders of a temple out of an obol and a half, and it was urged that one who stole so petty an amount of sacred money would do any wrong. But, measured by justice, Aristotle says, this would not hold good. Sometimes again, he continues, “a great wrong is measured by its amount of harm, or by its being greater than any penalty can reach, or by its being irreparable or by the inability of the sufferer to obtain satisfaction. Sometimes a wrong inflicts a disgrace, on account of which the injured person inflicts evil on himself (such as suicide). Sometimes the greatness of a wrong depends on whether one did it *alone*, or for the first time, or with a few others; and sometimes on his repeating it. Again, a *savage* wrong is greater than another, or a more premeditated than a less premeditated; or one exciting terror when it is heard of, or an accumulation of crimes, or a crime like false witness in a place where wrong-doers are punished [*i. e.*, before a court], or a shameful crime, or one against a benefactor, more than others without these discriminating characteristics.”

## § 114.

Some of the considerations affecting the estimate of the magnitude of the crimes are the following :

Causes enhancing  
or diminishing crime.

1. Such as are to be found in *the state or nature of the person himself*. Thus, *weakness of intellect* mitigates criminality, if it do not altogether destroy responsibility. The same is true of *disordered reason*. Insanity exempts from punishment entirely. *Mental irregularities*, like abnormal fear, jealousy, fanaticism, or bodily causes acting on the intellect, may lessen it. *Condition in life*. A man of high condition has far stronger motives acting on him for doing well than one born and moving in the lowest ranks of life. Dr. Dodd's forgery, and Prof. Webster's murder, other things being equal, were higher crimes than others called by the same name. *Provocation*. Wrongs dictated by reasonable anger or unprovoked insult, are naturally put lower on the scale of criminality than like wrongs committed in cooler moments. So *premeditation* heightens guilt. *Imposture* and false pretences are more odious and ill-deserving than a single theft, partly because they imply a series of knaveries and partly because they proceed from cool purpose.

2. The injury done or meditated furnishes an estimate. Thus, at the head of the list of crimes stand treason and murder, the highest wrongs against the state and the individual. Then follow inferior wrongs against the state, or against the community and the individual in one and the same act.

Some of the wrongs, however, which are inflicted on individuals and clearly deserve the name of crimes, are not always so regarded. Such is adultery, which by Hebrew law (in the sense of criminal intercourse with a married woman) was punished with death. By the law of Athens and of other states, an adulterous pair might be killed if caught in the act, which, however, is not so much a measure of the crime as an indulgence of the husband's vengeance. What the penalty was on trial for *μοιχεία* at Athens, does not appear. There

were, however, various penalties for this offence, some disgraceful, others painful, in various parts of Greece (Meier u. Schöm. Att. proc., p. 331). By early Roman usage, a wife committing this crime could be tried before a family court and sentenced even to death; and mention is made of special mulcts imposed by the people on matrons "*stupri damnatis*" in A. U. C. 497. The law of Augustus (*lex Julia de adulteriis coercendis*, of 737 A. U. C.) ordained for the guilty wife the loss of half her dower and one-third of her goods, with relegation, and for her paramour similar relegation (but to a different island), with loss of one-half his property. Under Constantine the penalty of death, with confiscation, was inflicted on the man, while exile continued to be the woman's punishment (Rein, Criminalrecht, 835 and onw). By English law adultery is considered only as a private injury, although, under the Commonwealth, it was made a capital crime (Blackst., iv., 65). In the states of the American Union it is generally an offence against public justice, and is punishable by various terms of imprisonment. Different codes seem to differ in their estimate of offences against chastity more than as respects most other classes of crimes.

3. *Combinations to do wrong* are more dangerous to society than acts of individuals standing alone, and yet many of those who become involved in the conspiracy may have very little guilt, as having been induced by threats, misrepresentations, parental commands, or other intimate association with the prime movers, to join in the plot. Mere privity also without active concurrence in some offences is a crime, but the criminality may be greatly reduced by the passive part which persons thus privy take in the affair; for they may have been led by threats, or by affection to persons engaged in the conspiracy, or by some disinterested motive, to conceal what they know; or may be ignorant how they ought to proceed in the matter. Political conspiracies will often involve many innocent persons in the knowledge of the designs, who, without assisting or approving, look on disclosure as treachery. A government that would punish with severity

those who thus stand on the outer circle of guilt would deserve the abhorrence of the world. And this shows that we judge of crime by an estimate of the feeling and guilt of the persons involved, and not alone by the evil done to society.

4. *Want or some urgent necessity* mitigates violations of the rights of property which are also treated as public wrongs. Thus, theft on the part of a starving man is one of the most venial of offences. Here we may again mention the threats which sometimes lead persons dependent on others to take a part in their crimes. In general the subordinate is less culpable and deserving of punishment than the principal.

5. *Compound crimes* may be said to be greater, other things being equal, than either of these of which they consist. Thus, burglary and homicide, even if the latter was not intended, but committed in self-defence, make together a greater amount of crime than either apart, since the burglar must have been well aware of the possibility of the innocent householder's resistance. So smuggling and violence to the person of custom-house officers contain more guilt than mere smuggling; robbery than theft or violence alone, perjury than ordinary falsehood.

6. There are several classes of offences in regard to which we may entertain a reasonable doubt. One of these descriptions is *those that are not easily detected*, such as taking bribes and perhaps counterfeiting. Here the question is, ought the punishment to be the greater on account of the difficulty of detection? As bribery, for instance, is a transaction between two persons, both of whom are liable to suffer if their guilt is known, and the motive for concealment increases with the amount of penalty, the severity of the law here defeats itself. Probably every object would be gained if the punishments varied between certain fixed and not very wide limits, such as deprivation of civil rights and a greater or less term of imprisonment.

Again, at times certain offences *increase in frequency*. Ought frequency to add intensity to punishment? The answer, as it seems to us, must depend on the causes of the

frequency. If, for instance, in a time of unusual want, theft multiplies, there seems to be no great need or reason for a higher penalty. For, if this is the only reason, as soon as the times assume their ordinary form, the theft will fall again to its old average. So, too, there seems to be occasionally a contagion of crime; one case of it puts it into the head of another person to do the same, but ere long the strange fascination of evil passes away. Here, too, as the misdeeds of this particular sort are not likely to be lasting, no new terror of penal law, no new impression of the majesty of law is needed. In short, whenever the causes of crime are temporary, there is no need of severer law.

*Repeated offences of the same person*, as theft or burglary, are generally regarded, and with reason, as calling for enhanced punishment, on the ground that an old offender is both more dangerous and more depraved than others, and is also an instructor of younger delinquents. A second conviction implies greater hardness, unless, indeed, when a man has lost his character by crime and is in despair, he renews the offence in order to find a refuge in prison. In such cases, especially, the humanity of society does one of its best works by establishing places of refuge, as well as by corrective processes in prisons offering motives and inspiring hope.

#### § 115.

We have said enough, without going farther, to show that there are numberless degrees of crime depending on the nature and character of the offender, on the nature of the offence, and on other considerations. These are enough to make it evident that to visit with the same amount of punishment crimes called by the same name, would often be a caricature of justice. To a certain extent penalties must always be a rude process, as we can neither measure guilt nor injury. The best remedy against this evil which lies in the imperfection of human nature is to do what Beccaria so decidedly condemns—to give the power, within certain limits, to the judge, of enhancing or diminishing the

Limits of amount  
of penalty.



infliction of evil on the convicted offender. This may be and is extensively done where imprisonment, or fine, or certain complex punishments, such as imprisonment with hard labor, are prescribed by law. The evil here is that the feeling of the judge will influence the decision; but where a definite time or amount is set beyond which he cannot go, no great evil can result either to the prisoner or to society, unless it arise from excessive lenity.

### § 116.

All penalty consists in deprivation of personal or political rights, chiefly of the former. The state, in punishing, does that to a man which every innocent man has a right not to suffer. Thus, personal liberty and the right of locomotion are taken away by imprisonment, and (relatively to the place of the crime) by exile and by deportation or banishment to a particular spot; the rights of property are affected by fine and confiscation; the right of personal honor by disgraceful punishments, such as the pillory, and that of political honor by the loss of citizenship, or, as at Athens, by the loss of certain special political rights; the rights of the person, externally considered, by corporal chastisement; the right of life by the punishment of death; and a number of rights together by penal slavery. The kinds of punishment may be classified, according as they deprive the criminal of life, of freedom wholly or in part, of property, as by fines, or of civil honor, or expose him to corporal punishment, or to some other bodily infliction. Most of the penalties are enumerated in a fragment of some lost part of Cicero de legibus, preserved by Augustin (de Civ. Dei, xxi., 11): they are *damnum, vincula, verbera, talio, ignominia, exsilium, mors, servitus*. One or two of these deserve some remarks. 1. *Damnum*, here used in the sense of money payment, is not one of the earliest kinds of penalty, as fines could take that form only after money became a measure of value and an instrument of exchange. The more common word for a money-penalty,

Kinds of penalty.

Fines or mulcts.

*mulcta* (*multa*), has an interesting history, being derived from an old word, *mulco*, to strike, beat, cudgel, connected with *mulcco*, to stroke, and possibly with *mulgeo*, to milk. A *mulcta* at first, then, was a beating; afterwards a payment of sheep or other cattle, by way, perhaps, of composition for the beating, and then of money; finally it took a general sense, as in the phrase *morte multare*. Confiscation of a man's whole property was not in the early times of Rome a legal punishment, but was imposed by special vote of the people. Afterwards it regularly accompanied certain other penalties, and finally went along with all *capital* punishments.

*Fines* now are the ordinary penalty for violation of civil ordinances, which imply no especial guilt and often arise out of mere forgetfulness. They are also imposed together with or alternatively with imprisonment for many larger offences. The objection against them is that they act unequally, being often extremely burdensome upon the poor. In some countries they have been calculated upon as a source of revenue for the public treasury. Where the judges have a limited power of determining the amount of the fine, the inequality above mentioned may be in part removed, yet it must always remain an objection against this form of penalty. Relatively to other penalties, pecuniary ones, which made the staple of the penal codes of the mediæval times, have disappeared.\*

*Confiscation* of the whole or a large part of a criminal's property is now in little use. Its proper connection is with political offences and with attempts to defraud the public revenue. In former times it went with heavy offences, but was objectionable both because it harmed innocent relatives more than the criminal, and because it laid a temptation before the sovereign to get possession of the property of accused persons through judges whom he could influence.

\* Comp. Prof. Geyer in v. Holtzendorf's *Encycl.*, i., 534.

2. Imprisonment. In early times places for the safe-keeping of convicted transgressors could not have been very safe themselves, and the expense of maintaining them may have been an objection against this form of punishment. This was, as it seems, at first used as a method of detaining the accused before trial could be held. The Roman practice of chaining some state criminals to a soldier, which was in vogue under the empire, was therefore a humane method of guarding a suspected person (*custodia militaris*). Still more gentle was the detention in a magistrate's or a surety's dwelling (*libera custodia*). Imprisonment, however, was a punishment in a few exceptional cases, as in those of slaves, soldiers, and play-actors (Rein Criminalr. d. Röm., p. 914). So also at Athens the prison was used for confining persons who could not furnish the needed bail; and even in some private suits foreigners were so treated. But imprisonment was not an ordinary penalty, and, when it was required by law, was chiefly an accessory to some other. Thus, it is said (Dem. c. Timocr., § 105, p. 733) that a thief, if the thing stolen be not recovered by the owner, may be kept in the stocks five days and nights, if the dikasts so decree, besides being held to pay ten-fold the value of the article, together with other liabilities.

At Rome imprisonment may have been in little use for a freeman, because it was degrading, too much like the confinement of a slave in an *ergastulum*. In modern times it is the most frequent of all penalties. It is, unlike fines, equal for all except in the disgrace, which ought to have been thought of by the criminal of good condition when he was tempted; it is of variable length, so as to furnish a measure for all offences except the highest; it contains no vindictive element, so that the prisoner need not look on society as his foe; it allows the use of hard labor, or other enhancements, temporary or permanent; it supplies the hope of earlier release than the term of confinement prescribed in the sentence, as a reward for good conduct; it helps all corrective influences that modern humanity can bring to bear on prison-

ers. On the other hand, it is expensive, even if the power of labor is fully made use of; it is sometimes a better kind of life than the prisoner had when he was free, so that he will commit a new crime for the privilege of going again into prison; it is for certain natures almost a refuge; and the intercourse of prisoners is often more corrupting to young offenders than any other punishment could be. There is danger also of its being too much shortened in its term by misplaced humanity.

3. Servitude or penal labor. Hard labor is often connected with imprisonment, and a distinction is made between mere confinement in a jail and confinement with hard labor. The motives of the state may be mixed in requiring this temporary servitude; it may be thought to benefit the prisoner, or lessen the cost of keeping him, or to be a kind of retaliation for vagrancy. Slavery as a penalty seems to have been little known in Greece \* or in Rome. In modern times the most conspicuous instances of it are condemnation to the galleys, as among the French, which might be perpetual or temporary, and deportation with hard labor, as known to the English. The galley-slave was branded, and in the seventeenth century, if he mutilated himself to avoid the hard labor at the oar, suffered death. This penalty seems to have been introduced in the sixteenth century. The first *ordinance* that speaks of it belongs to 1548, but it was in use before that year.† Sentence to a penal colony was a relief from the necessity of inflicting death, when the English laws, especially in reference to crimes against property, were extremely harsh, before Sir R. Peel's reforms, and it helped to found colonies and break up the soil in new countries; but such a colony cannot in the end be of great advantage. Confinement with hard labor for life, which is a received penalty, ranks among the heaviest of all, since it may include the ignominy and the infliction of cor-

\* Comp. K. F. Herm., Gr. Antiq., iii., § 72. Schöm. Gr. Alt., i., 492.

† See Stein, in vol. iii., p. 614, of Warnkönig u. Stein's Franz. Staats u. Rechtsgesch.

poral punishment, with the loss of liberty and compulsory labor in the state's service.

4. Verbera. Corporal punishment by the whip, cane, or cudgel, was almost unknown to the Romans. Corporal punishment. While beating with a *fustis* or cudgel was used for military crimes, and slaves were punished with flagellation, the person of the free citizen, out of the camp, was in a manner sacred (Rein., u. s., 915). Whipping and other similar bodily inflictions are common enough in various parts of the world, but are going out of use in the most civilized lands. Formerly, in the older parts of the United States, certain evil-doers were publicly flogged at the whipping-post; but the penalty and the whipping-post have disappeared everywhere except in one or two states. So it is also in other countries. Prof. Geyer says (von Holtzendorf's Encycl., i., 537), that "corporal punishment has kept its ground until the most recent time, as the last relique of the bodily chastisements which formerly were so common, and which still find a few earnest defenders. Even after the revolution of the year 1848 had swept it away, it was held to be necessary to bring it back again, even in highly civilized Saxony. Of late (he writes in or before 1870), it has almost everywhere been set aside again, and subsists still only in Saxe-Altenburg, and on a larger scale in the two Mecklenburgs." In Great Britain this class of punishments has not yet been abolished, but is destined ere long to cease. In Russia, under Catherine II., and in Poland at the same epoch, nobles and maids of honor were flogged, as even now, in China, mandarins of the highest rank are subjected to the bamboo.\*

What is to be thought of this tendency to put an end to all bodily castigations? Ought they all to go out with the more cruel ones, such as mutilation, branding, the strappado, or the more *disgraceful*, as exposure in the pillory or the stocks? Their principal merit, as Bentham observes, is their "exemplarity." But the actual sight, by one or two hundred vaga-

\* Comp. Bentham's Rationale of Punishment, p. 84, who does not express himself decidedly against whipping.

bonds, of a man whipped at a post, and the hearing of his cries for a minute or two—cries so much the louder as he hopes to make the torturer believe that the pain is much greater than it is—will this public spectacle, or the knowledge of a very brief punishment, have as great an effect as the knowledge of his confinement would have, or of his being put at hard labor for a few weeks or months? On the other hand, all ignominious punishments, especially if submitted to in public, must destroy a man's spirit and self-respect. He loses the power of rising again to the level of his fellow-men. Punish him as he deserves, but not so as to extinguish the sparks of a nobler life that may have survived his crime. Even bodily chastisement in penitentiaries, where no one knows of them, are said to be of no use by men best acquainted with prison discipline. And in general no penalties ought to send a man back into the world with his body or mind injured, or his spirit broken, so far as this is not inevitable. Otherwise he resumes his rights without a capacity to exercise them to advantage

5. Ignominy, that is, loss or diminution of honor or of one's good name, especially as related to *honor*  
 Ignominy. in the sense of honorable offices or political privileges, was at Rome a concomitant of certain other penalties, as relegation and corporal punishment, or was the main punishment for other crimes, as extortion in a provincial office, where the convicted magistrate was thenceforth *improbus et intestabilis* (unable to act as a witness or a testator). Infamy, *ex edicto*, took away the right to vote or hold office, with certain other rights, on conviction of perjury as the sole penalty, and in connection with other penalties, in the case of a number of other crimes. Certain offences, again, involved the loss of a seat in the senate.

The Athenians followed a similar plan of visiting certain misdeeds, especially in the political sphere, with *atimia*, or loss of some or of all political and civil rights. The orator Andocides (*de mysteriis*, p. 36, Reiske) mentions several descriptions of *atimia*. One kind consisted in prohibiting per-

sons convicted of certain misdemeanors from doing some particular act which other citizens were free to do, such as speaking in the assembly, or holding the office of a councilman, acting as a public prosecutor, going into the agora, or sailing to Ionia or to the Hellespont. To this kind of *atimia* belonged the forfeiture of the right of bringing this or that particular suit, when a public accuser had not received one-fifth of the votes of the court, or when he had brought a public suit and abandoned it. Besides this partial loss of citizens' rights, there was a complete loss of them, accompanied, in some cases, with confiscation. The offences for which this was a penalty were such as bribery; embezzlement; false witness; and false declaration, thrice repeated of being present at the summons of a defendant by a plaintiff before a magistrate, which was necessary before commencing a suit; cowardice in war; failure in filial piety; injuries done to a person acting for the state while in the discharge of his duties; partiality of an arbitrator, and some others. It is also mentioned by Andocides that the penalty of *atimia* went down to the children of the two first classes of criminals—those found guilty of receiving bribes or of embezzling public money. In other states of Greece the same penalty, without doubt, prevailed, as it did at Sparta (comp. K. O. Müller, *Dorier* ii., 223).\*

No objection can be brought of any weight against making disfranchisement by itself a penalty for some offences, especially for those which tend to corrupt the political system. Both he who offers, and he who receives bribes are equally unfit to vote or hold office; and no examples of punishment could be more calculated to purify the polls. In some of the United States, no person giving or accepting a challenge can sit in either branch of the legislature, the reason for which disqualification lies in the fact that duelling generally grows out of political contests. But it appears to be much more suitable

\* I have used Andocides (*loc. cit.*) and followed K. F. Hermann, *Gr. Antiq.*, i., § 124, rather than Meier and Schömann *Att. Proc.*, p. 563, in making two rather than three sorts of *atimia*.

to visit embezzlement, bribery, "ballot-stuffing," fraudulent voting, fraudulent rejection of votes, and the other offences against the purity of elections, with a penalty which would take away for a time, or perpetually, the privileges of a citizen with full rights, than thus to punish crimes which the public opinion of some communities does not condemn. This, further, is a penalty well suited to times and to states where universal suffrage and the arts of the demagogue flourish. It may, however, be questioned whether a voting community, where corrupt practices at elections have been rife, should be disfranchised in mass, as has been done sometimes in England. In justice to the honest citizens of such a place, no more ought to be done than to pronounce a dishonest election void, and let the place go unrepresented for the time, punishing those with disfranchisement who have had any participation in the frauds.

Besides advocating the free use of penalties like ignominy or political dishonor for misdemeanors especially political, we suggest that it be applied in other cases such as show an unfitness to discharge the duties of voting or holding office, of sitting on juries, etc. All convictions for theft, all arrests for drunkenness, all assaults and brawls, for which imprisonment for any length of time is the stated penalty, all convictions for frauds in business involving a similar punishment,—in fact, all that renders a man ignominious as well as amenable to the criminal law, should have this as a concomitant of the main penalty, on the ground that suffrage and office are privileges to be won at first and kept afterwards by good and honorable conduct. The penalty, however, should be temporary at least for minor offences.

6. Talio, from *talis, like*, of such a sort, denotes no specific punishment, but only the likeness or identity of the injury and the retribution. It is natural in a rude state of society to measure the requital by the original act. The wrong is looked on as a debt, demanding an equivalent. It is natural also in all altercations, when men give way to resentment, to render back what has been

Talio, or like penalty.



received—blow for blow, a slap on the face for a slap on the face, and so on. From the early contests of children with one another we may infer the same thing.

*Talio* is most interesting in the history of punishment, because the early laws are full of it, and also because some philosophers of great name, as we have seen, regard it as lying at the very foundation of punitive justice (See § 110.) It appears in the code of the Old Testament. Thus, we have in Exod. xxi., 23–25 (comp. Levit., xxiv., 19, 20), “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning (*i. e.*, mark of burning on a part of the body), wound for wound, stripe for stripe” (comp. Knobel’s comment on this place). So in Deut., xix., 21, the law imposes on the false witness what he thought to do to his brother: “life shall go for life,” etc. The Ægyptians had a similar law for the same case (Diod. Sic., i., 77), where, however, it is also said that perjury was a mortal crime. The Roman law under the emperors supplies somewhat of an analogy to this, when *talio* was applied in cases of malicious accusation of an innocent person, the accuser being obliged, from Constantius onward, to give his consent to this; when he signed his name on the list of cases and on the form of accusation. In the Laws of Manu also *talio* appears (B. viii., 278 onw., in the transl. of Deslongchamps). Thus, “whatever member of his body a man of low birth uses to strike a superior, that member ought to be mutilated; such is Manu’s order” (279). “If he raised the hand or a stick against him, he must have his hand cut off; if in a fit of anger he kicked him, his foot must be cut off” (280). The *talio* aimed at in No. 282 is more astonishing. Greek law used retaliation to some extent, as the story given by Demosthenes of the one-eyed Locrian shows (c. Timocr., § 140).\* And to go no farther, the laws of the twelve tables contained this provision, “*si membrum rupit, ni cum eo pacit,*

\* Comp. the notices in K. F. Hermann’s *Gr. Antiq.*, iii., § 69, note 9. Compositions were then practised in Greece.

*talio esto*," which is of great value as showing that compositions for injury were in use.

Retaliation, as a rule and measure of punishment, is looked on by some of the Greek poets and philosophers as very natural and just. In a noble passage of the *Choephoraë* (v., 309) Æschylus expresses himself thus: "In return for a hostile tongue (for words of enmity), let a hostile tongue be paid back. Thus justice cries aloud, exacting what is due. And in return for a murderous blow let one give again a murderous blow. He who has done must suffer. This a thrice-old proverb declareth." Such is the voice of the ministers of divine justice, which again (v., 400) proclaims the law to be, "that drops of blood spilt on the ground demand in return other blood." So also Plato, in respect to certain kinds of intentional homicide, takes much the same ground. First he says (*Laws*, ix., 870, E.) that "there is a tradition believed by many, which has been received from those who are learned in the mysteries; they say that such crimes will be punished in the world below, and that, when the perpetrators return to this world, they will suffer what they had wrought, by a compensation of nature, and end their lives in like manner by the hand of another." Then, a little after, he speaks of priests of old who have pronounced "that the justice which inspects and avenges the blood of kindred follows the law of retaliation, and ordains that he who has done any murderous act should of necessity suffer the same. He who has slain a father, shall himself be slain at some time or other by his children, and if he have slain his mother, he shall of necessity take a woman's nature and lose his life at the hand of his offspring in after-ages. For where a family is polluted with blood, there is no other purification, nor can the pollution be washed out, until the homicidal soul which did the deed has given life for life" (872, D., E., Jowett's transl.). But this is not Plato's enactment, it is only an embellishment drawn from the earlier views of divine justice and of *ate*.

It appears from all this that *talio* was adopted in very old

times as a rule for measuring punishment due to some kind of crimes. But it must have appeared to be a rule inapplicable to many kinds of offences. There is no evidence that it was ever the basis of even the rudest code of criminal law, and it is quite probable that where, in some kinds of personal wrongs, it gave the measure of punishment, it was early superseded. It was mechanical and outward, having respect rather to the wrong than to the intention.\* It could be applied in the case of injuries to the person, but in such a rude way that the loss to the injured party was still much the greater. It could be applied in some instances of injury to property, but only if the wrong-doer had property of his own to be injured; but strict talio towards a thief, that is stealing his property *jure*, would be absurd. But to wrongs against the state or the rights of the community and to most private wrongs it had no applicability; which shows that it was from the first very limited in its measure of wrongs, or that it arose when much of the justice of mankind was in the hands of septs or families.† Talio, as furnishing the rule of life for life, brings us to the penalty of death.

\* Cic. de leg., iii. 20, 46, seems to like a certain correspondence of crime and punishment. "*Noxie poena par esto, ut in suo vitio quisque plectatur: vis, capite; avaritia, multâ; honoris cupiditas, ignominiâ sanciat.*"

† Philo touches the Hebrew law of *talio* in his treatise de spec. leg., § 33, et seq. (ii., 330, ed. Mangey): "One must with reason blame those who enact penalties for things done which are unlike the injuries, as fines in money for personal assaults, or ignominy for wounding and maiming, or forced exile for voluntary homicide, or imprisonment for theft. For the uneven and unlike are in contradiction with a polity that aims at truth. Our law is the minister of equality, in that it commands transgressors to suffer things like what they have done; in their substance, if they wrong a neighbor in his substance; in their bodies, if they transgress against bodies in their parts, or members, or organs of sense; and if they plot so as to reach even the life, it commands that they be punished even unto the loss of life. For to inflict other punishments, having nothing in common with what is done, but unlike in kind, belongs to those who dissolve and not to those who establish laws." This gives a fair specimen of a loose kind of reasoning from which modern philosophers cannot escape. What is the likeness or unlikeness of

## § 117.

No crime excites greater horror than murder, and however we explain it, life for life has always seemed to men a fitting penalty, when it was committed with design. Law has always made a distinction between manslaughter without previous intention and murder properly so called. Thus, while cities of refuge were provided under Hebrew law, to which a man who killed his neighbor without hating him in times past might flee from the *goël* or avenger of blood; if a person who had designedly slain another should seek to take the benefit of the law, the elders of his city could demand him back and give him over to the *goël*, who acted as an executioner. In Greece or at least in Athens, by old usage, if the man-slayer fled, the murdered person's relatives were entitled to seize on hostages in the country harboring him; and if he were delivered up and

crime and punishment? Is it outward likeness? Can you measure the crime by its effects? There must be a proportion, as far as can be, between the crime and the punishment; and between the punishment of different crimes and their penalties there must be a desert of punishment to start with, but how can likeness or equality go beyond the moral impression commensurate with the offence, as conveyed by the law. As for Hebrew *talio*, Michaelis, Sualschütz, Salvador, decide that the lawgiver simply states, in Exod. xxi., 23, and elsewhere, the *general standard*, the *jural basis*, according to which exceptional assaults on the person were to be judged. Comp. Saalschütz, Mos. Recht, chap. 57, who quotes Salvador as remarking that "la peine du talion est un principe plutôt qu' une loi. Comme loi, elle ne peut pas, elle ne veut pas, en general, être exécutée." He also declares (notes 567, 568) that the Rabbins most positively assert that no talio, according to tradition, was in practice, but only damages in money for such offences. But here comes back again the old difficulty, What is the likeness or equivalency between killing a man and the weregild? I can see no other than equivalent loss sustained by the dead man's family. It was found that so many *solidi* would be about equal to the pecuniary worth of his life, to those who were in the family union with him. So of other wrongs to the person. This at last became the measure for the injury to society. The guilt was not much taken into account, although guilt was assumed.

found to have done the deed with forethought, he suffered death, at which his accuser was entitled to be present. If he was judged to have slain a man without forethought, he was obliged to leave the country until he got leave to return from the dead man's kinsmen. The murder of a citizen was visited in the historic times with death, or in case of flight to perpetual exile and confiscation of property. At Rome, the primeval law, remaining probably unaltered in the twelve tables, ran thus: "si quis hominem liberum dolo sciens morti duit, parricidas esto," *i. e.*, "if any one with evil intention, knowingly put a freeman to death, let him be a parricide," that is, let him be judged by the same law and before the same tribunal with parricides, and receive the same punishment of death. But the unintentional manslayer offered a ram in sacrifice before a gathering of his agnates and went away clear.\* The Germans, when we first learn what their institutions were, seem to have regarded all taking of life, voluntary and involuntary, as something which it was the business not of the community, but of the family, to follow up. Life has its stated price; blood-revenge, or composition for it, measured by the dignity and quality of the person slain, was in vogue through all the tribes. There were, however, crimes punished by death, such as immediately concerned the state and not the family; and the number of modes of putting criminals to death in the mediæval law of Germany, shows anything but humanity.† Finally, to give one illustration of ancient feeling and practice from outside of Europe—the ancient laws of India, while they condemn thieves and the helpers of thieves, with various other transgressors, to death, and are cruel in their ways of punishment and of execution, do not seem to save their harshest penalties for the crime of murder. The murderer of a Brahmin, for instance, is to be branded with the figure of a man without a head, to be excluded from human intercourse and be forsaken by his

\* Rein. Criminal R., 401 et seq.

† See the list of them in Grimm *D. Rechtsalterth.*, pp. 682-701, ed. 1, and Osenbrüggen, *Alamann. Recht*, §§ 40-42.

relations. If a Brahmin committed such murder with premeditation, his penalty was exile, but he could take his effects and his family with him. If a man of the other castes did the same with premeditation, he was to suffer death. (Laws of Manu, Deslongchamp's transl., book ix., 235, 241, 242). Expiations, however, were allowed in such cases. A person of the military caste, having committed this crime, might offer himself to archers made aware of his desire to expiate the murder, or throw himself thrice, or until he died, head foremost into a burning fire (xi., 73).\*

Many other crimes of high degree, especially those against the state, have been visited, in most countries, with death; but as a penalty for intentional manslaughter, this is probably far more general than others. Why the penalty and the crime thus afforded originally an instance of *talio*, I will not stop to ask. It may have been that murder being highest in degree among the crimes committed against individuals, and the taking of life the greatest loss, the equality fitly expressed the horror of society at the wrong and the desert of the wrong-doer. Or it might be that the protection of the community demanded this at a time when prisons were insecure. Or the culprit might be conceived of as at war with society. More important for our purpose is it to inquire

Right to punish capitally. whether society or the state has the right to take the life of one of its members. We have already seen that such a right cannot be derived from the right of the criminal to dispose of his own life, which would be to transfer the power of punishing himself capitally to another authority; nor from the murdered man's right to defend himself, which has ceased with death. But what is the need of asking whether life may be taken away, if stripes, incarceration for life, deprivation of any or of all other rights except life, are permissible? What is the so radical distinction between this and exile or life-long confinement, that we should hesitate about the one more than about the others? It really

\* Comp. Duncker Gesch. d. Arier, ed. 3, p. 155.

seems like straining at a gnat and swallowing a camel, to demand that hundreds and thousands of citizens, innocent and useful, for whose protection the state exists, shall expose their lives in war, with the certainty that many of them will be killed, and to hesitate in regard to the rightfulness of the death penalty.

As for the expediency of this penalty there is more room Expediency of capital punishment. for doubt. The subject does not strictly pertain to our discussion, so that I will content myself with a word or two concerning it. Some of the principal difficulties attending the penalty of death for murder, are :

1. The consideration that the consequences of a wrong decision cannot be remedied, unless a long time intervenes between the sentence and the execution, which is itself an evil, as destroying much of the moral impression. Suppose a prisoner to have been kept twenty years in prison, and then be put to death. Who would not feel the uselessness of so late a following up of the verdict ?

2. Some, perhaps many, persons tried for murder, escape conviction through the jury's fear of giving a verdict that is irreparable.

3. Pardons, after conviction of murder, are made easier by the same consideration.

4. The border-line between the worst kinds of manslaughter and the least enormous murders is so indistinct, that they seem to differ in name only. Hence, in some cases, there is a doubt, in favor of which humanity casts its vote.

5. In all punishments regard must be had to the feelings of the society. If opinion settles down decidedly in favor of abolishing capital punishment, the uses of it in part come to an end.

On the other hand it may well be asked (1) whether the increasing humanity of the times is an entirely moral sentiment, whether it may not in part be due to a greater sensibility to physical pain, to a more delicate nervous organization, and may not need to be counteracted rather than obeyed.

2. The almost universal resort to punishment by death in

the past shows that a long experience has not found it unnecessary or too severe an expression of the ill-deserts of certain criminals.

3. It is a motive of greater weight than any other to deter from the crime. Some speak of solitary confinement for life as a greater. Perhaps it is, and certainly it is objectionable as injuring the reason of the sufferer. But lifelong imprisonment at hard work, with the unavoidable hope of being released after long good behavior, is certainly a motive for wrong-doers of less strength than the fear of suffering a death of disgrace. If so, murder in connection with another crime will be more frequent; because, if discovered, the criminal will not have to suffer much more than for the primary crime, and may also, by the murder, secure his escape.

4. If, where capital punishment has been abolished, crimes, capital before, have not increased in their ratio to others or to the population, this, as yet, is not a sufficient indication of the ultimate tendency. Crimes of violence tend to diminish with the increase of civilizing influences. A good police will prevent many crimes. The criminal classes may have been more reached than formerly by moral and religious truth. Humane institutions add what weight they have to other causes. Emigration, by opening better prospects to the poorer classes, keeps them from crime. On the whole, it is as yet uncertain whether the death penalty can be given up with safety.\*

#### § 118.

8. Exile. To be sent away from one's country, of old, was a very great evil, second only to death, and reserved for great criminals. The world has now changed so much that mere absence from one's native land will not, in many cases, seem to be a great hardship. Bentham tells us of an older culprit rebuking a younger, who wept when sentenced to transportation, and asking him if he

\* Comp. v. Holtzendorf, *das Verbrechen des Mordes und die Todesstrafe*, 1875, who advocates the abolition of the death-penalty.



should weep in case he had to go on the grand tour. Deportation to a penal colony with confinement is merely sending to a remote jail. Condemnation to the mines, with enforced labor and no chance of escape, is the hardest imprisonment. Prohibitions issued to nobles and courtiers against coming to court, or requiring them to keep at home, were trifling penalties which influenced but a few. In short, so far as exile differs from hard labor with a degree of confinement, it is of little use in the present state of the world.

§ 119.

A word or two touching some special cases of crime will close what we have to say on that subject. One Epidemic crimes. is what may be called *epidemic* if not *contagious* crimes. Sometimes it is found that crimes increase fearfully, even among nations of a very settled character. In the year 570, of Rome (=184 B. C.), according to Livy (whose authority in this place, however, Valerius Antias, is none of the best), trials for poisoning occupied one of the praetors for four months, chiefly in the towns and smaller places outside of the city, and two thousand persons were found guilty. (Liv., xxxix., 41.) Two years afterwards there was a new fright about this crime. A number of leading men died suddenly, of whom one was a consul; his wife was convicted of procuring his death; and a praetor who had charge of the trials in the country wrote that he had already condemned three thousand, and that the number of suspected persons grew through informations. Special trials for the same crime continued into another year. (Liv., xl., 37, 43, 44.) Many years before these events (in 332=422 B. C.) the same state of things had existed, at which time ladies of distinguished families were the authors of the mischief, and twenty died in consequence of being forced to drink potions which they had prepared. More than one hundred and seventy others were convicted of aiding in the crime. (Liv., viii., 18.) No trials, according to Livy, for poisoning, had been known at Rome before, and there was something so demonic about this that

a piacular rite was resorted to. It was looked upon more like derangement of mind, adds the same author, than like wickedness.

Similar examples of contagious crimes, and still more of the contagious suspicion of it, are furnished by the history of different states. We need only refer to the mutilation of the Hermae at Athens, to the excitement at Rome in regard to the Bacchanalia, to Titus Oates' plot, and the witch delusion at Salem. If such fits of terror and suspicion led to no judicial proceedings, they would pass by at once, but there seems to be an unnatural temptation, extending even to children, to bear false witness on such occasions, dictated in part, at least, by the great importance attached to those who seem to know more than others. There is, however, no doubt also that a form of crime multiplies itself by its power over the imagination, so that stories of crime beget crime. Great care is needed at such crises lest courts themselves and publicity add to the evil which all wish to cure.

§ 120.

While no government can afford to overlook crimes of which the state itself is the object, the general Political crimes. policy of governments attacked by such crimes only increases the bitterness of the feeling out of which the crimes arise. The agents of justice take a part against the criminal; the whole power of the administration is on their side; the ordinary rights of accused men, even the use of counsel, have been denied to political offenders as if they were of all persons the most unprincipled; and unusual courts have been established for their trial. While governments are thus their natural enemies, their good characters, their disinterested views in the schemes in which they have had a part, their high position and birth, it may be, their heroic courage in facing death, cause them to be regarded by the people as martyrs rather than as traitors; so that nothing is gained for public security or peace by subjecting them to extreme punishment.

In no part of criminal law have even Christian states been so harsh or gained so little by the use of penalty, as in the treatment of political crimes. It is plain that the severe treatment of a so-called patriot at the present age in the way of correction or of example does little if any good; and certainly the moral criminality of such men is often very small. True policy seems to require that they should be used gently, should be treated as *têtes exaltées*, and often should have a door left open to them for reconciliation to the government. Especially ought their followers, those who join them out of friendship or the spirit of kindred, or from the affection produced by long service, to be spared, as having been influenced by the better feelings of human nature.

#### § 121.

It is worth our while to consider the proper weight that public opinion ought to have in adjusting the scale and determining the amount of punishment. Public opinion and penalty. It is in part in order to instruct such opinion that penalties are appointed. They show the feeling entertained by the state in regard to offences against private and public rights. But if the opinion of society decides that the so-called crime was a virtue, no penalty can change this, and loyalty is weakened by the execution of the laws. In general, however, there will be some correspondence between law and public feeling; or, in other words, law will represent the average feeling outside of criminal classes, in regard to the penalties due to transgression; it will be harsh and severe when an age is half civilized, and the nerves of men are less sensitive; it will change with humanity and with greater sensibility to bodily pain or disgrace. But opinion may change some time before law changes, either under influences from a real humanity or those from a false humanity, which thinks little of righteousness and much of suffering. When opinion has changed, it is hard to inflict the same penal sufferings as before. Juries will be swayed by the dislike of capital punishment; benevolent people will make prisons very comfortable places, and will

lead criminals to believe that they are peculiarly unfortunate, and that to injure one's neighbor or the state is potentially in all men. How ought the state to act in regard to legal penalties, when such alterations are perceived? Some yielding is necessary, for the objects of punishment are partly relative; but is it not also the legislator's duty to correct public opinion and give it a new course? The general tendency of the changes thus far has been good; and it is shown by trial that the humanity of modern times, by diminishing the punishment of crimes against property, of political crimes and some others, works reformation in prisoners, and probably tempts few into crime.

§ 122.

As laws are general and offences are described by general terms, and arranged in classes, it must happen  
 Pardons. that criminal acts outwardly similar may run through several degrees of evil. It may happen, also, that the evidence in the opinion of the judge was not as clear as it was in that of the jury, or that some feeling of the community had weight in the verdict of the latter, or that the offence was technical rather than real. If there is no reason for revising the verdict by a new trial, there may be a fair claim to some mitigation in the time or other circumstances of the penalty; or there may be some new evidence which, after the term of punishment is begun, shows it to be inequitable. For these and other reasons pardon or diminution of penalty is sometimes necessary; but the practical abuses of the pardoning power have been such as to make it evident that, as at present conducted in most communities, this evil is as bad as the one it seeks to cure. In general, it may be said, 1. That some judicial report giving the reasons for its exercise ought to be necessary before any pardon be granted; 2. That no political chief ought to have the power lodged in his hands; 3. That no one man ought to possess it, for he will be almost sure to swerve towards indiscriminate pardon; 4. That not even the slightest consideration of the disgrace to the family of the criminal and of his position in so-

ciety ought to be allowed. On the contrary, it throws lustre on the law, when it is seen to be equal toward the highest and the lowest, and even more severe towards those who break the law against the greatest light. 5. Whether reformation and general good character during confinement ought to be rewarded with pardon, will depend in part on the evidence of its genuineness. If a criminal is really reformed, so that, as he goes forth, he preaches by his conduct the law that once he destroyed, he is one of the best helps of society against transgression, but if the hope of reform acts in such a way as to whiten his exterior only, there is small advantage to society in letting him out. 6. Special cases for pardon, such as loss of health brought on by prison confinement, must be judged of, each for itself. Imprisonment was not meant to break down health any more than to destroy reason, to which solitary confinement gives rise.

#### § 123.

We have seen that private claims may with a kind of justice expire, and new relations of justice arise within a certain period. Ought it to be the same in the case of crimes? There are more reasons for applying the same principle in criminal law and fewer against it than in civil. Some considerations to be urged here are that absolute justice is unattainable, and the purposes of the state are tolerably well accomplished though many crimes escape detection. If now a discovery should be made of the commission of an ordinary offence after some time had elapsed, the impression made by the connection of the crime and the penalty would be seriously impaired. If the wrongdoer had reformed, society would sympathize with him and demand for him mild treatment; if he had not, he could hardly have continued some years without committing fresh evil for which he would be brought to justice.

In the case of atrocious crimes, however, the limitation ought to be long, and perhaps the fear of being brought to light might be in itself a penalty of high degree.

## CHAPTER IX.

### SOME POINTS OF POLITICAL ETHICS EXAMINED.

#### § 124.

POLITICAL ethics is that branch of moral science which Only a few points of ethics here treated of. treats of duties and obligations growing out of the relations of men in the state. If we draw a line between duties and obligations, between the *moral* and the *jural*, the latter, as being a subject-matter of law and polity, may be passed by in a treatise on morals; and there are points touching the *duties* of the citizen which do not find their most appropriate place in the narrower or jural department (§ 7, 1). Thus the various virtues which qualify a man to be a good member of a political community,—inward virtues, such as moderation, sympathy, courage, patriotism, and the general virtue of outward obedience to the law,—will find a place, in a treatise on moral science taken as a whole, by the side of the social, the Christian, and those that end with the perfection of the individual being. But besides such as these, there are special cases, questions of limits or of casuistry, where the general duty or obligation of loyalty may come into conflict with others that seem to be higher and more imperative. So, also, there are duties of the state and of its officers, and similar questions of casuistry touching what they ought to do. In general it may be said of these last-mentioned duties that wherever the relations coincide with those of individuals, there is a duty incumbent on some one to fulfil what the state owes to other states or to private persons, which corresponds with the duties of private persons. Thus the state must observe contracts, must keep to the truth, must not commit any kind of injury on private property or person, and the like. In such wrong actions some officer

must take an active part. He is bound to refuse to obey the command of a higher power if it is clearly against the rules of morality. Otherwise, all manner of wrong can be excused by the command issuing from a superior. But we intend to leave out of view nearly the whole of this department, except the special cases which may arise in the minds of private citizens or of public officers who are desirous to discharge their political duties.\*

### § 125.

First we will enquire whether the individual can by right sever his connection with his country. There is no doubt that a relation with a state once formed, in whatever way, by birth or by naturalization, cannot cease without the state's consent *while the person in question lives within its territory*. If it could, a state might be reduced to atoms without the right to save itself from ruin. Could we suppose so absurd a thing as that all the members of a body politic wished to put an end to state life and fall into chaos, or the state of nature, so called, except the magistrates, and they could, by the help of force from abroad, prevent such a destruction, it would be right to do so, as it would be right to keep a man from committing suicide. The real good of all without and all within the state would demand such an interposition. But what is the tie of the single person? Is his allegiance indefeasible? Can he renounce his country in such sort, that another may receive him into the same relation? Has his country such claims on him that its consent must be had before he can terminate his obligations to it by leaving its territory with the intention of never returning?

It has been in matter of fact extensively claimed that the

\* A treatise on political ethics, including both the doctrine of the state and political ethics, properly so called, in which the political virtues and many political duties are considered at some length, was published by Dr. Francis Lieber, in 1838, and a second edition appeared in 1875, after his death, edited by the author of the present work.

private person has no right to leave the soil of his country without its consent; allegiance has been pronounced indefeasible, and no higher obligation has been generally admitted towards aliens than to protect their persons and industry if they were allowed to settle in a country, which permission itself depended on the will of the territorial sovereign. Nor has the *jus emigrandi* been conceded on account of any supposed right of the private person to demand it; and higher privileges than mere protection to aliens have been given by treaty on consideration of mutual benefit. Even with regard to colonies, consisting of native-born subjects and their descendants, the tendency has been to withhold from them some of the higher political rights, to consider them as dependencies, not as integral parts of the state. The most modern times, however, have witnessed great changes in these respects. Colonies are made self-governing, under the mother-state; and private persons can become naturalized citizens, and can again renounce their nationality and resume the old one, according to treaties between several of the principal nations of the world. Even English law, which long held to indefeasible allegiance, has changed its principle in this respect.

