THE

ELEMENTS OF MORALITY

INCLUDING

POLITY.

BY

WILLIAM WHEWELL, D.D.,

MASTER OF TRINITY COLLEGE, AND PROFESSOR OF MORAL PHILOSOPHY IN THE UNIVERSITY OF CAMBRIDGE.

AUTHOR OF THE HISTORY AND THE PHILOSOPHY OF THE INDUCTIVE SCIENCES.

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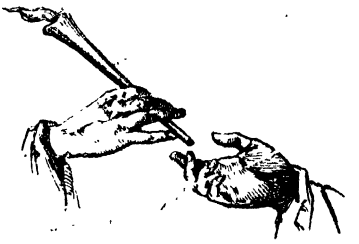

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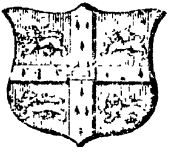

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BY

WILLIAM WHEWELL, D.D., F.R.S.

MASTER OF TRINITY COLLEGE, CAMBRIDGE.

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JUS.
OF RIGHTS AND OBLIGATIONS.

CHAPTER I.

RIGHTS IN GENERAL.

648. LAWS made by societies of men acting in their capacity of States (94, 375), require the Moralist's consideration in two points of view: first, as supplying the materials of human action; and secondly, as cases to which moral principles are to be applied. Laws supply the materials of human action; for they define property, marriage contract, and the other elements of human life, with regard to which men may act rightly or wrongly. Again: Laws are cases to which moral principles are to be applied; for the Laws ought to be just, and to promote justice, veracity, purity, humanity, and other virtues, among men. In the first point of view, Morality takes Law for granted, and so far, depends upon Law. In the second point of view, Law depends upon Morality, and must conform to Morality.

We cannot reject either of these views. If men's Rights are not fixed by Law, or by custom equivalent to Law, there is no field for moral action. To act morally, a man must abstain from theft, adultery, breach of contract, violent aggression on other persons, and the like. But if there be no received definition of property, there can be no theft; if no definition of marriage, no adultery; if no definition of contract, no breach of contract; if no definition of personal rights,

no violation of personal rights. Our Morality becomes a mere formula of unmeaning words, if, having asserted the Duty of honesty, purity, veracity, humanity, we allow each person to decide for himself what is honesty, what is purity, what is veracity, what is humanity, without any recognition of the common rules by which property, marriage, promises, personal security, are regulated. A person who asserts Morality to be independent of Law to the extent of rejecting legal definitions of Rights as of no moral value, is led to a Morality by which any conduct whatever, however dishonest, false, impure, violent, according to common rules, may still be asserted to be moral. So far therefore, Morality depends upon Law.

But on the other hand, as we have seen in the preceding Book, Law must conform to Morality. Justice requires (393) that inequalities, those produced by Law, as well as others, should be constantly corrected: and in like manner, that Laws which authorize or occasion inhumanity, falsehood, impurity, and other immoral habits, should be reformed. And thus Law depends upon Morality.

We have already seen (398, 399) how this apparent inconsistency is reconciled. Law must tend towards Justice, constantly, though it may be slowly. Law must be considered *in the first place*, as positively and peremptorily fixed: it judges everything according to its own Rules and Definitions. But these Rules and Definitions may change *from time to time:* and in the course of the moral cultivation and education of man, of which we have spoken (104), do change. Men change their Rules with a view of making them more conformable to the Supreme Rule of human action. They endeavour to determine Rights more rightly; to make the Laws more just. And thus, for the moment, at any time, Morality depends upon Law; but in the long run, Law must be regulated by Morality. The Morality of the individual depends on his not violating the Law of his nation; but the National Law must be framed according to the National view of Morality. The

moral offense of coveting my neighbour's goods, as well as the crime of stealing, extends to everything which the Law determines to be his goods. But the Law which gives him everything, and leaves me to starve, may be an unjust Law; and if so, may be altered by the progress of time, and by the improved Morality of the legislative body.

649. We shall in this and the succeeding Book, consider Laws under the two aspects which we have mentioned. In this Book, Law is considered as fixed and given. But even under this aspect, Law is considered as the expression of Justice. The Law gives to each person his Rights, but the Law also aims at giving to each person what it is right he should have. That which is legally fixed is intended also to be morally right. *Jus*, the Doctrine of actual Rights and Obligations (90), has for its object to conform to *Justice*.