Looking, however, at the right in the case, we find that there are conflicting reasons for the treatment of emigrants which may give rise to conflicting laws. 1. It cannot be said that the obligation to remain in a country is for the private person absolute; nor that he is obliged to return under all circumstances when so commanded. If a country is at war and needs the aid of all its men, to leave it at such a time is morally base and deserves also to be ranked among crimes. Such was the offence of Leocrates after the battle of Chæro-neæ, according to the oration of the fervid Lycurgus. Or again, if a private man should leave his country in order to avoid impending duties that were onerous, it would be no injustice to hold him to them, if he should again be found within the territory. But in ordinary times it would be tyranny and injustice to shut men up within the boundary-lines of a



territory. The nations of the world are destined to flourish by intercourse, and private persons spread the knowledge, arts and products of one land over the rest of the world. It is only fear, or the selfishness of a protective system that can oppose this. There seems, then, to be something like a right for the private person to choose his place of sojourn, since it is alike for the development of his own industry and for the good of mankind. 2. It cannot be said, however, that aliens have an absolute right of settling in foreign lands. The population may be overcrowded already. To allow great numbers to do this might disturb the political system. If it be allowed, there is no absolute right on the part of the alien to demand citizenship or even ownership of landed property, if otherwise protected. But if he remain and have a family in the place of his sojourn, his children sustain a different relation to the new country from his own. They are assimilated to its institutions and social usages by dwelling there from youth upward. Hence there seems to be a rightful claim on their part to be put, if they desire it, on a level with other persons born of native parents.

To this we may add that the tie to country is a complex thing, in part arising from the political system itself, in part from relations of kindred and other connections. If the political institutions are in the view of a person so tyrannical that no true freedom can be enjoyed under them, he is to consider what good is to be gained for others by his remaining there ; and if the good arising from coming under better political forms preponderates, he may regard himself as free to remove. The grown-up child leaves the family in quest of a settlement for himself ; what right has a state to bind men to their birthplace any more than a father ? Nor can it be shown that, if the state allows absence, it has any right to call its native-born citizens back, after they have formed other ties. On the whole then the citizen or subject, except at particular crises, ought to be left free to choose a new dwelling-place ; but any other country which he may wish to make his home may have sufficient reasons for denying him

the privilege, which there he certainly cannot claim as a right.

§ 126.

For the citizen within the state a large part of his outward duties is comprised in loyalty or obedience to law, because the law covers all political relations with its definitions and its penalties. Loyalty signifies especially fidelity to a sovereign, but in its original form was nothing but *legality*, and assumed the narrower meaning because the personal tie to the superior included most of the obedience demanded from the upper members of the feudal system. Such personal attachments which had their noble side, society everywhere is outgrowing; and among us they are impossible in the political sphere, except in the miserable caricature presented by the relation of office-holders to their chief on whom they depend. We are brought down to naked abstract law, to the obligation to obedience, to the idea of a good citizen, to the sense of the state's importance, and the sanctions of religious duty. But a safeguard of obedience to law comes from our having pledged ourselves to it by the citizen's or freeman's oath, while its venerableness is diminished by the feeling that the constitution may be essentially altered by the act of the people.

The obligation to obey does not depend on the individual's own judgment of the utility of the law; but, if it be within the rules of morals and the power of the law-making body, he must obey any law however objectionable, nor permit himself to be influenced by the shallow pretext for disobedience that it was passed by an opposite party, or by men holding false commercial principles. He will not smuggle goods into the country where he lives although a full believer in free trade, nor disobey vexatious police regulations when he is sure of impunity, nor bribe custom-house officers, nor encourage or make use of any other person in open or secret illegality. Furthermore, as every law is attended by some penalty, and as the breach of it, if it relate to private

rights calls for reparation, his obligation he will feel to extend to the endurance of the penalty and the endeavor to make reparation. So that the loyal citizen will stay in prison, as long as his sentence requires;—following in this the noblest man among the Greeks, when he was condemned on false charges to death and by the help of his friends could have escaped.

The limits of the citizen as to obedience we will consider presently. At present we may ask whether the stranger passing through a land—for about the domiciled stranger there can be no question—is under equal obligation to obedience with the citizen. The reasons in his case are far weaker, as his knowledge is less complete. But we may say with confidence that at least everything which is deducible from the principles of justice or necessary for their maintenance, all laws universally admitted among just communities, all regulations necessary for the public peace, ought to be obeyed by sojourners and strangers. This, however, cannot apply to the absurd usages of half-civilized or barbarous lands, or to degrading compliances with slavish forms of respect. A man will thus be loyal to justice everywhere, as he will be to truth, if loyal in spirit.

Obedience to the law implies obedience to the magistrate in executing the laws, and all such marks of respect as just law may happen to require. But the magistrate, apart from his relation to the law, is entitled to no obedience, and when, presuming on his authority, he gives out an unlawful command, it is he who commits the act of disobedience; and refusal to obey is loyalty. It will be claimed, of course, that the legality of the act has been decided by persons skilled in the law, and that the officer of administration is presumably right in his requirements. But in all governments where there is freedom of the individual, there is or ought to be some tribunal which can decide how far the authority of the officer extends, and he ought to be liable to the private citizen for unlawfully disturbing him in his free movements. In constitutional governments of the

present day, the head of the state executes the duties lying on him chiefly through others, and they are responsible; this responsibility of ministers, if it be really such; that is, if it be understood that no unconstitutional orders from the principal authority can be obeyed, and, if issued, cannot be a plea against breach of the law, will to a great extent be an effectual protection of the private person against the unlawful caprice of the magistrate.

§ 127.

The inquiry may be made whether a citizen who has the right of voting can be obliged to vote, and whether a man set up for office can be obliged to serve; that is, whether either to vote or to hold office may be compulsory, or the failure to do either ought to bring with it some penalty. If these political rights stood on the same ground with personal or civil rights, the answer would be in the negative without hesitation. No man can be compelled to acquire property or to make a contract; and the ancient states that laid a tax on bachelors do not represent our sense of personal rights in this particular. But as voting and holding office are not rights necessary to personal liberty, nor natural in any sense, the analogy fails. On the other hand, as the right of voting is greatly prized by those who cast the least intelligent votes, so the reverse is equally true. There are multitudes in countries where suffrage is unrestricted, whose property is injured by misgovernment and who are continually complaining of the state of things around them, who make no efforts by use of their right of suffrage to improve it. Either in despair or in selfish disregard of the public welfare they stand aloof from politics, although a political duty might not cost them half an hour's time once or twice a year. On the theory that voting is a privilege, it involves for the most part a duty; to enforce it by penalty would not comport with the nature of a privilege; it would be more reasonable to make the continued neglect of exercising it a reason for its forfeiture. As for office, which may

require great sacrifices of private business, the case is different. The call may be declined after nomination ; and much more may appointments by the executive of a country be so declined, since acceptance might be construed into approval of measures which the person concerned condemns or might require action with those in whom he has no confidence. The question becomes one, then, of simple duty, and is to be solved, not by the mere preferences of party or personal feeling, but on the highest principle of regard for the general good.

### § 128.

In all free countries there will be public parties divided from one another by various lines ; some local and territorial, others growing out of industrial interests ; others still dependent on changes or on interpretations of the constitution, or on questions of foreign or domestic policy ; and these interests will variously combine or oppose one another, so that there will be complications of party-policy, open questions and close questions, together with interests and aspirations of rival candidates for office, bringing the whole matter of politics to a focal point. It will often happen that important questions will be set aside or postponed, because, if too many points are made there can be little hope of a successful combination of interests. To a considerable extent, then, the arrangements of parties, so far as they relate to selections of candidates and even to measures, are subjects of compromise ; often of mean compromise, and nothing is more common in this country than to announce principles, in what are called "platforms," by which there is no certainty that the party will abide. The arrangements for candidates are no better. They are brought forward, not in the open, manly way of self-nomination, but by a committee for whom no one feels himself responsible. They are chosen, not for merit, but because they are most popular, or for some other unworthy reason.

Such, in brief, is the way in which parties themselves act.

Parties and relations of individuals to parties.

Generally there is some question or course of policy on which honest men may differ, and then there is a real reason for divisions of opinion which are somewhat permanent. The question now arises, What are the relations of the private citizen toward such somewhat vague unions which are longer true to their names than to their original principles, and which, if wielding the powers of government for a length of time, almost inevitably gather to themselves hangers-on that are anything but a credit ?

The questions here to be considered are those of duty and wisdom in the long run, questions, some of which require much thought and calmness for their solution, and demand an amount of intelligence which certainly large numbers, who are brought to the polls by unrestricted suffrage, do not possess. Some of the ethical rules for the conscience of individuals, are those which follow :

1. No person ought to sustain a party or a representative of a party when either of them, as he has reason to believe, will advocate any positively wrong measure. Let the measure be within the powers of the legislature, such as declaring war on grounds which the person in question believes to be altogether unjust, or let it involve a breach of the constitution, or let it be neither, but simply something calculated to corrupt the people—a demagogical bribe for votes ; in no case can he give his voice for the election of a representative who will, as he supposes, favor such an act of legislation. The check, which the representative feels, is the loss of confidence of his constituents. If a party, on account of favoring wrong or unconstitutional measures, is not in danger of suffering a loss of support—if the representative or his constituents can be kept with it through thick and thin, one great fear will be removed from its leaders, and they will be far less scrupulous and more audacious. The restraint of public opinion on the measures of public men is of no value, if that public opinion does not express itself in some way that can be felt. Will it be said that this opposes a rule already given, that the representative ought to disregard the judgment of his immediate

constituency and enquire what is best for the whole country? But the two rules are so far from being inconsistent, that an honest representative would feel most keenly the suspicions that a man whom he respected entertained in regard to his motives, still more such a man's open condemnation of his official conduct; while he would feel assured that really honest departures from the views of his constituency would approve themselves to just such a class of persons. Perhaps there is nothing more wanted, at least in our politics, than the marked rebukes of legislators by their party friends, whose esteem they value.

2. Parties ought to be kept up to their promises and pledges by the fear of disaffecting independent men. If it were well understood that such men watched the movements of parties, and withdrew confidence from them for defection from their own principles—defection owing to fear or to the want, at first, of an honest purpose to fulfil promises—the leaders of parties in public assemblies or in government offices would not venture, as readily as they do now, to commit acts inconsistent with their professions. The strength of evil counsels, that which most corrupts parties at present, consists in the ability of a party in public assemblies to stand together; but they would not stand together if they were more sure of being met by rephension at home.

3. In voting for representatives and public officers, the character of the candidate or nominee ought to be regarded as of great importance. If it be made a point of political duty or honor to stand by the nominee, whatever may have been his past conduct; the control of parties will fall into the hands of the worst but most available members, because the worst side of a party has no objection to be so represented by men of doubtful character, and is generally the most busy in political intrigues, while the better side is bound by the feeling of duty and is quiet. On the other hand, if the principle were admitted that no one ought to vote for a candidate who was not a man of thoroughly good character, or, to make the statement still stronger, was not the best person for the

place to be found, there would be no hope of union among the most patriotic and virtuous persons belonging to a party ; each would follow his own subjective opinion without compromise ; and those whom it is every way undesirable to put at the heads of parties would assume their control. We have, then, here two extremes to be avoided, and they can be avoided, unless a rigid principle of political ethics demands that every voter ought to cast his suffrage for the best possible man, whether others will join him in so doing or not. But surely no man is bound to act invariably on this last-mentioned principle. In acting with other men having convictions different from mine, who have a common object to carry with me, there must be of necessity sometimes a yielding of judgment and a compromise. When it is decided, by whatever process—whether that be the miserable expedient of *caucus* or some other—that a man will receive the votes of the party to which I belong, I must decide from a consideration of his abilities and character on the one hand, and from the risk of failure on the other, if I withdraw my vote, whether in the particular case a rebuke of the party for selecting a bad man is on the whole desirable. We do, and always will in some cases, choose untrustworthy persons for special trusts. Thus let a company of travellers be in danger of attack from robbers, and one among them, the worst of all in character, be alone skilled in conducting the defence of the party ; would any one refuse to give him the lead on account of his want of moral principle ? And if it be said that in this case the character of the man can do no essential harm to the company, but that in politics questions of right and wrong come up all the while ; that indeed is true, but yet there may be cases where the services of a man who is none of the best may be greater than those of any other, while he may be put under such a stress of motives that his character will be neutralized.

And yet the general rule can only be not to vote for a man whom on account of his character you cannot trust, who has no convictions on political subjects, who is a mere soldier of



fortune, who will make use of his place to favor corrupt jobs. This independence of the single voter is the great purifying agency in politics. If there is even a tithe of a party that will in ordinary times vote for no such man, parties will put forward their best men; if this is done on one side it must be done on the other, or the good will by moral affinity pass over; and seldom have times been so bad that a separation of men, according to their principles, from a party would not be able to destroy it. And this becomes the more important, when we take into account how bad politicians send down an evil taint through a whole community. They are the successful men who manage states and nations, and so the young, the aspiring, begin to think that unscrupulousness is necessary to success. They are the great men in the people's eye, and so the idea of greatness, stripped of moral strength and wisdom, becomes dexterity, readiness to carry ends and outwit other men. There is such a crop of aspirants, each of whom lays his claims on services rendered to the party, that the evil of the example spreads wide, and the idea of what is demanded for filling political office becomes miserably low, so that what statesmanship means we must gather from history, and not from actual life.

It has been often inculcated in this country, that it is the duty of the best class of citizens to attend the primary meetings, as they are called, and there to use their influence for the nomination of fit men. That this may be done to advantage sometimes, there can be no question. But, just as a certain class of under-managers, who know all the voters, feel at home in such meetings, so the best citizens are repelled from them. Probably if they obeyed the advice of being present, the caucus-system would develop another and a lower part of its machinery, as, when low tenements give way to good houses in one quarter of a city, it is only to remove the inferior population somewhere else.

## § 129.

The individual conscience never gave any great trouble to ancient legislators, when they undertook to lay the heavy burden of state authority upon it. But when Jews were brought under pagan authority and obliged to submit to idolatrous ceremonies or to suffer, a resistance was called forth which has since been repeated in numberless instances by Christians, from the time that the Apostles said, "We ought to obey God rather than men," until now, when, on this plea, Catholic bishops refuse to observe the laws of the German empire. And it is one of the highest things that can be said both of human nature and of the Scriptures, that conscience is so quickened by the religion there taught, that the humblest persons will endure any suffering rather than do what the law of righteousness and of God seems to them to forbid. Without this quickening of conscience and the objective standard given for its guidance, modern civilization would have been impossible.

There are no moralists who do not hold that if the last antecedent before action is a conviction that the action ought not to take place, it is wrong. That is, whether, objectively considered, the action be wrong or right, it is wrong to him who performs it with such a conviction. This is the rule of the Apostle Paul: "To him that esteemeth anything to be unclean, to him it is unclean." "Whatsoever is not of faith, is sin." It is thus possible for two moral authorities, the state and the individual, to come into collision. Both cannot be objectively right, the one in commanding, the other in disobeying, at the same time; but both may regard themselves to be right. What now shall be done? Shall the private person as such yield the point? But this would involve the absurdity that a subordinate moral power, like the state, could nullify the law of God, and so the subordinate, the parent, require from his child disobedience to the law of the state, the under-officer, from the soldier, against the express command of the superior officer. In other words, obedience

would thus be due only to the next higher moral authority, so that the individual is cut off from the Divine Being, something as the lower vassal or even as the vassal's serf was cut off from the suzerain. As that rule made nationality impossible, so this would make a moral universe impossible. It may be said, however, that it is presumption for the individual to adopt a different rule of duty from that which the law, representing the wisdom of the state, has laid down ; he must submit his views of human relations and convictions concerning what is right to this higher power, and obey. It may indeed be presumption for him to judge as he does, and if so, he " strikes violently against the high seat of Justice " to his cost. But states, too, have been wrong ; they are not always the most enlightened nor the fairest of moral legislators, and individuals by their resistance have taught states something of their upright convictions. If all the resistance to unrighteous law had been blotted out of the world by such a rule as that of the necessity of absolute obedience, the world would be much worse than it is now.

So then individuals must follow their consciences, and states must follow theirs ; a collision must take place, and suffering be endured. If the individual is right it will be felt by and by, and law will be modified or abrogated. A healthy conscience is one of the most impracticable and strongest things in the universe ; it will in the end enlighten the bigoted or the unprincipled to see moral relations under a new aspect. If it is merely fanatical, that is, supported by no just views of the true standard of duty, its resistance serves to excite discussion and thus to give light.

The same rule which we have applied to the state, holds good in all the analogous cases of the parent in relation to the children, the military officer, the civil officer in relation to their subordinates ; and where obedience has been held to be due to the commands of a king, it must be limited by the lawfulness of the commands measured by the divine law. If the Quaker believes that according to that law of Christ, " swear not at all," he may not take an oath as a witness or

juror, he must resist and suffer, if the state in so trifling a matter should carry out its authority. The soldier must render an unquestioning obedience in all the ordinary operations of war, but all the early Christians held with reason that he could not join in pagan rites; yet, on the other hand, it was senseless scrupulosity, when a soldier in Tertullian's time came forward to receive a donative with the laurel crown in his *hand*, because he was a Christian (Tertul., *de cor. mil.*, cap. i.), while the others had theirs on their *heads*. The Quakers have sometimes followed the principle that it is unlawful to pay taxes to support a war; but this too is over-scrupulous; if they were forced into the army, they might refuse to "resist evil," but the taxes which they paid they had nothing to do with after these went into the public treasury. There are many worse uses made of public moneys than to pay and equip armies.

### § 130.

The duties of the state are chiefly pointed out by the constitution and law as far as the citizens are concerned; and by the right theory of the state unjust or deficient law may be rectified. Into this field of ethics we forbear to enter, and will only examine certain points where there may be some difficulty for the state itself with the best intentions of deciding what it ought to do.

With the progress of moral ideas a state may receive new light on certain practices before unquestioned. Certain duties of the state. It may now appear that the law allowed some habits or institutions which sound morality and the highest views of expediency must condemn. How it must deal with bad institutions. But these having long existed have left a deep impress on opinion and social relations. Supposing that the necessity of reforms is admitted and that it falls within the competence of the state by the ordinary course of legislation to make them, is it bound to do this at once or by a gradual process. (1.) This case of conscience must have presented itself to the early Christians, after there was a manifest decay of paganism and the empe-

rors had gone over, with their despotical power, to the Christian side. Should they have waited and temporized, or have cut down idolatry and heathenism at once, just as the pagan emperors had tried to put down the religion from Judea by persecutions? We ask not what with our faith in religious liberty they ought to have done, but what with their convictions was the course open before them? With their views no other course was open than that which was pursued in successive edicts from Constantine onward through the fourth century and into the fifth.\* Yet even they went to work by a slow process.

(2.) We put another case on which the Protestant states had to act during the reformation period, and acted very badly. A large amount of property in every part of Europe had been given by public or private persons for religious uses. Some of the lands so bequeathed supported convents of monks or nuns; others were given to universities with obligations attached to them which could not be carried out by the new forms of Christianity. And the question as to the right of the new religions to divert from the old worship the places of worship, the parish churches built in the Catholic spirit, was one deserving of attentive consideration.

It was everywhere felt among the Protestants that the churches must be taken from the old religion, which was no longer the religion of the state or of the people. Nothing remained but to put them in the state's hands, as a trustee to carry out the purposes nearest to those for which they were erected.

(3.) The same was true of endowments for fellowships and scholarships, to which the condition of praying for the soul of a founder was attached. These, indeed, were traceable to the bounty of a particular person, who might have descendants still living, while the churches would generally have been

\* Comp. E. v. Lasaulx, *der Untergang des Hellenismus*, Münch., 1854, and Chastel, *histoire de la destruction du Paganisme dans l'empire de l'Orient*—a work crowned by the Institute of France. Paris, 1850.

built by the contributions of many. Were now such endowments to go back to the founder's descendants, if they could be traced? We seem obliged to give a negative answer, because the main point was the support of a student; and the very secondary point, the praying for the founder's soul, had become impossible and illegal. Nay, if not illegal, and yet through a change of circumstances not to be executed, the same answer still remains to be given.

We may, then, lay down this general principle, that *when institutions of charity or education cannot, under a change of religious sentiment, or of polity, in all respects fulfil their original design, the state is not bound to restore that which was originally bequeathed, but may carry out the purposes of the donor as far as the altered state of things will allow.*

(4.) The case is still clearer when governments suppress religious foundations, like convents for monks and nuns. Here the considerations from political economy are so strong, that of themselves they would be a great weight on the side of the suppression. The very considerable power, also, which such houses give to a religion, making it, if they are sufficiently numerous, an *imperium in imperio*, would be decisive on the same side, in countries where the inhabitants are no longer Catholic. Several states, holding this religion, and even maintaining it by laws, have abolished convents in modern times. No corporation ought to be absolutely sure of being allowed to live on, when all the state's institutions are modified or done away with. Such eternity of continuance cannot belong to the private foundations of mutable men. But what ought to be done with the foundations in question? As the succession of monks depended on law, law may forbid others from entering a monastery. But shall the lands revert to the heirs of the donor or fall to the state? The same answer in substance must, I think, be given here as was given above. The state is not positively obliged to restore them, for they were alienated entirely by the original donors, but ought to do with them something good in itself and as near as may be to the original intention. If a monastery helped the poor by

its charities, trained up the young, and fulfilled religious ends, these may still, in the change of things, be the objects to which the revenues shall be made to contribute. This was the plan, I believe, in Scotland, although it was thwarted, in a degree, by the cupidity of the chief laymen. In England an unrighteous use was made of the vast wealth lodged in dead hands, and the same is true to a large extent in Germany.

(5.) There are other cases where the question, What ought to be done, is embarrassed by the rights of property of particular persons. One such is where for a long time man is allowed to become the property of man ; and the whole system of property and industry, all habits, the system of laws, are woven together with slavery. That the state has a right to put an end to what it regards now to be a violation of rights is certain, or else nothing is right. But two points of difficulty come up here. Shall a compensation be made for particular losses ; and shall emancipation be all at once or gradual. As for the question of compensation, it might be said that if proprietors of slaves were to live on forever, the payment of wages to freedmen ought to be an equivalent to the support of the former slaves, so that nothing would be lost. But the death of heads of families and the division of estates make a difficulty, which is not easily got over except by requiring the emancipated slave to remain on the plantation, doing work and getting wages, or by paying the least price that is just to the proprietor. But the one of these would be unjust to the freedman, the other to society, which ought not to bear the burden of a wrong it did not create, but only endured. On the whole some delay would be not unjust,—some interval as brief as practicable between the present state of things and the new one demanded by righteousness. But a compensation to be paid by the state seems unjust, since, if the average cost of the slave's subsistence had been less than that of a freeman, taking his productive power into account, there might still be something due to him ; and if more, it is a benefit to society to initiate a more productive industry. On the whole, in the end, society ought to be a gainer. As for the

hard cases, they are not peculiar. Every revolution in industry brings with it some temporary evils that cannot be avoided.

These remarks will not, I trust, be regarded as placing all incorporations at the mercy of legislation, so that no funds given for education, for the poor or the diseased, or for the fine arts, can be sure of safety from the whims of public opinion and of lawmakers. If such a feeling should arise, it would destroy a great part of the public spirit of a country. It would be better to maintain a number of worthless institutions than to encourage such despotism of legislatures. And better still would it be to have general laws, in violation of which corporations of certain kinds could not be founded, either by the living or by testament. But what has been said contemplates extreme cases, where there can be little or no doubt of the right to overthrow institutions, and where the only doubt is what measures coming after shall carry out as nearly as possible the spirit of the ancient founders.

We give a very brief consideration to other cases of the Other cases of difficulty. extreme sort, whether affecting the citizen's rights as against the state, or the state's rights against the citizen or against an external power.

1. What can a state in justice do when it has serious apprehension of an important and powerful subject or citizen? In regard to strangers, states have often acted on the ground that they might be ordered out of the country whenever public safety or honor requires, unless some treaty stands in the way. What can they do, when the obnoxious person is a citizen? The Athenian ostracism will supply us an illustration which is to the point. The reason for the temporary exile which was voted by this process, lay not in any overt acts of disloyalty to the state, but in a distinction, as a head of a party, earned it might be by the highest merit. Aristotle regards it as plainly being not absolutely just. (*Polit.*, iii., 8, § 6.) But it has been defended on the ground that the old city states had reason to fear individual citizens vastly more than a state would, which had a large and scattered popula-



tion, and that designs against the constitution might easily and suddenly be supported from abroad. The expedience of ostracism may be admitted, although it went out of use at length, being succeeded by accusations of one leading political man by another brought before the regular courts, against which in form no objection on the score of justice can be brought. Another way of preventing plots might be to require security for good behavior by pledge of property or bail of friends. But ostracism is justly liable to the charge of injustice, and of injustice so great that no just state could make it one of the public institutions. It might take away the best man in the state; it became a contest of parties and of heads of parties; it might turn a citizen, patriotic before, into a foe of the city, and do all this by a direct act of wrong in stripping him of his personal rights. It uses private special laws, or *privilegia*, to accomplish what under general law would be enormous injustice. And this on suspicion or even without suspicion, out of mere dislike.

2. A state may by conquest become sovereign over communities or provinces having well-established civil rights. May it justly withhold these rights? We take it for granted that the old right of war by which such new subjects might be reduced to slavery was wholly wrong. Civil rights, such at least as the new state into which they are engrafted, concedes to its own citizens according to its idea of justice, must be conceded. But an interval of time may elapse and measures of security be taken, before the new citizens have all the freedoms of the older.

3. Shall it be asked whether a state may repudiate its debts? In no possible case is this right, unless in the extreme one, where they were contracted through manifest fraud. In all other cases the community must pay its own debts, and not lay the burden of them on those who were induced by public legal promises to advance their money.

4. Is there such a thing as prescription against the state in favor of the citizen, or against the citizen, in favor of the state? Why may not the cancelling or obliterating power of

time, which we have admitted in regard to private claims, apply equally well when one of the parties only is a private person? States, having a continued and long existence, are much in the way of never abandoning a claim once made, or of conceding that their rights can expire. And yet laws become obsolete, and to revive them may be unjust. Ought not both parties to be put on the same ground, as far as any influences of time are concerned; while the private person ought to have no benefit from his own fraud or gross negligence, because it has been long overlooked by the public authorities.

### § 131.

If obedience to law is a prime duty, including for the citizen nearly all the political duties, there can be no right to resist officers of law, as such, in the discharge of their lawful duties. But an officer is not in the discharge of his duties if, in a fit of passion, he assaults an innocent person, and the latter has the same right of self-defence against him that he has against any one else, even to the taking of life. But an officer's command to do an unlawful act ought to be met first by passive resistance or direct refusal to obey. Thus if the command relate to something which the private person holds to be irreligious or immoral or illegal, he must refuse to comply, while the officer, if he holds himself to be bound to enforce obedience in the case, must take the necessary steps to have the disobedience brought before the proper authorities. If the courts, after the case is acted upon, will not accept the plea, the person refusing obedience must suffer. There is another possible case, namely, that the officer prevents the private person from doing what is lawful. Here, too, he is ordinarily to submit to force, and ought to have as in all cases a remedy at law against illegal interference with his rights. I will not say that after arrest the private person may never in any case escape from what he deems to be unrighteous imprisonment. Grotius, a lawyer and moralist, tells us by his example that this

is sometimes permissible. But the general rule is passive obedience for the individual, and when in the regular course of justice this becomes necessary it ought to be endured from principle.

There is and can be no right of *émeute*, nor of a district of a country to separate itself from the state. For this would break up society, and every disturbance in a little territory—no matter how small—would, if it gave rise to the right, justify perpetual disquiet. The society must be looked at as a whole under one law which no part can set aside.

2. *The Scripture rules* (Rom., xiii., 1-7, I. Pet., ii., 13, 14) are given to individuals and no other rules could be acted on, if obedience to law is to be the general duty. It is not the inexpediency of the rule or the oppressive character of the government, but the unrighteous nature of the law which justifies resistance.

3. We cannot argue from the unlawfulness of an individual's disobedience to the law, and of his resistance to the magistrate in favor of the unlawfulness of revolution. Nor can we show such unlawfulness from the harm that revolution may have occasioned in particular cases, for it is quite clear that without them the world would not have been as well off as it is now. The whole history of Israel is determined by the departure from Egypt against the will of the king. The expulsion of the Pisistratidæ was necessary to make Athens what it was. The same is true of the expulsion of the Tarquins. The revolution of 1688 was of incalculable advantage to England. Of our American revolution I need not say that, besides giving birth to a great people, it has added strength and given spread to the principles of English liberty over a whole continent. Nor can it be reasonably doubted that the French revolution was necessary for the deliverance of that misgoverned country from immense social and political evils.

There are many crises included in the word revolution, which differ considerably from one another. Sometimes only

Cannot argue against right of revolution from duties of individuals.

Nor from their evils.

a dynasty or a branch of a family is driven out and the succession slightly altered. In the revolution of 1688, a king ran away and was politely said to have abdicated. The next of kin was put in his place, with the right conceded to her husband, also near of kin, to reign with her, and until his death if he should survive her. But not a person suffered death, not a law was altered, not a single act of armed force occurred. And yet this peaceful event has stamped a new meaning on the English constitution for all time. The revolution in the American colonies in 1776 was attended with war and much misery, but brought with it no changes in private law and few in public. In the state where the author lives the charter of Charles II. continued to be the instrument of government for a generation after the termination of the war. On the other hand, the French revolution was followed by the most radical changes in government, constitution, ranks of society and law. Add to this that while the other revolutions spoken of were passing events, satisfying the sober judgment of the people, and exciting no desire of further revolution or of change by force, that of France was followed by no equilibrium or social rest, and the spirit of change, after trying all forms of polity, may be said to be chronic. It is evident, Many kinds of revolutions. then, that the word *covers a number of political movements*, in one of which only a sovereign or dynasty is got rid of, in another a remote and feeble allegiance is shaken off, in another there is a complete overturning of society; in one case a revolution is an utterance of the sober judgment of a people, in another it is the result of discontent with the present; in one case it is a conflict of principles and power, in another there is no resistance; in one case it is final, and the beginning of a new order of things; in another it is an endless brewing and seething of elements without the power of forming a chemical union.

4. It is made probable from these statements that whenever a revolution is demanded by a part of the community, the practical question is the leading one: —Whether it is likely to be successful, final, and satisfying;

The practical question the main one.

whether the society is prepared for more self-government, and for a new or partially new polity. And among the practical questions this may be of great importance,—whether it will be necessary to overthrow institutions that have entwined themselves around a nation's affections and history, and whether any others can take their place. For it is manifest that a new polity built on bare, untried abstractions, has small probabilities of success. This, however, is not the place to discuss the practical question which finds its place in another part of this work. Granting that a revolution may be righteous in itself, it still remains to be decided on practical grounds whether it ought to be attempted. Theory can only establish the doctrine that such a change may not be morally wrong; there is a long way between that premise and the conclusion that in a particular case it is right and wise.

Our revolution, although carried through by a long war, seemed so small an evil that, for a long time, this country sympathized with all movements of a violent kind for the advancement of political liberty; as if they could not fail to bear good fruit, as if every nation had enough of ripe, political judgment and self-governing capacity, not to undertake what it could not complete, and knew just what it needed. We did not seem to be aware that our own success was prepared for us by our education under English liberty, or that we simply followed divine providence and built up on our past history. But our recent four years' war, which began so mildly in an attempt to sever the Union and in the establishment of a new constitution for the seceding states, differing but little from the old one, but which ended in the prostration, the almost destruction, of those states, and in the final abolition of slavery, the protection of which was the great motive in the struggle—this war, I say, ought to teach us that men in conflict do not know one another, that they are not able to weigh the chances of success nor their own resources, and that what is called statesmanship is often sheer folly. “It is an easy thing,” says Pindar (*Pyth.*, iv., 485), “even for persons of a weaker sort, to shake a state; but to set it in its place again

is indeed difficult, unless by a sudden intervention God shall become a pilot to its leaders."

§ 132.

Confining ourselves to the moral question whether a people has ever a right to undertake a change of its own polity by force, we will first bring forward some of the opinions that have been held on this subject.

Greece, the fruitful mother of political forms, passed, in and before the historical times, through a succession of changes which may be called revolutions. The old kings, whose right was derived from the gods, gave way, in a great degree, to the nobles; and these again, especially in cities where the class of common citizens grew in wealth by commerce and domestic industry, had their power taken from them by tyrants, who would naturally belong to the aristocratical class. The tyrants were a transitory phenomenon. The *demos*, which had given them the victory, expelled them; and now democracy, verging towards ochlocracy, and at length, in the decay of the country, partly overpowered by a new set of tyrants, had its day of glory and of shame. Plato was aware, no doubt, of this

historical movement, to which his forms of polity somewhat correspond. They are (de Repub., viii.) aristocracy, timocracy, oligarchy, democracy, and the *tyrannis*. Oligarchy arises from overgrown wealth, *tyrannis* from overgrown liberty (p. 562 B). There is a fatal tendency in this successive deterioration of politics, as he supposes, but there is no hope held out, if we do not mistake, of a renewal of the cycle. Polybius, however, in his sixth book, takes up this theory and goes somewhat farther. He starts from the simple and primitive monarchy which is followed by *basileia*, or kingly power, more constitutional and systematized, and this again from its cognate form of bad polity, the *tyrannis*. From the decay of this form aristocracy springs up, which in turn by a natural degeneracy passes into oligarchy. The turn of democracy succeeds, which has its origin in the fact

that the people visit with wrath the iniquities of their foremost men. From the violence and lawlessness of the people, in time ochlocracy—mob rule—is engendered (§ 4). This which he calls also cheirocracy—*first law*, “runs out into murders, exile, redistribution of lands, until, having reached its limits of barbarity, it again finds a master and a monarch.” “This is the returning cycle of politics, this, the economy of nature, according to which forms of government change and alter and again come back to the same condition as before” (§ 9). A cheerless theory without doubt, and false, if Christianity is true; which, however, is pardonable for a pagan who saw no effectual cure for human evils, and is one which even some modern authors have advocated.

Aristotle finds the necessity for the alterations of polity laid in the various, often irregular changes of human conditions, but opposes Plato's view of their orderly sequence (*Polit.*, v., last chap.). Experience shows, says he, that all politics as readily run into their opposites as into the next in order. Thus oligarchy arises out of democracy and the converse also happens; so the *tyrannis* passes over both into oligarchy and into democracy. Moreover, *tyrannis* being Plato's final point in the progress ought to be perpetual.

The necessity of revolutions seems thus to have been admitted by the best political thinkers of antiquity, but I have met with no formal discussions of its lawfulness. I cannot, however, doubt that they would have conceded the right of opposing an unjust government or a usurping one, without stopping to ask whether a majority accepted the rule. Even tyrannicide by an injured man was not thought so badly of as it would be by us. The doctrine of some of the Sophists, that right in any given polity depended on the interests of the ruler, rendered it almost necessary for the opposite principle to be advocated that the people had a right to put down the unjust ruler. The expulsion of the Tarquins was approved and gloried in by the Roman people. Injustice placed ruler

as well as subject out of the protection of the law, and the state or a party in it could rise for the purpose of overthrowing him.

In the history of Israel, if we deduct those cases where a prophetic command excited revolt against the unlawful rulers who had subjugated the people, Among the Jews. there remain a number of others where the revolution was undertaken by some patriotic man, without being justified, as far as it appears, by any express divine commission. Such instances may be found in the book of Judges (chapters iii., xi.).

In the middle ages the Popes exercised and claimed authority to release subjects from obligation to their prince on account of some offence against morals and religion. In the middle ages. The claim of Boniface VIII. in his contest with Philip the Fair amounted to this: that the temporal sword must be used *ad nutum et patientiam sacerdotis*, that if a temporal ruler went astray, he could be judged by the spiritual, but the spiritual was above judgment; and that the subordination of the temporal powers under the Bishop of Rome is necessary to salvation. After effecting nothing by the bull *unam sanctam* and other messages, he put the French king under the ban, released his subjects from the oath of fealty and summoned the Emperor Albert of Austria to take the throne of France as being vacant. This put the right of revolutionizing states on grounds that could be used against subjects in defence of rulers as well as against rulers themselves.

It was not, as far as we have discovered, until after the Reformation that this right was taken off from religious grounds, and regarded on political grounds as belonging to a people who were to judge for themselves when it was to be exercised. The right placed on grounds of state right. Yet under the feudal system opposition to the suzerain on the part of his vassal was not only an event of constant occurrence, but the vassal had the right of ending his relation to his superior by renouncing his fief; and when this was done on account of de-



nial of justice, could make war upon him.\* Liege-men were required by St. Louis to refuse aid to their seigneurs against the suzerain. In fact the general doctrine that the possession of supreme power was dependent on the will of the society in the early Germanic times, may be argued from elections and from depositions by the chief men, and by a certain acceptance of a new king by the people.† In some parts of Europe the states acquired by convention with the prince the right of renouncing their allegiance, of supporting their cause by arms, and even of deposing him (see for Germany Dahlman's *Politik.*, pp. 123, 129). In Magna Charta King John agrees to the appointment of a committee of barons, who are empowered, in case of unreasonable delay in redressing grievances, "together with the community of the kingdom, to distrain and distress the king in all the ways possible," saving, however, him and his queen and children harmless.

Perhaps it was owing to such precedents, to the influence of ancient ideas of liberty after the revival of Theories after the Reformation. letters, to the increased power and great misgovernment of the princes, and to the divisions produced by the Reformation, that in the sixteenth century theories began to be formulated in which the power of the people was extended further. These theories, based on political grounds, came from Catholics as well as Protestants. Thus George Buchanan in his *jure regni apud Scotos*, ‡ held the doctrine that there is a compact between the king and the people, the violation of which by the former is followed by forfeiture of his rights, so

\* Comp. Warnkönig, *Französ. Reichs u. Rechtsgesch.*, i., § 111, p. 239, and for the right of resistance in general, Guizot, *hist. of civil. in France*, iii., p. 96. Amer. ed. of transl.

† Comp. Grimm, *Rechtalterth.*, p. 231 et seq. of ed. 1, and esp. Stubbs' *constitut. hist.*, § 58, who, however, somewhat modifies Kemble's exact statement, that the *witan* had power to depose the king if his government was not conducted for the benefit of the people. Saxons in Engl., ii., 219.

‡ I cite the opinions of Buchanan, Languet, Rose and Mariana, from Hallam, *Hist. of Lit.*, ii., 183, 186, 198, and Languet's in Hallam's words.

that the people is freed from its obligation towards him. If he plays the tyrant, they have a right to make war on him and slay him, nay, "any one of all mankind" may inflict on him the just penalty of war. Thus he justifies rebellion and tyrannicide, the last of which he defends by examples from classical antiquity. An eminent French Protestant (1579), Hubert Languet, is somewhat more moderate. He thinks that kings, "who lay waste the church of God, support idolatry, and trample on their subjects' privileges, may be deposed by the states of their kingdom, which indeed are in duty bound to do so, although it is not lawful for private men to take up arms without authority. As kings derive their pre-eminence from the will of the people, they may be considered as feudally vassals of their subjects, so far that they may forfeit their crowns by felony against them." A book published in 1590, and ascribed by some to Rose, bishop of Senlis, entitled "*de justa reipublicæ Christianæ in reges potestate*," advocates, from a Catholic stand-point, the pope's right of deposing a schismatic or heretic, lays it down that the oath of allegiance is conditional on a king's observing what he has promised to do, and that to withdraw obedience from wicked kings is a fundamental part of the law of Europe; and affirms that a tyrant, whose definition is made to suit Henry of Navarre, may be put to death by any private person. The Spanish Jesuit, Mariana, in his "*de rege et regis institutione*," published in 1599, gives the arguments for and against the assassination of Henry III., by Jacques Clement, which occurred in 1589, evidently approving, says Hallam, the murder. He also declares that all philosophers and theologians agree that any one may kill a usurper. As for a lawful prince, who is doing intolerable harm to the state or religion, the estates of the realm may, after ineffectual admonition, rise in arms against him and may put him to death, when he has been declared a public enemy; and any private man may do the same. This rule he regards as a safe one, because it implies the consent of the wise and experienced in unison with the people's voice, declaring the ruler to be a tyrant. He is also

in favor of limiting the power of the king, and his theory looks towards the doctrine that the people is the ultimate sovereign.

When the contest in England between Charles I. and the parliament culminated in war, the question with whom the right lay was a very serious one for conscientious persons.\* Both king and parliament were essential parts of the constitution, both had rights and were in conflict; who should decide in the case? If the king had that power, all liberty was at an end; since his own aggressions, as it was claimed, caused the war. The nation, by its representatives, ought to judge; since the interests, the wisdom, the power of the state really lay in their hands, and there had been a long effort to introduce new notions of royal prerogative opposed to the rights of Englishmen. Moreover, a doctrine of a contract between people and king, implying really their right to choose and to judge when the contract was broken, had come from venerable authorities even of the church. Thus king and parliament went to war, with good consciences on both sides, until the extreme party on one side procured the king's death. This step needed justification before the world, and Milton, for that purpose, published in

In England. Milton's. February 1648-9 (2d edition in 1650), his "tenure of kings and magistrates, proving that it is lawful, and hath been held so through all ages, for any who have the power to call to account a tyrant or wicked king, and after due conviction to depose and put him to death; if the ordinary magistrate have neglected or denied to do it." This was followed by his *defensio pro populo Anglicano* against the *defensio regia* of Salmasius, first published in 1651, and other tracts which continued the controversy. From the "tenure of kings and magistrates," omitting his authorities from scripture and the classical authors—we cite his leading propositions; and first that the power of kings is only "transferred and committed to them in trust from the people to the

\* Compare what Philip Hunton says, as cited by Dr. Whewell, in his *El. of Morality*, B. V., ch. 5, § 892.

common good of them all, in whom the power remains fundamentally, and cannot be taken from them without a violation of their natural birthright." Secondly, "to say the king hath as good a right to his crown and dignity as any man to his inheritance, is to make the subject no better than the king's slave, his chattel or his possession that may be bought or sold." "But suppose it to be of right hereditary, what can be more just and legal, if a subject for certain crimes be [required] to forfeit by law from himself and posterity all his inheritance to the king, than that a king, for crimes proportional, should forfeit all his title and inheritance to the people? Unless the people be thought created all for him, he not for them, and they all be thought in one body inferior to him single, which were a kind of treason against the dignity of mankind to affirm." Thirdly, "to say kings are accountable to none but God, is the overturning of all law and government. For if they may refuse to give account, then all covenants made with them at coronation, all oaths, are in vain and mere mockeries." Fourthly, "since the king or magistrate holds his authority of the people, both originally and naturally, for their good in the first place and not for his own, then may the people, as oft as they shall judge it for the best, either choose him or reject him, retain him or depose him, though no tyrant, merely by the liberty and right of freeborn men to be governed as seems to them best." And this right of the people he supports by a passage of Scripture, Deut., xvii., 14, "When thou art come into the land which the Lord thy God giveth thee, and shalt say, I will set a king over me like as all the nations about me," etc. As for a tyrant, that is a man, who, whether coming to the crown by wrong or by right, reigns not for the common good, but for himself and his faction, he would make short work with such a ruler, and leave it open for a private man to deal with him, as Ehud dealt with Eglon, king of Moab. Milton's appeals to authority and example on behalf of a nation's right to depose a king, are very full and to the point. The *defensio* against Salmasius runs along the same line of argument, only dealing more

with the constitution of England. He hopes (chap. 10) that impartial persons will be satisfied that he has proved from the law of God, rights acknowledged by the nations, and the institutes of his own country, that a king of England can be brought to trial and capitally punished. "The House of Commons (*ordo plebeius*) had a right to judge within itself and to delegate to a court the power of judging the king by its supreme authority." He claims that the House of Commons alone was a parliament, "totis numeris absolutum," and was as legal a body after Pride's Purge as before.