In all cases of human action, considered with reference to Morality, there is (390) an Idea and a Fact. The Fact is the actual Law and other given external circumstances of action: the Idea is Justice, or some other Moral Idea derived from the Supreme Rule of Human Action, that is, from the Moral Nature of man. The Fact is an historical element. It is what it is, in virtue of the previous course of events, which have successively produced or occasioned one another up to the present time. The Idea is the purely Moral element of our judgement. The Law, as part of the Fact, is historical. It is what it is in virtue of the national history (384). The Laws of acquisition of property, of inheritance, contract, marriage, and the like, have been produced in each country by a series of historical events. If the previous condition and history of the nation had been different, the present Laws would have been different. But yet, as we have said, at each step, Legislators and Jurists have endeavoured to make the Law the expression of Justice under the conditions of the case. Good Jurists have interpreted the Law according to Principles of Equity (401, &c.) And this is involved in

the notion of *Jus*. Wise Legislators have endeavoured to make Laws accordant with the Principle of Morality in its largest sense, as applied to the action of States. The mode of doing this we may treat of as *Polity*. And Jus and Polity will be the subjects of this and the succeeding Book. Jus treats of what Law is, and Polity of what it ought to be, both of these regarding Law as the instrument of Morality.

650. In order to treat of Jus, we must take Law as it is. But Law, wherever it is, has an historical origin. We must therefore take as our case some community with its Laws as they are given by the History of the Society.

Of the Systems of Law actually established in the world, two especially deserve our notice, and may throw light upon our subject, if we follow them into some detail; namely, the System finally established in the ancient world, and the System actually established in our own country. The former Body of Law was that which prevailed when the whole civilized world was one single State; the latter is that which prevails in the State in which we live. I speak of the Roman Law, and the English Law. These two Systems of Law are those in which we are most interested, as past and present realities. They are the Laws of two nations, both of them eminent for the clearness of their jural perceptions, and their vigorous habits of jural action. We may also take some examples of Laws from the Laws of the Jews; for these are of importance, in consequence of their antiquity, their authority, and their influence upon Christians. And for the reason just mentioned, we shall take into our review some of the Comments of Jurists, as well as the Decrees of Legislators.

651. In the notices which we shall give of Roman and of English Law, we do not pretend to give a complete account of each System: nor even of the principal parts of each System; but mainly, to exemplify the manner in which the historical element of a national System of Laws shows itself. The *Jus* of the Romans,

the *Common Law* of England, may be conceived as collections of traditionary principles which do not derive their authority from legislation at a given epoch, but from the national idea of Rights and of Justice: and these ideas are defined and developed, not constituted, by their application to particular cases and by the *dicta* of Judges and Jurists. With regard to this element new Laws are made rather to declare and interpret than to change the existing Law.

But besides this traditional Jus we may have Legislation the object of which is to reform and improve the Law. Statute Law may remedy the errours as well as the obscurity or uncertainty of the Common Law. And such Legislative Reforms and Improvements must be regulated by the Moral Ideas (Justice, Equity, Humanity, and the like,) of which we have already spoken in the Second Book. But these Moral Ideas, when applied to the purposes of such Legislation, assume a political aspect. They belong to Polity, and under that head will be treated of in the next Book. They direct us to the consideration of the Duties of the State, and give rise to Principles of Political Morality.

652. In order conveniently to survey the legal Definitions of Rights, we must divide Rights into their kinds, and arrange them in order. The Division and Arrangement of Rights in different Codes, and different Jurists, have been various. We shall have before us the Division and Arrangement which are most suited to our purpose, if we take those Classes of Rights to which we have been led by our survey of the Springs of Human Action. Of these Classes, the principal are, as we have said (80), *the Rights of Personal Security, the Rights of Property, the Rights of Contract, the Rights of Marriage,* and *the Rights of Government.* To these we might add, as has been said, other asserted Rights, arising from less simple and universal springs of action, as the Right to Freedom of Opinion, and the Right to Reputation. But these are less important; and we shall for the most part confine our attention to the *Five Principal Classes* of Rights which we have mentioned.

In the Roman and in the English Law, all the five Classes of Rights are, for the most part, clearly and fully established; and the same is the case in all communities, in which Law has made any considerable advance. In rude and turbulent conditions of Society, it may happen that some of these Rights are very imperfectly defined, and very precariously held; or it may be, that from a portion of the community some of them are withheld altogether. Thus, in countries where Slavery exists, the Slave has not the Rights of Personal Security. The constraint which Slavery implies, is of itself an entire violation of the Rights of Security. And the Slave is further liable to blows and wounds in a great measure at the will of his master. He has commonly no legal remedy for such inflictions, which would be Wrongs, if any Rights of the Person existed for him. And with the loss of this class of Rights he loses all. He can have no Property; for he can have nothing which his master may not take from him, using violence if other courses fail. He cannot contract to do anything; for what he is to do, must depend on the Will of his master. He cannot even have the Rights of Marriage; for his master may at any time separate him from the sharer of his bed.

653. Thus, in such cases, we have an absence of all the Classes of Rights. Such cases are recognized in the Roman Law, for Slavery was one of the elements of Roman Society. One of the distinctions laid down as the basis of the Roman Code is, that all men are *Freemen* or *Slaves*. "Summa divisio de jure personarum hæc est, quod omnes homines aut liberi sunt aut servi*." But this state of things was afterwards altered, by the improved condition of the national morality. The steps of transition in the abolition of slavery are gradual. In many countries, there exist classes which, without being Slaves destitute of Rights, have Rights inferior in kind to the Classes above them. In many cases these inferior Classes are the successors of a vanquished race: for in ancient times, by the custom of nations, the conquered

* *Inst.* 1. 3.

in war became the slaves or servants of the conquerors. The stages by which, from this condition, men pass to an equality of Rights, are generally connected with the Right of Property, and especially with the tenure of property in land. Thus, in many countries, in which the land is cultivated by *Serfs*, who are allowed to raise their own subsistence from the soil, but compelled also to labour for the Master to whom the land belongs, men are often *ascripti glebæ;* bought, sold, and inherited with the land: yet they are not Slaves. They have a right to their own share of the produce; and, under favourable circumstances, pass by various gradations into the condition of Freemen; a change which is taking place extensively at present, in the state of the cultivators of Europe. Property in land is a Right which exists in all States; yet in some States the Right of Property of individuals has been much limited. In some of the ancient Republics, as for instance Sparta, the land belonged in common to all the citizens. And in another form of Society, which prevailed in India, the Ryots or Cultivators generally occupied the land in common, and were collected in villages under officers who distributed to the cultivators and tradesmen their respective shares of the produce*. Out of the earlier forms of tenure of land, emerged the more complete Rights of Property of modern times; bearing traces however, in many respects, of their historical origin.

The Rights of Marriage are justly considered as essential to settled Society: and those who look back to the origins of things, speak of those men as the founders of Society, whose office it was to establish this institution: *concubitu prohibere vago.* Yet the female slave has generally been at the mercy of her master, wherever slavery has existed: and polygamy has been a practice extensively prevalent, and has only gradually given way to more perfect forms of the Rights of Marriage.

654. It may be asked whether the Five Principal Classes of Rights, which we have mentioned, are entirely

* Jones *On Rent*, p. 116.

distinct; whether one Class does not run into another. Especially, it may be asked whether Contracts do not necessarily imply Property; for we contract to buy and sell our property; and whether Property be not merely a general tacit Contract that each shall have his share. To this we reply, that Contract is really distinct from Property: we contract for services, for bodily labour, for mental labour, for knowledge and intelligence, as in hiring a teacher, or combining in a literary work. It may perhaps be said, that a man's limbs, his knowledge, his intelligence, his mind, are his Property; so that, in these cases also, Contract implies Property. But to speak thus, is to introduce a lax and fanciful use of words, which renders all exact expression and rigorous reasoning impossible. Such a use of words annihilates the fundamental distinction of Persons and Things; and is inconsistent with our previous reasonings, in which we established the existence of Rights. For the Right of Property was shown to be necessary, by considering that man cannot act without some command of the external world, the world of material objects. By the nature of our arguments, we spoke of Property as something external, visible, tangible; or at furthest we included, (as we shall see,) only the inseparable appendages of such material Property. We cannot consider *knowledge* and *mind* as Property, without making *Property* cease to have any definite meaning at all. Hence Contract may exist where Property does not; the two Conceptions, and the corresponding Classes of Rights, are independent of each other*.