The right of the community to change its government for good reasons, of which no one else, not even the chief magistrate, but the community only, is the judge, and the right to bring the chief magistrate to a capital trial for his wrong-doings became, of course, unpopular doctrines on the fall of the commonwealth. In the reign of the second Charles non-resistance and passive obedience in all things not immoral were taught through the English church; and all political doctrine that could justify the rebellion was denounced in votes of parliament and in multitudes of pulpits. Thus Dr. South puts the question "whether it be lawful for subjects in any case to make war upon the magistrate" (posthumous serm., xviii., works, vol. iv., 258, Amer. ed.), and replies, "my answer to it is in the negative. And the reason is because the subject has resigned up all right of resistance into the hands of his prince and governor." "When a man consents to be a subject and to acknowledge any one for his governor, he does by that very action invest him with all the necessary means of being a governor; the chief of which is a quitting and parting with that natural right of resisting him upon any occasion whatever." Again, of a nation punishing its kings he says (serm., xxiv., vol. iv., 358), "that while God punishes inferior malefactors by the hands of princes, he takes the punishment of princes wholly into his own." "It is God's prerogative to be the sole judge of princes, and heaven only is that high court of justice, where kings can be legally

Opinions in Eng-  
land at and before  
1688, 1689.

arraigned, tried and condemned." In this he virtually begs the question.

As the country and the church began to be alarmed by the measures of James II., freer doctrine was taught and was embraced by the liberal or Whig party. Locke's two treatises on government to which we have referred in another place (§ 63), especially the second, met the non-resistance theory. A community, he teaches us, is formed by unanimous consent, but afterwards the will of the bare majority is binding. And this he accepts not as a jural fiction but as a fact. This origin of government authorizes the majority to retain or delegate power, which power, however, is never absolute; because no man by nature has power over his own life or the property of another, and law must be conformable to natural justice. If the power is delegated, the trustees cannot exercise it in a greater degree than the majority could, governing by themselves. Thus the property of any one cannot be taken without his consent or that of the majority. This power, again, cannot be transferred. Royal power acquired by usurpation gives no right, unless by formal consent of the people. Royal power exercised tyrannically dissolves the government. The government is dissolved also by breach of trust on the part of the legislature or the prince. There is thus a trust put into the prince's hand on the execution of which the right to reign depends. Locke's principles in his second treatise are but the carrying out of those of Hooker in his ecclesiastical polity. (Hallam's *introd.*, iv., 375.)

When King James was got rid of, the right of deposing him was really exercised, although in appearance covered up under misleading words. It was based on his having endeavored to subvert the constitution of the kingdom by breaking the original contract between king and people, etc. *This* original contract was no absolute fiction like the social one, but was founded on facts in English history, was supported by parallel arrangements between kings and people scattered through the history of the world, and was confirmed by the

true theory of government. It may be said to express, down to our time, the only opinion on the rights of resistance and revolution that has had any authority in England. At the trial of Dr. Sacheverel\* in 1710 on impeachment by the House of Commons, for having in a sermon denounced the revolution of 1688, the managers on the part of the House took this same ground. As Burke states, in his appeal from the new to the old Whigs, the foundations laid down by the Commons on this trial for justifying the Revolution were, that there was an "*original contract* implied and expressed in the constitution of England, as a scheme of government fundamentally and inviolably fixed in King, Lords and Commons. The fundamental subversion of this ancient constitution, by one of its parts having been attempted and in fact accomplished, justified the revolution. It was justified solely by the *necessity* of the case ; as the only means left for the recovery of that ancient constitution, formed by the original contract of the British state, as well as for the future preservation of the same government." The most important opinions of the managers are given by Mr. Burke in the Appeal (works, Bohn's ed., iii., 45-64).

The moderation and respect for law and order as well as for liberty shown in this revolution, the anxiety that it should seem to be an exceptional case, have been of vast benefit to the English race, even to us who have cast off kingly power ; and with the doctrine of a responsible ministry they have been safeguards against future revolutions. Still, as it seems to the writer, the defence of the revolution as explained by Mr. Burke takes for granted facts that had no existence. If the contract was *original* and yet was implied in a scheme of government by King, Lords and *Commons*, it was no earlier than the origin of the House of Commons. Moreover the constitution had been growing since the supposed *original* contract. And there seems to be involved in the original contract, if preserved, no possibility of future growth with-

\* State trials, Howell's ed., vol. xv.

out a departure from the contract, unless the parties should make a change by common consent. How much neater and simpler to have said that the king is under obligation before God and man to observe the laws and the constitution ; that his tenure of office ought to depend on his fidelity in these respects ; that he actually promised in his coronation oath to keep the laws ; that allegiance, being correlative to protection, is limited by his fulfilling the duties of a king, and that when he does great and intended wrong, so as to destroy confidence in him, it is for the nation to decide, through its wise men, whether he ought to reign any longer. And yet England has saved itself by shunning theories and by taking up each difficult case, as it is brought along by the stream of events.

The French theory of the right of revolution, as expressed in the more modern overturnings, has come to be practically not so much that the sovereignty of the people is the source of rightful power in the state, as that every idea has the right to express itself in life, and whether received by the majority or not, if it can get power into its hands, to control the country.

In the United States the right of the community to alter the government is turned into a peaceful right, by the process of revising the constitutions, both state and federal, in a certain prescribed and constitutional way. The changes are, for the most part, effected, not by a majority, but by two-thirds of the votes actually cast. The question of unconstitutional use of power,—as whether an executive officer has violated constitutional provisions or a legislature has passed a law beyond its competence,—is decided by the courts before which an aggrieved individual brings his case. The executive officers are liable to impeachment for various misdemeanors, and to removal from office if found guilty ; besides which, they have no immunity from being prosecuted for a crime, if it be not a political one, before the ordinary courts of the country. The states have no right, on any pretext, to separate from the Union, and such seces-



sion is almost the only cause for which war can arise. Between the different states, all quarrels are composed by the courts, and in case of any violence between state and state, or of sedition within a state, if the power of the state is not sufficient to quell it, the power of the Union may be evoked to restore order. Thus the theory of popular sovereignty is hedged around, and has its violent remedies taken from it by finding peaceful ones within its reach.

### § 133.

I proceed to give an outline of the theories of one or two modern writers, in regard to the lawfulness of resistance and revolution. Among them I include Kant, on account of his extreme notions on the extent of the citizen's obedience. Speculations about the origin of the state he thinks to be very idle for the citizen; for if in following them out he resists the law-making authority, he is exposed by the laws to utter destruction. Law, which is so holy that even to make it practically a matter of doubt, and hence to suspend its authority for a moment is of itself a crime, is represented as not coming from man but from some supreme, blameless lawgiver; and this is the meaning of the proposition that all magistracy is from God: which, not as a historical foundation of constitutional society, but as an idea, a practical principle of reason, expresses the thought that the existing lawmaking power must be obeyed, let its origin be what it may.

From this the proposition follows that the ruler (*i. e.*, law-maker) sustains only duties towards the subject and has no obligations that can be enforced. Further, if the regent (executive officer) acts against the laws, *e. g.*, through illegal imposts or enlistments, the subject may meet this injustice with complaints but with no resistance. And even in the constitution no article can be contained (*i. e.*, according to the right theory of government), making it possible for a power in the state, if the constitution should be violated by the high-

est magistrate, to oppose him and so limit him. Against the supreme legislative head of the state there is no legitimate resistance of the people ; for a jural condition of things is possible only through subjection to his public legislating will. Hence, there is no right of sedition, still less of rebellion or insurrection ; least of all is there any right against him as a single person, on pretext of his abusing his power, to seize his person, or take his life. The most trifling attempt to do such things is high treason, and the traitor of this kind ought, as one who seeks to ruin his country, to be punished with nothing less than death. The reason for the duty of the people to submit to an abuse of supreme power, and even to an abuse regarded as intolerable, lies here :—that popular rising against the highest legislative power must be thought of as never anything else than contrary to law, or they will annihilate the entire legal constitution. For, that the people may be authorized to do this, there must be a public law giving them this right of resistance ; *i. e.*, the highest code of laws must contain in itself a provision preventing itself from being the highest, and making the people as subjects, sovereign over him to whom they are in the relation of subjects, etc.

It may be necessary, sometimes, says Kant, to amend a constitution, but all changes must emanate from the sovereign in the way of reform, not from the people in the way of revolution ; and the reform, when made, can affect only the executive, not the law-making power. When a revolution has once succeeded, and a new constitution is set up, the unlawfulness of the movement, at its beginning and in its course, cannot free the subjects from the obligation to comply with the new order of things, and to obey the existing authorities. (*Rechtslehre*, works v., 153-157.)

All this is as passive as the most despotic master of a people could desire, and yet Kant deduces state-obligations from contract. He falls into the rut of Hobbes and Spinoza ; and as the “ *Rechtslehre* ” was published first in 1797, it must have been written under the influence of the events that occurred in France in 1792.

Stahl's views as to the right of resistance may be gathered from the following passage (Philos. d. Rechts ii., 2, p. 223): "The law, therefore, must be for the king not merely an inward binding force on his conscience, as the absolutists will, but also an external limitation imposed by public justice. If now the king oversteps the legal limits, if he aims at overthrowing the constitution, his sovereign power cannot on that account be taken from him; there is no tribunal of justice over him, but his commands must find no execution. For the subject is not permitted to judge over his prince, but he may and must pass judgment over his own conscience; and there must be a boundary found somewhere, beyond which obedience and compliance cannot pass. This is found, even in absolute governments, at the point where the king's command is against God's law or against the universal sense of justice and of honor. But where law is in an advanced state and is acknowledged as a limit on the sovereign, there the positive provisions of law also, and the existing constitution become an affair of the conscience, so that no well-meaning man can lend himself to their downfall. All this is indeed no complete outward security, for there can be found tools enough who will still obey; hence in the last resort, the check on the king is furnished by the moral power of public opinion and the strength which it adds to institutions. And this is sufficient. On the contrary, an institution which in a mechanical way makes violation of the constitution impossible for him, which by its force at once sends him back within the due bounds or dethrones him, ought not to be and cannot be provided. Such a power would itself require a higher in turn to watch over its right use, and so *ad infinitum*. There must be an authority over which there is no other: *prima sedes a nemine judicatur*."

Quite in another spirit Fichte (Naturrecht, p. 182 works, vol. iii.) expresses himself thus: "the people (be it well understood that I speak of the people as a whole) is never a rebel, and the term *rebellion*, used of it, is the highest absurdity that can be uttered. For the

people is in fact, and according to right, the highest power, above which none can go; the source of all other power, and responsible to God alone. Through its assembling together the executive authority loses its power in fact and in right. [!] Only against a higher can rebellion find place. But what on the earth is higher than the people? It could only rebel against itself, which is absurd. Only God is above the people. Never did a people rise up as one man, and it never will, if unrighteousness has not reached its acme." In his *Sittenlehre* (iv. 238 et seq.) he says, "It is against conscience to overturn the state, unless I am firmly persuaded that the community wishes such an overturning. And this, although I were convinced that the greater part of its institutions were contrary to reason and justice, for I act in the matter not for myself alone but for the community. But it can well happen that the common will is entirely against the state constitution. Then its continuance becomes unjust tyranny and oppression; then the state, which existed only as a necessity (a *Nothstaat*), falls down of itself, and a more reasonable constitution takes its place. Every honest man, if he is only satisfied what the common will is, can then, with a good conscience, overthrow it."

Some of the most esteemed writers on Christian ethics among the Germans discuss this subject. Schleiermacher, etc. Schleiermacher\* goes for passive obedience strictly. Harless (*Chr. Ethik*, ed. 4, p. 298), after laying down the general rule of obedience for the individual, considers the case of attacks on civil order made by the legitimate ruler or his subordinates. Here obedience cannot be righteously demanded, and the Christian feels himself called upon to participate in opposition to the power that is seeking to destroy public order; "yet so that the form of this opposition or resistance, and the individual's participation therein, be confined within the limits of the existing order of a people, and his own personal calling, as a legal (*berufsmässig*) protest within

\* *Christl. Sitte*, p. 271, cited by Rothe.

his especial sphere. Force the Christian never exercises against force, whether it come from below or above." "If the usurpation triumphs, the Christian can by no means acknowledge it, but must remain in the country steadily protesting against it, or must emigrate."

Rothe (*Theol. Ethik*, iii., § 1173), after considering the cases where refusal to obey unlawful commands or lawful magistrates is a duty, and denying that insurrection against them is never right, proceeds to an essentially different class of cases (p. 979), where the magistrate does injury, not directly to the individual as such, but to the state by violation of law or constitution. This is in fact a case of rebellion, for the executive power can rebel equally with the subject. Here the subject must refuse obedience, but may not stop at simple refusal. He must go farther; and if this revolt of the magistrate against the constitution and consequently against the state, is of importance, he must withdraw from the magistrate the acknowledgment of the rightfulness of his power; for it exists only in virtue of his being a representative of the constitution and giving himself to it as to his organ. The main question, however, is, What further steps are now to be taken? Before all other things there must be a fixed conviction in the nation that the sovereign has broken the constitution and has done this intentionally. If this be made out, the state is in fact dissolved: as Schleiermacher says (*Chr. Sitte*, p. 268), "where the sovereign violates the contract, the state has ceased to exist, and there is a reign of bare force." The problem of the people now is to restore the state as securely and speedily as possible. If the sovereign can be brought back from his insurrection against the constitution and be made to subject himself to it anew, order is again established; but if this be unsuccessful and he resort to force, then especial difficulties arise. For an authority above the highest power, to which the people can appeal against the violation of the constitution, is in the nature of the case impossible. The question now arises whether the people may or rather whether it ought to

use outward power against such a sovereign. This question is superfluous, if there is a general unanimity in regard to the breach of the constitution ; for in this case obedience towards him is suspended; he is cut off from the use of his functions and deprived of his office. The people's right to do this cannot be doubted. But if there is not a general agreement as to the sovereign's breach of the constitution, and no amicable agreement between opposite opinions is to be reached, no other way of decision remains but the employment of force."

As it seems to the writer, the excellent man, whose opinions have been given in a free translation, has some bare places in his exposition of the right of resistance. He says that the state "*ist factisch aufgehoben*" if the sovereign has in fact and intentionally violated the constitution, and of this the people is to judge. But is the state really thus dissolved by an act of the executive? Does any one feel that when a *coup d'état* is defeated and the prince driven away, that all law has to begin again *de novo*? Could a criminal plead, in the interval between this act of the king and the restoration of order, that he violated no law? A revolution of the most peaceful kind would be a most frightful thing if this were so. The author too speaks of dealing with such a sovereign *à l'aimable*, condoning his offences, and perhaps putting one of his line in his place. But surely there is no obligation to do anything of this sort. The parties are now, as he admits, bound by no ties; all allegiance is dissolved, all confidence has ceased; the monarch's tenure of power is not in any sort the same as if the question touched his family estate. The people can do then as it will in regard to the tenure of executive power. The constitution exists; and not even that, much less the state, much less still the laws, could expire in consequence of the act of a man and his subordinates. There remains, after the sovereign's crime, a people organized under law and constitution. If the organized people so decide, he can be restored or one of his line be called in, or some one to begin a new line, or they may do without kings. In all cases there is a continuity of the state.

## § 134.

The teachings of the New Testament, although few, have had a vast influence on the duty of obeying magistrates, wherever it has been received as an authority. The principal places where this duty is treated of are Rom. xiii., 1-7, I. Peter ii., 13, 14, 16. Besides these, there are more general directions of obedience in Titus iii., 1. In Hebrew xiii., 7, 17, there is a command to obey Christian officers equally general, on which it may be observed that apostasy or open immorality of the officers would without question have been regarded as dissolving the relation and abrogating the duty. There is also the example of the apostles refusing to obey a command of the Sanhedrim requiring obedience at a point where a Christian could not yield. And in addition to these there is the Saviour's command not to resist but to endure evil, together with the practice of the apostles, to waive their right and suffer evil; although once or twice St. Paul urges his claims as a Roman citizen, in opposition to the arbitrary conduct of Roman officers in the provinces. And finally, as to submitting to evil, there was a choice given between suffering persecution and fleeing to another place, which choice was to be made in view of what the various claims of duty required, and not for the sake of merely saving life or avoiding shame or suffering.

## § 135.

In view of these various, most wise, and important passages we have to say *first*, that they instruct private consciences in cases of individual duty, and are not given as a law to the state, or to bodies of individuals acting in a political capacity. This is clear. The New Testament makes no attempt to teach political doctrine. It implies rights when it shows the virtue of waiving them, but it never enters into questions of legislation or government. It may be said, that as each conscience is bound to "obey

New Testament on  
right of revolution.

Summing up.

magistrates" to "submit to every ordinance of man," it follows that a hundred thousand Christian freemen, constituting the body of a state, may not resist unconstitutional encroachments of the supreme executive. But this does not follow any more than that a Christian army would do wrong in not yielding to the force of a body of invaders. The state must have principles of action which are outside of Christianity; not wrong, but extra Christian. It makes men suffer for assaults, and pay their debts. But the individual Christian will—it may be—not prosecute his claims nor complain of injuries. Otherwise there is no especial *jural* province and no possibility of a free state.

But, *again*, the duty of obedience to magistrates is expressed like other moral precepts relating to action in a general way, and exceptions are possible. The duty of obedience to parents is still more sacred, and yet it would be right for a child to disobey a father who ordered something unlawful or was in a state of intoxication, and even to resist him, if in a fit of rage he sought the child's or its mother's life. The duty of the soldier and of inferior officers to obey the commander's orders is not only imposed on them by law, but also by the necessities of military service; but both would be morally justified in refusing to submit to a general who was evidently acting traitorously in concert with the enemy.

*Thirdly*, the obedience thought of in the New Testament is limited by the purpose for which executive authority exists. In Romans xiii., 3, rulers are not a terror to good works, but to evil. They are ministers of God for good. In I. Peter ii., 14, submission is required to human institutions, *i. e.*, to law and its administration, because they are founded for the punishment of the evil and the praise of the good; *i. e.*, for the recognition of right actions and well-doers by making a discrimination between them and the evil. But what if they fail to fulfil this end, especially if the highest authorities in the state are untrue to their appointment as ministers of God, so as to break the law themselves, favor injustice, usurp power



not given to them? We must then say that they have ceased to be ministers of God as well as ministers of the laws. All magistrates in the idea are God's ministers; the office is a part of the moral order among men; but in fact such men as Alexander of Pheræ, or Ezzelino of Padua, and Dr. Francia, are the devil's ministers.

*Fourthly*, the reasons given for the obedience of the private person apply as well in the case of the king *de facto* as in that of the king *de jure*, provided that there is an actual orderly administration of justice and an apparent intention to reign for the people's good. This is an argument *ad hominem* against legitimists, cutting off the justification for one kind of revolutions, by reference to the end and aim of government. When it is good and just, no matter how it began; when it is not, there is no right of the ruler to his power; and therefore no wrong in principle for the people to work a reform by dispossessing him of his power. It may be hard to tell when the usurper can become—as far as the private conscience is concerned—a lawful king; but this is certain, that a line of rulers cannot on the principles of the scriptures be expelled solely on account of a defect of their original title, especially if they have been for some time actively accepted by the people. Nor is it right for an expelled king to disturb an established order of things which conforms to the idea of a righteous state but is under a ruler who had originally no claims to the throne.

I say nothing of the revolutions in the Hebrew commonwealth, except that in general they furnish no sure ground of argument on either side. It is said that God raised up Ehud, and so, it is said, God stirred up Hadad and Rezon (I. Kings xi., 14, 23) against Solomon's authority, but the motives and means of these men were bad, as the assassination of the king of Moab by Ehud was atrocious, whatever his motive or his commission may have been. But who can fail, on the other hand, fully to approve of the conspiracy of the high priest with the commanders of the troops against the old queen, Athaliah, and of the summary vengeance inflicted on her?

It is then one thing for a private man to attempt resistance to established order, and to take the law into his own hands, and quite another for the people to expel a ruler, change a dynasty, alter a constitution, risk a civil war for such purposes, when the crisis seems to demand it. And here by the people I do not mean the *whole people*, for it can never be known what they think, and least of all at a crisis like the beginning of a revolution. Nor do I mean the *organized people* which can seldom in a large state assemble at such a time. Nor would I require the absolute certainty of a *majority's* sanction of a revolutionary attempt, which must often be secret in its beginning and go forward in hope, with the possibility of forming an incorrect judgment. When the pretender's friends in 1715 were trying to get up a conspiracy in his favor, they sent word from England—as I have somewhere read—that nine-tenths of the people were for him, but there was no movement in England when he came over, except one of trifling importance in the north.\* Nor on the contrary would the certainty that a revolution had *a majority in its favor* be alone sufficient to justify it. We require a vote of two-thirds to alter one of our constitutions, as if there were a more decided expression of opinion necessary to change a constitution than to set it up at the beginning. How much more, when armed force and civil war are probably necessary for the change, ought a revolution to be well weighed and soberly accepted by a large portion of a people. In truth, no rule can be laid down more definite than that there are great abuses demanding change or great wrongs demanding redress, that the mass of the wise and good are in favor of the movement for a revolution, and that others are not against it so much as they are hesitating through timidity or conservatism while they admit the vastness of the evil.

There is a practical and there is a theoretical side to a revolution. *Practical considerations only can justify it in each particular case.* Theory only shows that it *may be right* for

\*Lord Mahon's Hist. of Eng., chap. v.

a people to attempt revolutions, and that the decision rests with them. The practical considerations, which are the principal weight in the scale, are drawn from the genius and temper of a people, from the probabilities of success, from the probabilities of establishing a better government, from the amount of calamity likely to be endured before a successful end is reached, and like considerations. The probabilities of success are uncertain, because they depend on uncertain or variable causes, such as the ability to bear heavy burdens, the military skill at command, the zeal which can be called forth in the people, the amount of principle in public men, and the like. This side of the subject we shall not consider at the present time. We may attempt to show, in another place, that some approach to a philosophy of revolutions may be made, which will inspire patriotic advocates of them with caution or with confidence, and may tend more than hitherto to prevent ill-timed schemes for reforms in the way of violence. At present all that we shall do is to close what we have thus far said on this subject by a brief attempt to show that there is no wrong, according to a true theory of the state, in revolution in itself considered.

Revolution is an extreme, exceptional, remedial measure, emanating from the judgment and will of a community, which is living, at the time of the attempted change, in civil order. None but the community have a right to decide whether the change shall be made, and they have the right. The government has no right to initiate revolutions, for its sole duty is to govern according to certain laws, and under a certain form of government. If it should make the attempt by a *coup d'état* to overturn the existing constitution, the attempt would be unlawful; for it did not receive its power for this purpose: it could not do this rightfully for its own interests, for it did not exist to carry out its own interests, and it could not do this with the interests of the people in view, for the reason already given that it is subject to the constitution. Even if we supposed an absolute government to have the authority as far as any fundamental law was concerned, of making and carrying

out what political arrangements it pleased ; it certainly could not destroy nor attempt to destroy society by virtue of its absolute power ; for its power exists for the security and preservation of society. If such a government, or any with somewhat of an absolute character, grants a constitution to the people and the people accepts the grant, it does not follow that the absolute government had the right to change the constitution at will, nor that the people acknowledges such power, but only that they could do no better.

A people have the right to change or to defend an existing constitution even by armed force if resisted ; *first*, because they are most interested in the matter ; *secondly*, because they have the most wisdom ; and *thirdly*, because they are the true source of power. They are the most interested, evidently, as those for whom and for whose descendants a government exists. They represent many generations. The interests of an administration or a dynasty weighed over against them, hardly deserve to be taken into account. As for *wisdom*, the assertion just made may seem strange ; and if a people has been ground down to the dust, if light has been shut out, if their leaders have been cut down or banished, or converted into courtiers, it may be true that they have little wisdom, and most probably they will be conscious enough of this not to act but to endure. But it is safe to say that, if they lack means of combination or men to lead their movements, they are well aware what their wants are, and that a government is far from being wise, which relies on its methods of corrupting or dividing as its principal security.

But a community also is the real source of power in the last resort within the territory which it occupies. The executive may have the power in its hands, and may be able to crush the people, but mere power gives no right, or else right changes with every change of power. If a government, in order to fulfil the ends for which organized society exists, must respect and protect the rights of the individual and the welfare of the society, a failure to do this ought to involve forfeiture of its existence. It can have no other right to ex-

ist except that of serving the ends for which it was instituted. Executive power is a kind of agency, and there is no right of the agent which is not derived from the purposes for which he is appointed. If there is an instrument showing what these purposes are, and if there is an express agreement that he shall discharge certain duties and have certain authority, his authority is conditioned by the discharge of his duties, and ceases of right when his fulfilment of duty fails; or if there is no instrument stating in express terms his duties and powers, the nature of the case shows both that he is an agent and what is the nature of his agency, and that when his fidelity to his trust ceases, he ought not to be "any longer steward." To say that there is power in a ruler, by whatever name called, without responsibility, or that his responsibility is only to God, as if his being God's minister gave him a right to his ministry when he did not fulfil it, and that he is not amenable to the people for whose benefit he holds power, or, that when he misuses his office he has the same right to hold it as before, and may not be brought to justice or deprived of his place, seems to be most unrighteous and inconsistent with the whole system of human affairs. The greatest wrongs, on this theory, cannot be righted. The chief culprit must escape punishment. What wonder if, in despotic monarchies, the mad freaks of unbridled will should be followed by the wild process of assassination?

Constitutional monarchies are built on the principle here laid down. The king can do no wrong; therefore, as some one must be responsible for every wrong, his chief adviser or advisers bear the pains and penalties. If now it were provided (in all constitutional kingdoms) as by the English constitution, that the minister could not be saved from impeachment by an act of the crown, and also that when found guilty he could not be pardoned after conviction, revolutionary attempts of the supreme executive would, to a great extent, be unknown. There would still remain other kinds of violent revolutions, such as the disintegration of a country by force; separations of colonies from the parent state; insurrections on

account of great burdens or grievances due to no especial fault on the ruler's part ; movements called forth by religious oppression ; overthrowals of the old order of things growing out of changes in the distribution of property or removal of the centre of influence in a country. But as revolutions are not begun without some expectation of success, and as a people possessed of constitution freedom would be little tempted to take part in them, their number would then be much diminished by the allegiance of a large part of the people to the government, and, if they should break out, they would probably be neither long nor violent.

We add that throughout, in all political movements of a revolutionary kind, the people must judge for itself. There is no power in or out of the state that can perform this office. And therefore, as the responsibility falls on the people and the suffering also in case of failure ; the greatest caution is needed in counting the cost, in comparing the resources within its reach with those that can be used by its foes, in going into all and through all with a deep conviction that its cause is right in the sight of God.

The right of revolution, when resorted to as an extreme measure, ought to be and has been of great benefit to the world. If it were understood by wicked rulers that conscientious citizens could never engage in such movements, they would be far more unscrupulous. But if this is to be calculated upon as a possibility, it will make oppressors cautious ; they will not dare to go beyond a certain point ; they will fear the opinion of society. If the best men in a community believe in this right as a remedy for evils in the last resort, their co-operation will give strength and sobriety to an incensed people ; and they will be best able to determine what securities shall be given for the future—where, in short, a revolution shall stop. If they stand aloof, when success with their concurrence seems possible and the demand for violent reforms is imperative ; on them will be laid the guilt of failure, and the reproach will be theirs that they were too cautious and not self-sacrificing enough to attempt to save their country.

## Part 3.

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### THE STATE.—PRACTICAL POLITICS.

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#### CHAPTER I.

##### EARLIEST INSTITUTIONS.

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###### § 136. (INTRODUCTORY SECTION.)

POLITICAL science in general may be called practical ; for something to be done is everywhere the end of The aim of practical politics. inquiry. And yet we may speak of political *theory* as having for its objects the nature and functions of political communities, the fundamental relations between a government and a people with other matters touching the state as a general conception, without as yet approaching the questions : How the ends contemplated in the existence of the state may be best attained ; how liberty and order can be alike secured ; how a government can do its work without encroaching on the rights of individuals or of a people ? These and like points touching the fit constitution of states in given circumstances belong to another branch, which we may call practical politics—a branch of great importance, nay, in some respects of the greatest. For if the ends to be realized by a state are not kept in sight, or are not provided for by a good working constitution, in either case the result must be a failure. Liberty must be given up to preserve justice and order, or a defective administration must be over-

turned in a revolutionary way, in order that the ends may be secured for which states exist.

The aim of practical politics may be said to be in one sense the *optimus reipublicae status*, and yet in another sense, this is an enquiry quite beyond the reach of either branch of our subject. There are limits in every community, within which the practical branch especially must stop; and the theoretical branch can only show what a political community ought to be, without suggesting any way in which it can be made such. If for instance, it be desirable to have a law-making assembly, there are communities which furnish us no adequate materials for instituting such a body; hence if called into existence, it must be a failure. We come then to this limitation; that unless a community is such as to be capable, without further experience and with no change in the order and plan of society, of putting on the best form of government, practical politics can do little for it immediately besides instructing and enlightening its public men.

There is another limitation of great importance. The polity of a country, if foreign conquest has not interfered with its orderly developments, is as truly indigenous and the growth of local causes, as the animals and flowers. At first, if we conceive of a regular progress, all parts of the world ought to agree; afterwards special causes will give the same variety to human institutions that we observe in race and language, only the diversity will be somewhat less. Institutions are clung to with affection or with the tenacity of habit which we should regard with abhorrence. Let blood revenge serve as an example. Practical politics must take account of this growth in certain directions, and not attempt, because the plants are not the best, to cut them up by the root at once. It must rather prepare the soil for better ones in the future; it must collect the results of experience for the instruction of makers of constitutions. On the other hand, it does not pretend to have all sorts of constitutions on its shelves labelled and ready for use—our readers will perceive



whence we draw our illustration—but it may properly pass its judgment on extinct or on existing constitutions, showing by way of example wherein they have fulfilled their ends and wherein they have been unsuccessful, as well as the reasons why they failed or succeeded.

The inquiries within this branch of our subject are such as these: the nature of primordial governments and the progress of political societies; the various forms of government; their especial characteristics, as whether they be pure or mixed; the departments of government and their advantages as limitations on each other; the practical relations of a government or constitution to municipal institutions and other self-governing bodies under it, to religion, education, art and science; the checks on governmental power; the gradual changes of states; their violent changes or revolutions; their decline and decay.

It will be at once seen that we follow a path here where history ought to be continually consulted. Whether its responses should be embodied in a work like this or not, and at what length, may be a matter of doubt. In his politics Aristotle has a multitude of references to political forms and to events which occurred in a large number of Greek states, some of them known from other sources, others quite unknown, which without doubt must have acted on a mind able like his to make large generalizations, in the formation of his views. He also wrote another work entitled *πολίτεια*, *polities*, giving account of a vast many states, no fewer according to some than two hundred and fifty in number, and of some seventy of which fragments are extant or mention is made by ancient authors. Of this work, which would have been invaluable if it had come down to modern times, we know but little distinctly. But I cannot help thinking it probable, that when he had conceived the purpose of writing on politics, he made these collections for his own immediate use, that he might establish his conclusions on the solid basis of fact. Montesquieu roamed over a vast field in endeavoring to discover the differences between the laws and

usages of mankind but, as we must think, with less success ; because he does not sufficiently analyze his material nor separate adventitious from fixed causes ; on which account he arrives at unsafe conclusions. In the present treatise we shall aim to follow these “maestri e duci,” and yet venture to go beyond them in regard to fulness of detail when our way brings us to the constitutions of different polities.

### § 137.

The first subject demanding our attention is the political progress of society from its early stages, or the Early polities. imperfectly organized primeval communities, that can hardly be called states, and which show their development from a union of blood relatives. There is no highly civilized society which, if its history is traced back, does not contain some vestiges of a type of polity, which may fairly be supposed to be connected with, and to have grown out from, the first institution of mankind. There is no savage or uncivilized race, which cannot in its institutions be referred back, on the supposition of degeneration or of natural departure, to social forms that grew out of the family state or out of something like it. Can we trace this progress any farther than credible historical traditions furnish us grounds to stand upon ?

There are two difficulties that meet us here. One is the difficulty of making up our minds whether the lowest races now in existence, or of which we have any record, fairly represent primeval man, or whether a degeneracy in morals from an original state, partly owing to unfavorable circumstances of life, may be assumed as explaining the lowest conditions into which the human race has fallen. The other difficulty arises from the changes to which tribes of uncivilized men were subject from very early times, owing to the violence of their neighbors. There is reason to believe that in North and in Central America, earlier and more civilized societies were conquered by their more savage neighbors. And according to Waitz (*Anthropol.* ii., 359), a higher culture

once prevailed in the heart of Africa, as is indicated by two large kingdoms of the Mazimba and the Monomotápa which probably existed once, and by the confederations of tribes on the Zambeze and in Londa. The Hottentots also have been driven out of their former territory into narrower quarters and otherwise checked in their development by more powerful neighbors. The history of the short-lived kingdom of the Zulus under Chaka, and others, shows to what uncivilizing influences many barbarous tribes are subject. We must admit, then, both progression and degradation, or, in the words of Mr. Tylor, "under proper limitations the principles of both theories are conformable to historical knowledge, which shows us, on the one hand, that the state of the higher nations was reached by progression from a lower state, and on the other that culture, gained by progression, may be lost by degradation." (Primitive Cult., i. 34.) Of course, this fair statement, which is verified by history, may be applied to ages anterior to history, when the stock of civilizing influences was small, and men were more easy to fall into the lowest barbarism than it would be now.

### § 138.

But what is the starting-point of man in regard to govern-  
Early family com- munity. ment? Were families distinct, as now? or, in the  
 early communities which had the feeling of be-  
 ing descended from common progenitors, was everything  
 common—not only lands and dwellings—but was there no sep-  
 arate marriage, and no recognition of separate children? Did  
 all belong to all under some kind of patriarchal authority?

The theory that finds in such a community the earliest condition of man, which tracks him out until he is caught at a stage of life below that of some birds and animals that are, for the time, faithful to their mates, is the most painful one in the history of man except that of his crimes, and is relieved in its unpleasantness only by the immense capacity of growth which it attributes to the human race in all moral and social respects. We have given, in the first part of this work (§ 26,

§ 42 B.), the conclusions of archæological study in regard to the institutions of property and of marriage. As to property in land, or the community system, these conclusions may be received without question. As to marriage and the family, one cannot help doubting them, until several gaps, such as that between the supposed primeval system and marriage, as now understood in civilized races, are better filled up; and until exogamy, an unquestioned practice of wide extent, is better accounted for. But aside from these weak points, the government of these communities must have been somewhat unlike the patriarchal as it has been conceived of. For if there were no succession through fathers and no common ancestor and eldest line, either election or actual seniority must have determined to whose hands the government, what there was of it, should be committed.

However this may be, and in whose hands soever the defence and control of the earliest communities may have been placed, the following must have been among the earliest usages of mankind; in regard to land, no separate ownership, occupation, a feeling of right to anything produced by labor of the individual or taken by him in a wild state; in regard to marriage, a wide-spread usage which shows an aversion to marriage within the clan or with a woman of the same name; bride-stealing, or purchase of a wife from her father; in regard to the family, the great closeness of the tie between a child and its mother, while the father stood in the background; the interest of the maternal uncle in the nephew; the feeling of property of the parent in the child; in regard to the effects of marriage, either the wife's passing over to her husband's clan or *gens*, or the husband becoming a member of the clan to which his wife belonged. The child, of course, inherited no land until the causes for separate land began to be active, but it is natural to suppose that rights to certain grazing grounds would at an early time arise in nomadic tribes. The laws of inheritance, by their diversities, seem to show that they sprang up after diversities of social life in the various parts of the world had become fixed. On the other hand

the punishments for violence, especially for homicide, by their uniformity show an extreme antiquity. Blood-revenge we have had occasion to speak of, as pointing to a time when the loss done to the family was left to the family to notice ; and the compositions in cattle or money point to a somewhat later stage of human progress.

§ 139.

When separate property began to exist, we find several Early tenure of land. stages in its progress toward fixed ownership in the family of the proprietor, by which, however, we do not mean to affirm that, wherever it now exists, it reached the goal by the same steps. In some parts the person who has brought the land into cultivation has the exclusive right to its use only so long as his occupation continues ; and there seems to be no power of selling or transferring or transmitting it to heirs. Such is said to be the case among the Iroquois, the Indians on the Orinoco, in New Zealand, in Malakka (although in the last-named country the ruler is regarded as the proper owner), among part of the Caffres, and the Malagashy ; while in the Aztek kingdom neglect of cultivation for three years produced a forfeiture of land from that time onward. The laws of Manu gave land in proprietorship to one who had cleared it of timber. It is said to be permitted among the Circassians, to any one who finds an unenclosed field, to settle there and fence it around. The theory is said to look on the land as national property ; and this is nearly the "squatter's right" as recognized by our laws relating to territory purchased by the United States. Land reverted to the communities when it was no longer cultivated. Lands in the Althaslau mark became common property again, when the bushes had grown up high enough to hide a yoke of oxen. This usage points back to a state of things which continued in the Germanic race until recent times, and has not yet altogether died out. Doubtless in the early infancy of private property the responsibility for tillage would seem more natural.

## § 140.

The transmission of property in the family was naturally later than exclusive occupation. The laws of <sup>Early transmission of property; especially of land.</sup> succession have been various. An old and extensive usage, still in force in different parts of the world, is that of the passage of property through the mother or some other female relative. This does not imply a political sway of the woman, but only, at the most, a system of relationship to which the certainty of the connection between the mother and her offspring and the uncertainty who was the father of the child might originally have given rise. Whether this is the true account of this kind of succession may be doubted, but it has existed long since the alleged ground for it ceased to exist. In many places dignity as well as property is transmitted according to the same law; so that in some parts of Africa the king's sons cannot follow him on the throne, but his oldest brother, the brother of his mother and the sons of the sister of the latter have the best rights of succession. Examples of this descent of property or of rank occur in the races of this continent, in Polynesia and Australia, among the Malays and the non-Aryan tribes of India, in many parts of Africa, among the ancient Lycians, the Locrians of southern Italy (where the noble houses according to the story of the origin of the colony were sprung from noble mothers and slave fathers), the Etruscans, and perhaps the Egyptians.

Blood-revenge has already been spoken of. We add here <sup>Blood-revenge.</sup> that while it appears at first as the war of one family, gens, or clan against another, a war which might go down from generation to generation, it shows itself afterward in a milder form; banishment, the duty of the next of kin, instead of the whole family or clan, to avenge the slain man's death; then composition by agreement; finally composition by law for all injuries occasioned by violence, are the steps which mark the progress of justice, as it comes to be the work of society and of legislation.

## § 141.

In the early societies, frank-pledge or the responsibility of the whole clan, hundred or other union for the members, plays a noticeable part. This of course implies organism, and throws the detection and to a degree the prevention of crime on the community. This must have begun in communities of relatives by blood, which were small enough for each member to know the character of the rest. The responsibility meets us in various forms. The brother of an adulterer or his next relations are liable among some of the Polynesians for the crime of their kinsman. Among the Malays the family is bound for its members, the *suku* or gens for its families, the whole village for the *sukus* there living together. The responsibility touches debts in general as well as the payment of the composition for blood. A similar usage appears among the Bedouins and the Circassians. In parts of West Africa the creditor is thought to have a right to exact a debt not only from a relative but from any countryman of the debtor. Old Slavonian law made the commune responsible for theft and homicide. In Russia if the stolen property could be traced to a particular village, the village was required to give restitution. The Germanic race had similar usages, with which, as in frank-pledge, a system of police might be connected. Thus as the property belonged to the community, the crimes and wrongs lay on the community. It is a relic of the same early feelings and usages, when the feudal vassal committed certain crimes against his lord, that the children suffered; and this came down below feudal times in attainder of treason.\*

\* Many of the facts here given in relation to early societies are found in recent works, such as I have mentioned in a note on § 42, B. Dr. A. H. Post's work there spoken of, which is intended to serve as a contribution to "comparative political and jural science," has been principally used. Such a comparative work, based on broad and unquestionable foundations, will be of the greatest benefit to students of political and jural science. At present Waitz's work, continued by Gerland, contains more materials than any other.

## § 142.

We have thus reached political conceptions in their rude forms. Communities are taking shape under Early governments. head-men and have chiefs to give counsel and to guide in peace, or in war, or in both. Certain persons and families begin to have a higher rank than others; they are raised still higher by being connected in race with the protecting spirits of deceased ancestors and with the gods of the people. Language, common religious rites, common usages, and the like united certain communities together against certain others, their foes in war. Hence confederations, or larger unions more or less lasting, with the treaties of confederates, and the treaties of parties to a war.

We stop for a moment at two points, the head man of the communities, and the unions of the communities with one another. 1. There must have been a chief in every community, whether chosen by the community or succeeding by some law to a deceased relative. These chiefs in some parts of the world have at this day very great power; even the lives of the clan or tribe depend on their will; nor is this strange when the power of life and death within the family is exercised by its head. Election probably can be accounted for within the single tribe by special circumstances unfitting the next of kin for bearing sway; and in a union of tribes the military qualifications of one would naturally cause him to be selected before others of equal birth. As in many transactions the chieftain was the fit representative of the tribe or clan, it is not strange that the power of punishing and that of giving in marriage came into his hands, and that he was at length held in many places as the ultimate owner of all the lands. When a community was composed of several clans, there would naturally be a union of the different heads on some principle acceptable to the whole community, and a senate or assembly of old men might arise to act as a council of the chief and as judges of the people. In the higher races, assemblies of the people or the heads of fami-



lies appear everywhere, and a leading class more or less connected by birth with the principal family is not wanting, but there is a diversity of usage as it respects nobility proper; nor are kings who may be regarded as the heads of a number of united communities always found. Among the Germans, as described by Tacitus, there was a class of *principes*, so called from their office and not necessarily from their birth, of whom there might be one or more in a canton or a hundred, who exercised certain acknowledged rights, and had certain prerogatives in their districts. They were a kind of upper house in the assemblies; they judged through their district with the assistance of elected judges from among the free men; they had the privilege of surrounding themselves with young men or *comites* who were bound to them by a peculiarly close tie: but this they had not as nobles but as *principes*, as an upper class to whom this power was committed by the people.

Kings appear, in the account of Tacitus, in part of the German tribes, and are wanting in others. The  
 Kings. Saxons had none originally, and when they needed a leader of their army they chose one by lot. When a war was over he returned to an equality with the other head men of the tribes. This difference within the same race is remarkable. It has been maintained that in older times the kingly office was universal, but that a more democratic time came when they were disused by certain tribes or collections of tribes. The other opinion, that the tribes without them were the best type of the earlier usages, seems to me most probable. Cæsar knows no German kings except Ariovistus who was so called by the Senate of Rome. Yet in other branches of the Indo-European race they appear very generally. Mr. Freeman says that kingship was "an office which, like any other, the nation could give and take away. But it was something more than an office; it was the privilege of the chosen house, which extended itself beyond the actual holder of the office to all the members of the *Cynecyn*, the stock of stocks, the stock from which alone kings could be

chosen, and of which every member was in some sort kingly." (Compar. politics, lect. iv., p. 164.) Waitz finds it hard to decide whether an ancient kind of royalty, having somewhat of a patriarchal character, may not have preceded the more modern species. In this case the growing power of the principes may have put an end to it in several tribes.\*

2. The natural tendency of neighbors who feel themselves to have very much in common, would lead to confederations which we find to have begun in prehistoric times among the Greeks and Romans. The Israelites in war united under a *shophet*, who, after delivering his people from danger, acted as their judge or ruler. It would appear that the tribes were not all united in these extemporary leagues, which fell to pieces after the need ceased or the man died, and which led at last to the establishment of the kingdom. The Germanic confederations of a similar sort, such as were denoted by the names of the Franks and the Anglo-Saxons, led finally to the establishment of nations and kingdoms. The same leagues show themselves elsewhere in the world. Comp. what is said of the Iroquois below, § 145, and in chap. 7 of Part iii.

### § 143.

We will now give a few examples of these primitive governments, selected from different races, and tending to show an advance from one form to a higher, until we reach the stage of the city-state.

Examples of governments after an early type. The Tunguses of eastern Russia have had a division into Tunguses. septs and clans, the feeblest of which at one time contained five and the largest four hundred and thirty-five men. In 1766 there were in all ninety such divisions. Every sept traces back to a common ancestor. An elder chosen by the families in the sept conducts its affairs; and the rudiments of political union may be seen in the presiding officers of these septs who are chosen out of families of superior rank. Politically considered they are thus superior to the Lapps and other Nomads of the Finnish-

\* Verfassungsgesch., 1,276, whom I have followed.

Altaic race, whose constitution of society, unless modified by contact with superior races, rises little above simple family government.

Here we may remark that the tradition of common descent may often be deceptive. It may happen, as was the fact, I believe, among the Scotch clans, that one portion of a people is reduced, by disease or war, so as to be unable to maintain a tribal existence. In such cases a kind of adoption takes place; they are engrafted on the stock of a larger clan of the same blood, and partake of equal rights, together with the name of the new stock.

The Kalmuks and Mongols, nomadic hordes, like the Tun-  
Kalmuks. guses, rise above them, possibly by influence from more southern parts of Asia, into a capacity for greater political union. They had long preserved the tribal constitution, and seemed incapable of an extensive confederation, when Temudjin, born about 1155 A. D., united a large part of the hordes and laid the foundations of the Empire of the Mongols. But here we seem to see an influence from a more advanced civilization than these nomads had reached. For Temudjin or Jenghiskhan, as he was called, when the supremacy over the Mongols was conceded to him, belonged to a tribe known already as the golden horde, and living in the north of China, which had so far conquered a union of hordes on the Amur as to compel them to pay tribute. It must have been this influence accompanying Temudjin on his flight from his own people and through his subsequent career, that led to the first formation of the Mongol law-book, which seems to have an attempt to unify the conquests of this great barbarian.

#### § 144.

Some of the inhabitants of Caucasus show an advance up-  
Institutions in Cir- on the condition of the Mongols, when we look  
cassia. at the ranks of society and the free spirit of these mountaineers. But the point of especial interest is the brotherhoods, which have some resemblance to the early

unions that appear in some of the Germanic nations. They differ greatly in the number of their members, which run up from a score to several hundred. Sometimes, when they are reduced, they dissolve and join more prosperous fraternities, or it may be that one dissolves into two. The tie, if not that of blood, which must have been the original uniting principle, is regarded as equivalent to blood, and hence marriages within the association are considered incestuous. The elders of the fraternities are chosen by a majority of votes, and one of them is appointed chief judge. His duty is, when disputes arise within the brotherhood, to call the elders together in order to compose the matter; and if this prove impossible, to convene the whole body. In this latter case the elders appoint a species of jury from six to ten in number, to whom the management of the affair is entrusted, and who choose a presiding officer from among themselves. On greater occasions a larger assembly is called together, made up of all the brotherhoods of a district or tribe, at one of which, meeting on account of common danger apprehended from the Russians, Bell, the traveller in Caucasus, was present. It is interesting to find that the fraternities among the Circassians, like the Anglo-Saxons, sustain, or sustained towards each other the relations of a society for mutual responsibility and assistance. Thus, when a member commits theft for the first time and is poor, the others pay his fine, which is usually reckoned according to the price of so many oxen. But where a crime is repeated, the fraternities withdraw their protection and inflict punishment on the offender. There is also throughout Circassia a price for life, varying with rank—for they have several ranks, princes, nobles, free proprietors, and slaves—and with sex. But notwithstanding this institution, blood-revenge, which it was intended to extinguish, still survives.\*

\* Comp. an article on Caucasus, in the *New Englander*, ix., 88-109, written by the author of the present work, the words of which, in part, are used. The institutions are in the wane.

## § 145.

Another and a more barbarous race, that of the North American Indians, presents to us several peculiarities. The political unit in early times seems to have been the sept or clan, which was distinguished from others belonging to the same tribe or nation by some animal (other than a fish, which was an emblem of a bad spirit), used as a mark or coat of arms, and probably at first as a religious sign or a protecting spirit. This was known to the Algonquins as the *Totem*, the name now in general use. That the persons having this for their mark were descendants of a common ancestor, seems to be shown by the fact that there was no lawful marriage between those who had the same *totem*. This in fact was their common name, and they thus corresponded somewhat with the members of the Roman *gentes*, who showed their common ancestry by the Gentile name—Fabius for instance—the personal name preceding and the family name coming after. The number of totems within the same tribe or nation varied greatly; from three as among the Delawares, to fourteen, among the Sauks. The Choctaws had eight totems, which seems to have been a not uncommon number. No trace of this division has been noticed among the Sioux. These different clans or families did not live territorially apart, but the same village might be composed of divisions belonging to each. The family name of the child, his totem, came from his mother and not from his father.

The totems seem each to have had a head-man, and at the head of the tribe stood a sachem or prince, generally the child of the preceding chieftain. Women also appear at the head of tribes and even children, for whom maternal uncles acted as regents. There are instances, also, of elected chiefs, for the most part taken out of families. The power of the sachems in the eastern tribes was very considerable, in the western apparently less so. They could undertake no war without the consent of the nation, yet they seem to have

been authorized to make treaties with the whites without consulting others.'

We find the spirit of confederation among the American Indians as among other races. The most remarkable instance is that of the Iroquois, consisting of the Mohawks, Onondagas, Senecas, Oneidas and Cayugas, living in the middle of the present State of New York. The league had been formed before any English settlements were attempted in America, as early as the beginning of the seventeenth century, if not before. In 1715 the Tuscaroras of North Carolina, allies of the Iroquois, having been driven from their homes and broken up, fled northward and were received as a sixth member of the confederacy by the powerful tribes of the league. The wars and raids of the Iroquois extended from Virginia to Lake Huron. We find them in 1744 yielding up to the colony of Virginia all their claims to the country of the Indians lying west of the mountains, within the parallels of that colony. Their policy was to keep the balance even between the English and French power in America. Their decay was due, apart from external causes, to the institution of a nobility who were chosen on account of merit, and whose power so far increased as to undermine that of the old chieftains of the tribe. Notwithstanding their great history and the terror connected with their name, and especially with the name of the Mohawks, their fighting men were estimated, in 1660, at not more than twenty-two hundred; yet the habit of incorporating the remains of conquered nations into their union must after this have considerably increased their number.

The league had at its head fifty chieftains, of whom the Onondagas furnished fourteen; the Mohawks, nine; the Senecas, eight; the Oneidas, nine; and the Cayugas, ten. They stood, however, on an equality, with five votes each, the Onondagas being placed at the head, and the Mohawks furnishing the leader in war. Every nation, according to Mr. Morgan, had a veto. They seem to have had a strong conviction of the importance of union without surrendering their

independence. Every nation had a chief for the affairs of peace, and another for war. An assembly of chieftains stood at the head of affairs, chosen out of particular families. Unanimity was necessary for the passage of any measure, and the members of the assembly deliberated in separate divisions before they met to take common council. These meetings were secret, and the results were communicated to the people collected together.

§ 146.

On the American continent two large kingdoms, with a civilization most probably native, although derived, in one of them, from earlier sources, were at the height of their power, when the Spaniards first explored the country. In the northern parts the red men have both changed and degenerated, since they became known to the first English and French settlers. There is evidence also to show that a large and flourishing race must have been displaced by wilder tribes between the great lakes and the Ohio. But if these changes were taking place in this continent, separated from the sources of culture, much more must we admit the probability of foreign influence in Africa. Here we find extensive despotisms as in America, agriculture widely diffused, and a tendency towards trade and city-life. It is probable also that the negro race is not altogether unmixed, and certain that Arabic culture has been travelling for ages far down into the middle parts of the continent. Other changes, on a great scale by conquests, seem to have been going on without the help of foreigners from remote periods; nations have been mingled with their conquerors or destroyed; others have been expelled from their homes, a remarkable instance of which is presented by the Hottentots, who have no affinities of race with their darker colored neighbors, and are regarded by the Caffres as earlier inhabitants of South Africa, having been, it is probable, driven down in the course of time from the remote north.

Changes of population in early times.

In America.

Africa.

In the negro tribes the government is chiefly a patriarchal despotism, originating no doubt in force, to which the common people submit with most degrading marks of submission. The kings demand for themselves to some extent a veneration approaching to divine worship. Succession to the crown is within the royal family, but chiefly through a female; a sister's son follows his uncle. This is in conformity with a law of inheritance to which we have already had occasion to advert.

These negro kingdoms are not all despotisms. Among the Mandingos the royal power is limited by a council of hereditary nobles. In Bambarra the French traveller Raffanel found a senate consisting of three ranks or classes, and three guilds or something like guilds among the free people. Here, too, a kind of secret union for police purposes existed, the object of which was, it seems, to prevent and punish certain crimes, such as theft and the practice of magic arts. If we may rely on the accounts of travellers, there may be found among the tribes to the south of the Gambia all sorts of polities, democratic and monarchic, oligarchic republics, a military despotism, and others still under a kind of priestly government. Among the negroes converted to Mohammedanism a description of feudalism is general.

The Kroomen or Grebos have a pure patriarchal system.

The Kroomen. In every family or sept a patriarch is to be found, in whose hands every male deposits a part of his property, which thus constitutes a fund, out of which he, as the responsible family head, defrays the expenses, pays fines and the like. The members of his family are so far under his control, that he can send them on journeys, hire them as sailors to captains of European vessels, and receive from them a part of their earnings for the common fund. The family, in short, form a community under his government. The patriarchs constitute a council of elders to whom the management of all political affairs is committed, but the men of the tribe exercise the legislative power with the elders for their advisers. A chief patriarch and a head-



priest are presidents of the council ; these, with the president of the assembly and the general, are the four principal officers of the tribe. Another account speaks of the people as divided into three parts, the elders as above, the warriors, and the young men. Among the Kroomen the soil is common property, but the tiller and his descendants, as long as they cultivate it, have the usufruct. (Comp. § 138, supra.)

These examples may serve to show the variety and apparent want of antiquity in the political institutions of one of the most flexible races in the world. It would not be strange if the patriarchal communities of the Kroomen were not of very ancient origin.\*

The Kaffres and other cognate tribes, reaching obliquely across the African continent from the land of the Zulus in the south through thirty degrees of latitude, to those who speak the M'pongwe language on the western coast, resemble the negroes with some differences. They have adhered to what we must suppose to be their earliest institutions far more than the negroes of the middle, northern and western parts of the continent. Among them a patriarchal system obtains, interrupted by the frequent attempts of Zulu chiefs in modern times to gain large territories by conquest. The sons build their kraals near that of their fathers ; the poor put themselves under the protection of the wealthy as his children—becoming thus incorporated into a family. The tribes are only expansions of families. The rank of tribes and chieftains must be explained by traditions of nearness of blood to a remote ancestor. The feeling of blood-relationship being strong, the hereditary chieftain finds ready obedience to commands conformed to old customs, but meets with resistance when he violates ancient usage. There are differences, however, in the estimation of the chieftain in different parts of the Kaffre race. Among the Betyuanas they have less power than among the more south-

\* For tolerably full accounts of the political institutions among the negroes and other African tribes, see Waitz's *Anthropol.*, ii., p. 128 onw., which I have freely used.

ern members of the race. The Bassutos put a check on their chieftains as well in every tribe as in all inferior divisions of the nation, by associating with them two or three councillors. The chieftains of the people called by this name, give lands to those who are under their protection and receive from them tribute, but the protected persons may leave their lords and the lands at will.

§ 147.

The inhabitants of the Polynesian islands, belonging to the Malay race, although for ages separated from one another, seem to have had a general sameness in their political institutions until the visits of European ships and the teachings of missionaries brought the spirit of change into some of them. Everywhere there is an upper class and a class of the common people, and in most of the groups a third, intermediate class, the owners of land, who, however, do not seem to exist in Hawaii and New Zealand. Captives taken in war and reduced to slavery may be ranked as a fourth. Quite common is a relation like that of feudal chiefs to their vassals, the chiefs being all equal among themselves. A centralized government is also found on Hawaii, Tahiti and Tonga. The separation between the upper class, or nobles, and the common people, was most marked in Samoa and New Zealand; and there is reason to believe that the nobles established their superiority by having the offices of religion in their hands. All the power, all the property belonged to them in the latter island, and the people were without recognized rights beneath their sway. Samoa has had a patriarchal constitution, under which the nobility chose a head of the family to which they belonged; and the heads of the families chose a chief of the village in which they resided. The chief of the district, again, was elected from among the heads of the villages. Several of these heads of districts are spoken of as having had an authority which extended over all the group of islands. The relation of these ranks of chieftains is conceived of after the manner of the patriarchal age, as that of the father towards his children. A village, for instance,

Polynesian govern-  
ments.

without a chief, would be as a family without the protection of a parent. The chieftain had no uncontrolled power, but in every village and district there were assemblies which were convoked by the principal chief; or, if he neglected to send out summonses, were gathered without his intervention. On the whole, the power of the headmen is small. The lands are common property of the family, and the head of the family alone can sell them. If he should act against the will of the family, he would lose his place.

In New Zealand, when it was first known to Europeans, the population was divided among a number of tribes which had no connection with one another. In this respect, says Ellis (iii., 343, of his *Polynes. Researches*), their system corresponds with that which prevails in the Marquesas, where right is unknown, and no law acknowledged but that of power. But others speak of a chieftain whose sway extended over a number of tribes, each of which had also its own special ruler. The reconciliation of these opinions is found in the fact of a change between the times when larger unions than the single tribe were known, and the times when the modern system began to invest the single tribe alone with political importance. The people formed two classes only, the free and the slaves who had been taken in war. An earlier noble class had, at the time of the discovery of New Zealand, lost a large part of their political importance, retaining respect chiefly on account of their religious character. The *maori*, or heads of the tribes at that time, seem to have been similar to those already described, chiefs of families and of districts or tribes, of which one hundred and four are said to have lived on the north island. The constitution of New Zealand has been called a sort of patriarchal democracy, and again, an aristocracy with a feudal character. The myths point back to an aristocratic despotism as the old political form under which, in remote ages, the island was settled.\*

\* Comp. Gerland, the continuator of Waitz, *Anthropol.*, vi., 165 onward, on whom I have principally relied.

## § 148.

Among the nomads of the world the Bedaweens, perhaps, exhibit to us the most genuine traits of early patriarchal life, although even among them the Koran, and intercourse with strangers, must have introduced some novelties and changes. We find among them some very old usages, which are known also to nations of other races, as the *jus leviratus*, blood-revenge, which composition for homicide accompanies, with the practice of plundering travellers (comp. Jer., iii., 2), which must have grown up after the rise of overland trade. The political unit is the tribe, consisting of a number of families dwelling in tents, and forming a body consisting either of one encampment or of a number of tents near one another, occupied by relatives, and by weaker families, who are in some sort under the protection of the more powerful. At the head of the tribes is the sheik, so called originally from his age (like *presbyter*, *senior*, *dcmogeron*), who has, in modern times, nothing more, in peace, than advisory power, and the office of executing the resolutions of the heads of families. In war he leads the host; he also presides in the deliberations relating to war and peace, and to him the entertainment of distinguished strangers belongs. What must have been the prevailing usage of the earliest patriarchal age, the right of succession of the oldest son in the office of head of the family, is by no means a rigid law among the Bedaween. If the son is thought to be unfit for the office, another is selected in preference. Sometimes tribes divide on this point into two. And during his lifetime, if the sheikh shows any special incapacity, the tribe does not hesitate to depose him.

On the southern coast of Arabia (according to Wellsted, i., 287, cited by Klemm, iv., 187), the Dijabi, an association of Bedaween, are divided into seven parts or tribes, each of which has a chief called *abu*, father; but there is no common sheik or sultan. The seven chiefs form a deliberative and executive council; they sometimes

receive their power from their fathers, sometimes are elected on account of their superior abilities, and are responsible for all the thefts committed in their district, even to the point of giving restitution themselves, if the thief has no property.

The Kady or judge has the special office of settling disputes, although the sheik also can act as an arbitrator in this capacity; he is chosen not by the sheik but by the tribe, and is paid for his decision by the contending parties. The parties or either of them, if not satisfied with the judgment, can appeal to other Kadies. A portion of the Bedaween have a judge of appeal or higher instance, who, if he fails to bring the case to a conclusion by the ordinary methods, resorts to an ordeal, which consists in licking with the tongue a red-hot spoon. If the accused does this without injury, he is held to be innocent.

Without a written code, except so far as the Koran is their guide, they have regular fines for specific offences. Blood-revenge is made the duty of certain relatives, and extends to a part only of the descendants of a common ancestor. Composition for homicide may be accepted, but the tribes that adhere closest to their original usages, know little of it. The criminal flees to another tribe until his friends can make a bargain for his safety, or perhaps will remain for life a member of the tribe which has given him shelter.

#### § 149.

The power of religious ideas to unify a collection of tribes and even of nations, which is seen in the history of Israel, of Iran, of the Arabs under Mahomet, is shown in modern times by the state of the Wechabites or Wahhâbites, founded by Mohamed Ibn Saoud, who after his conquests established sheiks in all the conquered districts, over which he was supreme.

If we go back to the period of the history of Israel, when the tribes lived side by side, with no bond of union besides a common religion, common traditions and similar usages of life, we shall find that their political organism was much like

that of the Bedaween, only more compact. The tribes, equal in rights, although Judah and Ephraim had a sort of pre-eminence, were divided into families or clans (*mishpachoth*); these again in some instances into subordinate clans, such as those of the tribe of Manasseh (Numbers, xxvi., 29); these or the main tribe into houses, and these again into separate families. Each tribe had its leaders, who are called in Numbers, i., 16, heads of the thousands of Israel, and elsewhere princes of the tribes or of the assembly. The men who took the census with Moses and Aaron, and who afterwards appear in the book referred to at the head of their tribes, are selected by divine command. How these officers, and others, to whom inferior divisions of the people were entrusted, received their appointments afterwards, we do not find distinctly recorded, although they would naturally be taken out of the number of the heads of houses, or patriarchal chiefs. In times of danger, such as the book of Judges records, extraordinary magistrates are brought forward, who form temporary unions of a portion of the tribes most exposed to danger; and after effecting deliverance from the enemy, are, like Joshua, dictators for life. Their office of judges is especially brought forward in their name *shophetim*, which corresponds with the *suffetes* of the Carthaginians. After the death of one of these judges and rulers an interval of peace may have succeeded, in which there was no common government, and the old loose juxtaposition of the tribes went on. A little later we find lifelong *shophetim* of *priestly* extraction, Eli and Samuel, the latter of whom had much to do with the culture and religious life of the people. The necessities of war now demanded a warrior at the head of the tribes, and the monarchy then established continued as long as the Hebrews were an independent people. Under the monarchy, the tribal system was weakened by a system of officers appointed by the will of the king.

The headmen of the tribes and of minor portions of the people seem to have had at first the duties of police and of administering justice in their hands. The elders of the tribe

or the city are executive officers and representatives of the people in public affairs. In Deuteronomy, xvi., 18, we read "judges and officers shalt thou make thee in all thy gates," a command which points to local courts; and since the elders of a community or town are spoken of elsewhere as concerned in the administration of justice, we may safely say that the courts consisted of these elders (aldermen) or a detachment of them. Where Levites resided, they might share this office with the elders of the place; and to them mainly under the kings belonged this part of public business, on account of their acquaintance with civil and religious usage and law. Appeals "to" the priests and Levites and to the judge that shall be in those days, are spoken of in Deut., xvii., 8-13.

The conquest by the Israelites of numerous cities of Canaan, and their favorable position near industrious communities, as well as near important routes of intercourse, must have tended to the laying aside of a pastoral life in a measure, and to a division of labor. Political changes now become easy. It is interesting to notice that houses in walled cities among the Hebrews, if not redeemed within one year, passed over to the purchaser in perpetuity, while houses in unwallied places went with the land, "being counted as the field of the country" (Lev., xxv., 29-31).

The method relied on for securing permanence of families and homogeneous population in the towns and districts of the country, was that the land could not be alienated in perpetuity, but returned to the family at least after forty-nine years. The laws and institutions of the tribes were conserved by the aid especially of one of the tribes dispersed through the country, to the members of which religious usages and the religious instruction of the people were committed.

### § 150.

The separation of a people into tribes and smaller divisions seems to have been the natural course of things in all the nations of antiquity known to us. The tribes live side by side, now at peace, now quarrelling,

Tribes in other early nations.

never united, except for a time until some religious faith spreads over them, or they are conquered from within or from without. Thus, to use the words of Duncker (*Gesch. der Arier*, p. 18), in the *Rigveda*, "the people appear divided into little tribes, at whose head princes stand called *Viçpati*, that is rulers of tribes or *Gopa*—a word which originally signifies cowherd, protector of cows. The quarrels of the tribes consisted evidently in expeditions for booty and plunder; they drive off each other's herds and fight for good pastures." The Persians, according to Xenophon, were divided into twelve tribes (*Cyri inst.*, i., 2, 5). The Medes, according to Herodotus (i., 96), whatever may be thought of his account, lived not in cities like the Greeks, but in villages or hamlets, when Deïoces made himself their king, aided by the prevailing lawlessness. The same author speaks of the Medes as divided into six tribes, one of whom was the Magi. The Edomites are mentioned in the earliest Hebrew records (*Gen.*, ch. xxxvi.) as under the government of chieftains, of whom a number are mentioned "according to their families, after their places, by their names," where families means a tribe or a division of one. The "kings" of Edom seem to have been elected by the heads of tribes (*Isaiah xxxiv.*, 12).

The divisions of the Greeks and Romans in their early history correspond tolerably well with those of the more eastern nations, whether of the Semitic or the Aryan race. Only the tribes (*φυλαί*, tribus) are of principal importance among the Greeks, while the clan or sept (*γένος*, gens) is, in their political development, of but little moment, but among the Romans is of very great. We see the difference in this respect in their methods of describing individual persons. To the Greek it was enough to give the name of the person and of his father, as Alcibiades, the son of Cleinias, Pericles, the son of Xanthippus, but the Roman Gentile name was always prominent, as Fabius, Furius, Julius, together with the family which formed one of the branches of the *gens*, and the name of the individual himself, to which others might be added on special accounts, as Publius Corne-

Tribes and clans  
in Greece.



lius Scipio Africanus. To these the names of ancestors were added in the fasti for three or four generations. This is connected with the strong family feeling of the well-born Romans, and this again rests on the closeness of the parental relation and the greatness of the father's power, on which the institutions of Rome may be said to have been founded.

The tribes which have passed under our examination have been, for the most part, groups descended from a common ancestor, and probably diffused from some common point over the adjoining territory. The occupation of ancestral territory was secured in one case, at least, by the usage or law of reversibility, at certain epochs, to the family that had formerly owned it. If such connection existed in later Greece between the land and the families to which it was allotted, it does not appear that the territory was so distributed that the *tribes* were confined by local boundaries. The lots or portions of land assigned, according to the received account, to the Spartans at the first, were equal, indivisible, and inalienable, although the old institutions touching property gradually fell into decay; but the tribes, which were at least three in number, as in the Doric states, formed no important part of the new constitution for a long series of years after the Doric invasion of Peloponnesus.\* The little that is known of the *obae*, which answer to the *phratriæ* elsewhere found, is a proof of their small influence in the Spartan constitution. The inferior orders of society in Sparta were determined by the events of the conquest. Those who submitted first formed a protected class without full Spartan rights, and, indeed, had no share in public affairs. The Helots, consisting of such as having offered a stout resistance to the invaders, became serfs, the property of the community.

A change of society is indicated in Greece by changes in

\* Comp. Schömann, Gr. Alt., i., pp. 132, 211. The tribes in Sicyon were four, one being added for such of the earlier inhabitants as were admitted into the state. At Argos, also a fourth tribe, composed of Achaeans, was added to the three Doric tribes. Comp. Müller, Dorer, part ii., No. 5.

the original tribes. Sometimes local or topical divisions were substituted for such as depended on common ancestry, real or mythical. Sometimes the old significance of the tribes faded out, and they were merely political divisions, with no reference to place or ancestry. Sometimes, as among a number of states belonging to the Ionic race, the names of the earliest tribes indicate a caste-like division of the inhabitants, which is scarcely credible. At Athens we find a mention of tribes pertaining to mythic times which are partly local; but more distinct are the four later caste-like tribes, three of which must denote a heavy-armed class, goatherds, and workmen. Of the absurdity here involved, that the heavy-armed class should occupy a district by itself and the workmen another, an explanation is given that the names are derived from the prevailing population in a district; for that they were local is a pretty general opinion. Then the remaining tribe offers peculiar difficulties of its own. The tradition found in Plutarch's life of Theseus (§ 25), that the lawgiver first separated society into the three classes of nobles (*eupatridæ*), landowners and handicraftsmen, can mean no more than that these orders were fixed parts of the community at that remote time. The four tribes were divided each into phratriæ, clans or brotherhoods, and these again into gentes (*γένη*), thirty in number, for each tribe. A division of the tribes into *thirds* (*trittyes*) and *naucrariæ*, twelve to each third of a tribe, has no claim to high antiquity, and was used for convenience in taxation and military arrangements.

The phratriæ are, without question, very ancient. In the Iliad (ii., 362), Nestor gives the advice to divide the host by tribes, of which the Rhodians are arranged into three (ii., 668, 655), and into brotherhoods (*κατὰ φρήτρας*). The phratriæ in the historic times of Athens—for they always subsisted as a division of the people, even after the artificial tribes of Chisthenes had taken the places of the older tribes, had in later historic times more jural than political importance. It was a rule for a legitimate, native-born citizen to be inscribed on the register of these bodies in one of the stated assemblies,

when the father swore that his child was born in lawful wedlock, made an offering to the tutelary divinity of the *phratriæ*, and gave a feast to his brethren. Adoption was legal only under similar formalities, and newly married men introduced their wives to the *phratores* with like festivities. Perhaps, also, the sons of heiresses and orphans were required to have their jural capacity examined in their *phratriæ* before they could manage their property. These bodies were thus protectors of the rights of family and kindred; they had their ancestral gods; and the feast of *Apaturia*, which was common to all the Ionic race, belonged especially to them. It is interesting to find that the *phratriæ* were concerned, according to very ancient laws, in the blood-revenge then usual, and in remitting the punishment of the man-slayer. (Demosth. c. *Macartat.*, 1069.)

The *phratriæ* and the later local districts of Athens, the *demi*, are of much more public importance than the *γένη* or family communities, which all had a common family worship, and stood in the order of succession according to their relationship within certain limits. They probably had registers like the *phratriæ*, but little is known of them.\*

### § 151.

An ancient tradition of Rome divides the new inhabitants into three tribes, a frequent number to which we are indebted for the word *tribe* itself. These three tribes, about the meaning of whose names the Latin writers are in the dark or follow very questionable etymologies, may have belonged to three different nationalities—the Romans to a Latin, the *Tities* to a Sabine, and the *Luceres* to an Etruscan origin; † or the city may have arisen out of a joint settlement of Latin and Sabine elements; the former including two of the tribes, the latter only one. This joint settlement

\* Comp. for Athens, Schöm., u. s., i., 319, 365, K. F. Hermann, *Gr. Antiq.*, i., §§ 99–101, and Meyer *de gentil. Att.*

† So Schwegler *Röm. Gesch.*, i., 504 onw. But see Mommsen, *B.*, i., ch. 4, 5.

Mommsen compares to the *synœcismus* of the Greeks, when two or more villages united to form a walled town, or at least had one senate-house and place of judgment. The tribes had each a tribe-master or tribune; the ten curiæ which composed them, a *curio* each; and consisted each of ten gentes. The curia had its common sacred rites, its especial *flamen*, or priest, its presiding divinity, and the thirty together represented the original people of Rome,—those out of whose number the senate was taken, and who gave their votes in the comitia of the curiæ.

There are authorities for regarding the Attic *γένος*, answering to the Roman *gens*, as not related by birth nor of the same blood, but so called from the religious rites which bound them together.\* This seems to me to be very inconsistent with other facts. They were called *ὁμογύλακτες* or milk-brethren. The phratriæ, themselves, to which the gentes or houses belonged, wear evident marks of blood-relationship. Niebuhr had the same view of the Roman gentes, that in the institution the principle of a common descent was not controlling, but that persons having different ancestors were united together under a common Gentile name. So Cicero conceived of the matter, but Varro regarded them as a blood-union. This latter opinion in itself is far more probable, when we consider the extreme closeness of the family tie, and that the name must have been used in the first instance to discriminate between those who had different ancestors. We may suppose the *curiæ* to be artificial political divisions in which the gentes were united who had no agnation; but the gentes themselves or clans were the communities sprung from a common ancestor, who lived together or near to one another; out of whose junction, as Mommsen justly asserts, the Roman community arose. In these clans there were already different classes; those who recognized each other as being of the same blood; and the dependents or clients, an inferior class but higher than serfs, who cultivated the lands,

\* See the authorities in Schwegler, i., p. 612.

were called by the same name with the original members of the clan, and in process of time were merged among the plebeians. The clans formed the original nucleus, to which, in various ways, plebeians were added,—men without membership in a clan, exiles, fugitives, strangers engaged in commerce or some handicraft,—who put on, to a degree, the forms of the old patrician relationships, but did not belong to the old people which originated the family spirit of the Roman state. The gentes or clans had their peculiar sacred rites, their especial objects of worship, images of their ancestors; and, forming an upper class, for a long time controlled the state

§ 152

The examination of the communities out of which states proper have grown up, may be concluded by the following brief summary of results.

Summary in regard to the primeval condition of mankind.

1. All the divisions of early society rest, for their basis, on the family union. Almost everywhere appear traces of common property, of a time when the land was thought to belong to all, and when there was no division by inheritance.

2. There was little need of any other state of things, in the nomadic form of life; and the community feeling would continue, when that condition of life was passing over into the agricultural. Cattle even then could be pastured together on common lands; the fields might be tilled in succession by the heads of families; but in the course of time there could not fail, in many parts, to arise separate property with separate family abodes. This, wherever it was introduced, denotes a new organization of society, which must require new political forms, sooner or later.

3. In every ramification and extension of a community, some government or magistracy for settling disputes, some council and head in war, would be a social necessity; and these all would partake more or less of the patriarchal and paternal power.

4. A common language, common traditions, the same religious rites and faith, would be bonds of union within certain

tribes and in certain districts, so that those who had scarcely any need of confederating in peace, would be able to unite in war.

5. With the exchange of commodities cities would arise ; and these might become the centres of great states formed by conquest, which states, by binding together large territories and a multitude of tribes, did an essential service to mankind.

6. The tribal division and others subordinate to it, derived from original consanguinity, appear in all those city-states of the world, from which our culture is mainly derived. Those who were united by blood would be also settled, at first, within the same district or in the same village.

7. Distinctions of classes might grow up, as in historical times, from conquest, from descent, which would be aided by mythic narratives of the ancestors of certain families, and by personal qualities of leading men in war or in peace.

8. It is altogether probable that each of the races which constitute the leading divisions of mankind, had each its own traits and religion before they formed separate communities and entered on a series of emigrations. It is assumed by Mr. Fustel de Coulanges, in his *Cité antique* (p. 138, ed. 5), that "the gods of physical nature" were later objects of worship than deceased ancestors, who would be different for different tribes and clans. Whatever may be said of early worship and faith, which is a subject lying aside from our present course of thought, it is certain that the whole Aryan race had common objects of worship and a worship of nature before they left their original home. At least the god of the clear sky and the daylight belonged to the religion of Greece, Rome, Germany and Scandinavia, as well as to that of India, and was superseded as a principal divinity in the two latter countries and probably in India also. It is natural, when a common feeling of race arises in a part of the world, that the leading objects of worship should be common ; but it was not strange, when a part of a race that is separated from the rest gives itself to a certain mode of life more than before, that new

protecting divinities should usurp the place of the older gods. We must regard the influence of religion in moulding new societies as subordinate to the causes which determine the modes of life and divisions of a people. The outer world, the needs of life, the necessary unions, are positive forces; religion is a restraining force.

9. Differences of religion, mutual fear and suspicion, actual distances with difficulties of intercourse caused by mountains and rivers, separated mankind, and made it easier for differences of dialect to arise when there had been a common language before. Every separate portion of a race developed itself now by new causes as well from within itself as from changes in external condition, and endless varieties of men of the same race appear.

10. Conquest now mixed races, produced political unions of different peoples against their will, and promoted intercourse between distant points, so that commerce, industry, compact settlements, enlargement of knowledge, would be promoted by this violent method. But city-life, although to a degree following conquests, was not originated by conquests.

11. Amid all the causes of difference in the human race, it is remarkable to how great a degree there has been a uniformity at the same stage of civilization, in institutions, even in some which are now regarded as unnatural; and how government, especially in its varieties and changes, represents changes in society of which it is full as much the product as the author.

### § 153.

We now have reached the stage of development when the building of cities introduces an era in the history of political institutions. Cities flourished and abounded in Palestine, wherever the Phœnicians and Greeks dwelt, in middle and southern Italy, to say nothing of more eastern parts as India and China. The notion of a city implied a fulness or a crowd of people and fortifications

Rise of cities.

for security against enemies.\* In the Hebrew scriptures, the walls, gates, and bars of cities are mentioned more than once. In the dominions of Og, king of Bashan, there were three-score fenced cities, some of which now excite the wonder of travellers. These walled places are expressly distinguished in the account of the conquest from "unwalled towns a great many" (Deut., iii., 4, 5). In the book of Joshua we read of the conquest of thirty-one city kings (ch. xii.), and the walls of several of these places are spoken of (vi., 20, vii., 5). In Greece before the composition of the Homeric poems, walled towns appear, many of them in the "catalogue" (Iliad, ii.), and Crete is the land with the hundred cities (Il., ii., 649). The fortifications of Troy, of Gortys, of Tiryns and others are spoken of by Homer. Those of Tiryns are now among the oldest remains of Greek antiquity. Mycenæ still shows ruins of very great age; and indeed it may be said, in general, that all the towns which controlled the surrounding country, and where the headmen of the state dwelt, had the protection of walls if not of fosses. In Italy the same usage had spread itself before the foundation of Rome, if the antiquity of existing ruins has been correctly estimated.

But why was this town life adopted by Semitic and Indo-European nations on the Mediterranean to so great an extent? As long as pastoral pursuits mainly occupied the inhabitants of a territory, there was little motive for walls of defence; but when agriculture was the principal employment, or at least divided the labors of a people with the care of flocks, there was need of places of protection against marauders, where women and children could be sheltered, grain could be stored, and flocks shut in on the alarm of an invading force. Of the

\* The Hebrew name for city, seen in the name Kirjath-Arba, etc. denoted either something *framed* or built, or something *fortified*. Another word of wider sense, צִיָּר, may have signified at first a "place of watch or guard." (Ges.) πόλις and *pur* in Sanskrit, according to G. Curtius, belong to roots denoting fulness. Urbs has been connected with *orbis*, as if at first it was the *circuit of the walls*; and oppidum has been derived from *ob* and *pedum*, as if it denoted guarding the field. (Curtius, p. 84.)



Cyclopean remains in Italy, some seem to have been not permanent abodes, but refuges of this description. The necessities of protection against hostile incursions ere long made these walled places a residence for an upper class, who cultivated their grounds by means of slaves or clients; then artificers, merchants and others were added; the cities became the seats of the religious rites of the district; and last of all a number of unwalled villages were artificially united into a large town for political and military purposes. In this way was Megalopolis in Arcadia founded in historic times, to be a bulwark against Spartan control over Arcadia.

If these thoughts in regard to the first reasons for the foundations of cities should be deemed to have any justice in them, it will follow that cities were built for present wants, and not with the foresight of some further needs of a more civilized condition. Then the utility of defended places brought men together, and while the same divisions of society remained as before,—the tribes, and clans, and families,—the action of the city dwellers on each other, together with the city's adaptation to become the seat of power for the king and the well-born, by producing alertness, inventiveness, increase of knowledge, gave to it a superiority which extended in time to the political sphere, and secured to the city the superiority over the country. The city-life, however, was not universal, nor were the cities always fortified. Thus Sparta continued without walls until the Macedonian period.

## CHAPTER II.

### FORMS OF GOVERNMENT.

#### § 154.

FROM this brief sketch of the early institutions of man, we pass on to consider the forms of organization which societies of men assumed at a later period. In the earlier times the progress was not so much voluntary and caused by reflection as the result of the laws of man's condition and of the accidents which might befall him. Now he becomes in a greater degree the master of his condition, he criticises and analyses, he seeks a better constitution, he shapes his own governments in a degree, he resists grievances and plans changes. Divisions of society into classes, ranks or castes, have begun to exist, perhaps, before the "political animal" is made aware of his power; but henceforth nature alone does not build up governments for him; he now builds with the help of, or it may be against, nature.

It is our plan here to attempt with the help of political theorists and historians to classify and describe the various forms of government, and to give such illustrations of each of them, as may show how they express themselves in the states where they have been organized.

A very early division of governments made by the Greeks into monarchies, oligarchies and democracies Divisions of governments. appears in Herodotus (iii., §§ 80-83) where he introduces the Persian princes, after the slaughter of the magi, as deliberating, like a school of philosophers, on the best form for their country. The same distinction is made Aristotle's divisions. by Æschines (vs. Ctes., § 3, vs. Timarch., § 2), and no doubt was current and familiar. Aristotle in the Politics accepts this division, as in Polit., iii., chap. 5, § 1, where he says that "the government and constitution being

identical and the government being the supreme master of the state, it must needs be that this master be an individual, or a minority, or the mass of the citizens." But Aristotle goes on to draw a distinction between governments where the ruler or rulers govern for the general interest, and those where they govern for their own interest. Thus there arise six forms, three pure, and three corrupt or diverted from their true end. The names given to the forms where the common interest is aimed at, are royalty, aristocracy and republic (*πολιτεία*); those given to the forms in which the ruling power aims at its own interest are tyranny, oligarchy and demagogy. The oligarchy has for its object the special interest of the rich, the demagogy that of the poor, the *tyrannis* that of the one ruler; and none of them, the welfare of the community. In this passage Aristotle calls the degenerate form derived from the republic demagogy, but rarely makes use of this term. (Comp. vi. or iv., § 2, 1, 2).

Plato's division of governments is on another plan. As the government depends on the character of the people, there are as many kinds as there are different characters of men. To the men of best tempered character the *aristocracy* answers. Next to this in a descending scale comes the *timocracy* of which Sparta and Crete were specimens, corresponding to the man of ambitious and contentious spirit. Below this and growing out of it is the *oligarchy* founded on advantages of wealth, and similar to the avaricious man in spirit. *Democracy* is the next step downward and is represented by the man of unrestrained desires. Farthest off from the perfect commonwealth is *tyranny*, which grows out of the license of unrestrained freedom, and is supported by and leads to all kinds of crimes. Both in this view of the connection of politics, and in Aristotle's classification of the original forms and the corresponding degenerate ones, we find the true principle that governments must change with a change in the character of those who constitute a society, and in their relative conditions of life. (Plat., *Repub.*, viii., 547 onw.)

Polybius has given us in his sixth book a theory of the forms and transitions of politics suggested possibly by the passage of Plato's Republic just now referred to. In the infancy of society, as he teaches us (vi., § 5 onw.), it is necessary that he who stands foremost in bodily strength and physical courage should have sway. This he calls *monarchy*. Monarchy is succeeded by *royalty* (*βασιλεία*), when the ruler follows the rules of justice; and, instead of courage and brute strength, reason has the predominance. It has permanence, "because men believe that not only the rulers but their descendants, brought up by them, will have the same aims and character. And if at any time the people become disaffected towards the posterity of these monarchs, they will make a choice afterwards of kings and rulers no longer according to qualities of strength or courage, but with reference to superiority of sentiments and reason; while the race of kings, placed in the midst of pleasures and luxuries, will degenerate until they become *tyrants*, instead of kings, and this degenerate form of government by a single man is at last overthrown not by the worst class of society but by the best, the most manly, magnanimous and courageous. This is the origin of *aristocracy*. For the people, returning favor to those who overthrew the monarchs, make them their leaders, and commit to them their affairs. They, on their part, at first regard nothing to be more important than the public interest; but their children, "being without the experience of misfortune, and altogether without the experience of political equality and freedom, addicting themselves, some of them, to avarice and covetousness, others to drunkenness and immoderate feasts, others to indulgence with women and boys, change the aristocracy into an *oligarchy*," and speedily cause their own subversion, as the tyrants did before them. "The people now, having put these to death, do not dare any more to set a king over themselves, through fear of the injustice of the early monarchs, nor to entrust public affairs to a number of persons; so that, their only hope that is left unimpaired being in themselves, they

make the government a *democracy* instead of an oligarchy. So long as any of those who had had experience of what prominent position and sway were, remain alive, they are content with the existing constitution and value most highly freedom and liberty of speech. But when the democratic institutions are handed down to new generations, they cease, through the force of habit, to value as before the public liberties, and seek to have more than the masses. Especially do those who are the wealthier fall into this spirit. Then comes on a strife for power, together with bribery and corruption of the common people; by their eagerness for distinction they make the people greedy of gifts and ready to take bribes; and thus the democracy is dissolved, and gives place to violence and the law of force (*χειροκρατία*). For the common people, having become used to devour the goods of others, and to depend for their living on their neighbors' property, if they can find a high-spirited and audacious man for their leader; since they are shut out from the prizes to be gained under the existing form of government, will make use of the law of force in its full measure, and in their assemblies will decree death, exile, divisions of land; until becoming savage again, they again find a despot and a monarch. This is the revolution of politics, this the natural arrangement, according to which forms of government change, pass over into others, and again come back to their old condition."

We will make, at present, no criticism on this cycle of changes,—which, if it were in accordance with a necessary law, would afford a most hopeless prospect to the world,—except that the genesis of tyranny is contradicted, as far as Greek history is concerned, by facts with which Polybius must have been familiar. The earlier tyrannies were not the sequel of the *basileia* or moderate and just monarchy, but sprang out of the strife of aristocratic factions; and those of later Greek times were caused by aspiring men who kept troops in their pay. The leading ideas of Polybius, the three simple forms and their degenerate copies, and the necessity of changes

arising from moral and social changes, had been established in Greek thinking long before he flourished.

§ 155.

Besides this classification, another had considerable currency among the later Greeks and the Romans,—that Simple and mixed forms. into simple and mixed forms of government. Plato shows, in an interesting passage of the *Laws* (iii., 691–692), that the mingling of institutions had occurred to his mind. The early kings, he says, through cupidity, sought to be superior to law, violated their oaths, and destroyed their own authority. The legislature of Sparta endeavored to temper this power of one man by mingling other elements with it. *First*, providentially, the line of kings was divided into two reigning together, and thus the royal power was moderated and contracted. Then the wisdom of old age in the *gerusia* was mingled with the self-willed strength of a royal family. Finally, the power of the *ephoroi* was put as a bit into the mouth of the vehement and impetuous sovereignty. Thus royalty among the Lacedæmonians, becoming mixed with the proper elements, and reaching the due measure, saved itself, and became the cause of safety to other states. Here Plato may have looked on the senate as representing an aristocracy, and the ephors as representing the people; or, perhaps, he only goes so far as to regard these institutions as checks like the double line of kings, without having any distinct notion of a mixed government.\*

\* It is worth while to compare these opinions of Plato with the severe criticism that Aristotle passes on the institutions of Sparta. The remissness of the laws in regard to the women (which Plato also notices, in the *Laws*), the consequent unrestrained love of wealth, the inequality of estates, the institutions of the *ephoroi*, the puerility of their election, the far from perfect organization of the *gerusia*, some characteristics of the kingly power, the common repasts, the evils attending the naval service, the undue development of the war-spirit, the management of the finances—each of these points has a black mark put upon it. Sparta had greatly declined before Aristotle wrote, and perhaps he was not the man to give due weight to

Aristotle does not seem to have attached much importance to mixed systems of polity, yet in one place, at least, he shows himself familiar with the notion. He says (*Polit.*, ii., 9, §§ 2, 3), that "some persons regard Solon as having proved himself an excellent legislator, in that he put an end to an oligarchy which was absolute, and freed the demus from servitude, and established the democracy of the country by a good commingling of institutions. For, as they say, the council of the Areopagus was oligarchical, and the election of the magistrates aristocratic, and the constitution of the courts democratic." The thought is thus shown to have been before his mind without having made much of an impression on him. Others also had entertained it before him.