* The distinction of the rights of property and the rights of contract agrees with the antithesis established by Roman Jurists, between *Jus in re* and *Jus ad rem:* the former being a property in the thing; and the latter being a right of contract relating to the *res*, but only good against the other party to the contract. The primary notion of property is that it consists in things, or the adjuncts of things; (as a right of way:) and in this sense, no property can exist, without some corporeal thing for it to inhere in. But the Law has created various rights in particular persons, which may in a wider sense be called *property:* as an exclusive right to the use of an invention given by a *patent* to the inventor: an

Again: we reply, that Property cannot be said to depend upon tacit Contract, if we are to classify Rights at all. For Contract, as we now consider it, is the result of a special Act; or at least of an Understanding founded on some distinct analogy. A Contract implies Language, or something equivalent to Language: Property does not imply the use of Language, or any substitute for it. A tacit Contract, not understood from any special act, but, without any special ground, assumed as a universal fact among men, is not a Contract in that sense in which we have used the term in our previous reasonings. Moreover, if we suppose the prevalent respect for the Right of Property to be founded upon a tacit general Contract, we must, for the like reasons, suppose the prevalent respect for the Rights of the Person, and for the Rights of Marriage, to be founded upon tacit general Contracts: and thus, all Rights would be identified with Rights of Contract. But such a use of terms would make all classification of Rights impossible. We must, therefore, make Contract a special and definite kind of Right: and if we do this, Property will be independent of Contract, and the corresponding Classes of Rights will be distinct from each other*.

The Five Classes of Rights of which we have spoken do not occur, in that form, in the Roman Law. But we see in that Law indications which readily direct us to

exclusive right to publish a certain book, given by a law of *copyright* to the author. Such rights, however reasonable and just, are rather of the nature of Privileges or Monopolies than of Property. *Literary property*, for instance, as the copyright of authors is termed, is not a property in the author's manuscript merely, nor is it a property in all the printed books which follow the manuscript; it is the exclusive privilege of publishing and selling such books. Such incorporeal property agrees with other property in this respect, that it may be transferred by contract: but this can only be done in virtue of special laws regulating such property.

* Other ambiguities or variations occur in the arrangement of Rights. Thus, in the Prussian Law, Rights of Domestic Servants are not arranged as we should arrange them, with Rights of Contract; (Hiring;) but with Rights of Persons. This is an approximation to the distinction of Persons into Free, and Slaves, assumed by the Roman Law.

those Rights. The leading distinction of heads, in the Institutes of the Roman Law, is of Persons, Things, and Actions. *Omne jus quo utimur vel ad Personas pertinet, vel ad Res, vel ad Actiones**. Here *Actiones* means legal proceedings; but we may take the term as representing peculiarly the Class of Rights of Contract; for these derive their reality especially from the support of the judicial authority. The Second Book of Justinian's Institutes is mainly concerning Property, *De Rebus;* and the Third, concerning Contracts. Family Rights also are distinguished in the Institutes from the other Rights of Persons. Thus, in the First Book, the ninth and tenth Titles are, *De Patria Potestate* and *De Nuptiis.*

655. In both the Roman Law and the English Law, there is a distinction of Wrongs, as Private, and Public Wrongs. For the Social Order being established, in which respect for the Rights of all is commanded, those who transgress this respect, offend, not only against the particular persons whom they injure, but also against the State, the general protector of Rights. If one man violently beats or wounds another, he not only wrongs him, but violates the general order of Society. On the other hand, if one man holds, and claims to hold rightfully, a field or a house or a horse to which another also asserts a claim, the first may be doing a wrong to the second, but the possession being held under the show of law and justice, the question between the two claimants is, which of the two really has the right which both assert. The former is a Crime; a Public Wrong; and a Crime belongs to *Criminal Law*, and must be tried by Criminal Courts. The latter is a question of Private Rights, belonging to *Civil Law*, and to be decided by an Action or Suit, *Actio.* In England, the Office of the State, as the guardian of Order, and

* *Inst.* 1. 2. "The whole body of Jural Doctrine refers either to Persons, or Things, or Actions." The Rights of Persons include the Rights of Family, as well as Individual Personal Rights; the Rights of Government are implied in the actual enforcement of all Rights; but in a fuller treatment of the subject, require to be made a distinct class.

of the Rights of all, is embodied in the person of the Sovereign. A person who commits violence, breaks *the King's Peace**.

Taking the Classes of Rights as we have stated them, we shall now notice some of the jural expressions and distinctions by which these Rights, and the corresponding Classes of Wrongs, have been practically carried into effect in particular circumstances.

CHAPTER II.

THE RIGHTS OF THE PERSON.

656. THE Rights of the Person are the Rights to Safety, Security, and Free Agency, which, as we have said (79), are requisite for the peace of Society, and the human and moral character of man's actions. These Rights are protected by the Laws, which prohibit deeds of force and violence in general. But from the extreme of violence, the infliction of death, there is a gradation to slighter acts, which also are Wrongs or Injuries. The division of these *Wrongs against the Person* is very similar in the laws of most countries.