Polybius, however, expresses himself clearly as to the importance and excellence of mixed forms. He says that most writers have mentioned but three forms of polity, *basileia*, aristocracy and democracy; but that, in his opinion, one might reasonably ask them whether they name these as the only or as the best among the governments. In either case they are, as he thinks, in an error. "For it is plain that the polity which is composed of all these different ones must be considered as the best. For of this we have had proof not in simple theory but in fact, as Lycurgus first established after this fashion the Lacedæmonian constitution." This thought, which probably came from Plato, is to be traced in the later writers. Thus Dionysius of Halicarnassus (vii., 55, p. 1440), makes a Roman, who is arguing for admission of the plebs into greater participation in the government, say, that this would preserve the freedom, strength, and inward peace of the state," and that the form of polity which administers public affairs should not be an unmixed one—oligarchy or democracy—but the constitution which is compounded of these would be of benefit above all things. "For every form

what was good in the constitution. To Plato Sparta recalled the attractive qualities of heroic Greece, and he contrasted her forms with the extreme democracy of Athens. (For the license of women at Sparta *Comp. Plat. Laws*, i., 637 C, and Stallbaum's note.)

of constitution most readily breaks forth into outrages and lawlessness when it is simple and stands alone ; but, when all things are duly tempered and mingled, that element which moves aside from its place, and goes out of the wonted order is held in restraint by that which is sober-minded and continues true to its own habits." Cicero repeats the same thought. In the republic (i., xxxv., 54), Laelius asks Scipio which of the three simple forms he most approves of. The answer is, "recte quaeris quid maxime e tribus ; quoniam eorum nullum ipsum per se separatim probo ; anteponoque singulis illud quod conflatum fuerit ex omnibus." He then adds that, if any one simple form is worthy of being accepted, it is the kingly. A little after he adds that "while the royal form is far the best of the three, that form is better than the royal which is composed of the three best kinds of commonwealths by an equalizing and tempering process. For it gives pleasure when there is one prominent and regal element in a commonwealth; another department; assigned to the authority of the principal men and some affairs, reserved for the judgment and decision of the multitude." This constitution has, he thinks, a certain equability (or equal respect for the claims of all elements of society), and has firmness also, because the three simple *forms* turn into the contrary, vicious ones, so that a master can grow out of a king, a faction out of an aristocracy, a mob and reign of confusion out of a popular government ; and also because the *kinds* of government often give place to one another ; while such changes can scarcely happen, without great mistakes of the chief magistrates, in this composite form of commonwealth which grows out of a union and duly tempered mixture of the several simple governments." Tacitus agrees with him in liking a mixed form of government. "All nations and peoples," says he (Annal. iv., 33), "are ruled by the people or by the principal men, or by individual persons. A form of commonwealth, constituted out of these by selection and union, can be praised more easily than it can come into existence, or if it exists it cannot be lasting."



## § 156.

The division of forms proposed by Aristotle, with the addition of mixed governments, by which a new class was introduced into political theory, has remained and has been adopted for the most part by modern writers. Montesquieu's divisions. Montesquieu, however (B. ii., ch. 1), constitutes three species—republican, monarchical and despotic. The first is “that in which the body or only a part of the people is possessed of supreme power;” the second, “that in which a single person governs by fixed and established laws;” the third, “that in which a single person without law and without rule directs everything by his own will and caprice.”

Here we find two serious defects of definition. *First*, two forms, democracy and aristocracy, are included together under the head of republican government which are different in nature and in spirit. Montesquieu admits this difference by treating of the laws naturally arising in the two apart, and by attempting to show that the principle or conserving quality is unlike in the two. Surely the contests which ran through Greek and Roman history, the hostilities and intestine wars to which they have led, are enough to show that men have felt that the two do differ materially in regard to the question of the supreme power and to the political rights of citizens. Again, would not the definition of tyranny exclude almost all the governments of the world from this category? Where does a single person without law or rule direct everything by his simple will and caprice? Is there not almost everywhere in despotisms some body of men, some code of laws, some religious faith and habits, that serve for an effectual check on the ruler's will in many particulars, so that he is afraid, or unwilling on other accounts, to act according to his caprice? We are wont to call the later Roman empire a despotism. Yet here the *laws* were to a great extent as fixed as they can be found to be in any other form of polity.

Montesquieu seems to have made the class of mixed governments of little account, for so far as we have observed he

never mentions it. And indeed, logically, there can be no such thing as a mixed government, if governments differ by the number of persons in whose hands the power is placed. If it is placed in one man's hands and that is essential to the species, this fact must exclude the sway of a part of society, or of the whole. A mixed government is thus an impossibility. It may however be taken to mean a government where all the powers of society are made to unite in carrying on affairs together in such a way as to restrain and modify one another, so that all the advantages which either kingly or aristocratic or popular government could have, are combined ; each power is represented ; and the excesses or other evils from the selfishness and narrow views of a part are curbed by the influences of the others. Something like this seems to have been the notion of a mixed constitution as in the familiar remark that the sovereign, lords and commons of England, the three forces of the constitution, are checks on one another. Montesquieu was alive to the eminent excellences of this constitution, but he did not find any ground for placing such tempered governments under a rubric by themselves. And it may be doubted whether the modern term "limited" as opposed to absolute does not express all that "mixt" denoted, while it avoids some of the inconveniences of this latter word.

#### § 157.

Here perhaps it may not be without use if we enter somewhat more at length into a discussion of the Criticism of terms. meaning of the terms that are used when the classification of politics is under consideration. And first it is to be remarked that an *absolute* government may be such *in the powers granted by its constitution* while it is not absolute *practically*. Almost every state so designated contains forces of society actually at rest which the despot fears to put in motion, and his councillors must decide for him how far he can go without danger in levying taxes or attacking institutions cherished by the people. His advisers and ser-

vants themselves impose a check on him as has been said, and if they think alike can carry their measures against his opinion. The religious element in the state may be such that no one will venture to oppose it, so that compromise, or craft, producing divisions in its ranks, will be resorted to by the absolute ruler, lest the people join their religious guides. Fear, too, of personal violence from courtiers or leaders of the army will be a motive to him if he listens to the voice of history. So also there may be no constitutional limit on power, and yet the sense of right awakened in a people will impose a check on the despot and on his advisers. A ruler of this description in modern times, since the belief in individual rights has become generally admitted, would not dare to do what could be done in Oriental countries, or in the Roman empire, or even in the reformation period when it was taught that the subject had no property of his own, but everything belonged to the sovereign.

In the same way an absolute aristocracy can scarcely avoid producing divisions in its own ranks, or exciting the people, when these have acquired wealth and intelligence, to rebellion and to attempts to overturn the government. An absolute democracy differs from the other absolute forms in this, that there is no other element besides the people in the state. If we define it as the constitution under which the will of the people for the time can be expressed in public measures, without any check giving room to soberer thought or formality of discussion, or requiring more than a majority to sanction a law; or, which is the same thing in the end, as the constitution under which the demagogue plays the same part as the tyrant in a monarchy; there cannot fail to be parties growing out of differences of wealth or some other difference, and one of these parties will be the object of the absolute will of the other. A modern absolute democracy will not overturn the *principle* of equal rights, or in its theory of government intend to overthrow it. But this absolutism itself, by making the will of a majority the supreme rule, must end in a tyranny over the individual.

In using these important terms, we ought to see that we do not confound the absolute character of a constitution with that of the practical government under the constitution. Even the most absolute government may be controlled by old constitutional habits ; or an unmitigated despot may happen to have a mild character ; or public opinion in the nation or in his ministers may make it dangerous to follow his own will. In estimating a particular government we must not judge it by its constitution only, but must ask what checks from classes or orders in society, from want of concentration of power or the like, prevent the absolutism from showing its perfect work in the management of affairs.

It ought also to be remarked that the origin of government does not enter into the estimate of its form. If the actual polity, whether tyranny or free democracy, is introduced by force of conquest, it is no other in its type than it would be if the people had created it. Or if it had started from a very imperfect form and by gradual growth,—in the most desirable of all processes,—had eliminated one evil of its constitution after another, and had engrafted successive improvements, suggested by experience and by new political wisdom, its beginning certainly gives no rule for judging what it is in its end. A state may have a progress towards decay and degeneracy, or towards higher forms of political life. At each epoch of marked change it must be of the same class with other states of the same kind, which had always remained true to their early character, if any such there can be.

The term “ *mixt* governments or polities ” can only mean that there are several distinct elements in the state, each of which is invested with a certain amount of political power, which it can wield for its own protection or for thwarting the ambitious and encroaching designs of another or of the others. There may be and indeed there are states where several orders exist, three or four, including the reigning house, but where the monarch has all constitutional power ; and the orders may be without rights of a political kind. These are simple, absolute governments. Now suppose one or more of them at

some crisis to gain the right of meeting as estates and of voting their own taxes. Here a certain kind of division or mingling of power is introduced into the constitution, which is a check or limit to the formerly absolute sway of the monarch. But the control is, of course, not everywhere the same. In some states it will be small in extent, and administration, for instance, will remain chiefly as before. In others, it is large enough to serve as a starting-point for acquiring a greater share of power. All mixed governments, being constructed on the scheme of a balance of power, have a certain instability or tendency to change, which is due to the changes in the condition of society.

The term "mixt" is not altogether a happy one. A state may be so called where there is no tendency toward one form more than another, where the elements are in chemical union; and a second state may have its elements mechanically mingled. In all modern states of this kind there must be an adjustment of the powers of society, but it will be on different plans and with different degrees of power assigned to the orders or forces. One will be called a monarchy rather than an aristocracy, another may have a strong popular element, another may attempt to maintain an equilibrium among the elements; thus there may be as many mixed governments as there are simple.

The word "*limited*" has a wider signification. It may apply to any constitutional provision or any old institution, by which power is prevented from passing beyond due bounds, from acting out its will otherwise than according to law. Limits, as we just now saw, may exist practically in an absolute monarchy; they may exist in a democracy where neither king nor aristocracy exist. They may be old institutions which have survived many changes of political order and are now a part of the national life. They may control the power of all the departments of government and of all public offices. They may appear in the mutual check of departments upon one another. They may take the form of constitutions.

In modern times "constitutional" governments have been introduced into a multitude of nations in and out of Europe. The word constitutional may denote the definition on paper of any forms whatever, collected into one body, or the fundamental laws not collected into a kind of code by themselves; and a tyrant or an extreme democracy may have a paper constitution as well as any other holders of power. But as the cry for constitutions was dictated in Europe by the desire of having some form of polity not subject to the will of a ruler or a ministry, in which the rights of a free people could be defined, and some political stability be looked for; the constitutional monarchies that arose after the French revolutionary have all been framed, although somewhat imperfectly, in the interests of freedom; and they contain for the most part, in order to secure the safety of the monarchs, the provision of the responsibility of the ministers of state.

#### § 158.

In another place we have commented upon a celebrated Spirit of govern-  
ments. passage of Montesquieu, where he makes a distinction between the nature and the principle of governments; fear, honor, moderation and virtue being, as he thinks, the principles or acting powers of despotism, monarchy, aristocracy and democracy respectively. Here we make the remark that the *principle* or spirit of *two governments* which pertain to different species of polities may be *the same*,—a remark for which, if we mistake not, we are indebted to Aristotle. Thus the three forms which he regards as deviations from or corruptions of the simple forms, that is tyranny, oligarchy and extreme democracy (demagogy, ochlocracy), resemble each other closely in more than one respect, as the Greeks learned from experience. The latter tyranny of Greek history was the sway, to some extent, of popular leaders, who were enabled, by gratifying the whims and hatreds of the people, to become their despotic rulers. So the history of the Italian republics furnishes us with examples of *condottieri* who came to the chief power with the

favor of the lower populace. Thus the tyranny and extreme democracy were alike in their spirit. An oligarchy again may be not so much a corruption of an aristocracy as a combination of leaders of a democracy for common purposes. All these corrupt forms agree in the spirit of lawlessness and disregard of the general good, and in endeavoring to crush parties composed of the wealthier or the more intelligent classes.

The distinctions between governments do not end with the number of persons actually in power, or with the character of the governments in relation to freedom or the want of it. Within each species there may be found differences due to some historical cause, to religion, education, state of civilization, isolation or intercourse, and to other conditions, among which physical ones may have some influence, but less, we believe, than Montesquieu and others have imagined.

In the *Politics* of Aristotle the principal minor differences within the main forms are the following. Minor differences in the same kinds of polity. Among the varieties of kingly government, he names first that of Lacedæmon, which is of all the most legal or constitutional, and not absolute; the kings having the leading control only when engaged in a military expedition outside of Spartan territory and in matters pertaining to religion. They have the power of life and death only in the heat of battle. This sort of kingship which may be hereditary or elective, is but a lifelong military command. (iii., 9, § 2). Aristotle's classification of varieties in the leading forms. It might be added that the contemporaneous lines of kings distinguish it from literal monarchy, and that the *ephoroi* controlled the kings in war during the later periods of Spartan history. Next to this sort of kingly government he places that which was to be met with among some of the barbarous nations. In all of these kingdoms the supreme power was like that of the Greek tyrant in extent, and yet was *legitimate and hereditary*. The despotism of this sort of monarchy is endured by the Asiatic barbarians without discontent, as they are more servile in their nature than the

barbarians of Europe. So also the guards are such as surround a king, not those of a tyrant, being composed of armed citizens and compatriots, and not of strangers. A third kind of monarchy is that indicated by the Greek word *Aesymnetia*, which was a sort of elective tyranny, differing from the barbarian monarchies not in being illegal but only in being *not hereditary*. But the *Aesymnetæ* held their office in some states through life; in others for a certain time or until a certain object was accomplished. Such a one was Pittakus one of the seven wise men, whom his enemy, the poet Alcæus, called a tyrant. This kind of supreme magistrate has been often compared to the dictators\* of Rome and the Italian states, who were a temporary renewal of the earlier kings. The *fourth* species of monarchy, among those mentioned by Aristotle, is that of the heroic times, constituted by the will of the cities, hereditary by law, conferred on public benefactors, and in functions limited to the command of the armies, the offering of sacrifices in cases where priests' services were not necessary, and the decision of disputes between man and man. By degrees this kind of kings lost their attributes by their own resignation of them or by act of the people, until they were reduced to the office of performing certain sacrifices, and—"where it was proper to say that a king existed,—to the command of the armies beyond the borders." The *fifth* species is when one is master of all things, and resembles in power the head of a family. This and the Spartan species may be said to be the two kinds properly so-called: most of the kinds, which have less power than this and more than the Spartan, lie between these extremes. Thus

\* Comp. what T. Mommsen says of the dictators, their resemblance to and differences from the kings at Rome in his and Marquardt's *Handbuch d. Röm. Alterth.* (Röm. Staatsr. ii., pp. 150-155). See also E. Curtius, *Hist. of Greece*, transl. I., 266, Am. ed. G. Curtius, *Gr. Etymol.* Ed. 4, p. 706, derives this word from *αἶσα*, due portion, equal share, and *μνάσμαι*, one who is mindful of, or cares for the restoration of political equality. It is thus something like *hieromnēmōn*, the man who is mindful of sacred things, used especially of the deputies sent to the Amphictyonic council.



Aristotle comes at last to absolute and limited monarchy (iii., 9, § 3-10, § 2). The absolute he calls *παμβασιλεια*, where the king rules according to his will (iii., 11, § 2), and condemns it when compared with the sovereignty of the law. "But when a whole race or a single person far excels the rest in virtue, then it is just that this race or this man should have the royal power. It is not just to ostracise such a one nor to demand a government passing from one to another by turn. Such a one ought to be obeyed and to be master, not in his turn, but simply master" (iii., 11, § 12). Thus while distrusting the hereditary principle (iii., 10, § 9), and condemning absolute power as contrary to nature, he makes an exception for the kingship of the hero.

Among democracies Aristotle's *first* class is a constitution where equality prevails, that is where the poor shall have no rights more extensive than those of the rich; where neither shall be sovereigns but both be alike such. *Next* to this he places that democracy, in which office depends on assessed property small in amount, so that those who fall below this limit shall not have a right to be elected. In a *third* species, all the citizens whose status is undoubted (or against whom the state has no unsettled accounts) can partake of power and office, but the law still remains supreme. In a *fourth* all, if only citizens, share in the polity, but the law is sovereign. In a *fifth*, under the same conditions, the multitude and not the law, is sovereign. This takes place when acts [passed by the assembly of the people] and not laws only [passed in a more formal way] have a decisive voice. This is owing to the demagogues. But in the city-states which have a democratic constitution *under law*, there is no demagogue, but the best men among the citizens are in the presidency of the assembly. Demagogues show themselves where law is not sovereign. "The people then becomes a veritable monarch, one composed of many; for the many are sovereigns, not each individual in particular but all together." "Such a people, being a monarch, seeks to play the monarch because it is not governed by law, and becomes despotic, so that flatterers are

held in honor. And such a people is analogous to tyranny among the governments controlled by a single man. They have the same character, but are despotical toward the better class of citizens." Thus the last democracy described by Aristotle, is *absolute*, above the law, really governed by those who pretend to obey its will, the tool of demagogues (vi. or iv. 4, § 2-6).

The kinds of oligarchy as enumerated by Aristotle are four. Under the *first* form the poor, although they may be the majority, cannot attain to power because the suffrage qualification demands too great an amount of property. "Another kind exists where the assessment required for holding office is large, and the magistrates co-optate others into vacant places. If, however, they make a choice or co-optation out of all the qualified citizens, this seems rather to be aristocratical, but if from a certain restricted number, then the oligarchical characteristic appears. Still another sort of oligarchy is when a son takes his father's place in public office." A *fourth* species unites to this hereditary privilege that the rulers and not the law shall be the controlling power. "In oligarchies this form corresponds to tyranny among the forms of monarchy as well as to the last mentioned among the democracies. This kind of oligarchy is called *dynasty*." \* Thus Aristotle reached absolute oligarchy, the extreme degradation of aristocracy. We cannot avoid adding his next words. "Often, while the constitution, as fixed by the laws, is not democratic, the government, owing to the habits and training, is popular; and, on the other hand, although the constitution, as fixed by the laws, is more popular, the habits and training of the community cause it to be administered in a more popular way." A wise caution against supposing that the *polity* and the spirit with which the government is admin-

\* The word *dynast* elsewhere occurs in this special sense. Comp. Plat. Polit. 291 D., and esp. Thucyd. iii. 62, who distinguishes between oligarchy where the laws are the same for all and democracy on the one hand, and the dynasty of a few men, nearly approaching to *tyrannis* on the other. See also Plass, "die Tyrannis," i. 132.

istered always run in the same direction (vi. or iv. 5, § 1-2). The various influences which counteract constitution tendencies, social and political, must ever be taken into account.

### § 159.

A remark may here be made which is of some interest in regard to the Greek and Roman divisions of governments, that they leave out of consideration, as of no political weight, one very important class of the inhabitants of these countries—the slaves. There were, in the Athenian republic, in 317 B. C., according to Clinton's probable calculations, founded on the statements respecting the census of Demetrius Phalereus made in that year, 527,660 inhabitants, of whom 400,000 were slaves, while the foreign residents made up almost one-third of the remaining 127,660. Now suppose that the slaves who formed the main body of the laboring class had been freemen. There would have been nearly 100,000 more voting citizens of the lowest class, and this would have wholly changed the spirit of the government and probably the destinies of the state. This ought to come into calculation when we ask to what category a political community belongs. Was Athens, "the fierce democracy," a democracy at all, if measured by modern ideas, when the ten myriads of strangers whose lot was cast there neither had any vote nor could expect to have any; and could be sure that the most beggarly of the citizens of native birth would never endure that they should vote? Athens was an aristocracy if you count in these slaves; but in its spirit, during the time after the Peloponnesian war, it was not only a democracy but a demagogy.

The institution of slavery was thus not put into the balance by the Greek political writers, for the reason perhaps that no class of society fell back on them when it sought for allies. The *demus* would do this least of all, for there is a natural pleasure in the lowest classes of a democracy in feeling that they have a class below them. Only when the later tyranny sought for instruments, did it look to emancipated slaves.

But if a large part of the working class is in a state of bondage, this certainly must make more than one difference between a state where such an institution subsists and one where it is not tolerated.

Another important element in our political estimates must ever be the extent of territory. When the political power is chiefly shut up within the walls of a city, the action of all the state forces must be, in many respects, unlike that which shows itself in a large territory where the same forces exist. This gives rise to the group of city-states with which the speculations of political writers among the ancients were almost solely concerned, as contrasted with the great republics of modern times, which the use of the representative principle has rendered possible. But other forms as well as those of free governments are affected by this principle, and we may make a division in all kinds of states on its basis.

Another division may be denoted by the terms "simple and compound," the latter including states formed out of a number of states by violence or compact, and not strictly united to the leading state in one union or even in one form of polity. Such would be the vassal states of the Oriental empires which managed their own affairs and kept their own forms, on condition of paying tribute and acknowledging fealty to the conqueror, or were placed with some sort of independence under provincial governors. Such too, at first, were the parts of the world conquered by the Romans; and such are the dependencies of Great Britain. Confederacies also for the sake of convenience may be put in this class, whether of the looser or the more compact sort. Still another marked characteristic is that between governments (which may pertain to any of the forms), according as they are concentrated or diffused in their administration; and there is a cognate distinction depending on the connection between the chief and subordinate officers.

In examining the principal forms of governments by themselves we shall begin with monarchies, then proceed to aristocracies and democracies, and end with confederations.

## § 160.

It will be expedient to take samples of the principal forms, and thus view them in the concrete. The city-states will introduce the three forms, as being the earliest class, after the primeval institutions, concerning which we have accurate knowledge. This will subject us to the inconvenience of dividing up the political history of certain states which have passed through several stages of development, and of considering them in separate chapters, but it may bring out their progress perhaps more clearly.

The principal forms of monarchy according to our division will be those of city-states ; next absolute monarchy of the Oriental type as originating in conquest ; then the theocratic ; that which represents the people and which may be elective ; that in which the religious element is strong ; the limited monarchies and the partially disintegrated ones of the feudal type ; the elective, the mixed and the constitutional.

The aristocracies may be separated into those properly so called and the oligarchies. Those states also may be considered here in which other elements are in conflict with the leading one. Aristocracies have been small and generally weak, but some very important states of this kind will call for a careful consideration.

At this point in our progress we may suggest the remark by way of caution, that it ought not to be supposed that the main secret of politics is discovered or revealed when they have been arranged in classes. We must not call a state free because it has a democratic constitution, or even wholly unfree when it has a despotic government. The form is of great importance, as disclosing the powers and range of activity which is possible for the state or the people ; but every state has its individual character like every human being. Nor ought it to be supposed that all polities in the same class are alike. On the other hand, there are states of one class which depart from the type or form of their class in important respects so as to agree with states of another species more

than with their own ; and there are states which almost refuse to be classified with one form more than with another. Again, there are nations that have run through several forms in their political progress ; and among them are several which are more important studies than almost any that have been tolerably stationary. The growth, again, or decay of such states is not due to the development of a polity alone ; indeed, other causes which are not political may have acted on the mode and direction of this development.

Hence the utility of studying the progress of constitutions ; and of looking at the characteristics of individual states, especially in the early stages of their political history.

Democracies will be divided into those of city-states and those which occupy a larger territory, the democracies which have grown up naturally and those which have been artificially formed on the rule of popular sovereignty and of strict equality verging towards a democratic tyranny.

The compound states will come last before our notice, in the order already mentioned. The forms to be examined will be those in which a number of states are brought together in some political union, whether as subordinate to a larger political power, on terms of subjection and dependence without close political union, or as constituting a confederation on terms of equality. The greatest space will be given to the consideration of confederate systems under their two forms of an aggregation of states created by a league, and of a state made out of a number of states. After this examination of forms of government, we shall proceed to the subject of the departments of government or administration.

## CHAPTER III.

### MONARCHIES.

#### § 161.

Among the forms of monarchy, we shall consider first that of city-states and of other small states in the Ancient city-kings. early history of mankind. There is reason to believe that, wherever a pastoral life was not made permanent in a race by the nature of the country and the situation, compact settlements succeeded the scattered village communities of earlier times. These settlements, as we have seen, where several clans came together, were surrounded with walls for purposes of defending both the residents and the surrounding inhabitants, with their flocks, when they needed shelter. When these cities engaged in commerce, the walls were required against invaders from the sea. The political power with the administration of justice, the festivals and common religious rites found their centre in the generally walled city, which was for security's sake not on the seashore but in some situation provided with a hill or a citadel, and therefore often not in the middle of the territory (Comp. § 153).

1. The government of these city-states in the early times was placed in the hands of kings, or of single magistrates at least, to whom various names were given. In all of them there seems to have been a body of more privileged freemen, whom we may call nobles, and a class of common freemen, with slaves or serfs either obtained by earlier conquest of the lands where the settlements were made, or brought for sale from abroad, or gained by war with a neighboring state. Thus through Greece and Italy, among the Phœnicians, Canaanites and Philistines on the Eastern coast of the Medi-

terranean, there were city-states under the sway of one man. In Germany some tribes had a similar constitution, yet without a system of cities. In Gaul there were cities, but the political form was constructed after the canton rather than after the cities, and the nobles had great masses of men under them in a relation of clientage or serfdom. The smallness of the territory belonging to these city-kingdoms has been already spoken of (§ 153).

Wherever city-states prevailed, the idea of confederation would naturally spring up. Yet the earlier confederations were either for religious and festive purposes, or were temporary ; so that consolidations on a great scale seldom took place. We meet in Greece, even in the historic times, with the formation of new cities by the union of a number of villages ; and wherever the Greeks settled out of their country, cities were built almost as a matter of course.

2. The poems of Homer give us an idea of the kingly estate, as it was then found among the Greeks.\* By the side of the commander in chief at Troy, who was lord over a considerable part, but not of the whole, of Peloponnesus, stood many associated captains who were also kings, but over smaller territories, who have this title (*βασιλῆς*), in common, and for the most part the additional one of being *sprung from Zeus* and *nourished by Zeus*, and whom already to some extent the myths of the poets traced back to a divine parent on one or the other side. It is plain that their divine right, and the special protection of them by the gods, had now become parts of the religious faith ; but the historical origin neither of kings nor of nobles can be ascertained ; nor are there, as far as we are aware, any speculations about it in the earlier poets. The nobles called by Homer counsellors, perhaps, leaders and old men—which already could signify office and not age (as the Greek leaders at Troy are not in general conceived of as especially old) are the senate of Agamemnon, assembled by him for meals which began

\* Comp. Schöm, Gr., Alterth., i., 19 et seq. and Mr. Edw. A. Freeman in his Compar. Politics, lect. iv.



with religious offerings, and after finishing the meal, called on the chief to speak and give him advice. This, no doubt, was the practice in all the little kingdoms, during peace as well as in war; but the head of the state was not bound to follow their suggestions. His will gave the final decision, but he would of course be slow to oppose a strong opinion or to form a decision in which none supported him. The common freemen were called together to hear a resolution made by the king and the elders, rather than to give advice or express their wishes. When Telemachus (*Odys.*, ii.) calls a gathering of the people for the first time after his father went to Troy, it was for the purpose of complaining and asking assistance, and not for any political reason.

The king does not appear as a judge in the Homeric poems, although doubtless he had that for one of his functions; \* but in the description of the shield of Hercules, old men—perhaps not nobles, but ancient men of the people—hear and decide in a case of manslaughter. In Hesiod's *Works and Days*, the upper class, there called "kings who take gifts," are the judges between the poet and his brother. (vs. 38, 39). †

Taking another view of the kings in Greece at a later period, we find them leaders in war, judges in disputes, and representing the community in the sacrifices of the public religion (*Aristot. Pol.*, iii., 9, § 7). In several parts they have enlarged their power, as in the Doric kingdom of Sparta. In Attica, where the traditions point to twelve kings at first, as among the Etrurians of Italy, and to a union of the districts under one king, with Athens for the centre, there had been an immigration of important families during the disturbances of early Greece; for this was the more quiet corner of the land. The descendants of some of these attain to

\* *Il.* xvi., 542; *Odys.*, xix., 111.

† The etymology of βασιλεὺς is obscure. See the opinion of G. Curtius, p. 364 of his *Gr. Etym.*, ed. 4. \*Αναξ also is of uncertain origin. Rēx is from rēgo. King is generally derived from Kunni, Kyn, race. Grimm has another derivation (*Rechtsalterth*, B. i., chap. 1, beginning).

royal power, and others help to constitute a stronger nobility than had grown up on the soil. It marked an era in the constitution of Attica, when the name *king* (*βασιλεύς*), for some reason or other becoming distasteful, was abandoned for that of *archon* (ruler). It is a breaking with antiquity, and indicates a relative increase of the power of the nobility. The change, which is veiled under the legend that no one was thought worthy to succeed Codrus after his self-devotion, consisted perhaps in a greater responsibility and check on royal power exercised by the aristocracy or *eupatridæ*, who were his assessors in judicial proceedings, and probably furnished the members for the criminal court of Areopagus. The archons, selected for life from the reigning family, lost their religious functions. They filled the chief place in the state for nearly three hundred years when this elective monarchy ceased, and the archonship for ten years was established, although still remaining a prerogative of the old royal house. Then it was open by election to all the Eupatridæ, and in 685 B. C. an annual archonship, to which the nobles alone had access, completed the separation from the monarchical spirit and prepared the way for a democracy.\*

Athens had a slower and more peaceful development than most other city-states of Greece, yet everywhere the transition to more popular forms occurred. In all we see the effect of civil disorders and of a new stage of society in which the upper class are principal actors, and the mass of freedmen have become conscious of their strength. Dissensions in a well-born class and the increasing wealth of other proprietors of the soil seem to be the causes of the revolutions.

3. The monarchy at Rome continued, according to the his-  
Early kings of torical tradition, through seven reigns for two  
Rome. hundred and forty-four years, when the last king with his family was expelled, and a government under two annual magistrates, with almost kingly power, was established. Admitting that the history is uncertain, that the seven kings

\*Comp. E. Curtius, Hist. of Greece, Amer. ed. 1, b. 2, ch. 2.

could not have taken up so many years in reigning, that, in short, there was much invention and much projection of later Roman ideas into the earlier period, we may be sure that the idea of the kingly power was in the main correctly handed down. In the first place, he was the king-father, or the holder of power in the state, with nearly the authority of the father in the family, expressing that conception in the political sphere, which the law expressed in its definition of the *patria protestas*. He was more absolute than the legitimate kings of the early period of the Greek race, as far as we can trace their authority. In religion, in war, in administration, he was nearly uncontrolled. He could, however, make no new laws without the consent of the senate and the assembly of the *populus*. But he could not be called to account any more than a father could be by his family.

What seems remarkable,\* when we think of the strength of the hereditary principle at Rome, the kingly office was entirely elective, and thus the doctrine of the sovereignty of the *populus* or burgesses was expressed in the constitution, as that of the sovereignty of the whole people was afterwards, when the imperial power succeeded to the republican constitution. The free citizens or burgesses were equal among themselves, or nearly so, while the remaining free members of the community had no rights of citizenship, no participation properly in the state.

The Servian constitution was military in its objects, but it took away no power from the *populus* or burgesses in full, and gave none directly to the non-voting class. Yet it indicates that a considerable number of persons of foreign birth had come into the community and were in a thriving condition; it gave them, probably, places in the army as officers; and with wealth in their hands they could not long remain without civil rights.

The revolution which drove away the last Tarquin, putting

\* If we conceive of the elements of old Rome as existing independently side by side, there was no union but by conquest or agreement. Agreement expressed itself in election.

thus two annually elected magistrates in the place of one of no greater authority elected for life, finds its parallels in the other communities of Italy, not only in those of Latin extraction but among the Etruscans, Sabellians and Apulians.\* But there must have been some special cause for this act, which moved not only the aristocracy or full burgesses, but the whole people. Some tyrants, in the times when aristocracy prevailed in city-states, sought power by taking part with the lower people against the upper class to which they themselves belonged, but in this case we discover no such movement. The hatred of the name of king, as Mommsen remarks, shows that this was a general feeling.

The Etruscans, of another race than the Latins, were in early times governed by kings, probably elected and not hereditary, and held in decided check by the aristocracy. The king was called *Lucumo*, and in the two Etruscan confederacies of twelve states each, one of the kings had the presidency. The influence of the aristocracy and of the chief officers must have been greatly increased by the possession of the religious forms which was in their hands.

4. From the Romans we pass to the Germans, of whose earliest institutions we know nothing except so far as we can infer it from the accounts of J. Cæsar and Tacitus. Here we pass beyond the bounds of city-states, but on account of the similarity between their institutions and those of early Greece and Rome, we place them together. Leaving out of view some debatable points, we may say, 1. that in smaller districts composed of a number of hamlets, a *princeps* was the political head, who owed his life-long office to election of the free people, and was not, it would seem, necessarily of noble birth. (Waitz *D. Verfassungsgesch.*, i., 225–227, ed. 2). His duties were administration and judicial decision in smaller matters; and in greater, the preparation of business, judicial and other, for the assembly of the people. The sovereignty of the community,

\* Comp. Mommsen, *Hist. of Rome*, i., b. 1, ch. 5, and b. 2, ch. 1

its entire political freedom, without active participation, under the initiative of the princes, the union of judicial and political functions in the assembly, no very definite privileges of the families of noble birth—such seem to be the leading features of the smaller political unions at the time when this race first comes under the eye of history.

2. It is distinctly affirmed that not all the tribes or unions had a king. The Gothones, the Rugii, the Lemovii were among the number of monarchical states, and were characterized by ready compliance with the ruler's will. (Tac. de mor. Ger. 44). So the Suiones, the Marcomanni, Quadi, Hermunduri, the tribes in the Scandinavian peninsula, were under royal authority. On the other hand, the old Saxons had no king, but a number of chieftains equal in authority, one of whom in time of war they placed at the head of affairs; but his pre-eminence expired when the war was over.\* The settlers in England all break up into monarchies, but unite for a time now and then under a common head, who forms a kind of president of a confederation, and whose office expired when the need for it had ceased. We may see in this the development of the Saxon usage above spoken of. In general these Saxon kingdoms had a tendency to become hereditary without establishing this as a right, and the next of kin could be set aside by the assembly of the wise men. (Comp. § 142.)

We can affirm that as these nations settled in Roman territory, there was felt to be a necessity for royal power of a permanent kind, although the power was treated as an inheritance, and broken up or put into fewer hands according to the laws of succession in property. The tendency may be accounted for not so much by imitation of the Romans

\* See the passage from Beda in Prof. Stubbs' Const. Hist., i., 41, and comp. § 142. The theory that seems to meet all difficulties is that kingly power was a primeval and indigenous institution; that the principes represented the early kings; that where larger tribes were formed by combinations of smaller communities a *tribe-king* was appointed when the *principes* and their communities gave their assent; and that when they did not, the principes chose a general leader in war whose power expired when the war was ended.

as by the needs of the wars of conquest. Other causes may have concurred, such as the binding of many subordinates to the commander-in-chief by gifts of lands, and the requirement of united action in order to maintain themselves in the control of the conquered countries.

We may look on the *principes* as an old institution, answering to the Greek and Latin kings of the earliest time, as far as could be where there was no city-life, and on the German *hundreds* as an earlier form of society than the city-life of the lands on the Mediterranean. The kings are heads of the whole race of people, who would not be needed, as long as great movements were not common. Some, as the old Saxons, appointed a head *pro re natâ*; others, under the influence, in part, of a mythological connection of certain races with the divinities, established royalty earlier and retained it with no intervals of return to the old order of things. That the new monarchy was of use in combining and compacting larger states, in calling forth the feeling of a national or race unity by representing it, can hardly be doubted. It is equally certain, I think, that within the territory it promoted order and peace. It would be folly to say, with Pope Gregory VII., that "kings took their origin from those who, in ignorance of God, by pride, rapine, perfidy, murder, in fine, by almost all sorts of crimes, under the instigation of the devil, the prince of the world, sought after secular dominion over their equals, that is, over men, in blind desire and intolerable presumption." \* A government that springs up in many parts of the world at a certain stage of human society, must be called for by outward needs or political opinion. But it is not easy to see how the monarchy "was rooted in the German mind" (Kemble *Anglo-Saxons*, i., 137), any more than how democracy was rooted in the Greek mind. †

\* Comp. Friedberg *de finium inter eccles., et civ., regund. judicio*, page 8.

† Bethmann-Hollweg, in his *Civil-process*, iv. 84, a citation I met with in Prof. Stubbs' work, before cited, p. 67, says,—in answer to the question, in which of the categories of political forms the old German

## § 162.

From what seems to be the oldest form of royal power we pass to the absolute monarchy growing out of conquest, and supported by superiority in arms. This, again, seems to be one of the earlier forms of political rule in the world, and with all its lawlessness did the immense good to the world of making intercourse more secure and important than it had been before. If the world was broken up at one time into a vast multitude of little communities differing and with every generation becoming more different in language, institutions, religion, and thus having almost nothing in common, it was essential to progress and peace that there should be a bond of union and a common power reaching over wide tracts of country. In looking at human interests on the whole, then, the consolidating empires of antiquity must be regarded as promoting the welfare of mankind.

To a great extent, however, this bringing of the parts of the world together, was outward. There was attending the spread of these empires no proper fusion or elevation of their subjects. The tributary condition, with the same government as before, with no disturbance of existing forms of oppressive administration, was all that was required of the conquered provinces. Nothing humane or elevating em-

constitutions ought to be placed,—that it should be called a *democracy*, “inasmuch as the highest state-power lay in the body of free members of the state-community; just as in the *gau* and small commune affairs were managed by the assembly of the free heads of families. It was, however, so far aristocratic that the unfree and even the freedmen were excluded from all part in public affairs. But apart from these elements, aristocratic and even monarchical elements were not strangers to the oldest German constitutions; how, otherwise, could they play so great a rôle in all Germanic nations in the middle ages and even until the present time?” The universality shows a universal cause, but as man is pliable and capable of receiving all political forms according to his needs, I do not see how an especial leaning towards these forms can be argued to have existed for ages without a quicker development.

nated from the central seat of power at Nineveh or Babylon. Liberty to pass between remote places without danger of robbery, the distribution of the products of the earth over a wider surface, with a diffusion, to a small degree, of certain arts,—these were the good results of the earlier conquests. Of the simple despotisms which brought these results about, considered as forms of absolute power, nothing needs to be said.

The general type of oriental monarchy is expressed by the especially oriental monarchies. word despotism, which implies the relation of the master to the slave. The exact distinctions between the freeman, the serf and the slave, the notion of rights which the government of the despot could not invade, the limitation of power by its divisions into independent departments, the right, especially of the subjects to hold property which was fully their own, were either unknown or had little influence on governments. The inhabitants of many eastern countries were by climate, religious doctrine, and want of power to combine, so weakened in character, that despotism had full room and was under no apprehension of resistance. In India “the doctrines taught by the Brahmins of patient obedience, of subjection to destiny, of a quiet and submissive life, connected with a constant reference to a destiny after death, were calculated to increase the already uncontrolled power of the kings by relaxing the energy of the people, their independence in spirit and bearing, their boldness and enterprise.”\* Here, also, the subjugation of an earlier race to the Aryans, added the submission caused by conquest to other reasons for despotical institutions. In countries farther towards the west, Assyria, Babylonia, Persia, the same cause had full sweep. Everywhere was the king held forth as a representative, as an incarnation of a god. “Never may a ruler be treated with contempt,” say the laws of Manu (vii., 8), “even if he is still a child; for a great divinity dwells in a human form.”

\* Duncker, *Arier*, ed. 3, i., p. 138.



The Persian despotism, as we find it under Darius Hystaspes, compares advantageously with most other eastern monarchies. The different nationalities were permitted to enjoy their ancestral institutions, the control over the provincial governors was vigilant, justice was tolerably well administered, in short, the mind of an enlightened ruler appears in the conduct of affairs. But the system was the same that we find in other parts of the east, except that the king was farther off from the divine being in his exaltation, in proportion as the religion was purer than any other heathen system. (Comp. § 201.)

### § 163.

A sovereign may be regarded as an incarnation, or as a representative of God, and in this latter relation as a mediator between men and their divinities. It is difficult to give a precise idea of religious monarchy. Loosely speaking, it is that polity in which religious ideas of sovereign power make it natural that the people should render a similar obedience to the king and to their objects of divine worship, that his person should be sacred, his rights very great, if not uncontrolled, and that the same conception in his mind should remove him from the condition of man and take away his sense of responsibility to human beings. In such a monarchy the priests, if a compact body or a caste, could act as a check to some extent, but no such control in public affairs appears under the heathen religions as that of the Hebrew prophets.

To certain religious monarchies, that is, such as are supported by religious ideas, the name of theocratic monarchy is given. Here we may first ask what is meant by a theocracy. The word first occurs, we believe, in Josephus, although the passage where he makes use of it shows that he did not coin it. He says (c. Apion. ii., 16), that there "are endless differences among men in their usages and laws. Some entrust the power of government to a monarch, others to the dynasty of a few, others still to the people.

But our lawgiver, having respect to none of these, made his constitution a theocracy, as one may say, putting a force on the word, by ascribing rule and power to God, and persuading all to look to him as being the author of all good that belongs to mankind in common, and to each individual, and of all that they receive when they offer prayer in their perplexities." Here the very essence of theocracy seems to be left out of the definition. Josephus is content with representing it as lying in a persuasion of the providence of God, as a ruler over men. But such a faith can exist and be acted upon in any form of human polity. It must mean much more than this, and *first*, that the laws, not only the moral Jewish theocracy. but also the civil and religious, are expressly given by the divine being through some legate and are not subject to human alteration. A *second* idea is that the civil constitution is prescribed by his will, its principles meet with his approval, and the persons who administer it are not only in a sense his representatives, but are consented to, if not appointed by him. It is also *implied, thirdly*, that the nation with such a constitution is under his care, and is to receive blessings or calamity as the laws are observed or neglected. We may add, perhaps, that he is expected to make known his will from time to time, for the well-being or reformation of his subjects. But it is not necessarily involved in a theocracy, or, at least, in the Jewish form so-called, that there should be any one particular form of government. Thus it existed under Moses, and afterwards, without a king; and when the people wanted a king, the prophet Samuel was averse to the change of polity. The theocracy, therefore, could have existed without putting on the form of a monarchy. Yet when David became king, Jehovah is represented, as by covenant, giving the kingdom to him and his descendants, subject, however, to chastisements for unfaithfulness. Such a chastisement was the separation of the northern tribes from the house of David. These were permanently in a state of apostasy, and the complete fulfilment of the covenant with David would be their reunion under one of his descendants.

To sum up, the theocracy might subsist under any political constitution ; it, however, at length took the form of monarchy under the family of David, showing in this that a code of theocratic laws might be upheld under a changing political constitution. Moreover, very much might be left to the wisdom and judgment of the kings, thus divinely appointed, in developing the principles of the law according to new necessities of the people. Thus David made most important additions to the temple-service, without any special divine command. The theocracy, then, was not an all-absorbing absolutism of God, as the God of the people, but a set of principles and a government derived by revelation from him, and so far unalterable.

It may be doubted whether this particular theocratic system could be called absolute, so far as the monarch was concerned. The prophets were nearer to the fountain of theocratic power than the kings were ; and they were frequent checks on departures from the spirit of the religion. The priests were another, but a smaller check ; thus they resist Uzziah, when he takes on himself to offer incense in the temple. An absolute command, again, in the law could not be set aside by the king without treason to the theocracy. It gave him power, but it restrained him in the use of power.

We may compare the relations of a theocracy like the Jewish as to civil polity with those of the oracle at Delphi, " the common hearth of Hellas " and the centre of religious worship. It was thought in its responses to be a fountain of wisdom, and hence both private persons and states consulted it. When colonies were projected, its advice was generally sought. The constitution and laws of Lycurgus are reputed to have received their sanction from this source. The laws of Zaleucus were given with the same divine permission ; Solon and Clisthenes got the approbation of the oracle. In most cases new religious festivals were not instituted without Apollo's allowance ; and there are numerous examples where undertakings of a public character were abandoned after an unfavorable response, and prosecuted only when the

divinity concurred. Even the line of kings of Cyrene was thus in a manner appointed by the oracle. As far as relations to politics are concerned, it mattered little whether in a theocracy a direct revelation imposed a law, or merely gave or withheld consent from a law or project. The race of David were to be kings by covenant of God ; the Battiadæ of Cyrene were sanctioned by the oracle at Delphi. (Herod. iv., 155, et seq.). The laws of Moses were uttered by revelation ; those of Lycurgus received divine sanction after being put together. In both cases there was something fixed in the faith of the nations, and in both the theocratic interference did not imply that absolute civil authority was conceded. The kings of the house of David were less absolute and less tyrannical, in spirit at least, than those of northern Israel, who had no divine sanction for the most part, although Jeroboam and Jehu were helped or put in the throne by prophets. The house of Omri were mere usurpers and had no religious sanction whatever ; they were far more despotical as well as far less safe on their thrones than the house of David.

Our conclusion then is that a theocratic government may assume any form ; that if it is a monarchy, the sovereign may or may not be regarded as having a special divine right ; that if he have a divine right, there may be divine or civil limitations upon his power, preventing it from becoming absolute. It is plain, however, that where a king or line of kings is conceived of as placed in the throne by divine power, and has no check of a divine law or of a constitution over him ; the belief that he thus receives his authority helps him to use his power freely, by the reverence which he inspires as a divinely commissioned being who stands far above his fellow-men, and causes them to be submissive and even abject. But the belief, also, of a successful conqueror, that his god or gods have raised him to the throne is an encouragement to the unscrupulous exercise of power.