In the Laws given to the Jewish people, the primary Law upon this subject was the Command, *Thou shalt not kill:* and this Law was followed out by various

* In some cases the distinction in the English Law between criminal and civil proceedings depends upon whether the public peace is broken or not, not upon whether the injury be a violation of the rights of the person or of property. A *false* (that is, wrongful) *imprisonment*, though an injury to the person, would not be the subject of indictment (that is, of a criminal process). A *forcible entry* into a house is the subject of criminal proceedings.

The same act may be both a crime and a private wrong. *e. g.* In English Law an assault and battery, which, as a misdemeanour, may be the subject of an indictment, may also be concurrently the subject of an action for damages.

In Roman Law, Crimes are included in the body of the *Jus Civile.*

Rules concerning *Smiting:* which are given in the Book of Exodus, chap. xxi. verse 12, and the following verses.

In the English Law, proceeding from *Homicide*, which is the highest crime against the Safety of the Person, the following offenses are treated of: *Maiming;* (anciently *Mayhem**,) which is an injury depriving a man of the use of some bodily member: *Wounding;* which consists in giving a man some hurt with a weapon which breaks the skin: *Battery;* which is any, the least, Hurt or Violence unlawfully and wilfully done: *Assault;* which is an attempt to do such violence†. *Threats* and Menaces, by which a man is put in bodily fear, are generally not punishable; but they may be the ground, of compelling the person who uses them to give sureties, that he will keep the peace.

The least touching of another person wilfully or in anger is Battery: for the Law, as the Commentators upon it remark, cannot draw the lines between different lower degrees of violence, and therefore totally prohibits the lowest degree. In like manner among the Romans, the Cornelian Law, *De injuriis*, prohibited *Pulsatio*, as well as *Verberatio:* distinguishing Verberation, which was accompanied with pain, from Pulsation, which was not.

657. Without attempting to enumerate all the wrongs of this class, we may notice other Wrongs against the person, consisting in Violations of the Right of Personal Liberty. These come under the head of *False Imprisonment;* so called in opposition to *true* Imprisonment, which is constraint put upon the person by the authority of the law.

To these offenses may be added *Kidnapping*, the

* *Mayhem* is, in strictness, confined to a deprivation of some member by which a man is rendered less able to defend himself; as a leg or an arm, but not a nose or an ear.

† Threats (with certain exceptions) to do bodily harm, as also challenges to fight, are only regarded in their tendency to provoke a breach of the peace, and in these cases are not the ground of punishment, but of Sureties. Blackstone, IV. 255.

forcible abduction or stealing away of a man, a woman, or child, from their own country, and sending them into another. This offense was noticed also in the Jewish Law*: "He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death." So likewise in the Roman Law, *Plagium*, the offense of buying, selling, taking or keeping as a slave, a freeman, was severely punished. The *Plagiarius* was generally condemned to the mines.

658. The English Law also takes cognizance of injuries affecting a man's health, arising, not from Malice, but from neglect. Thus a remedy is given when a person is injured by selling him unwholesome provisions or wine; or by a neighbour's exercise of a noisome trade which infects the air. There is also a legal remedy given to a man for the neglect or unskilful management of his physician, surgeon, or apothecary, which is called *mala praxis*. The same is the course of the Roman Law†: *Imperitia culpæ adnumeratur: veluti si medicus curationem deliquerit, male quampiam secuerit, aut perperam ei medicamentum dederit.* The Injuries which are under our consideration, in this part of our work, are, for the most part, accompanied with Malice; but the physician's Indifference to his patient's health, and Disregard of the Trust reposed in him, are held by the Legislator to give to such damage, so inflicted, the character of Wrong, as well as Damage.

Malicious Intention, or a carelessness of mischievous consequences equivalent to malicious Intention, is requisite to the notion of the Wrongs or Crimes here spoken of. But in the cases which have just been mentioned, such Malicious Intention or carelessness is inferred from the act itself. In all cases of personal damage inflicted,

* Exodus xxi. 16.

† *Inst.* IV. 3. "Want of skill is accounted a blamable neglect; as in a case in which the physician leaves off his attendance on the patient while the cure is incomplete, or performs a surgical operation wrongly, or gives pernicious medicines." A similar maxim is found in Old English Lawyers: "Like law is for want of skill as for want of care."

the law infers malicious intention, unless there be some circumstances to excuse, mitigate, or justify the act.