## § 164.

The Chinese government may be called absolute, but how stands the emperor related to the religion? He is the son of heaven and the father of the people; he alone makes public offerings to heaven, to earth, the great streams and mountains which belong to the whole empire, "while the great and small vassal-princes formerly only gave offerings to the mountains, rivers and spirits of their territory;"\* he is the son and the vassal of heaven, indebted for his power to no man but only to heaven, whether he came to the throne by birth, or choice, or revolution. All executive power emanates from the king, and the people has no self-government of any kind. As the highest representative of heaven he enjoys almost divine reverence, and the kingdom with all that it contains may be said to belong to him.† The government of China, then, is a pure absolutism, built on the religious idea of the emperor's relations to heaven, as well as on strict notions of paternal and patriarchal power transferred to the political ruler. And yet there are checks on this absolute power, both of a moral and of an irregular political kind. The moral power lies in the voices of the wise men of old that by vicious practice the king falls below the idea of being the son of heaven, and even forfeits his throne. The Shu-king says that "heaven has no especial predilection for one or another man, but loves those who treat it with respect." And again, another book, the Ta Hioh, uses these words: "The commission of heaven conferring the government upon a man, does not confer it for all time. If he uses it aright, he retains it; if unjustly, he loses it." With this may be mentioned the doctrine that the discontent of the people is a measure of the emperor's ill-desert. He is responsible for it. Under a good emperor there can be no insurrection of the

\* Plath, *Relig. u. Cult. d. alt. Chinesen*, in *transact. of the royal Bavarian Acad.* (1862), p. 15 of *Abhandl.*, 1.

† *Comp. Wuttke, Gesch. d. Heidenth.*, ii., § 61 et seq., with the references there made. The citations following are from his work.

people ; a good and righteous prince finds everywhere obedience and love. This imputation of the sins and even of the calamities of the people is often insisted on in the books and carried to an absurd length. The right of revolution is admitted in the books in this sense—that when the emperor instead of following the ordinances of heaven, makes his own will his rule, the people is no longer bound to render him obedience ; nay, it has the right and duty to drive him from the throne. The frequent changes of dynasty by revolution, and the insurrections which often occur show that this doctrine of the wise men is carried out in practice by the nation. In regard to successions in the oldest times the practice was the contrary of that which generally prevails in absolute governments. The emperor with his ministers and persons of importance chose the successor, sometimes passing over the sons of the emperor, and making the choice out of obscure families. Thus, after the death of the fourth emperor, an assembly of the mandarins and people, discontented with the slackness of the late ruler, chose his nephew. In another case the emperor was deposed and his brother put in his place.\* This, however, can have been no great check upon despotic power exerted without injuring the community by a wise prince.

Another monarchy of the absolute type, strictly hereditary in its law of succession, in which the religious Japanese. idea had greater sway than it had in China, was that of Japan. The chief ruler here, the son of the Sun-spirit, the Dairi, or Mikado, was indeed absolute over against the people ; but a nobility with great privileges, and reputed to be allied with the Dairi, held him in some sort of check. Another check began in the twelfth century, when the general-in-chief of the army managed to get a position where he thrust the old legitimate head of affairs into a secondary place, but in quite recent times he has been overthrown. In the old Japanese opinion, the Dairi was more than a representative

\* Wuttke, §§ 63, 65.

of divine power, he was an incarnation, perhaps owing to the influence of Buddhism. Recently it is well known, a revolution of affairs has made the Dairi again sole ruler, and the feudal Daimios have given up their territorial authority. The government, in other respects, seems to be departing from the old principles of administration in various ways, under the influence of foreign opinions.

The type of monarchy in Japan has been compared with that of the Incas, the children of the sun, in Peru. Peruvian. But these rulers, though similar to the Japanese in uniting temporal and spiritual power, were far more absolute in fact. Mr. Prescott says of them that "we shall look in vain in the history of the east for a parallel to the absolute control exercised by the Inca over his subjects. . . He was both the lawgiver and the law. He was not merely the representative of the divinity, or, like the Pope, its vicegerent; but he was the divinity itself. The violation of his ordinance was sacrilege. Never was there a scheme of government enforced by such terrible sanctions, or which bore so oppressively on the subjects of it. For it reached not only to the visible acts, but to the private conduct, the words, the very thoughts, of its vassals." \* To this he adds that an order of hereditary nobles of the same descent with the Incas were the officials and the prompt and well practised agents for carrying out the executive measures of the administration. This added not a little, he thinks, to the efficacy of the government. In itself, however, a hereditary class is rather a check on despotal power ; and a general levelling of ranks, with a bureaucracy depending on the sovereign, offers the best field for uncontrolled sway over a nation. A territorial nobility are apt to be independent in feeling, and to have an influence over their retainers and a common feeling among themselves, which can make them strong and turbulent. The real explanation of the strict absolutism in Peru lay, as it seems, in the religious faith and the peculiarly abject nature of the

\* Conquest of Peru, i., 166.

people, perhaps united with the general mildness of the government in practice.

### § 165.

In the two last examples we have had civil and religious authority united in the original constitution under one ruler. The Mohammedan idea of monarchy furnishes a third specimen of the same sort. The Califs succeeded to Mohammed's temporal and spiritual power, both. They had, at first, no hereditary right to this succession, nor was this principle introduced until the Ommiad Moawiah I., (ob. 679), managed to have his son Jezid I. accepted in his lifetime as future ruler. The constant wars probably increased the absolute spirit, and the califate sunk more and more into a military despotism from the patriarchal type of the first heads of the faithful. (H. Leo, *Mittelalt.*, 222.) The breaks in this absolutism were found in the schisms and the fanatical sects which divided up the Mohammedan world, in the interpretations of the Koran by the religious expounders, and in the great power of the viziers.

### § 166.

4. We pass on next to imperial despotism, or that form which is founded on the doctrine of the sovereignty of the people in the last resort. The emperor has become their permanent representative, and their share in the government is little or nothing. Two great examples of this are the Roman principate or first empire, and the two Napoleonic empires. As connected in the order of time we shall briefly consider the western empire of Diocletian and Constantine, and the eastern or Byzantine in company with the empire of Augustus and his successors.

The first form of the empire was the natural heir of the republic, and was built on the sovereignty of the people. It arose out of the dualism in the republic, or the strife between the optimates, whose organ was the senate, and the people under tribunes and other

Mohammedan absolute monarchy.

Imperial despotism founded on popular sovereignty.

The Roman principate.



leaders; of whom, as generally happens in ill-balanced polities, members of the upper classes and even of old patrician families were among the most influential. It was facilitated by the principle of the Roman constitution of vesting very considerable power in the chief magistrates, which was handed down from the primeval monarchy, and was never sufficiently checked by all the changes which transferred from the consuls part of their power to new state-officers. Its right to exist was perhaps also based on the inadequacy of the senate's administrative power to spread order, justice, and peace through such an immense empire. It belonged to an age when the old religion was no longer believed in; and when the practice of offering religious honors to the rulers of a large kingdom; passed over from the degenerate subjects of the successors of Alexander to imperial Rome; and was not offensive to the mass of the people, while the emperors seem to have accepted it out of state policy. Religious veneration added what it could of lustre to the dignity and glory of the Roman prince. Besides all this, when we take into account, also, that the people of the city had become, to a great extent, a mingled populace of foreign birth, accustomed to servility and despotism from the first, that the provinces wanted the order produced by one man's power, and the soldiery would accept of a supreme commander; the transition from the republic to the new order of things will not seem strange.

If a perpetual magistracy like the proconsular or tribunitian had been given to the *princeps* while the others were filled as before through free popular election, there could have been no stability or vigor of administration. The more important powers, therefore, by formal consent of the people, were heaped up upon the new head of the state. To the proper name of Octavianus, was added the cognomen of Augustus, an old word not differing much in sense from *sanctus*, and used in the sphere of religion. His principal functions were the proconsular, by virtue of which the provinces were put under his control; and the tribunitian, which made him inviolate, and took away from him rivals, such as the former tri-

bunes had been in relation to the consuls. The consulate seems to have been the office to which the principate at first was designed to be attached, but it was afterwards filled by the emperors only on occasions, and was generally conferred on others. The censorship was sometimes assumed by them, and Domitian received it for life; but it disappears after his reign. The office of head pontiff passed over to Augustus after the death of the existing holder of it, and was thenceforth associated with the imperial power. The administration at Rome was in the emperor's hands. He had, like the old proconsuls, his own fisc, and with it important censorial control over the revenues of the state; the command of the army went with the proconsular power and the imperium. The power of making "*constitutiones*," whether general (edicts) or special, was lodged formally in his hands, at the commencement of his reign. He was in a sort the supreme judge, and to him, as proconsul, appeals were directed.

The senate, according to the original idea, was to share the government with the prince; but this was only an illusion, as Mommsen calls it, and the direct as well as indirect control of the early emperors over this body made them little more than his creatures. Domitian at length joined to the principate the formal power of constituting the senate at will.\*

As the emperor or princeps succeeded to older officers and engrossed their power, so he was formally acknowledged by the senate and elected by the people. This indeed was little more than a form, but the Romans had a remarkable attachment to forms when the spirit had left them. The tribunitian power was conferred in the following manner (Mommsen, u. s., ii., 2, 815): after a decree of the senate one of the magis-

\* We have used in this sketch, part 2 of vol ii., of Mommsen's *Röm. Staatsr.* (Leipz., 1875), and acknowledge our obligations to this great scholar, as also to Marquardt for his contributions to *Röm. Antiq.* both in the earlier work of Becker completed by him and in the new one.

trates, probably one of the consuls in office, brought a rogation before the comitia and probably before the centuries, indicating the name of the person and his competence or extent of authority; and on this the comitia decided by vote. Thus in this act senate and people co-operated; and between the decree and the comitia, the regular time from a market day to the next but one after, transpired (about 17 days). A part of the law conferring authority on Vespasian is still extant on a brass tablet. It contains this clause, "that whatever things have been done, transacted, decreed, commanded by the emperor Cæsar Vespasian Augustus, or by any one by his bidding or commission, those things shall be just and valid to the same degree as if they had been done by the bidding of the *populus* or the *plebs*." Of course the soldiers, or some unconstitutional power, often created the emperor; but the form seems to have been deemed necessary. Tacitus says (*hist.*, i., 47), that "the tribunitian power was decreed to Otho, with the name of Augustus and all the honors of the princes." The same recognition of Vitellius and of Domitian by the senate is on record. In the life of the emperor Tacitus (*Flav. Vopisc.*, §§ 3-7), his nomination in the senate is narrated at length. After this they all went to the Campus Martius, where the prefect of the city addressed the people—the assembly is called *militēs et Quirites*—telling them that they had a prince whom, in compliance with the opinion of all the armies, the senate had chosen. The acclamations of the people wishing him blessings ("*dii te servent,*" *et reliqua quæ solent dici*) closed the scene. This looks as if in the third century (275, A. D.) the elections had become mere acclamations, like the confirmation of bishops by the laity.

Any person was eligible to the imperial office; but if he were not of patrician birth, it was thought necessary to procure his adoption into some patrician family.

The princeps was under the law, as is shown by the votes according to which he had special exemptions from certain laws; a fact which is proved by the document already men-

tioned conferring power on Vespasian.\* As this dispensing power passed over to the emperor himself, he himself could naturally act in violation of any law from which dispensation was allowable. In this sense he could be said to be free from the control of law (*legibus solutus*).

Once or twice in the earlier empire a son was made co-emperor with his father, and bore the title of  
Later Empire. Augustus. M. Aurelius associated thus with himself his son Commodus (177 A. D.), after the death of L. Verus, his partner in power. Afterwards this co-principate was frequent, and from Diocletian on was almost a necessary part of the constitution. Thus the hereditary principle strove to establish itself, or at least the effort was to secure the same family in possession of the empire. But on the death of Julian a new man was set up as emperor by officers of the army, and again on the death of Valens another new man, Theodosius the great, was co-optated by Gratian. The new principle, so far as it had a sway, shows the increasing power of the emperor in determining the succession. It is now more and more taken from the hands of the senate and people, even in form. By his new seat of empire at Byzantium, Constantine both acknowledged the necessity of dividing the government and also broke away from the traditions that clustered around Rome as the centre. The administration also was changed in an important respect by separating civil and military jurisdiction, by abolishing the office of prefect of the prætorium at Rome, and by the official ranks of nobility which were now instituted. The conception of imperial power was raised; before Diocletian, the emperors were considered to be ultimate proprietors of the soil in the provinces but not in Italy; now "a property of the state, strictly such and distinct from the property of the *dominus*, is

\* Line 22 et seq., in Mommsen, p. 711, and in Zell's Röm. Epigraphik, "utique quibus legibus plebeive scitis scriptum fuit, ne divus Augustus, Tiberiusve Julius Cæsar Augustus, Tiberiusque Claudius Caes. Aug. tenerentur, iis legibus plebisque scitis, Imp. Caes. Vespasianus solutus sit."

no longer known.”\* The religious idea came in to modify and in part to increase the emperor’s absolute authority. He had been sacred before, and an object of almost divine honors ; but now, in the change of religion, he derived his power immediately from God, and the moral sanction of Christianity made disobedience to him a greater crime than it had been, even an offence against the Divine Being. From the conversion of Constantine onward, the emperor took upon him the control of religious affairs. In the east, men like Heraclius prescribed articles of faith on the most abstruse points, and for the most part found feeble opponents in the secular clergy. Only the monks made an active and obstinate opposition. As time went on in the eastern empire, as well the effect of Roman law in destroying freedom as the mechanical administration of affairs sunk the spirit and lowered the energy of the people more and more. Perhaps, too, the loss of liberty and of a free spirit before the Roman empire began, both in Greece and the east in the times of Alexander, ought to be brought into account, when we seek for reasons for the servility and the decline of public virtue in the Byzantine empire. It was not merely the result of a tyrannical government, but the effect of such a government on an already decaying civilization. The traditions of free institutions were forgotten before the sombre despotism of Byzantium began.

The two French empires were built on the sovereignty of the people even more clearly than the empire of the Cæsars. The first consul was elected emperor by the nation in 1804, and Louis Napoleon reached the same dignity by steps somewhat like those of Augustus. A constitution was framed in 1848, and Louis Napoleon chosen president. Then in 1851 occurred the *coup d’état*, the dissolution of the assembly, the restoration of universal suffrage and the re-election by an immense majority. The new constitution which by vote he was allowed to make, be-

Modern French  
empire.

\* Comp. Mommsen, u. s. ii., 2, 1009.

longs to the end of 1851. In this constitution, a responsible head for ten years, a council of state, a legislative body chosen by universal suffrage, a ministry dependent on the executive, and a "second assembly formed of the most illustrious men of the nation, as a counter-balancing power," were the principal machinery of the government. In this constitution the senate could propose modifications of the constitution, which were to be submitted to universal suffrage. Accordingly this body, by a *senatus consultum* of Nov. 7, 1852, established anew the dignity of emperor in the person of Louis Napoleon and his direct legitimate descendants; and this was submitted to and confirmed by a vote of the French people in the same year. The empire came to its end in 1870. Like the Roman principate it owed its birth to civil dissension and the desire of security, and fell into the hands, like that, of a relative of the overturner of the republic. Like that, also, it was in its management governed by a policy in which the endeavor to secure and perpetuate itself was the leading motive; but being feeble, cunning and profligate, and having formidable enemies to contend against, with no respect felt for it, but rather hated within and suspected without, it quickly fell.

#### § 167.

There is yet another type of absolute monarchy which Tyranny in city-states. needs to be considered—the tyranny which has appeared in city-states. Examples may be drawn from the Greek and the mediæval Italian republics. The latter had a nominal dependence on the German emperors after they had reached their independence, but may be regarded, like the Greek tyrannies, as entirely self-governing for all practical purposes. Of Greek tyrannical governments there were two eras; the first, while aristocracies were the governing powers in the cities; the second, in the time of the decay of the democracies, and when mercenary troops could be hired by an ambitious chief to subjugate his townsmen. The Italian tyrannies were greatly aided by the same practice of raising troops

and fighting the wars of princes. Some of the first tyrants were themselves condottieri. If historical order could here be followed to advantage, the first Greek tyrannies would follow the aristocracies, as they grew out of them; the others would range themselves after the decay of popular self-government and of self-government in general in that country. The Italian grew out of the claims of the emperors over the towns, the machinations of the popes, and the disorders of the towns themselves; and they need, in order to be fully understood, to follow the section on city-states.

The first Greek tyrannies arose when the old kingly authority was undermined by the increasing influence of an aristocratical class, and the common people were beginning to be a power in the state. Athens may serve for an example, as having had a development under the influence of slowly working causes. To the change of the supreme magistrate's name from *basileus* to archon, and to the shortening of the *archon's* term of office, we have already referred. An aristocracy was all along growing in power, but Athens was as yet without mobile elements. It is probable that with the old name the religious functions of the king ceased, and that the *eupatridæ* acquired a control in the administration. Next follow the time of annual archons, nine in number, and eligible from the whole of the aristocratic families. The kingly office having now altogether come to an end, there was no uniting or controlling principle among the chief members of the aristocracy, while traditions and examples of the power of one man tempted the boldest to seek to establish a new dynasty. Pisistratus and his two sons were the tyrants. Taking advantage of the local parties in Attica and playing the rôle of a most accomplished demagogue, Pisistratus was enabled to get the better of his eupatrid foes; but his three expulsions show how nice was the balance of parties; he was indebted for his renewal and continuance of power to their dissension, and to his ingratiating himself, by real services and wise mildness, in the favor of the people. The crimes and despotical temper of the sons,

with assistance from abroad to the disaffected eupatridæ, procured the downfall of the family.

Of some of the other tyrannies belonging to this period (from 700 to 500 B. C.) we will let Aristotle speak. "The least stable of governments are tyranny and oligarchy. The longest tyranny was that of Orthagoras and his descendants in Sicyon, which continued a century. The reason for this length of rule was that they treated those whom they ruled with moderation, and in many things were obedient to the laws. Clisthenes, of Sicyon, again, on account of his ability in war, was not a man to be despised; and to a great degree this line of tyrants played the part of demagogues in their cares for the people. Clisthenes is said even to have crowned the man who decided against him in regard to a victory in public games, and some say that the statue placed in the agora (of Sicyon) is the image of him who gave that decision. They say also that Pisistratus once bore it patiently, when summoned in a suit before the court of Areopagus. The next longest of the tyrannies is that of the Cypselidæ at Corinth, for this lasted seventy-three years and six months; Cypselus reigned thirty of these, and Periander forty-four, (?) Psammetichus, son of Gordius, three years. The reasons for the length of this tyranny were the same that we have already spoken of; Cypselus was a demagogue, and at the first continually went without a guard; Periander became despotical, but had military talent. The tyranny of the Pisistratidæ was the third in length, but was not continuous; for twice, while Pisistratus was tyrant of Athens, he had to go into exile; so that his sway occupied seventeen years only out of thirty-three, and that of his children, eighteen—thirty-five years in all. Of the other tyrannies that of Hiero and Gelo at Syracuse, was the longest. It did not, however, last for many years, but only for eighteen in all. For Gelo, after reigning seven years, died in the eighth; Hiero reigned ten, and Thrasylbulus was driven out in the eleventh month." (Pol., viii., or v., 9, §§ 21-24.)

Many of these tyrants were men who advanced culture,



showed great public spirit, and patronized learning: they were neither remarkably suspicious nor cruel, but their families declined in character, and paved the way for their own ruin. They were a passing phenomenon in the transition of Greece from an aristocratical to a democratical society.\*

The later Greek tyrannies grew for the most part out of national corruption, and marked the period when a want of faith, of civic virtue, and self-restraint, with profligacy and treachery, were reigning qualities of the Greek character. It was supported for the most part by mercenary soldiers, as we have already mentioned. The practice of hiring troops was of much earlier origin, but in the later tyranny it was the main support of the irresponsible despots, who gained power, not through strife of oligarchical factions, but by mere force which the city-states were not strong enough to resist. The tyrants of Pheræ in Thessaly, those of Syracuse, from Dionysius I. to Agathocles, and later, Nabis, tyrant in Sparta, are specimens of this inferior order of tyrants, who were nothing but poisonous fungi springing up on the soil of moral and political corruption.†

What Aristotle says of the policy of self-preservation of the earlier tyrannies will apply to all; only the later were more cruel and profligate, less concerned with public prosperity, more dependent on brute force than on getting the regards of the people for their continuance in power. Aristotle attributes to Periander of Corinth many of the maxims which these men put into practice. One was to cut off all prominent and high-spirited persons; to allow no common feasts (*syssitia*), nor clubs, nor education (by the public); to guard against everything that could give birth to courage and confidence; to keep men, as far as might be, from being known to one another; to have a watch on

\* For the earlier *tyranni* see, among other writers, Plass, *die Tyrannis*, an essay crowned by the royal soc. of Gottingen, Bremen, 1852, vol. i., and the historians, as Curtius, iii., 250 et seq. (Amer. ed.), Grote in vols. iv., v.

† For the later tyrants comp. Plass, vol. 2, and the historians.

the citizens, so that nothing that they were doing could be hid, and that they might be accustomed to baseness and timidity; to employ spies and eavesdroppers, as was the practice in Syracuse under Hiero. Another principle was to keep their subjects poor, and in constant occupation. To this Aristotle ascribes the great works of the tyrants of Sicyon, Athens and Samos. So they wore down their subjects by heavy taxes. In five years Dionysius (the first) absorbed the property of the Syracusans in this way. They resort to war (he continues), to keep the people busy and create a necessity for a leader. The tyrant distrusts his friends, knowing that all wish to overthrow him, and that they are best able to effect this. The vices of extreme democracy are all of a tyrannical sort; among others the flatterer, in the shape of a demagogue, is to the people as humble courtiers to tyrants. Men of a free and self-respecting nature are hated and feared by him. He admits to his table and his familiarity strangers rather than citizens; these being natural enemies and those not likely to oppose him. All these particulars Aristotle sums up under three heads. *The first* is, that tyrants aim at debasing the spirit of their subjects, for a mean-spirited person will plot against nobody; *the second*, that they aim to breed distrust of one another among the citizens. Thus they are at war with men of worth as being hostile to their government, not only because such persons disdain to be governed in a despotical way, but also because they are trusted in by others, and are incapable of treachery and false accusation. *Their third* aim is to keep their subjects inefficient and feeble; for in this condition to attempt to overthrow the tyranny would appear to them a thing impossible. (Pol., viii., or v., 9, §§ 1-9.)

Aristotle, in a passage which may be compared and contrasted with Machiavelli's Prince, shows how the tyrant may maintain his power. As the "basileia" (limited monarchy) can ruin itself by becoming more tyrannical, so the tyranny can save itself by becoming more like the "basileia" if it hold on to one thing, to wit,

Aristotle on the tyrant's keeping his power.

its power,—that it rule over its subjects, whether they will or not ; for if it gives up this, it gives up its tyrannical sway. This secured, the tyrant, in act and in seeming, must play the kingly character well. Thus he must seem to have a care for the public interests, must render account of receipts and expenses, must use his revenues without wasting them on courtesans, strangers, and artists ; must, in raising imposts, appear to do it for the administration of affairs, as the guardian and treasurer of the public property and not of his own. He must not appear morose, but grave ; must keep all his retinue from outrages toward the young of either sex ; must keep the women of his house from insults toward other women, since such conduct has destroyed many tyrannies. He ought not to show to the people that he is addicted to pleasures ; for if he does this they will despise him. He should embellish the city where he lives, as being a guardian and not a tyrant.” “ He should seem to be zealous in things pertaining to the worship of the gods, for people have less fear of being injured, if they think the ruler a religious man and inclined to pay due honor to the gods, and they plot the less against him as having even the gods for his allies. But he ought to be such without silly weakness.” Then, after other cautions of less importance, he adds, in summing up, that the tyrant must appear to his subjects to be not a despotical but an administrative and a kingly man ; not a seeker but a guardian of his own interests, and to have the spirit of moderation and not of excess. He must keep company with distinguished persons and must court the people. He ought to be in his character either well affected toward virtue or half-good, and not bad but half-bad. And yet of all the polities, oligarchy and tyranny are the least lasting (u. s., §§ 10-21).

The mediæval tyrants appear in northern Italy, where the cities became so far independent as to be able to pass through an almost free development. The peace of Constance between Frederick I. and the Lombard towns in 1183, provided that all their immemorial rights

Italian city-tyrants.

should be continued, including the right of war and fortification and the administration of justice. For a sum of money the rights they had newly usurped were to be retained. In those towns where the bishop had had a count's jurisdiction he was to have the right of investing consuls with their power, if he had actually exercised that right at the time of making the treaty. In the other towns the emperor gave to the supreme magistrates their official power, but their investiture was to be gratuitous. Magistrates and vassals were to swear the feudal oath of allegiance. Appeals were to be to the emperor or his supreme judge, except in small cases. Disputes of a town or of its citizens with the emperor were to be decided according to the law and customs of the land, and in the emperor's court, if he were in Italy. When he came into Italy they were to furnish provisions, and repair roads and bridges.

This peace made the emperor's rights over the cities of very little importance, and, by weakening the league against him which was intended for their mutual protection, left them free to pursue, each for itself, its own course. Feuds arose between the towns, and ere long the whole country was convulsed with the strife between the Guelphs, or originally papal, and the Ghibellines, or imperial party. In the thirteenth century wars were waged between neighboring states according as they espoused one side or the other. Thus the house of Este of Ferrara were at enmity with Ghibelline baillis of Bazzano; the Ezzelino da Romano and Genoa with the Marquises of Montferrat of the same party. The tendencies of the more prosperous towns were towards the increase of power in the lower class, the members of the lower guilds, and the operatives. Out of the strife of factions and of classes the tyrants arose, by availing themselves of the power put into their hands, as heads of the government in the cities, or by the use of mercenary troops whom, with themselves, they hired out to cities or leaders of factions. From these *signori*, chosen to be at the head of affairs in the towns, and these *condottieri*, arose the brood of Italian tyrants in the fourteenth

and fifteenth centuries, such as the Visconti and Sforzas in Milan, the Langoschi in Pavia, the da Gonzagas in Mantua, the della Scalas in Verona, da Carraras in Padua, and others.

Milan may be taken as an example of the rise of such dynasties. After the fall of the Hohenstaufen (1268), the papal party was quite in the ascendant, but the old feuds were fomented by occasional visits to Italy made by the German emperors. In 1311 the emperor Henry of Luxemburg, helped the Ghibellines in Milan, under Matteo Visconti, to drive out the head of the Guelphs, of the family of della Torre. Both families were of noble extraction, and had taken the popular side against the upper class and the nobility. Matteo Visconti had been banished from Milan, and with the Pisans invited Henry VI. into Italy (A. D. 1310). His arrival was the signal for insurrections of the Ghibellines, who now again acquired ascendancy in many of the towns. Matteo became imperial vicar in Lombardy; the house rose to great prosperity, and Giovanni Galeazzo, having a large part of Lombardy under his sway, induced the emperor Wenceslaus, in 1495, to make him hereditary duke of Milan, with the dignity of a prince of the empire. He is said to have meditated the establishment of an Italian kingdom of his own, which would not have been much more of a usurpation of imperial rights than had been submitted to before. His son, Gianmaria, a tyrant in temper and in his government, was murdered in 1412. Under his successor Phillippo Maria, Francesco Sforza, the great condottiere, was taken into the service of Milan in 1425; he became the duke's son-in-law in 1441, and, on the death of the latter in 1449, was appointed by the Milanese, who had then restored the old government, to be their captain. A quarrel ensued soon afterwards between him and them; he besieged and took Milan, and was accepted as their duke in 1450. The successor of this very able man, his son, Galeazzo Maria Sforza, after ten years of tyrannical rule, was assassinated in 1476. He tequalled, if not surpassed in his atrocities, the worst Greek tyrants. The dynasty, and the separate existence of Milan,

ended in 1500, when it was conquered by Louis XI. of France.

The progress of things in Milan, from the condition of a town of the empire under the direct sway of a bishop, through self-government and strife of classes towards a greater control of the lower people, and ending in the nearly irresponsible rule of a series of hereditary tyrants, is enough to show the tendencies in a number of Italian towns. Their state was worse than that of the Greek communities under a similar government. The quarrels of pope and emperor, the intestine feuds of the strata of society, the rivalry of candidates for power, the condottieri-system, gave the tyrannical spirit the opportunity to expand, and with other causes spread a terrible demoralization over Italy.

#### § 168.

As we have had occasion already to remark, even absolute governments meet with some check to their caprice and lawlessness from old institutions, or from the unwillingness of their servants to expose themselves to vengeance, or from fear of rebellion. The limits of power in limited monarchies, on the other hand, lie in the constitutions themselves, and in the existence of orders and organs to which a portion of power is committed. Simple governments, like pure democracies in which there are no orders, may contain checks upon the political powers in their framework of government, and others of a practical kind in the people's sense of its interests. But limited monarchies must find their checks not only in their constitutions but in the actual strength of those political powers which are able to resist or counterbalance the leading power of the state. Mixed monarchies are something more than limited ones, as we have already seen. There may be a limited monarchy where king and people, the former restricted by a constitution, the latter organized and invested with certain means of preventing illegal government, are the only forces. This may be called mixed, perhaps, yet the term rather inclines to embrace only

Limited and mixed monarchies.

such states as have three or more political powers, as king, nobles, and people, united in the government, or the same powers with the clergy, as in many mediæval states. Thus all mixture contains limitations, but all limited governments are not mixed. It may, therefore, be said with some justice, that a mixed government contains institutions naturally belonging to one form, which are introduced into another, as those belonging to aristocracy or democracy into monarchy, while limits or checks are provisions which may be introduced alike into either of the three forms, or into any other form that may be laid down. Thus the securities of English liberty, such as the habeas corpus, the necessity of special warrants, the prohibition of quartering troops, or even such great features as a constitution or a separation of powers, might enter into either of the forms without taking it in the least out of its category or mingling it with any other; while local self-government, or a House of Lords, or the overcoming of the king's veto, as in Norway, by three successive storthings, is a mingling of forms, properly understood; it is not like a break or check on a movement of a simple form of government, but more like setting two rulers on the throne, or dividing power among the forces of society. Whether, indeed, practically such a distinction is worth anything more than a passing notice, we may well doubt. This, however, deserves to be remarked, that elements entering into forms of government, increase in strength or in weakness through the rise or the fall of social forces. Thus we may conceive of a nobility, represented in the government of a state, becoming so weak that it is a mere form and incapable of playing its pristine part. Then to eliminate it is a true policy, because it no longer stands for itself or represents some portion of society. So a free community gathers wealth and strength, has an opinion circulating through it, and is in a situation to enforce its demands. To open the way for it into power, to *mingle* the new elements thus supplied with the old ones, will be a wise, perhaps a necessary thing. Such introductions of new powers may be said to make a government, which was pure or simple

before, mixed or complex. But to construct new systems on such a plan as if the mixture were to have the best qualities of several forms, seems to be a fantastic proceeding.

It may sometimes be a matter of doubt by what name a government in actual existence ought to be called, for the reason that it has changed since its history began by the rise of new interests and ideas. Thus, what was the Spartan government? was it a monarchy under its double line of kings, with its ephori gradually growing to represent popular power, and restraining the kings; or was it an aristocracy with two heads? What is the British constitution at present, and especially what is the power in it that is actually supreme? It is not monarchy that is supreme in fact, nor aristocracy. It is not strictly what might be called *plutocracy*, but it is the will of the better class of the community expressed through parliament under a prime minister at the head of the opinion that controls for the time. In form it is monarchy, and the monarch appoints the minister, but does little else. And it may be that the very best governments are nondescript, as the most effective and useful characters have a blending of qualities which it is hard to describe, or reduce to system.

#### § 169.

We begin our remarks on monarchical forms with elective monarchies. Probably a great part of the early Elective monarchies. kings were chosen or in some way accepted in the first instance; but the hereditary principle is so strong, and the king's motives to secure the succession to his family, so great, that few continued true to this principle. And it is unnecessary to say that a despot may be elected; and that election only implies, in regard to the sovereign's power, that those to whom the choice belongs will naturally make some capitulations with him in regard to their rights or their privileges. The hope also of securing election for a son is some pledge of the elected king's good conduct.

As for the advantages of election, one is that a man in the full vigor of life will always be chosen; thus the evils to



which hereditary monarchy is exposed, from the minority and the feebleness or ill-training of families already in possession of the throne, will be prevented. During 520 years, as Sismondi remarks, in his "*études sur les Constitutions des peuples libres*" (p. 157), France was governed by sovereigns who had not reached the age of twenty-five,—the legal age,—for ninety-two years; and during fifty-six years, by princes under twenty-one. A long minority is apt to be a time of weakness, intrigue and danger. And again, Charles VI. of France was deranged for many years, during which the kingdom suffered untold evils in consequence. It is to be added to these facts that the families, to which sovereigns must look for wives according to the usage of Europe, are few in number. There is great danger from this breeding in and in, that the lines will have hereditary diseases and weakness of intellect, not to speak of the enfeebling vices to which the free command of money opens the way.

Another consideration is drawn from the disputed successions which have convulsed Europe in various countries. The claims of Edward III. of England against the house of Valois brought on the long wars of England and France in the fourteenth century, and their sequel in the fifteenth. The war of the Spanish succession at the beginning of the eighteenth century convulsed all Europe.

But, on the contrary, the evils of disputed elections have not been small. The wars of election in Germany, according to Sismondi, filled up a space of forty-three years, those of Poland hardly thirteen, those of Hungary ten (u. s. pp. 155, 158); but to this ought to be added the evil of uncertainty regarding the future.

An elective king will also be restless and full of plans, as one who has no stake in the country for the future, and must act according to the leading of a vigorous nature. In constitutional countries, where a responsible ministry carries out public opinion, it is of little moment whether the ruler be a man of great abilities: the main thing is to secure quiet and prosperity, justice and intelligence. On the whole, the

dangers arising from a new election after an elected king's death are greater than any evils of hereditary monarchy.

The principal elective monarchies have been Poland and Hungary in modern times, with the Germanic body, whether empire or confederation. In Poland. Germany the election was apt to fasten on a member of the same family with the deceased king. Thus, soon after the last member of Charlemagne's family came the Saxon, the Salic, the Hohenstaufen, with short intervals; then the Austrian family after a long interval, but in almost unbroken succession until a recent time, so that the election has been rather a form than a fact. But the Germanic body will come before us more appropriately at another place; election was only one of its features, yet perhaps it contributed to the loose, disjointed state of the empire.

The limited elective monarchy of Poland was not the original form of government. The family of the Piasts, as sovereigns of a whole or a part of the country, succeeded one another by hereditary title from the close of the ninth century, until, on the extinction of the family, the Jagellons followed. In or about 1139 Boleslav III. made an arrangement by which the eldest of the family should occupy Cracow, with a precedence or seniorate over the rest, and, with the title of grand duke, should represent the unity of the kingdom. This division of jurisdictions broke up the kingdom, so that, although it had almost become an absolute monarchy, it sank under his successor into great weakness. Especially the larger landholders gained power in this time of discord (as was the case under the grandsons of Charlemagne), by grants of land securing them as auxiliaries. In 1319 Wladislaw Lokietek, duke of Cracow, was crowned king of Poland, with the consent of the pope and of the bishops in the country, who wished to unite the parts together into a compact fortress against the heathenism of the more eastern peoples. Under his son Casimir the Great (1333-1370), who united Poland together more completely, the nobility attained to greater power, especially through their unions or confederations, now formed

for the sake, at first, of self-protection against disorder. Louis of Anjou, the nephew of Casimir, and then king of Hungary, who succeeded him, was obliged, in order to induce the magnates to take his part, to promise that he would have no new taxes imposed, would preserve all their rights and immunities, would defray the expenses of himself and his retinue on journeys, and pay back to the nobles their charges incurred in foreign wars. With Casimir, the male stock of the Piasts ran out; after an interregnum and a disputed succession consequent on the death of Louis, and after an agreement on the part of many nobles that the king could reside in the land, a marriage was arranged between Hedwig, a granddaughter of Casimir, and Jagellon, afterward known as Wladislaw II., grand-prince of Lithuania, who now became a professed convert from heathenism and king of Poland (1386). Thus a union with Lithuania, and the nominal Christianization of its people, were secured. With this virtual choice of the first Jagellon by the magnates, their privileges were enlarged, so that it has been said that the absolute monarchy of the Piasts, as it appeared under Wladislaw Lokietek, had now turned into an oligarchy, which, to secure itself for the future, limited the concessions made to the new king and queen to the life of the former—a device which, by rendering a capitulation at the beginning of each new reign necessary, made the kingly office in fact elective. At the same time, the magnates obtained great extensions of their privileges. The first Jagellon reigned nearly fifty years, to 1434; his second son, Casimir II., from 1445 to 1492. Under him the diet had an essential control over public affairs and the kingdom became a republic. His three sons, who reigned in succession, were, I believe, all elected by the diet. At the death of the son of the third, Sigismund II., in 1573, the male line of the Jagellons ran out; and the royal election was established, with the provision that during the lifetime of a sovereign his successor should not be chosen; which would preclude intrigues for the choice of a son as successor. Henry of Valois was elected, but forsook his crown in a few

months to appear in France as Henry III. In 1587 John Sigismund of Sweden, related to the immediately preceding kings, was elected; and his two sons followed him until 1669. The two electors of Saxony, father and son, wore the crown from 1697, with an intermission until 1763; then Stanislas Augustus, under whom the first partition of Poland took place.

The greatest confusion reigned during many of these years, arising out of attempts of parties of nobles to get their candidates elected. The elections were managed in the diet by deputies; but multitudes of nobles, who were not deputies, were assembled with their armed retainers in the neighborhood. The diet drew into its hands most of the business of the country, leaving little for the king. They enacted laws, levied taxes, made peace and war, had the raising of troops, the coinage of money, naturalization and the power of conferring nobility in their hands. They could sit only six weeks, and could pass nothing but by a unanimous vote—what was called the *liberum veto*. Poland thus gives us an example of a monarchy becoming gradually more and more restricted in its powers by a numerous body of nobles; who could conspire to wrest privileges from the sovereign, but had no bond of union among themselves that kept them from dissensions which were worse than those of properly feudal kingdoms. The monarchy could never have been united and consolidated, unless the hereditary principle had presided over its growth. The later form of it, if it deserves to be called a monarchy, was anything but desirable; it was one of the worst of governments, and presents to us an instance of limitation on a bad principle and carried to an extreme for the interests of a great governing class, while the actual cultivators of the soil had no political power whatever.\*

Hungary passed through changes quite parallel to those of Poland, owing in part to influences proceeding  
 Hungary. from feudal Europe in favor of the encroachments of the nobility; in part to the expiration of the

\* I have derived much assistance from Weber, Allg. Weltgesch., vol. viii., 536-593, in this sketch of the Polish constitution.

dynasties (at which junctures the nobles could make their power felt in choosing or rejecting a sovereign); and in a measure also to the policy of the Church of Rome. Under Geisa, Christianity got a foothold in the land, and his son Stephen (997-1038) established the hierarchy and organized the kingdom with the advice and consent of the great persons civil and ecclesiastical. The succession was to be hereditary, the sovereign to be armed with full executive powers over the country. This was divided into counties under officers, who, like the counts of western Europe, were heads of military forces and chief judges in their districts: in other respects also the feudal relations were copied. No order of burgesses appeared for several centuries, and the grades of the nobility had the ordinary contests with each other. The succession to the crown, while hereditary, did not pass in course to the next male; but rather it sometimes happened that the king's son was set aside and his brother accepted in preference. Much confusion arose out of the uncertainty as to who was to be the next king. Under Andrew II. in 1222, the nobility received by an instrument called the "golden bull" or book, privileges such as exemption from all burdens except military service, which they were obliged to perform only within the land, and from forfeiture of life or estate except by judicial trial. If the king waged war out of the land, they were to receive pay for voluntary service. A diet should be held yearly in Stuhlweissenburg, at which every nobleman was to appear. If the king or any of his successors violated these privileges, and others given by the same instrument, he might, without breach of faith on the nobility's part, be resisted. By an addition to the "golden bull" in 1231, the lower nobility and clergy were secured in their rights and the peasants were somewhat protected.

In 1301, the male line of the house of Arpad becoming extinct, Charles Robert of Sicily, of the house of Anjou, a descendant through his grandmother, whose claims the pope espoused, was, after a strife of claimants, accepted by the Woiwodes and crowned as king. His son, Louis the Great,

also king of Poland (1342-1382 in Hungary), confirmed and added to the "golden bull" in a great diet at Ofen. Among the new privileges were that the allodial property of the nobles might be freely transmitted to their children and relatives, although not be alienated by gift or sale without the king's consent. The privileges of the higher nobility were extended to the lower. The peasantry also were allowed to have the right of free change of abode, but were made subject to an impost of a ninth part of their produce, and were amenable to the courts of the proprietors whose lands they cultivated. Thus they were brought down to the condition which the same class then had in other lands. The death of Louis was followed by long strife, until, in 1403, Sigismund, son-in-law of Louis, and afterwards emperor of Germany, was acknowledged as king. He made important changes in the constitution, especially by calling the deputies of the free towns and lower nobility to the diet, which thus was made to consist of two houses or "tables;" that of the magnates and that of the "estates." The estates, however, did not rise to great influence, partly because the German towns were not united with them, and partly because the lower nobility took more interest in the county diets than in those of the kingdom.

The house of Anjou died out in 1457, and the next year Matthias Corvinus, son of the great national hero John Hunyadi, was chosen king. On the death of this accomplished king in 1490, Ladislas of Bohemia, son of George Podiebrad, succeeded by election. His son, who was chosen to succeed him in 1516, Louis, king of Bohemia, perished in the fatal battle of Mohacz with the Turks, in 1526, and Ferdinand of Austria, brother of Charles V., emperor of Germany, was the successful candidate for the crown. The kingdom of Hungary from his time was permanently united with Austria, under a separate diet and retaining its ancient constitution.

Bohemia also became, something like Hungary, an elective monarchy, finally associated with Austria. The choice of the elector palatine as king, against the claims of a member

of the Hapsburg house, brought on the thirty years' war, which ended in the overthrow of the former.

The election within a certain family, involving the setting aside of the nearest relative of the deceased king, and even deposition itself, ran through most of the Germanic states. Waitz says (*Deutsch. Verfassungsgesch.*, i., 298, ed. 2) that no fixed right of inheritance obtained in the German kingdoms. "Everything depended essentially on the people; the people confirmed, acknowledged, chose the king. In a peculiar manner a right of inheritance belonging to a kindred and a right of choice belonging to the people are united together. So Tacitus himself says.\* The people of the Cherusci called Italicus, then a hostage from Rome, to be their king. (*Tac. Annal xi.*, 16). A coöperation of the people in raising a king to the throne, shows itself among Goths, Franks and Lombards. The king indeed recommended his son or grandson to the people; their word, however, could put another in the place. The occasion for this occurs when a minor son is without independent strength. In such a case also the people conceives the thought of calling some other to the sovereignty. With the people alone rests the decision what is to be done if the old line dies out, or when a kingdom is first founded." Mr. Kemble says that "the elective principle is the safeguard of their [the German] freedom, the monarchical principle is the condition of their nationality" (*Anglo-Sax. i.*, 137). To these authorities I add that of Prof. Stubbs (*Const. Hist.*, i., p. 135). "Of all elections the most important, no doubt, was that of the kings; and this belongs, both in form and substance, to the *witan*, although exercised by them in general assemblies of the whole nation. The king was in theory always elected; and the fact of election was stated in the coronation service throughout the middle ages, in accordance with the most ancient precedent. It is not less true that the succession was by

\* Germ. § 7. "Reges ex nobilitate sumunt." Choice is implied whether we translate *ex nobil.* from out of the nobility, or according to, with respect to, their nobility. From Waitz's note.

constitutional practice restricted to one family, and that the rule of hereditary succession was never, except on extraordinary occasions and in the most trying times, set aside." And again, p. 141, "the king is elected by them [the *witan*] and liable to be deposed by them. He cannot settle the succession to the throne without their sanction."\*

The elected king appears in the history of other states, especially of the Indo-European stock. We have seen that the Roman kings were elective, and from no one family; the *Æsymnetæ* of Greece are called elected tyrants by Aristotle, as despots in their power, and "*kings*" by their free election (Pol. iii., 9, §§ 5, 6). The *Tagi* of Thessaly seem not to have been hereditary. The story in Herodotus of the election of *Deïoces* may well be a Greek invention, or may contain distorted and colored facts (comp. Grote, iii., 307, 308); but it seems likely that when the disconnected village communities or the cantons felt it necessary to unite together, the union was brought about by election in the first instance. In fact, if there were a head over each community, no other process could adjust their rival claims. Then the hereditary principle, which reigned in the sept or village community, where all felt their relations to each other, soon became customary in the monarchy. But in many parts the nobles came at length into conflict with the power of the kings and brought it within their control by election.

### § 170.

We see in what has been called elective monarchy, the aristocracy curbing and controlling the kings by taking away from them hereditary or family right. In the *feudal* monarchy we have another instance of the weakening and limiting of that principle by a landed aristocracy, until it parted with a large share of its power,

\* Comp. also Grimm, *Deutsche Rechtsalterth*, p. 231, ed. 1, and Freeman, *Norm. Conq.*, vol. i., notes R and S, on the right of the *witan* to depose the king and on the election of kings.



and the old king became the head of men who were exercising most of his former rights in the districts of a disintegrated country. The rise, spread and fall of the feudal system form one of the most remarkable chapters in the history of mankind. We can take into view only its most general features, and must leave out of sight altogether the variety of details, and of differences in different parts of Europe.

Under the kings of the two Frank lines there was a nation owing obedience to the sovereign or sovereigns—for the realm was often divided up between two or more of the same family—with general taxation, and counts having military and civil power as public officers in their respective districts. In process of time, owing to the burdens of war and the distresses of the country, as well as to the grasping ambition of the large proprietors, the smaller landholders to a large extent disappeared, by commending themselves to the more powerful, surrendering their lands and receiving them back in usufruct, for the sake of the protection furnished by the strong societies gathered around civil or ecclesiastical chiefs. The chiefs (counts and others) themselves changed their relations to the kings by usages which had a wide spread. These were first *beneficium*, or the receipts of tracts of lands in usufruct; second, *vassalage* or *commendation*, by which with a simple form they entered into the king's service or became his men; and third, *exemption* or *immunity*, that is, the freedom from the count's jurisdiction both in the army-ban and in judicial matters. The two first of these relations at first appear separately; a beneficiary, it might be, was not a vassal, and *vice versâ*; and the last of the three, which developed itself latest and was by far, politically speaking, the most important of all, was built up on the personal relations denoted by the two others. The ecclesiastical foundations were the first to make this privilege available; the large lay proprietors followed them. When this new order of things first began (which was manifestly due to the weakness of the kings and the desire of the great proprietors to strengthen their positions), it was not transmissible from father to son;

a great step was gained by them in securing this advantage. The hereditariness of benefices or *fcuda* (fiefs), as they were called in and after the ninth century, is commonly ascribed to a capitulary of Charles the Bald, made a little before his death, at the diet of Quiercy sur Oise (Conventus Carisiacus), in 877, in which, if a count should die on the projected Italian expedition with the king, leaving a young son, that son with the *ministeriales* of the county and the bishops of the diocese, was to have oversight of the county until the matter came to the king's knowledge. This, however, was not an absolute nor a universal provision; it did not altogether fix the hereditary character of benefices in the kingdom, and in other parts of the empire of Charlemagne it had no force.\*

It took a long time before this system matured itself. *Beneficia*, at first, ended with the life of the grantor or of the grantee. Some were for short definite times, some for five years; others were expressly excepted from this condition. The king himself, or a female, or an ecclesiastical corporation could be a beneficiary. The beneficiary did not need to become a vassal. *Vassality*, again, seems gradually to have become a distinct relation from *commendation*. The relation began with placing the hands folded together in the hands of the senior or protector and taking an oath of fidelity. Yet neither of these forms was confined to vassality. We find women, even a king's wife or daughters, becoming *vassi*, and the counts as well as the bishops having persons under their protection, called by the name of *vassi* or *vassalli*, which had no difference in meaning.

Still more gradual does the development of *exemptions* or *immunities* (emunities) seem to have been. Immunity from taxes was much connected with admission under the king's protection and with gifts of lands (*beneficia*) from the king. This indeed was nothing more than a continuance of the freedom from taxes which royal lands had had before. Such

\* This is in Walter's Corpus, iii., 210, in Perz's Leges, i., 539.

immunity convents especially enjoyed; lands, given by the king to such foundations and to churches, had generally this privilege, which probably the king only could confer.\*

The immunities under the later Merovingians, Pippin, Charlemagne, and the later Carolings, generally take the form that no public officer should enter the court or lands of the foundation, either to institute judicial proceedings there, or to demand quarters or lodging, or take securities, or to levy peace-money,† or to hold the people pertaining to the same to justice. The immunities affected the direct obligations to military service of small proprietors who had commended themselves to ecclesiastical foundations, and thus a temptation was presented to free men who, not on account of poverty but to get rid of public services, entered into this relation. In 825 Lothaire, son of Louis the Pious, tried to prevent this by an edict requiring of such persons “*ut hostem et reliquas publicas functiones faciant . . . quousque res ipsas possident*,” and gives the counts the right to distrain upon them, the immunity notwithstanding. It was on the other hand an important point for the foundations to have these persons and their lands included in the privilege.

Immunity often excluded entrance of public officers into woods for hunting purposes, and exemptions from customs and tolls for highways and bridges. But three services due to the state, the services in the army, in watching, and bridge-building, are excepted by Charlemagne in a noteworthy document (Perz. Leges, i. 728). So among the Sax-

\* Documents issued to ecclesiastical foundations by nobles, grant it, either as pertaining to the land already, or as expressing a wish, which a higher authority might confirm. Forged documents are numerous in regard to this immunity, as given to convents.

† The transfer of the *fredus* (*fredum* or *freda*), *i. e.* of the composition or fine for acts of violence, when made payable from the fisc by the king's officer to the officer of the count or the religious foundation, shows that the claims of the king's officer as protector and judge had ceased.

ons in England ; saving that among them the *trinoda necessitas* included castle-building instead of watching.

The exclusion of counts from certain premises and lands, together with the granting of court-dues by exemption, led first to the usage that the superior, as the head of a convent, for instance, represented his people in the courts ; and this led, in the end, to separate jurisdiction, which was lodged perhaps, originally, in the hands of officers nominated by the king or his deputy, but still was private and belonged to the land. Thus such immunities, or lands under immunity, came to have the character of territories or lordships, separate from the body politic. Free men, with their services to the state, are passed over to the foundations in the documents instead of being under the king, and these rights were sometimes extended to the neighborhood of the properties. This precedent bishops made use of to get towns under their control, and the grants of Pippin and Charlemagne, by which towns were granted to the Roman See, were precedents for the future, the effects of which Charlemagne tried to keep within limits.

Through the immunities, a territorial nobility, consisting of descendants of counts, who naturally were large landholders in their county, or of landholders who received immunity from counts' jurisdiction, began to exist in the Frank kingdom ; for no titular nobility is traceable among them in their early history. By and by the name count no longer denoted a king's officer, but a man having the former political rights of the count on his lands, and transmitting them to his son or sons. The courts were his, with right of appeal as before to the king, or to his vicar the count palatine ; the command of his men became his under his flag ; much of the administration was in his hands. At length he grants charters, coins money, it may be, acts as a legislator, receives the homage of his vassals, has even the right of private war. Vast differences existed as to the rights of the feudal nobility ; succession was not the same ; the king's courts had powers in one part which they had lost in another ; there were various con-

ditions of the former unfree and of the smaller free class, all tending toward serfdom, with various burdens determined by custom within the fief.\*

Again, in some countries, as in France, nearly all property took the beneficiary form, while in others, as in Northern Germany, there were large masses of allodial lands that stood outside of the feudal system. So the greater part of the inhabitants in some parts became serfs or hereditary tenants, without power to leave their lands; but in other parts, as in Friesland and Ditmarsh, there were small freemen living together who always kept their free proprietorship from the invasions of the nobles.

By the rights, especially of jurisdiction, granted to the nobles, the king's power was restricted in its direct exercise to his own lands, where he exerted rights like his nobles. If they held great lordships, they, too, being vassals of the king or suzerain, had vassals under them; and in each grade of descent the inferior did homage for his lands to his immediate superior, down to the milites or knights who served in war as cavalry. Below these were the serfs, the few free men with small holdings, and the free people in the towns.

As the theory of the feudal relations became fixed, it was held that the king was originally the proprietor of all lands that were not allodial. Not the *state*, but the *king*; for all political duties became personal. Every proprietor who held his lands of the king did homage to him when he took possession, and the fine on this occasion was a token that strictly the land was only held in usufruct. The condition was fidelity (fealty), in failure of which the lands reverted to the superior. In general, on the same principle, there could be no alienation of land without his consent, and in the minorities

\* I have followed Waitz, *Deutsch. Verfassungsgesch.*, vol. iv., no. 7, and have been able to give but a brief account of what is most essential. The proofs are given by Waitz. The points in which he differs from the excellent books of P. Roth, *das Beneficialwesen*, 1850, and *Feudalität u. Unterthanenband*, 1863, do not affect this exposition materially.

of his vassals he was their guardian ; so also his consent to the marriage of an heiress of a fief was necessary where women could inherit. In the same way the vassals received homage from their vassals (arrière vassals), and so on. Allegiance was subdivided like jurisdiction.

It was the interest of the feudal nobility to have the king's rights over them fixed and restricted, while they were quite willing to act with more arbitrariness towards their vassals. The rights of the two classes did not go along together. In Germany, where the hereditary descent of *beneficia* or *feuda* was long unsettled, Conrad II., who had made a law for his Italian dominions to this effect, established the usage for vassals without positive legislation. Probably for the great princes it had been a fixed custom before, but he insisted that what he was willing to concede to them they should concede to the arrière vassals. This won the hearts of the smaller noblemen. "However much the crown, by conceding the hereditary descent of benefices, may have lost, the loss was richly compensated by the very numerous adherents who were gained in the class of the small vassals whose fidelity could be trusted." \*

The king, by usage or agreement (as by Magna Carta) was limited in regard to the occasions when he could demand money of his vassals, in regard to the amount and kind of military service, the offences against the suzerain for which they could be tried, and the manner of trial. The rule running through feudalism was that the vassal could not be taxed without his own consent, nor tried but by his peers. He was bound to attend the courts of his superior, he was bound to protect his person and generally to release him from captivity.

A system of this kind evidently broke up general society,

\* Words of Giesebrecht, *Gesch. d. Deutsch. Kaiserth.* ii., 167, who corrects the opinion generally received, and which Sugenheim adopts, that Conrad's German policy related especially to the lower vassals. It did them the most service, as the higher vassals, being a strong class over against the king, could have forced him into concessions.

the sense of security, and the general rights of a kingdom, introducing into their place particular rights, a divided kingdom, private war, the right of feud and of resistance. The kings were cramped and fettered. It was natural that they should be glad of any opportunity to overthrow this disorderly state of order. The changes of industry and law, new inventions, the rise of a moneyed class, afforded such an opportunity. The kings having always a right to hear cases on appeal, were enabled by their better Roman law,—which spread from Northern Italy over Europe from the twelfth century onward,—to supplant feudal law; by the help of the towns and their money to oppose the nobility; by the use of gunpowder and guns and hired men-at-arms to become more than a match for them and dispense with their help. This, with the national feeling that arose, was the beginning of the overthrow of feudalism. The national feeling was owing to increased intercourse, especially between the cities, to a law which was becoming common, to general estates where the three orders met together, to a new literature in the modern languages, to the rise of a diffused learned class.

Thus the sovereigns were beginning to change the balance between themselves and the nobility in their own favor. As they represented nationalization, general society and order, they carried the feeling of all classes with them, except the nobility. If now they could find a way of raising taxes for themselves, and could get the cities into their control, they would begin to lay a foundation for absolutism. In some countries they were enabled to do this; in others happily it was out of their power.

Feudalism exhibits to us national governments at their lowest point of weakness, and a change so vast as this was brought about in favorable circumstances by a class that at first had not the titles even of nobility. It shows us that an aristocracy of landholders under an almost nominal king is a form of polity which has in itself no elements of progress. Progress, for its support, demands aid from new social forces.

## § 171.

In the forms of limited monarchy hitherto considered the limitation comes from a part of the community, the only part that had any strength. In the mixed monarchy, the limitation comes from both the aristocratic and the popular elements of the state. The elective monarchy became such by influences proceeding from an aristocracy. The feudal monarchy owed its disintegration and its weakness to usurpations of the feudal aristocracy. What is called mixed monarchy contains three forces which may be developed into great activity and political life, but will naturally strive to repress each other's efforts at supremacy, by combinations of two against one, when that one is endeavoring to grasp more than its share; while, if the three (or four) are tolerably well agreed, the development of a nation may flow along under the control of great historical and social causes. It is, indeed, possible that such causes may dwarf one of the three, and favor the growth of the rest; but the nations that may be classed here give some of the most signal examples of order, and one of them, of progress, that history affords.

We will consider the constitutions of two that seem very unlike, the Sparta kingdom in Greece, and the British monarchy.

There was, in Doric Sparta, no nobility; all the Spartans proper were equals; and yet, over against the *Sparta. periocci*, who were free landholders without a share in the political rights, they were the aristocracy, while the helots were serfs owned like the land by the community, and did not become the property of individuals. Where then, were the three forces in this constitution? They were the *kings*, the *gerusia* representing tradition and order, and the *poorer class of the Doric Spartans*; who, long after the foundation of the polity, and notwithstanding the original plan of equality of shares in the common land, became reduced



below the level of the rest.\* These had their representatives in the *ephoroi*, who also, in an important sense, acted for the community as a check on the kings.

The kings present to us an image of the old Homeric βασιλεῖς somewhat shorn of their power, but with similar functions, and with this remarkable peculiarity that there were, through all Spartan history until near the close, two contemporaneous lines, which did not intermarry, had burial-places in different parts of the town, and were often at variance with one another. The tradition, beyond which it is not easy to ascend, makes them to have descended from a common Heraclid ancestor, but the reason given for the two lines is quite insufficient. We can hardly conceive it possible that at the early epoch to which a division of royal power reaches back, a dread of one man's power could have caused this departure from old usage. In Crete, if kings had been at the head of the states in the first Doric settlements, they ceased at an early date, giving place to *cosmi* or regulators, ten in number in each state, but chosen annually from privileged families (Aristot. Pol., ii, 4, § 6), a responsible board, punishable for misdemeanors, and invested with the charge of foreign relations and the interior administration, and with the preparation of business for courts. (Hoeck, Kreta., iii. 83-92.) At Sparta, the son first born after a king's accession, and of a Spartan mother, followed him, or if there were no son, the next relative on the father's side. The offices of the kings were, unlike those of the Homeric and early city kingdoms, subjected to constitutional limitations. They had a part in the gerusia, but no exclusive power of initiating business nor right of negative. In war they commanded together, in the early times; afterwards, one alone was

\* The skepticism of Grote in regard to the equality of lots of land under the old Spartan constitution, is justly rejected by E. Curtius and Schömann. Besides the difficulty of accounting for the tradition, its credibility is shown by the communistic leanings in other respects, by the equality of the Doric settlers, by the analogous practices in other lands.

entrusted with the command of the army ; and in later times so greatly had distrust of them grown, that an *ephorus* was given to them as a counsellor. They had among their judicial functions the decision in respect to the marriage of heiress-daughters, and probably of all jural questions growing out of the family relations. The oversight of the public roads belonged to them, and they had some especial connection, as protectors, with the perioeci, or non-Doric freemen.

The senate or gerusia was composed of twenty-eight members, besides the two kings. They must have attained the age of sixty, were elected for life by a kind of acclamation, the strength of voice in favor of any one being determined by persons in a place adjoining the assembly who were ignorant of the candidates. They were at first irresponsible, and continued to be so in the time of Aristotle. (Pol., ii. 6, § 18.) Their functions were, as counsellors, to prepare business for the assembly, which in early times accepted or rejected their resolutions without alteration ; as judges, to decide in capital cases ; that is, in those where life or civil honor and citizenship were at stake, and in cases where the kings were tried ; in which cases the *ephori* acted with them. The kings had a vote in trials, and if absent could appoint a proxy.\*

The assembly, consisting of all Spartans or "persons of equal rights," *ἴσμοιοι*, being summoned by the kings, and also in later times by the *ephori*, voted, as has been said, on propositions submitted by the senate, and perhaps expressed their minds on other points without having any formal resolution before them. The kings, senate or *ephori* might introduce the business. Legislation in the strict sense was a very rare thing. No laws can be found to have been made until the end of the polity, with the exception of two which materially altered it—one allowing the state treasury to receive gold and silver ; another, the law of Epitadeus, allowing alienations of estates.

\* Schömann, Gr. Alt., i., 134, whom I have followed to a considerable extent in this account of the Spartan constitution.

A very remarkable institution of Sparta, one which we may take occasion to refer to again, as a fine example of an institution in the strict sense, was the *ephorate*. When this began is not certain, but in its first form it was an office subordinate to that of the king, for the purpose of aiding him in administering justice and performing some of his duties in his absence. Police and censorial power over magistrates and the public discipline, which the king had at first, fell into their hands. Next they acquired a certain control over other magistrates and the kings themselves, a power representing the people even more than the kings represented them. With the prevalence of inequality in the size of estates, they took a democratic cast, as protectors of a poor majority against a rich minority. As Sparta mingled more in the politics of Greece, especially after the thirty years' war, they had great influence in external relations. Every month these representatives of the community, who never rose from their seats, as other men did, in honor of a king, gave to the kings, and took from them for the public an oath; the kings on their side promising to reign according to the laws, these for the state promising that if they kept their word, they should enjoy undisturbed authority. (Xen., Rep. Lac., end.) Their right it was to bring charges against a king, with the proposal to punish or depose him; or if another were the accuser, he must bring his complaint before these magistrates. The senate presided over by the other king decided the case. The accused king was obliged, when cited before the ephori, to appear at least on the third summons. All other magistrates were subjected to them in a still greater degree, could be suspended from their functions, could be arrested and even capitally tried. At first the king's assistants, then a checking board, they at length became a most positively active magistracy, especially in foreign affairs. Two of them accompanied the king in his campaigns to watch him. (Arist. Pol., ii., 6, § 20.) Add to this their power to take measures in regard to the Helots like the infamous *crypteia*, to keep up ancient discipline in ways of their own, to collect taxes

from the perioeci, to receive for the state the spoil taken in war, to adopt summary police regulations; and there will seem to be justice in Aristotle's words when he says (Pol. ii., 6, § 14) that the kings themselves were forced to play the demagogue because this magistracy was so very great and tyrannical.

We thus see a great change in the Spartan constitution, caused by the increase of the democratic power of the ephori, and that the power became democratic on account of the great inequality of landed estates and the number of poor citizens. The inequality itself was due, at least in part, to the decay of families in the male line and to the marriages of heiress-daughters. But if the general opinion is true that equal shares of land was a primeval provision of the Spartan, as it was of the Jewish constitution, it must have given way before a new sentiment inconsistent with the moderation and old-fashioned ways of Sparta. Connected with this is the looseness of life which Aristotle imputes to the women, of whom he says that "they lived in an unrestrained way in regard to all manner of licentiousness, as well as luxuriously." (Pol. ii., 6, § 5.) If then the constitution at first exhibits the kingly element in prominence, at the last, although the state was more than almost any other kept from the influences of foreign opinions and of commerce, it did not preserve its old upright position, but careened over toward the democratic side. The chief cause of change outside of institutions seems to have lain in the part Sparta had in the politics of Greece, and in the result upon the national character.

Aristotle, in his *Politics*, criticises the polity of Sparta with a degree of severity one would not have expected (ii., 6). One of his remarks has been already cited—that the Spartan discipline had failed in regard to the women; that wealth by consequence was honored; that the women had influence in public affairs and even did more evil if possible, during the Theban invasion, than the enemies themselves. A second defect is the disproportion of estates, which is such that the land had come into a few hands. The law rightfully made it

dishonorable to buy or sell a patrimony, but allowed the giving of lands away in life or by testament at pleasure. And yet the consequences are the same in both cases. Two-fifths of the estates are in the hands of women, owing to their coming into the hands of heiresses and to large dowers. It would have been better to allow no dower, or at most a very moderate one. As it is, an heiress can be given away by the father in marriage as he sees fit, and if he leaves no will the heir can bestow her in marriage at his pleasure. Hence although the territory can sustain fifteen hundred horsemen and thirty thousand hoplites, there are not a thousand of them in all. The state could not hold up under one blow, but perished on account of the scantiness of its population in the war with Thebes. The law relating to the number of children acts against repairing this evil; to promote a large number of male children, it gives to the father of three sons the privilege of being exempt from guard-duty, and to the father of four, exemptions from all state burdens. Yet it is plain that, as long as the division of landed estates continues as unequal as it is, the more poor there will be, the more children there are born. Another defect the philosopher sees in the *ephorate*. Although this magistracy has the greatest power in its hands, those who fill it are all taken out of the lower class of the people, so that often very poor men are put into it who are venal on account of their poverty. And yet this magistracy holds the constitution together; for the populace is quiet, because it has a share in the principal office. For a form of polity that will last ought to strive that all its parts should be and continue as they are. The kings continue as they are on account of their honor; the higher class on account of the senate, which is a reward of virtue; the common people on account of the *ephorate*, which is open to all. But it would have been better to adopt some kind of election not so childish as the present mode.\* And as the

\* Comp. what is said above of the election of the gerusia. Plato, *Laws*, iii., p. 692, A, speaks of the choice as equal to election. His

*ephor*i decide in the most important trials, it would have been well to lay down laws for them to go by, and that they should not have so much discretionary power. Their morals also Aristotle finds fault with, as contrary to the spirit of the state and opposite to the habits in which the other citizens are brought up. The gerusia in its composition ought to have been of advantage to the state, yet Aristotle thinks it of questionable expediency to leave to men through their lives the power of judging in important cases, for there is an old age of the mind as of the body, and some of the senators have been accessible to corruption. The manner of choosing the senators is more childish than that of choosing the *ephor*i (see above), and that the person who is to be thought competent to fill an office should ask for it himself is not well; he who is fit ought to have it, whether he wishes or not.\* In this provision the legislator follows a principle which pervades the polity; he makes the citizens ambitious by the manner of electing the senators, since no one unless he were ambitious would ask for an office; and yet the greater part of crimes are committed by men under the influence of ambition and love of money. As for the kings, Aristotle finds fault with the distrust which the legislator entertained toward them, in that their enemies (*ephor*i) were sent out with them on expeditions, and the discord of the two was considered the safety of the state. The common meals also he thinks not to be on as good a plan as the similar institutions among the Cretans, where the expenses were defrayed by the state. At Sparta every one had to contribute his part, whence it came to pass that the very poor were shut out, and lost their share in the polity in consequence. as to the system in general Aristotle agrees with what Plato says in the Laws (i., beginning, as in p. 628, D), that the whole system of Lacedæ-

opinion is that the ephorate, by being a check on the kings, saved them and the state.

\* Aristotle here condemns the life-tenure of senators and self-nomination to office. He never heard of caucuses, and probably would have accepted a long senatorial term with superannuation.

monian polity is calculated too exclusively for war. Triumph over enemies destroyed it, for they had no capacity of enjoying peace. The system of finance also was badly contrived; the state has no treasure, and the contributions amount to little. The state was poor and the private persons greedy.

In another place, where Aristotle is treating of the form of government which he calls *politeia*, he comes again to consider the Lacedæmonian system (vi., or iv., 7, § 5). Some call it a democracy, others an oligarchy; the former, because of the social equality in many respects, and the people's share in the elections; the others, because certain magistrates have great power, and the offices are given by election, none by lot. The demus elect the senate, and are eligible to the ephorate. What does he intend here and in the other passage by the *demus*? I am unable to say except that in the course of time a lower class of citizens arose, whose rights were not as good as those of persons who were eligible into the senate. In connection with this passage we may put those in Xenophon's Hellenica, where a class more numerous than the 'homœoi,' namely the 'hypomeiones' or the 'somewhat inferior,' are spoken of. They may have been the poorer class who had lost their full rights by being unable to defray the expenses of their common meal, as well as the descendants of such persons. The story of Cinædon (Xen., Hellen. iii., 3, §§ 4-11) shows the Spartan polity in the utmost danger, from a person of aspiring spirit who wanted to be inferior to nobody in Lacedæmon (u. s., § II. Comp. Aristot., Pol., viii. or v., 6, § 2).

#### § 172.

As in the Spartan state, so in England we find three forces, which may be called the kingly, the aristocratic or oligarchic, and the democratic, moving together or against one another, but different at different times in their relative strength. The kingly and aristocratic are in opposition at first, and the latter, gaining on the former,

English monarchy.

secures the liberties of England, and lays the foundation for a permanent check on royalty, and for liberties in which the commons share. Next, after a scene of war and conflict, in which the nobility perished to a large extent, the field was more clear for the royal element to aim at absolute power. The attempt was resisted mainly by the burgesses, who, however, received aid from a part of the gentry and nobles; and the result was, in the end, the weakening of the principle of monarchy, the stop of all tendencies to absolutism, the government of the country by a responsible ministry representing the prevailing judgment of the most enlightened classes in regard to the public interests and honor. But a constitution with several forces producing changes in opinion, which opinion is affected also by changes in wealth, industry, political theory, education, and other social or moral causes, cannot remain fixed in its details for a long time, however much a nation may hold to the great outlines of its polity. The leanings are, and have been for the greater part of the time since the revolution in 1688, except during the reaction caused by the French revolution, towards a more liberal and popular government, yet with a predominant influence of the aristocratical element; and in recent times towards extension of suffrage, removal of disabilities, and the transfer of the centre of opinion from the titled to the untitled wealth and intelligence of the country. The question now is whether the stream of change will not run in such a direction that the precedents of the past will be set aside, and forms of polity be adopted which are foreign from the genius of the nation.

A constitution which is so important in the science of government, which has had such a benignant influence on the states of continental Europe, and is to so great a degree the storehouse from which our American principles of civil liberty are drawn, deserves the most careful study; and its history needs acquaintance with long details for its thorough comprehension. The works of Hallam, May and Gneist, together with the learned history of the early constitution,



by Prof. Stubbs, when it shall have been completed, will furnish the political student with the needed information. Our aim in this place will be to consider the form or expression of itself in which the constitution appears, its leading elements, and the tendencies that show themselves at the present time.

1. The constitution appears in no separate form, distinct from the laws and usages of the realm. In this it is unlike the written constitutions—so-called—of modern times, unlike the charters and the instruments obtained by compact, that belong to the later middle ages but like the antique constitutions such as those of Athens and Rome, and especially like the latter, to which England in its fondness for precedent, its political skill, and practical good sense, bears a strong resemblance. In the ancient times, especially when strife of classes ran high, a legislator was called in to reform the laws and the polity. Thus Solon, and before him Lycurgus, gave a new form to the polity of their respective states; but the laws relating to the polity, and those relating to rights and order of society, are mingled together. The constitutions of Lycurgus are called *ρήτραι*, and whether the word denotes *covenants*, or *sayings*, or *maxims*, they were unwritten. One of them, according to Plutarch, was to use no written laws. (Vit. Lycurg., § 13.) But it is doubtful whether writing was then in use in Greece. The English constitution has something of the character of the common law; such a form or want of form could only suit a nation attached to precedent; and such attachment to precedent could belong only to a law-abiding people. A written constitution, full-grown all at once, has been compared to a machine made by rare hands, on a theory of powers and balances, which is expected by its framers to move of itself, through an inward mechanism. Certainly a constitution slowly rising and completing itself is likely to express most perfectly old political habits and to secure rights that have been attacked; it is like the common law and the customs of nations, a fruit of experience. But certainly, on the other hand, in an age when statutes over-

burden the books, and law takes a written form, there can be no objection to a constitution standing by itself in a written shape, separate from statute law, and, like some inner chamber, a sort of national adytum.

But it may fairly be replied to this that there is no broad line separating law and constitution. Laws may be trivial and may relate to minute matters; but they may, on the other hand, be of immense importance, and yet not within the political sphere. Thus, the right of trial by jury is secured in the Constitution of the United States; general warrants are prohibited, as well as quartering of troops. (Amendments, vii., iii., iv.) These are limitations of the power of the executive and courts; but other rights are not noticed in the same instrument, either by reason of their not having been invaded or of their smaller importance. The provision concerning general warrants was, without question, made prominent, because they were decided a little before, in the *Wilkes* case, to have been illegal and void. Was the illegality of general warrants a part of the constitution, properly speaking, or did this decision declare the state of the law? The decision was based on the uncertainty of such a warrant, which leaves to the subordinate officer what is the magistrate's duty, and is therefore no warrant at all (*Blackst.*, iv., p. 291); and yet, without doubt, the great argument against such warrants was a political one, drawn from the vast power they would throw, if allowed, into the hands of an executive. In England, then, they are illegal, in the United States, unconstitutional. This shows that there is no exact limit between the two provinces, but that good sense must determine where to place a particular provision at a particular time.

The question, what is the constitution, is often a very important one. How does English law or usage supply an answer to this? An illustration from the chapter of history to which we have referred will show. John *Wilkes*, a member of Parliament, having been imprisoned on a general warrant, for writing and publishing seditious libels, had been released by the court of common pleas on the score of privilege. Af-

ter this, parliament resolved that, privilege of parliament, of a political power, "did not extend to the case of writing and publishing seditious libels." Parliament had, by long use under the constitution, the power to expel its members for any crime or offence. But besides the oppressive nature of the resolution on other accounts, "to condemn the libel as seditious was to anticipate the decision of the proper tribunal." \* Now, who is to determine the privileges of parliament? Its treatment of its own members is perhaps within its own power entirely; but the case, in which Stockdale sued the printers of the house of commons (1836) for publishing by order a report declaring a book of his obscene and indecent, shows that their privileges will not justify a bookseller in publishing a parliamentary report containing a libel against a private person. † The commons endeavored to defend their privileges. They decided that the power of publishing reports "is an essential incident to the constitutional functions of parliament," and especially of the commons, and that "to institute a suit calling this privilege in question, or for any court to decide upon matters of privilege, inconsistent with the determination of either house, was a breach of privilege." Stockdale, however, went on with his suits, and finally, damages of six hundred pounds were assessed for him in the sheriff's court, judgment having gone by default. The sheriffs, who had the money in their hands and refused to obey an order of parliament to pay it back to the printers, together with Stockdale, were committed to the custody of the serjeant. The sheriffs were compelled, by an attachment from the court of queen's bench, to pay the money to Stockdale. At length an act provided that such actions should be stayed, on production of evidence that the paper, which was the subject of action, was printed by order of either house of parliament.

The question, then, what is or is not constitutional, may in many cases come before the courts, but it must not inter-

\* May, Const. Hist., i., 367.

† Ibid., i., 425.

fere with the privileges of parliament ; and in a conflict between the commons and a court, either the court's opinion must give way, or a new law must prevent all doubt for the future. The courts are thus not in the position of the supreme court of the United States, which in all cases can declare a law of congress to be inconsistent with the constitution. This is owing to the form in which the British constitution appears, and to the supreme power over *all* laws exercised by the houses of parliament and the sovereign.

Thus the "omnipotence of parliament" appears in this, that all laws, of whatever nature, are valid, if passed in the proper way through the houses, and have received the royal sanction. And in fact, the constitution has been changed most materially without receiving any formal sanction from the constituents. Thus the convention parliament declared James II. to have abdicated ; the succession was altered a little while afterwards ; the long parliament made war on the king ; a parliament of Henry VIII. put the right of naming his successor into his own hands. All this, however, has been consistent with a strong conservatism, a deep reverence for the constitution as it actually was or was understood to be. There has been no danger, owing to the happy stability of civil freedom and the general peacefulness of political parties, that such a thing as a radical constitutional change could ever be attempted or even apprehended. So great and just a change as the first reform bill was not passed without delay, long discussion and vehement opposition. But as the constitution verges toward the preponderance of the popular element, a time may come when it may be regretted that parliament itself had not been limited by a constitution which it could not alter or authoritatively interpret.

## 173.

2. The powers of the state. The royal power first calls for our consideration, as being of earlier origin than the others. As we have already seen, it was in the Anglo-Saxon times in theory elective ; but the kings were

Royal power.

taken from one family without regard to strict hereditary succession, the next of kin being sometimes passed by in favor of another nearer relative better suited to fill the throne. This election was made by the *witan*, who consisted of the principal ecclesiastical dignitaries (archbishops, bishops, and abbots), ealdormen and *ministri*, or king's thegns, who were the chief officers of the household and the leading holders of *folkland*, answering to the *antrustions* of the early Frank kings. The same body had the power of deposing the king; but in Wessex, there is no instance, says Prof. Stubbs, in which, without the presence of a competitor, who had perhaps an equal title to the throne by hereditary or personal qualifications, a king was simply set aside for misgovernment.

The Anglo-Saxon kingdom changed in the latter centuries of its existence in several important respects. The *folkland* by degrees became royal demesne or *bookland*; a number of persons commended themselves to the king; the military service became connected with the possession of land; private jurisdictions removed land from the jurisdiction of the court of the hundred. Thus influences from some source were beginning to put local relations, derived from proprietorship, in the place of state relations, and yet there was no complete feudalization of England. "The time however came," says Prof. Stubbs, "when the great local landowner was vested with the right of representing the king, as judge and *landrica* in his whole district, and so exercised jurisdiction over minor landowners." "This change," he thinks, "may have been a local enactment only." But "wherever it prevailed, it must have brought the local jurisdictions into close conformity with the feudalism of the continent." (u. s., i., 186.)

The king increased in power after the country was united under one sovereign, but the witenagemote was still necessary for legislation. He increased, also, in his sense of importance, in personal dignity, and is held to be Christ's viceroy on earth. He came also increasingly to be regarded as the fountain of justice, he was the guardian of the peace, and thus the head of civil order against those who broke the

peace and those who harbored them. And as jurisdiction is inseparable from the office of protecting public peace and order, all who were in his peace were under his jurisdiction; "he was supreme judge, limited, however, by the counsel and consent of the witan." (Stubbs, p. 183.)

When William of Normandy conquered England, he laid claim to the crown as the heir of Edward the Confessor. The same policy that led him to put forward this claim led him also to seek for acceptance from the witan and for coronation. No general division of lands followed at first, but with every new outbreak new confiscations and divisions took place, until "the fifteen hundred tenants in chief of Domesday take the place of the countless landowners of King Edward's time." All this took place without legislation. Military tenure came in by degrees, but the changes in the tenure of land and in other respects did not fully reach the strict feudalism of France. The oath of allegiance was taken by every freeman and freeholder, and at the council of Salisbury, "all the king's witan, and all the landholders of substance in England, whose vassals soever they were, came to the king and became his men and swore oath of allegiance and that they would be faithful to him against all others." This shows, as Prof. Stubbs observes, that he meant to modify feudalism, to prevent its disruptive tendencies. "The great feature of the conqueror's policy is the defeat of that tendency." Although the whole kingdom was brought under feudal forms, he meant to keep a personal hold on the lower vassals.

The form of royalty under the early Norman kings approached toward absolutism. The king's council, at which the lay and ecclesiastical magnates, and sometimes the smaller tenants *in capite* assembled, may be said to have succeeded to the powers of the witenagemote, but they rather gave consent than had a decisive voice. The administration was arbitrary, and the higher offices were in the hands of ecclesiastics to a considerable extent through fear of the feudal nobility. Had it not been for disputes concerning the title

to the crown, as in the cases of Henry I. and Stephen, the kings would have possibly been able to attain to an independence unknown in the feudal times. As it was, they were obliged to make concessions, to submit to an election by the council, and to take the old oath of observing the laws. What aided them was the want of union between the English and Norman elements. They were sure of sympathy from the old inhabitants, when they overcame the resistance of a refractory Norman nobleman. They retained jurisdiction in their own hands to a great extent through their own court-offices; although a few counts palatine had hereditary high jurisdiction, like the earls of Chester. They derived their revenues from royal estates of vast amount, from feudal dues of the usual kinds, and from old taxes, such as the Danegeld or assessment on cultivated land.

The reigns of Henry II. and his two sons, are important as the era when the people began to be a power in the state, as is shown in the great rebellion against Henry II. (1174), when the clergy, the newer nobility with the freemen of the towns and the country, were on his side. Still more is the reign of John of meaning for the constitution and for the English *nation*. Then first appear the beginnings of a representative assembly consisting of barons and representatives of townships; then, also, the right of electing the king is distinctly announced, when John is chosen instead of Arthur of Brittany;\* then finally, the leading men of the kingdom, with Archbishop Stephen Langton at their head, worn out and disgusted by the vileness, falseness and oppression of the king, force from him in his straits the Magna Carta (June 19, 1215).

This great charter, although a confirmation for the most part of rights before enjoyed under that of Henry I. (A.D. 1100), may be called more than any other single instrument a constitution; for it stands by itself in a written

\* See in Prof. Stubbs' *Const. Hist.*, i., p. 515, the speech of the archbishop from Matthew Paris.

shape ; it was repeatedly confirmed ; and although procured by the aristocracy, many of its provisions were for the benefit of all the people. Thus the city of London with all other cities, boroughs, towns and ports, were to have their liberties and free customs (Art. 12, 13) ; trials were regulated for the benefit of the community (18) ; fines at the discretion of the court were limited, so that even a villein should not be deprived of his wainage (comp. Blackst., iv., 379);\* and all ameracements were to be assessed by the oath of honest men of the neighborhood (20, 21) ; no town or person should be distrained to build bridges unless bound to do so by ancient right (23). There are also provisions for the settling of intestate estates of freemen, for fixed common measures of length capacity and weight (35), for the safe ingress and exit of merchants (41), for the general liberty of leaving and returning into the kingdom (42). Two articles deserve especial notice for their justice and wide application. One is art. 39: " No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished or anyways destroyed; nor will we pass upon him or commit him to prison, unless by legal judgment or unless by the law of the land ;" with art. 40, " we will sell to no man, we will deny no man, nor defer right and justice," and art. 60: " all the aforesaid customs and liberties, which we have granted, to be holden in our kingdom, as much as it belongs to us, towards our people, all our subjects, as well clergy as laity shall observe, as far as they are concerned towards their dependents."

Perhaps the spirit of humanity and justice may be recognized in these provisions which appear among the articles applicable only to the feudal classes of barons and higher clergy ; but there must have been a feeling also that the towns and smaller freeholders were a power which ought to be secured on the side of the higher classes.

\* That is, according to Blackstone, his team and implements of husbandry. But wainage seems to mean the wagon itself only, as carriage means that which carries, a vehicle. So the merchant is fined (24) saving his merchandise.



In the long weak reign that ensued (1216–1272), the third estate obtains a still further recognition of its importance. In the sixty-first article of the charter John had granted to the barons at Runnymede the power of choosing five and twenty barons, whose office it should be to cause the peace and liberties confirmed by this charter to be observed. In case of failure on the king's or his officers' part to perform what he had covenanted to do, this committee of safety, if we may so call it, had the authority to seize the king's castles, lands and possessions, and distress him in any other ways they could, except by getting his or his family's persons into their power. When the grievance was redressed they should obey as before. Here allegiance is legally suspended and the *ultima ratio* of feudalism, the vassal's resistance to his lord, permitted.

It was not strange that a weak king, under the influence of foreigners and unscrupulous ministers, should be uneasy at the ascendancy of the barons and allow the charter to be violated. The barons at first inefficient, at length, in 1258, with Simon de Montfort, a most patient man for their leader, persuaded the king to consent to a council composed of their adherents, and obtained the provisions of Oxford, according to which the king's principal officers were controlled by the council, and parliaments were to assemble every year whether summoned by the king or not. At these parliaments twelve honest men elected by the commonalty were to appear, "when the king and his council should send for them to treat of the wants of the king and his kingdom." This was a prelude to what took place soon after the battle of Lewes, in 1264, when the king with his brother and his son were made prisoners by de Montfort; and through the influence of this powerful nobleman, who had no hearty support from the feudal nobility, two citizens were summoned from every borough to what may be called the first parliament resembling those of modern times. In the next reign, sometimes the deputies from counties and boroughs were summoned to parliaments, and sometimes not. To the meeting of 1295,

were summoned the high clergy, a number of deputies for the chapters and the clergy, forty-nine lay noblemen, two knights from each county, with deputies, two in number, from each borough. Of equal if not greater importance in political history is the *confirmatio cartarum* of the year 1297, granted during the war with Scotland after a refusal of some principal noblemen to join the army on account of illegal taxation. The king then says, "we have granted, for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy church, as also to earls, barons, and to all the commonalty of the land, that for no business henceforth we will take such manner of aids but by the common consent of all the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed." \*

Reserving whatever else needs to be added respecting the subsequent powers and efficiency of parliament of England, for another place, we will briefly trace the principal changes in the royal authority. During the reigns of the three Edwards and the two first kings from the house of Lancaster, there was, on the whole, a government by the nation for the good of the whole, without continued encroachments of one political power on the rights of the others. But in the wars of the roses the nobility were in great measure cut off, and the commons—the representatives of the counties and the towns—were too weak, too much composed of men under court influence, too inexperienced, and incapable of general action, to keep up their side of the balance. With Edward IV. began a tendency towards absolutism of the monarch, an extension of his powers which went on through the reigns of the Tudors and the Stuarts until the civil wars, and was again resumed after the commonwealth, by Charles II. and James II. According to the ordinances of Edward II. and statutes of Edward III., parliaments were to be held every year, or oftener, if need be. But these regulations became

\* The French form may be found in Pickering's Statutes, vol. 1. It is found also in Prof. Stubbs' Select Charters, 487-497 (Oxf., 1874).

obsolete, and the practice of the sovereign to call them or not came to be as it was in France and other parts of the continent. The house of commons increased in subserviency as the towns became many of them close corporations, and as places in the house were filled by dependents of the court. The aim was to try to raise money in extraordinary ways, such as 'benevolences' or loans from private persons, sales of monopolies and titles, fines for special offences levied by illegally constituted courts or such as had their jurisdiction illegally extended, and the levy of taxes beyond their original design. The courts of justice could be browbeaten by the king's servants, and were more or less filled with servile men. The theory of the king's right, irrespective of the people, of the sacredness and special divine sanction of his office, of the unlawfulness of active resistance to his authority, was held and taught by a large part of the ministers in the established church, so that the church was less free and more servile in spirit than it had been in the times of Anselm and Stephen Langton. It was a blessing that James II. added, to his aim to extend the dispensing power, the design to give a free position to a church hated by the nation: otherwise the contest of prerogative against public liberty would have been longer and more severe.

Since 1688, the tendency has been an unobstructed one towards placing the house of commons at the head of affairs, as the strongest of the powers of government. Let us look now at the actual state of these three powers.

The sovereign, reigning according to hereditary descent from Princess Sophia of Hanover, as prescribed by the act of settlement of 1701, is the head of the church, the commander-in-chief of the army and navy, has the power of making war, peace, and all treaties, appoints all political and civil officers, bestows titles, grants pardons, summons and dissolves parliaments, must give consent to laws before they become valid, and has a certain prerogative of somewhat vague but limited extent. This array of powers seems like investing the sovereign with absolute authority, and to this

it may be added that personally he is above the reach of justice. But after all the sovereign is great in dignity rather than in power. He is so hedged round by restrictions that his own will in political affairs avails but little, for he must do everything through others who are responsible, and he not only has limitations put on him in every direction, but it seems also impossible that he should escape out of them.

Some of these limitations will show the peculiar nature of the English constitution. 1. He must have a responsible ministry who can command a majority in parliament. Here we come to the nature and workings of a party ministry, which cannot now be dwelt upon. Suffice it to say that if the houses, especially the house of commons has a majority in it against the existing ministers which is decided and permanent, either they must resign or the parliament be dissolved. If the crown and the ministers prefer the latter, an appeal is made to the country in a new election, and if the election goes against the ministry, they must now leave their places at any rate; for should the crown insist as it might, on retaining them, there would be a conflict between the powers of state, the commons could refuse supplies and in the end impeach the ministers. If, after all, the crown should insist on its rights of creating its ministers and should continue them in power, it would in fact become responsible, would lose its constitutional place and expose itself to destruction.

2. Again suppose that a law has passed through both houses, and the sovereign dislikes it. The constitutional power of rejection is unquestionable; but the fact that it has not been used since Queen Anne's days shows that it does not work in harmony with the existing mode of conducting affairs. It is too personal a power, and cannot be used without the sovereign's taking that active part in politics which would endanger the monarchy. Hence, if the ministry urge a measure unwelcome to the sovereign through the houses, either they must resign and parliament be dissolved, or a conflict, as before, must arise between reigning opinion and

the wishes of the crown, which will take the latter out of the position of irresponsibility. Thus this principle that the king can do no wrong, which the execution of Charles I. in the end forced on the country, has had a vast influence in modifying political practice under the constitution.

3. Suppose now again a bold minister to gratify the sovereign's wishes against the voice of parliament and the feeling of the country, and to be impeached. The pardoning power, if it were absolute, might be used here to screen a zealous friend of the crown. To prevent this it was enacted, in the act of settlement of 13 Wm. III, that "no pardon under the great seal of England should be pleadable to an impeachment of the commons in parliament." And the question whether an impeachment could survive a dissolution was decided, during the impeachment of Warren Hastings, by large majorities of both houses in the affirmative. (A.D. 1791, May, *Const. Hist.*, i., 436.) Thus, although after impeachment the crown can pardon, the end is attained of the country's passing judgment on a minister; and the crown can do no more for such a friend than the president of the United States can do for an unfortunate politician among his adherents, by rewarding him after his constituents' rejection of him at the polls, with an office in the custom-house or a foreign embassy.

4. The crown is the fount of honor, and is unrestricted in the exercise of this power by any definite restrictions. Hence, when the house of lords made opposition to the reform bill of 1832, it would have been easy to bring about a majority by a new creation of peers, if the king had felt willing to take that step. But this would have so lowered the character of the house by making any ministry sure of a majority there, and thus in the ending undermining its very existence, that all parties felt some other way of getting over the difficulty to be preferable.\*

\* Mr. Walter Bagehot in his *English Constitution* (ed. 2, No. vii., p. 290, Amer. ed.) calls this power of making new peers the safety-valve of the constitution. "It enables the popular will to carry

Again, there is no question that peerages for life may be created by the crown, since many precedents, opinions of expounders of the constitution, and the general theory of royal power in England all make for it. But when the ministers obtained a patent from the queen creating an eminent judge a peer for life, the House of Lords, after hearing the report of a committee, agreed to their report, "that neither the letters patent nor the letters patent with the usual writ of summons issued in pursuance thereof can entitle the grantee to sit and vote in parliament."\* This decision, so far as I can see, claims to judge who can be members of the House of Lords, and so, although not denying that such peers may be created, denies that they can be admitted into the legislature, which was the point aimed at. This is an interpretation with no authority except that of the interested party, yet wise in itself because the respectability of one branch of the government was involved in the question.

5. The power of declaring war belongs to the crown, but as the control of the purse and the authority to govern the army by military law are entirely in the hands of parliament, no war can be carried on without its aid. Much the same may be said of treaties of peace and alliance which in general require money to be paid out of the treasury. There is here a singular way of nullifying the exercise of the constitutional powers of the crown, much of the same kind as if our house of representatives should refuse to grant money to carry out the terms of a treaty made by the President with the consent of the senate. It has been held in this country that the house is bound to vote the money stipulated in the treaty, but not in England, (we believe), that the houses of

out within the constitution, desires and conceptions which one branch of the constitution dislikes and resists." It may be true that the dread of the exercise of this power may prevent the necessity of using it, that the resistance of the house of lords would give way before the apprehension that they would be "watered", as stock is in this country. But certain it is that a few experiments of this kind on this dignified house would make it a "corpus vile."

\* See May, Const. Hist., i., 237 and onw.

parliament are under an analogous obligation. Hence, ambassadors can only bind Great Britain to certain treaties, provided the parliament consents to the appropriation of the sum required. Another check on the power of the crown in regard to foreign relations is that of punishing the authors or advisers of an unfortunate treaty by impeachment, or by requesting the sovereign to remove them from his councils, as was done after the partition treaty in 1701.

It is evident from these considerations that the power of the English crown has since the revolution in 1688 greatly fallen, and that what we call sometimes the "one-man-power" does not exist there. Between the crown and the premier some such relation exists as that of the viziers towards the caliphs of Bagdad, and the mayors of the palace towards the Merovingian kings of the Franks. Powers very extensive belong by right to the exalted person who wears the crown; but they are not used save in carrying out the plans of the head of the ministry. And there is this advantage in the constitution, as it at present shows itself in its practical workings, that the will of the sovereign is guided by and does not guide public measures, but that a time may come—some extremity—when the latent authority may be put forth to the saving of the state. Thus there might be a majority in parliament of very radical views aiming to overthrow or suppress some forces of the constitution; as, for example, the house of lords: this could be done only by legislation of the commons, by brow-beating the house of lords, and extorting a consent from the sovereign. Then would be the time for a conscientious prince to use his right to reject a law so wide-sweeping, and put it to the test whether the country would go with him. If it would not, he would be compelled to yield or might pull down the throne.

Some of the modern English writers seem to us to assign far too low an office to the sovereign, as he stands in the present age. Thus Mr. Walter Bagehot, in various places of his recent work on the English constitution, gives us the impression of thinking that there must be in it something impos-

ing, *theatrical*, dignified, which appeals to the senses, which is not indeed of necessity the most useful, but is presumptively likely to be least so, which is "likely to be adjusted to the lowest orders," to those who are "likely to care least and judge worst about what is useful." (p. 74 et alibi.) If this *theatrical* element, which can be none other than the royal, is really painted here in its true colors, and if the hold of the monarchy on the mass of the people depends upon it, is it not a pity that they should discover the deception, and find out that the king is nothing but a mere figure-head? The more they know of the constitution the less they will revere it; admit them behind the scenes and they will look at what goes on there as mere action meant to impose on such as they are.

The same writer sums up royal powers or "rights" under a constitutional monarchy such as that of England under "the right to be consulted, the right to encourage, the right to warn." All these may exist without any direct influence on the course of public measures. A very able sovereign could not help having influence; a very weak one, however, who was also complying, who had no strong personal will, would be of all others best fitted for the part the English king has to play in the government. If it could be believed that there was a living king when there was not, the country might be well managed; but the government could not go on without a real or imagined king. Why is this? Is it not that the modern idea of the crown consists in the smallest amount of *personal will* in the head that wears it? The premier has, as the representative of the country or of a party, a representative will; the sovereign, a formal official will. The union of these wills secures through the constitutional methods the best government possible under the constitution; and that, as all will admit, a stable, quiet, just, intelligent government, but not one which promises stability, if opinion should change or if power should fall into the hands of the unintelligent classes.



## § 174.

In looking at the English aristocracy we perceive that it occupies a strong position in itself and a representative power in the house of lords. The place of the aristocracy in the state, aside from its political power, we shall consider hereafter; adding here only that this rank or class in society has been so treated by the English constitution as to give it great efficiency and influence, while exciting less of jealousy and hatred than is felt towards the upper class in other countries by the lower orders. As for the house of lords, the political representatives of the higher aristocracy, we find its function assigned to it long since, even in Anglo-Saxon times. While among the Franks no nobility of blood is traceable at first; it is certain from Tacitus in his *Germania* that there was an extensive distinction among some Germans between the *ingenui* and the *nobiles*, and the weregild of the noble was higher than that of the common man. Among the Saxons there were three or four orders, according to Nithard, three: *ethilingi*, *frilingi* and *lazzi*; "lingua vero Latina hoc sunt: nobiles, ingenuiles, atque serviles," where he, without doubt, counted freedmen among the serviles. (Comp. Waitz, *D. Verfassungsgesch.*, i., 171 et seq., ii., 289 et seq., and Stubbs, u. s., ch. vi., § 64.) In all these tribes a nobility arose afterwards, consisting of those who were in the service of the kings, or their vassals, who received large tracts of land from them, who had jurisdiction over counties and in other ways. The titles which became at length hereditary were such as *comes*, which was used in Roman times and answers to the count from whom the county (*comes comitatus*, *graf grafschaft*) governed by him takes its name; *dux*, a military title in its origin, *duke*; *marchio*, the count or officer set over the marches or border, *marquis*; *viccomes*; *baro*, baron, originally a man, free man, free landholder, *freiherr*. To *freiherr* in German answers knight in English, *miles*, in Latin, while the German *knecht* came to denote an unfree person. The Saxons in England had the

titles *eorl* (=jarl, in Scandinavian), which seems to have been at first used of a noble class, and afterwards of the *ealdorman* or chief office in the shire; *thegn*, the military companion, afterwards the large landowner whether serving in war or not, and *ætheling*, *i. e.*, of a noble family, but "restricted to the king's kin. The more ancient nobility finally merged into the nobility by service, and the *eorl* and *æthel* were lost in the *thegn*." (Stubbs, ch. vi., § 65).

The *witenagemote*, which enjoyed in Saxon England very extensive powers, consisted generally of the bishops, with occasionally an abbot, *ealdormen*, and a number of the king's friends or dependents, called in the documents, *ministri*, *i. e.*, *thegns*, including the principal domestic officers of the king. They could never have been very numerous. (Stubbs, *u. s.*, § 52.)

The great council under the Norman kings of England did not, at first, differ much from the Saxon *witenagemote*, except that it was advisory rather than legislative. The members, including the bishops and abbots, were *barons*, or the king's vassals as holders of estates by homage and fealty; although every tenant-in-chief was not necessarily at first a member of the assembly. The persons appearing in these councils are known by the specific names of archbishops, bishops, abbots, earls, barons (in its especial sense), and knights. On a few occasions, all the landowners of the kingdom were expected to be present.

Under the first kings of the house of Anjou, according to Prof. Stubbs, the national council realized the principle of a complete council of feudal tenants in chief. It also appears to be in a stage of transition towards that combined representation of the three estates, and of the several provincial communities, which especially marks the English constitution. The members of the councils now are the same as under the earlier Norman kings, but the minor tenants-in-chief have a more definite position and a greater prominence. There is "a growing tendency to admit not only them, but the whole body of smaller landowners, (of whom the minor tenants in

chief are but an insignificant portion) to the same rights. This latter tendency may be described as directed towards the concentration of the representation of the counties in the national parliament—the combination of the shiremoots with the witenagemote of the kingdom.” The royal council might consist of the greater barons, afterwards gathered by themselves in the house of lords, who paid their *reliefs* to the crown, each one according to a separate agreement, and led their vassals to the host under their own banner; or, of the entire body of tenants-in-chief, including also the lesser barons, knights, and socage tenants of the crown, who paid their reliefs to the sheriff of the county, followed his banner, and were summoned to court or council through his writ: even the general body of freeholders might be summoned. (Stubbs, u. s., ch. xiii., § 159). The name given in Latin to the sessions of the council was often *colloquium*, parley, and the Italian synonym *parlamento*, conference, place of or meeting for conference, was used on the continent as early as 1154, and perhaps earlier. The efficiency of the councils is greater under Henry II. than under the first Norman kings; their consent as well as advice seems to have been considered necessary before ordinances or assizes were considered binding.

It took some time after the representatives of counties and boroughs were summoned to meet in parliament, before political habits were fixed in regard to the constitution of the assemblies, whether they should meet in two bodies, and no more or less. Not long after the commencement of the reign of Edward III. the practice of having two assemblies became regular; and the efficiency of parliament grew greatly under the Edwards.

Relatively, the house of lords had at first much the greatest influence, and nothing could be done of which they were not hearty approvers. The commons contained few men versed in affairs, or trained to politics. We have already seen how the destruction of most of the nobility in the wars of the Roses helped the crown to usurp new rights, and that

a direction towards absolutism began, which only ended at the revolution of 1688. In the war of Charles I. and the parliament, the majority of the peers sided with the crown, and gave their counsel to the King at Oxford. Under Charles II. the lines drawn between parties became more distinct than before, and the whig peers of the next centuries had the government of the country in their hands. This was owing to the support they gave to the house of Hanover. But the dread of French revolutionary principles turned the scale in favor of the Tories, and the magnates of that party controlled public measures until some time after the downfall of Napoleon. Noblemen of both parties, by their influence and ownership of land in a county or in or near a town, returned a great number of members to the house of commons. But this source of power has been nearly cut off since 1832, and the amount of wealth in the hands of commons is now so great, that relatively, since the increase of manufacturers in Great Britain, the nobility have been falling behind. On more than one great occasion within the century, especially in the struggle over the reform of the franchise (1832) and the amendments of the corn laws or the abolition of the protection of English breadstuffs, which was in itself a measure for the benefit of the manufacturing interests, they have offered a decided resistance to any change, but finally have been obliged to give way. So that now they must be called an apparatus to retard and perfect, rather than to forward legislation. If the lords for any reason should hold out against the strong will of the commons, renewed perhaps after a new election caused by their persistence, they would endanger the constitution of the country, and their own existence in the future.

The house of lords has, in theory, nearly the same powers with the commons, besides those of sitting as a court of impeachment, trying their own members for political crimes, and until very lately, of last resort for hearing cases of appeal from the higher courts of the realm. They have lost their place of predominance in the constitution, and cannot

prevent any important movement favored by a decided public opinion, unless a strong sentiment of the intelligent classes lends them its aid.

§ 175.

We have already seen how the aristocracy of England created, so to speak, the representation of the towns and shires in the reign of Henry III. For a long time the house of commons, as it is at present conceived of, had no definite existence, and little self-subsistence. The "estates" of the realm might have taken the form so general on the continent, of clergy, nobility and "third estate," which might have embraced the towns only, as the knights, who were tenants-in-chief, might have been called to sit regularly with the larger landowners. The house of the clergy might have been made to consist of the great dignitaries, together with deputies from the rest of the order. Thus, the representatives of the towns, standing alone, would have been weak and perhaps unable ever to become independent of their successors in rank. The causes which gave strength to the house of commons were: 1, that the higher clergy appeared as magnates in the house of lords, and not as heads of a political body united with their lower brethren. 2, that the knights, representing the shires by the force of causes not easy to be traced, came to meet together with the men sent by the towns; and 3, that the habit grew up of summoning parliaments to meet frequently, if not every year.

In some of the parliaments of Edward I., as in 1295, there were deputies from the inferior clergy;\* and the houses of

\* Comp. Stubbs, ii., 129, for the parliament of 1295, where seven earls and forty-one barons had each a special summons. Two knights for each shire, two citizens for each city, two burgesses for each borough, are to be elected under the sheriff's superintendence. The archbishops and bishops are to bring the heads of their chapters, their archdeacons, one proctor for the clergy of a cathedral, and two for those of a diocese. The estates voted separately on aids to the king. The borough members and the knights gave different portions of their property.

convocation for the two archbishoprics of England seem to have been then in the habit of meeting. They were called upon for aids, and could pass canons which were valid with the royal assent. If, now, there could have been a house of clergy, having political rights, the constitution, at some favorable time, might have been essentially altered. It is probable, also, as Mr. Hallam remarks (supplementary notes to his *Middle Ages*, no. 167), that the great barons "looked with jealousy on the equality of suffrage claimed by the inferior tenants in capite, before the principle of legislation had been established." Thus these smaller landholders can have gravitated, so to speak, towards an association with the burgesses rather than with the great lords. When representation was established they were summoned by the sheriff of the county, and not like the magnates by special writs addressed to each. That mode of convoking them might produce a class-feeling between them and the representatives of the towns. Both were elected by members of their respective bodies.

2. The weakness of the burgesses at first is apparent. They needed association with some stronger body and could have had none with the higher nobility. The union of the knights of the shires or smaller landowners with them, when it became settled, created a strong body, representing a large amount of land and of movable property; some of the members of which had a knowledge of the world and of public affairs. The representatives of the towns seem to have felt themselves to be out of their element. Attendance in parliament is rather a burden than an honor. They do not see at first what they are to gain by consenting to grant aids to the king.

3. That which, more than all things else, kept similar bodies on the continent from acquiring power and influencing the political habits of their countries, was the infrequency of their being called together. It depended on the sovereigns when they should meet; and as those preferred increasing their revenues by some other means than that of asking the

estates for assistance; whenever financial difficulties did not press upon them they did not care to summon their estates to meet together. The French estates-general, which met together for the whole kingdom in 1484, and in which the three estates were not kept apart, petitioned the king (Charles VIII.), that they should be reassembled after two years. But as the kings contrived to raise money and issue ordinances without their help, a hundred and seventy-two years elapsed between the dissolution of the estates in 1615 and the convocation of them at the commencement of the French revolution. The jealousies of the estates, and the coalition of the two first orders against the third, favored this disuse of the semi-representative government in that country. But if the kings had been obliged to call on them every two years for subsidies, no such disuse and consequent absolutism could have taken place. So it was in other parts of the continent.\*

In England, as early as the fourth year of Edward III., and again, in the twenty-sixth and fiftieth of the same king, statutes were passed, to the effect of calling a parliament every year (a *new* parliament the first statutes declare), which does not imply, it would seem, anything more than a new convocation of the same members without new election. But "oftener if need be," is added, and "need be" may be made to refer not to oftener but "to every year," which leaves the matter to the king's judgment. But in the first year of Richard II., the terms of the statute seem express and absolute. The commons petition that meetings of parliament may be held once a year, at least, and that in a convenient place. The king granted the petition as it respected the annual meetings but kept the place within his own power, and the year after "he declared that he had summoned the parliament, because it was ordained that parliament should be held every year." The subsequent kings by no means adhered to this rule. There were under the Tudors and Stuarts long intermissions, under Henry VIII. one of four years, others

\*See Thierry's "Tiers État;" chapters iv. and vii.

of the same length under Edward VI. and Elizabeth, of six years in the reign of James I., of twelve in the reign of the first Charles. The long parliament of Charles I. passed the statute that not more than three years should intervene between the meeting of a new parliament, after the dissolution of another, with the very stringent provision that if the king should neglect to send out writs to the sheriffs for a new election, they should summon the voters themselves, and in case of their neglect that the voters should meet without summons to make their elections. An act of 16 Car. II., or 1664, repeated in 6 W. and M., provides that the longest interval in such a case shall be three years. Since 1688 the practice of legislation requires an annual assembly, as the mutiny act and the supplies are voted annually, so that without a new parliament every year the government could not be carried on, nor the army or navy be subjected to military discipline.\*

The hinge on which everything has turned in regard to the control of the commons in legislation, has been that the power of granting supplies by taxing the community—other than the peers and the clergy—fell naturally into their hands. If the executive power in a country finds it the easiest way of obtaining supplies from the different bodies of which the nation is made up to ask for them, we may be sure that there is some fear of resistance to exactions, or some feeling that the payers of taxes have a right to give or withhold their consent; and when things have come to this pass the giving of taxes will be coupled with corresponding grants of favors on the other side. If these grants have respect to the removal of abuses, or the substitution of regulated for arbitrary power, the country where they occur is on the way to a government according to established usages, which can become a constitutional government, when once the taxpayers have an acknowledged political power.†

\* See for parts of this paragraph Christian's notes on Blackstone, B. 1, ch. 2, p. 153.

† In theory the lords taxed themselves and the commons taxed themselves; but in modern taxation, customs, excise, the income tax,



Before the time of the Edwards, during which the house of commons became something of a power in the state, the preparation was made for the future orderly administration of the finances. In the Magna Carta no scutage or aid could be imposed unless by the common council of the kingdom, except on three special occasions; and it is added that all the cities and towns shall have the common council of the kingdom concerning the assessment of their aids.\* (Art. xiv., xvi.) Prof. Stubbs remarks of the period under Henry II., and his sons, "that the whole subject of taxation illustrates the gradual way in which king and people were realizing the idea of self-government. The application of a representative scheme to the work of assessment [by a jury of sworn knights and others in the neighborhood appointed to estimate the value of personal property now subjected to taxation], and the recognition that the liability of the payer was based on his own express consent, either to the grant itself or to the amount of his own contribution, mark a state of things in which the concentration of local interests in one general council was all that was needed to secure the taxpayer from arbitrary treatment on the part of either the sovereign or his ministers." (§ 161.) The learned historian goes on to show how the advances in the judicial system concurred with the causes above mentioned. Particularly, "the use of election and representation in the courts of law furnished a precedent for the representation of the county by two sworn knights in the national council." (§ 164.)

Legislation in the commons grew out of petitions which, if refused, might be attended with refusal of supplies. It was long before the commons could be said to legislate.

etc., are strictly national, falling on the individual consumer or property holder, whoever he be. This is really a constitutional change.

\* Mr. Hallam, in his supplemental notes to his "Middle Ages," notices the omission from the renewal of John's charter, in the first year of Henry III., of the clause making consent to the imposition of aids and scutages necessary, and requiring the summons of all tenants in *capite* before either could be levied.

It had been the king's custom not to reply to the commons' petitions until the last day of the session. Probably during the reign of Richard II. they attempted to reverse the order of things and to delay granting subsidies, until they had received from the king an answer to their requests. In 1401 (under Henry IV.), they asserted that it was not their custom to grant at once, and he insisted on the contrary. In 1407, they appeared before him, presented their grievances, and received his answer; their subsidies were not granted until several weeks afterwards. Again, in 1410, the subsidies were not granted until two members of the privy council had been dismissed, and satisfaction obtained on other points. In 1455, under Henry VI., the commons demanded a Protector of the Kingdom on account of the king's imbecility. The archbishop of Canterbury pressed the lords to give an answer, because the commons would not give attention to affairs in parliament until they had obtained an answer and satisfaction of their request." \*

The beginnings of a house of commons, as we trace them, are not very hopeful. As the parliaments were convoked in order to fill the king's treasury, every class voted by themselves. In 1295, the members of the old king's council, with the knights of the shires, gave the eleventh part of their personal property, the clergy a tenth, the towns a seventh. Under Edward III., in 1333, the knights of the shire gave a fifteenth, the representatives of the towns a tenth, and yet the records show that they voted in common. The men from the boroughs on the ancient royal domains constituted a separate class from the rest, and voted distinct supplies. There was also no fixed rule in regard to the towns that were summoned to send members to parliament. A town or borough might be omitted from one summons, and included in the next one. Nor was the number of deputies placed beyond the reach of the king's will, although generally each county and town returned two members. And it would

\* Guizot, *Hist. of Represent. Gov.* Sect. xxv.

seem that the sheriff, on behalf of the crown, had no scruple in influencing the choice of members.

In 1347, M. Guizot considers the fusion of elements in the commons to have been completely effected. Mr. Hallam places it somewhat earlier. Let us now briefly see what part, besides a participation in making the laws, they took in the general affairs of the country, what rights they acquired, and how they reached their present controlling and supreme position.

Even before the commons could be said to be a strong body secure in its position, it was employed in political affairs of the most vital importance. But it was used by others to carry out their purposes,—by a discontented faction of barons, by a pretendant to the crown, by the kings themselves. And the very important laws, not of a political nature directly, which they had an agency in passing, such as the statutes of præmonire and against provisors, originated, without doubt, outside of those inexperienced assemblies. The first great political action in which they were concerned was the deposition of Edward II., in 1327. The parliament met at the call of his son, and were asked whom they preferred to have for their king? They replied with one voice that the son should be made king. On his refusal to do so without his father's consent, commissioners were appointed to receive the king's resignation to the crown. On this, he renounced the royal dignity.\* Here, evidently, all classes were united against the favorites, who had brought misfortune on the country; but the commons would never have ventured on this step unless they had followed the higher classes. Again, the commons joined in the impeachment of Richard II., and pronounced his deposition. This was an expression, without doubt, of popular feeling; but the parliament had been a few years before entirely subservient to the now fallen king.

\* According to Sir Thomas More, in Cobbett's Parl. Hist., i., 79, the committee, sent to the king by the parliament, told him that if he would not resign, "the people would yield up (renounce) their homage and fealty, and choose a king out of the royal line."

And so, the acceptance of the several victorious claimants of the crown during the civil wars, and the numerous attainders of leaders of the vanquished party; the declaration, in 1461, that Edward IV. was undoubted king of England, and that the reign of Henry VI. was an intrusion and usurpation, (as contrasted with the vote in 1470, when the Earl of Warwick had put Henry again on the throne, that Edward was a traitor and usurper); the declaration after Richard III. had usurped the crown that the children of Edward by Lady Gray were illegitimate on account of a previous contract of marriage; the attainder of the earl of Richmond, and acceptance of him soon after as Henry VII.,—these, with all the acts concerning religion, the settlement of the crown, the sanction of the divorce of Henry VIII. from Catharine, as well as the restoration of the old religion under Mary, are either unwilling acts of timid men to a great extent, or acts of a predominant party and not of the nation. In them all the commons were a tool of the prevailing power, or an appendage to the house of lords. Still the fact that an acknowledged part of the government\* was called upon to join in sanctioning revolutions, shows that it had gained a high position, if not the highest, and suggests the possibility of a further advance in influence.

But other more independent acts of the houses of commons in these times, disclose to us a feeling on their part that they are watchmen over the interests of the country; and although sometimes they express themselves in humble strains, the real sense of what they say is bold enough. About 1376 the commons of the "good parliament" petition for the removal of Alice Perrers, the old king's mistress, from his person; and they represent to the king and lords that it would be for his honor and profit "that his council [should be] augmented with

\* The chancellor of Edward IV. declared, in a speech addressed to lords and commons, "that the three estates comprehended the government of the land; the preëminence whereof was due to the king as chief, the second [place] to the bishops and lords, and the third [place] to the commons."

some lords, prelates, and others, to the number of ten or twelve, who should be continually near the king, so as no great business might pass without the advice and assent of six, or four of them at least, as the case required." Here we see an attempt at a direct control over the king's ministers instead of that more efficient but more indirect one which has been developed in modern times."\*

Another characteristic of the early commons was a jealousy of churchmen and a desire to restrict their power in the state as landholders and as advisors of the sovereigns. In 1372 (under Edward III.), they petition against employing churchmen in the government, and that laymen of sufficient ability might for the future be made chancellor, treasurer, clerk of the privy-seal, etc. This arose from fear of the undue influence of men who had a foreign spiritual sovereign. But the commons had been educated by the legislation under Edward I., the greatest and wisest of the English kings, to see the danger of a power like that of the pope to the independence of England; and the reign of John may have given them salutary warnings and humiliations. The statutes of mortmain passed in the reign of Edward I., before the commons had much to do with general legislation, the statutes of provisors passed under Edward III., and Richard II., the statute of *præmunire* of 16 Richard, and subsequent legislation of a similar kind, indicate a spirit of sound political self-preservation in which all laymen, lords and commoners, together with many ecclesiastics, joined.

\* The proceedings against de la Pole, earl of Suffolk, in the 10th year of Richard II., led to high claims of parliament, higher, perhaps, than were made before or since. The parliament told the king that if the king should alienate himself from his people, and refuse to govern by the laws and statutes of the realm . . . and stubbornly exercise his own singular and arbitrary will, then from that time it shall be lawful for his people, by their full and free assent and consent, to depose the king from his throne, and in his stead to establish some other of the royal race upon the same. The old Anglo-Saxon spirit was come back again. The whole doings of this year (10 Rich., 1386), are altogether deserving of study. (Parl. Hist., i., 182-215.)

The new parliament, like the old council of the kings, not only gave consent to the passage of laws, and had high advisory powers, even reaching to interference in matters of administration, but they acted, also, as an extraordinary court, by impeachment and attainder. The first of these was very necessary, so long as the king carried on his government through ministers of his own, who were not otherwise removable, and so long as a powerful subject, acting in the interests of absolute power, felt himself equal to changing the course of the constitution. Here the commons might fail to bring about a sentence of the lords against the obnoxious man, but the risk of such a sentence, the voice of a branch of the legislature and of at least a minority in the other branch, the feeling through a lifetime of being hated by a part of the country, were themselves penalties. Unhappily, impeachment was sometimes the measure of a mere cabal. Attainder, an exercise of judgment without conviction, more terrible than ostracism or than any other process of Attic or Roman law, even if it had not long been attended with forfeiture of estates and corruption of blood, would have been a most barbarous method of reaching criminals whose power could screen them from ordinary prosecutions, and who had done nothing technically illegal. It was, however, condemnation on the ground of notorious bad character and bad counsels, and, except in times of great civil dissension, did not ordinarily strike at the wrong person.

The privileges of parliament have grown up and been acknowledged by slow degrees. In 1377 the first known speaker is mentioned,\* and of all the members he should be the most protected in the discharge of his duties. But in 1453, Thomas Thorp, then holding this office, was imprisoned together with another member, on account of damages yet unpaid, recovered from him in an action of trespass, by the Duke of York. The house complained, and the case being

\* Or rather, the first presiding officer called speaker, for the foreman or prolocutor of the "good parliament" was really a speaker as were others before him. Stubbs, ii., 430, note, and 392, note.

referred to the judges, they said that a general *supersedeas*\* of the parliament there was not, but a special there was; in which case of special *supersedeas* every member of the house of commons ought to enjoy the same, unless it be in cases of treason, felony, surety of the peace, or for a condemnation before the parliament." After this answer the house of lords resolved that "Thorp should remain in execution [*i. e.*, in prison], notwithstanding his privilege." Thereupon they sent a committee of their own house on the king's behalf to choose a new speaker. A strange transaction, unless it is to be explained by the fact that the Duke of York belonged to that body. In process of time privilege extended beyond their own personal exemption from arrest and their freedom of speech, to the freedom of their servants, lands, and goods. This, however, did not extend long beyond a dissolution, but, according to W. Prynne (cited by Chitty on Blackst., i., 166), only "for the number of days the members received wages after dissolution, which were in proportion to the distance between his home and the place where the parliament was held." A statute of 10 George III. took away the privileges of domestics, land and goods. Freedom from arrest† begins as many days before the opening of parliaments as are needed to come from any part of the kingdom, and expires at an equal time after dissolution; it continues also forty days after a prorogation. It does not include arrest for treason, felony, or breach of the peace. Freedom of speech is entire, as far as exemption from being called to account outside of the house is concerned; but disrespectful language in debate, referring to the sovereign or to a member of either house, can be repressed by the speaker and an apology can be required. Words or writings of members uttered outside of the house can be treated as libellous, like those of persons who are not members. In 1581 one Hall was

\* Comp. for this term Blackst. Com., i., 166.

† Comp. Hallam, Const. Hist., i., 365, and for the general subject, iii., 351, 382, also May's Const. Hist. in various places of vol. i., as in the passages relating to Wilkes, Stockdale, etc.

imprisoned, fined, and expelled for a printed libel ; and it has since been the usage and held to be the right of parliament to imprison any of the members for misconduct in the house or relating to it. In a few instances, the offending member was declared by vote incapable of sitting in the parliament then assembled, as in that of John Wilkes, in 1769, after his expulsion and subsequent re-election. But this, although there are precedents for it, decides without law in a particular case whom the electors shall not choose. (Hallam, iii., 357, May, i., 374.) As for persons who are not members, there is full precedent and reason for calling them to account by act of the house, and committing them to prison ; although, as Mr. Hallam remarks, this power has lain open to more doubt than that over its own members. On the whole, as the decided control of the house of commons has become more acknowledged and more unassailable, their stickling for privilege, beyond what is necessary for attention to duties and punctuality, has lessened ; until now it scarcely goes beyond those conceded to the congress of the United States by the federal constitution.

We have already said that there was no entire uniformity in the summoning of boroughs to send their representatives to the house of commons. And it would seem that both the boroughs were indifferent to the privilege and the burghesses often reluctant to attend the meetings of parliament. Possibly the smaller boroughs may have been glad to escape from the necessity of paying wages to their representatives, and there could be found but few able to quit their business. It was also at one time required, we believe, that the representative should live among his constituents. When afterwards the deputies served at their own charges, it might be impossible to find a person from within the borough ready to take this burden upon him. The two requisitions, therefore, of residence within the town and of being paid by it for service in parliament stood or fell together. When the practice of paying wages ceased, another order of men, residing perhaps in the neighborhood, or connected with families of



noblemen or of gentlemen in the near vicinity, offered themselves as candidates and were accepted. Thus an interest was formed which made it worth while for titled or wealthy families to own property in and around the boroughs so as to be sure of an entrance into parliament for a son or protégé. In this way some of the great statesmen of England made their début into public life. The ease of controlling places which returned members, was increased by two circumstances: *first*, many of the boroughs and cities had a very small number of electors, or perhaps the magistrates themselves alone had that power, and in the course of time many boroughs were, if we mistake not, restricted in their right of suffrage very considerably. But, *secondly*, in the course of five or six centuries, great changes in the distribution of the people occurred; places of ancient importance dwindled to small villages, and centres of industry arose where there had been no inhabitants before. Besides this, a most undesirable change went on in the gradual extinction of small properties and their absorption into great estates. These great proprietors owned, in fact, the small boroughs, could return whom they pleased, and even made it a family principle to secure them, as rights of presentation were secured, to their posterity. Thus great and crying inequalities of representation arose,—rotten boroughs, controlled by the aristocracy sending two members, near great towns, sending none, where vast wealth was accumulated, and which gave England its distinctive character for manufacturing industry. Had the control of these boroughs been in the hands of one party alone, the Tories for instance, it would not have been endured, but the field was open to the great families of both parties alike. This vicious system of representation reached its climax in the last century and the beginning of this; but as it brought able men of high character into the house of commons, as the true doctrine was admitted that the members returned were guardians and watchmen of the general interests of the country, and as the parties had alike resort to this method of securing influence and so balanced one another; the evils

were not so great as they would naturally be ; the country was governed by the aristocracy—the aristocracy both of title, and of wealth ; and although there was little of an enlightened spirit of reform or of sympathy with the lower classes, it was in the main governed well. But a change of sentiments swept over the world in which a new recognition of human rights and a new spirit of humanity were mingled ; while at the same time the intelligent middle class gained relatively to the upper in whatever justifies the claims of men to political power. The reform bill of 1832 enlarged the suffrage and distributed it on a juster scale, taking it away from many decayed places and imparting it to many new centres of industry. The new suffrage bill of 1867, proposed and carried by a conservative ministry, made other changes in the same direction. It is not unlikely that, for good or for evil, the enlargement of the suffrage has not stopped. With this great overthrow of abuses other reforms and advances mark the legislation of England and justify the reforms in the suffrage. Such are the improvements in criminal law, the new divorce courts, the smaller or county courts with cheap justice spread over the country, the new police system, the new education, the new court systems, with many others, which show that the present parliamentary system represents the light, humanity and hopefulness of a community increasing in wisdom and civic virtue.

This sketch of the progress of the house of commons from its beginnings, when it was the weakest, to the present time when it is the strongest branch of the government, is a fine illustration of the growth of institutions. A constitution written at first, would have petrified everything, and prevented all this progress. It may, however, now be asked whether the balance of the powers in the mixed monarchy of England can stay as it is, and whether, with an increased extent of suffrage downwards, there will be any restraint on rapid violent change, offered by the constitution in its present form or by other political forces, opposing radical tendencies in a house of commons. What is called the omnipotence of

parliament could now, without appeal to the people, overthrow the constitution by a vote, if both houses and the sovereign were agreed in this ; and if a strong vote, which was thought to represent the predominant will, should be cast for the destruction of the house of lords and of the kingly office, those powers could offer no resistance, except by dissolving the house of commons. If another house with the same spirit should be returned, what would there be to prevent their will from being carried out in act, unless it were an appeal to arms in which the weaker branches of government would be sure of defeat? Nothing then, under the present constitution, would prevent a complete change in political order, nor even delay it. A written constitution requiring, for instance, a convention and a vote of two-thirds might secure delay, but would it prevent revolution? A negative answer must be given to this question, unless the powers of the sovereign, inherent but now used only in an official way, could be directed towards stemming the torrent. It is certain that the house of lords, as such, could offer no effectual resistance to a democratic overturning. And if after such a change, the house of commons should remain in possession of the government, it seems altogether probable that the ensuing misgovernment would cry aloud for a check, and at least for the check of a written constitution on the wills of a democratic assembly, beyond its power to alter or interpret.

### § 176.

Instruments of government in a written form defining the powers of the departments, as distinguished from laws or charters of special political importance, have been known for a long time. Such was, for instance, the Utrecht Union of 1579, which constituted the United States of the Netherlands, each of which had its chartered privileges before. But it is only in the present and in the last part of the eighteenth century, that constitutions in a written form, whether given out by the head of

Written constitutions, and constitutional monarchy.

the state in the shape of a charter of conceded but irrevocable rights, or framed by public conventions, have come into vogue, through the desire of the nations to have some written statement of their liberties and of a settled order of government on which they could rely. It is quite possible for an absolute government to state its powers in a written form, but the modern written constitutions are mostly intended to be limitations of absolute power; and as in Europe they chiefly contain the principles of a limited monarchy copied in part from the English pattern, (although neither so stringent in their restriction of power nor so open in their gift of liberty), we may arrange the governments for which they provide together under the head of modern or constitutional monarchy. While they all have arisen into being through the admiration of the institutions of England which Montesquieu set in motion in the eighteenth century, they are unfortunate in being made to order instead of resting on ages of political experience; they carry with them few associations with the past and inspire no reverence; and if we are not deceived, the greater part of them contain no sufficient provision for impartial interpretations of their meaning against the decisions and arbitrary acts of the government. They do not admit, or admit reluctantly and but partially, that each nation has a right to determine what its own government shall be. They generally agree as to the inviolability and irresponsibility of the king, as to providing for a responsible ministry, and as to one or more than one legislative chamber. They differ in respect to the composition of the chambers, the extent of suffrage, the amount of self-government lodged in the hands of the municipalities and other districts, and in other important particulars which are noticed in another place.

The inviolability of the sovereign, and the responsibility of some one else for every political act must obviously be coördinate; but it is hard to make them so in practice, because powers are given to the sovereign which can be used to screen a minister who has simply carried out his will. The

responsibility of the minister is limited in a few constitutions, as in the charter of Louis XVIII., which provides that they cannot be accused except for treason or peculation. This provision (article 56) is changed in the charter of 1830, into liability to be impeached in general, without specification of any particular crime—and with reason; for many a man would commit neither treason nor peculation, who would endeavor with all his might to overthrow the constitution from which he derived his authority. Political offences of the gravest kind may be of an intangible nature, such as connivance with a king in stretching his prerogative, or neglect to maintain the constitution, or endeavors within the law to influence elections. The power ought then to be lodged in a body which judges of political misdemeanors, of deciding whether a minister has been false to his duties, whether he has duly respected the constitution. If he has committed treasonable acts, or embezzled public funds, let him be punished like other traitors or speculators; but if he is chargeable with political misdeeds which are not punishable by ordinary criminal law; let him be tried for them, and, if guilty, be incapacitated for all state employment in the future. And for such offences it would seem that ordinary courts of justice are not the most fit tribunals. Since their habits of judging require them to look after definite acts, a better court would be one of the legislative chambers where two exist, or one constituted for the case like courts martial.

Where there is more than a nominal responsibility of a minister, practice must conform itself to that under the English constitution since ministers on party principles began to exist. The minister must suit the majority in the popular constitution; or, what is the same thing, the chambers by a new election be made to coincide with the ministers; and thus the king's will be reduced to such a minimum as is compatible with efficient government. This point, the constitutional governments have not reached; and until they reach it, the executive will be continually tempted to take sides against the people, to have a party of his own, to

choose men for his ministers who will disregard the spirit of the constitution as far as they dare. When this point is attained, ministers will not need to be impeached; for collisions between the executive and the law, or the legislature, will hardly occur.

It is almost taken for granted by some writers on political forms that a sovereign monarch must be incapable of being called to account for private or public crimes. As for his private relations it is conceded that there ought to be some court where he may find or give justice. In England, demands on the king may be brought on petition before the court of chancery (Blackst., i., 243), although "no suit or action can be brought against [him], even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress; and a sentence of a court would be contemptible, unless that court had power to command the execution of it; but who, says Finch, shall command the king?" (ibid., 242). In the Austrian code it is said that "those legal proceedings which concern the supreme head of the state, but relate to his private property or to modes of acquiring property which depend on municipal law, are to come before the judges and be decided according to the laws." (Comp. Dahlmann, Politik., i., § 130.) This is clearly just. If the king or chief executive is the fountain of justice or is in any way its support, why should he have an exemption from just law, except so far as to give him personal freedom for the sake of attending to his important duties? The reasoning of Blackstone falls to the ground when once the true theory is received that a sovereign individual is such only as being the representative in chief of a sovereign state. Why should the highest representative of a just state be exempt from the control of just law?

As for the exemption of a king or other sovereign from the control of criminal laws, implied in the notion of a modern constitutional monarch, the propriety of carrying it

through so as to cover all crimes may be reasonably doubted. The doctrine of many advocates of monarchy would seem to amount to this, that the very notion of royal power and of sovereignty is inconsistent with that of being responsible. Thus Dahlmann says that "to rule and to be responsible, when conceived of as co-existent, are contradictions" (u. s., 104); and Stahl thus expresses himself: "The king is sovereign; that is the notion; and a king who is not sovereign is an absurdity." (Staatslehre, § 72.) He at the same time admits that a king may be limited by a constitution. What notion is contained in the word *king*, is a comparatively unimportant inquiry. We have attempted to show in another place that the real sovereignty is that of the state and not of the chief officer of the state. There is no middle ground between this and absolutism. And this opinion is not theoretical only; it has been acted upon, as in the Anglo-Saxon kingdoms, where the *witans* deposed their sovereigns, and in some of the feudal principalities of the middle ages, where the states exercised as well as claimed the right of deposition. The estates of Brabant, of Lüneburg, of Bavaria, of Schleswig-Holstein, the so-called "ewige union" of the Saxe-Lauenburg estates of 1515 recognized this right, as belonging to them in relation to their rulers. In 1514, the estates of Bavaria remind the lord of the land of the punishment (*i. e.*, deposition) which their old charters threaten, and declare their intention to side with the more compliant of two brothers. The estates of Schleswig-Holstein chose their ruler as late as 1588, and in the formula of election declared that, if their privileges were not observed so that they could feel assurance in respect to them, "honorable estates (landschaft) would be free from their oath and duty, and the election that had been made would be of no force." (Dahlmann, u. s., § 140, n. 1.) So the English theory, accepted at the revolution of 1688, was that there was a contract between the king and the English people, the infraction of which by the king might cause the throne to be vacant. In mild language a right of resistance in extreme cases was declared to

exist, against the sovereign.\* Now this right thus acknowledged is not made a dead letter by a complete representative system nor by ministerial government; for it is very credible that the head of the state, although acting through a constitutional ministry in ordinary affairs, may yet engage alone or with some one who is not a minister in nefarious political transactions. Here there is no minister to stand between the sovereign and wrong-doing, and so no one is responsible if he himself is not.

Furthermore this responsibility of the constitutional king in three cases—where he aids and abets political crimes of a ministry, where he engages in such crimes without their privity, and perhaps also where he commits gross private crimes—is a security against revolutions, and irregular justice. If a ruler is so absolutely inviolable, or so outside of law that no power within the state can reach him, he will be tempted by this very impunity to misuse the trust put into his hand; and on the other hand private vengeance, or general abhorrence felt for him, will take the course of assassination or insurrection. The knowledge of what befell two comparatively good kings, Charles I. and Louis XVI., from revolutionary courts, has kept back, without doubt, and will keep, worse sovereigns from crime. And the possibility of deliverance in a peaceful way from a bad ruler would, if he were amenable to justice, prevent outbreak and sustain the royal form of supreme authority.

In regard to private crimes, such as subjecting other men to the retribution of the law, the question of a sovereign's extent of responsibility becomes somewhat more difficult. But when we weigh the bad influence of a prince who seduces the wives of other men, or takes off his enemies by hired

\* As a curiosity what Plutarch says of Cyme (*Quæst. Græc.*, 2) may be mentioned, that "there was a public officer there named a *phylactes*, whose usual business was to keep the jail, but who came into the council during their nocturnal meeting, led forth the kings by the hand, and held them in custody until the council by a secret ballot decided whether they were acting wrongfully or no."



assassins, upon court and country, to give him impunity appears so corrupting, so destructive to loyalty and therefore to the stability of the government; that it seems as if some high court of justice, to be called in certain emergencies, might well be united with constitutional government. When the queen of George IV. was tried, did not the English nation feel a sympathy with an unworthy woman for the reason that the instigator of the trial was himself guiltier?

On the whole, then, the principle of a king's unlimited irresponsibility ought itself to be limited, in order that the quiet and morality of the country, and the safety and freedom from temptation of the sovereign, may be in a degree secured.

There can be no sure or permanent liberty under constitutional monarchies, if the armies are under the complete control of the executive; so that a refusal of an assembly or a parliament to vote supplies to a military establishment may not modify the arrangements of the administration. Just here lie the great obstacles in the way of regulated liberty. Mutual jealousy demands such vast forces that the countries of continental Europe stagger under the burden of taxes and debt, and live in constant dread of war. The armies become one of the chief interests; the spirit of the armies is a spirit of unreasoning obedience except at the height of revolutionary fevers; their attachment to and pride in great captains, who themselves know no law but that of personal devotion to the throne, will make it easy at some crisis to overthrow a constitution. Thus these new limited monarchies stand between two uncertainties,—that of going back towards absolutism by the help of *coups d'état* provoked by violently progressive parties, and that of violent movement in the attainment of the highest ends of the state. Add to this that police and bureaucratic systems, repressive of personal freedom, and implying the remains of tyrannical dread on the part of the administration, keep down in modern constitutional monarchies the feeling of personal independence, without which no institutions can take deep root in the hearts of a people.

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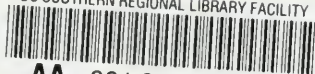
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