659. Homicide is *excusable* when it is committed without intention; in the Law phrase, *by Misadventure, per infortunium;* as in the case mentioned in the Jewish Law*: *When a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour that he die.* But though this is termed Excusable Homicide, the Jewish Law did not protect the slayer till he had reached one of the Cities of Refuge; and the English Law levied a fine upon the delinquent; also the thing which was the instrument of death was forfeited under the name of a *Deodand*†. The fine has been remitted at the suit of the person concerned as far back as our legal records reach; but the law of Deodand is still in force. These enactments seem to be intended to express the high value which the law sets upon human life; so that it always supposes some degree of blame in the conduct of him who takes away life, except by express permission of the Law itself.

660. In the same spirit, the Law does not generally allow Games, which may end in blood, to be received in justifications of homicide; as Tilting, Sword-playing, Boxing. And in general, if death ensue in consequence of idle, dangerous, and unlawful acts, as shooting, or casting stones in a town, the slayer is guilty of Manslaughter, and not of Misadventure only. But to show how much such distinctions depend upon the actual law, we may observe, that by the English Law, if the king command or permit such diversions, and death ensue, it is only Misadventure. In like manner, by the Laws both of Athens and Rome, he who killed another in the Pancratium or Public games, authorized or permitted by the State, was not held guilty of Homicide‡. *Si quis colluctatione, vel in pancratio, vel pugilis,*

* Deut. xix. 5. † Deodands are now abolished.

‡ Plato, *Leg.* Lib. VII.; *Dig.* IX. 2. 7.

dum inter se exercentur, alius alium occiderit, cessat Aquilia (Lex), quia gloriæ causâ et virtutis, non injuriæ gratia, videtur damnum datum.

661. Homicide in Self-defense, *se defendendo*, upon a sudden affray, is excusable rather than justifiable by the English Law. When a man protects himself from assault in an unpremeditated quarrel, and kills him who assaults him, it is termed by the Law *chance-medley;* (or, as some choose to write it, *chaud medley;*) which signifies a *casual affray*, (or else an affray in the heat of blood, *chaude meslée*). This term is rightly applied, when the slayer engages in no struggle, except what is necessary for self-defense.

662. When Homicide results from sudden heat of passion, arising naturally from provocation, without an intention previously formed, it is in English Law termed *Manslaughter;* as when one person kills another in a sudden quarrel. For the law pays, say the Commentators *, such regard to human frailty, as not to put hasty acts, and deliberate acts, on the same footing with regard to guilt. But in cases where homicide is committed upon provocation, if there be a sufficient cooling time, for passion to subside, and reason to interpose; and if the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and amounts to Murder.

663. *Murder* is Homicide committed with previous intention, which is termed *Malice prepense*, or *Malice afore-thought.* This is the most atrocious of Crimes.

664. Homicide is *justifiable* by the Law of England when it is committed for the prevention of any forcible and atrocious crime. If a person attempts robbery or murder, or endeavours to break open a house in the night-time, and is killed in such attempt, the slayer is acquitted†. The Jewish Law had the like

* Blackstone, IV. 191.

† By the more modern decisions of law, the distinction of night and day is no longer noticed. The owner is now understood to be entitled to resist the robber to the last extremity; subject to the condition of showing that *that* extremity was requisite for the defense.

rules*: *If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him.* So also in the Roman Law: the Law of the Twelve Tables was, *Si nox (noctu) furtum faxit, sim (si eum) aliquis occisit (occiderit) jure cæsus esto.* But there was, in this case, to be no attempt at secrecy on the part of the slayer; but, on the contrary, a loud appeal to any one within hearing†; *Lex* XII. *Tabularum furem noctu deprehensum occidere permittit, ut tamen id ipsum clamore testificatur.* In the day-time, the person attacked by a robber is allowed to put him to death if he cannot otherwise defend himself: but we are not, by the English Law, allowed to kill any one in order to prevent a crime, if the crime be unaccompanied by violence. In this case, the Law requires us to cause the offender to be legally apprehended and tried. So also the Jewish law, in the place already quoted‡: *If the sun be risen upon him, there shall be blood shed for him, for he should make full restitution.* And the Roman Law is similar§: *Interdiu deprehensum ita (lex) permittit occidere, si is se telo defendat, ut tamen æque cum clamore testificetur.* And again; *Sed et si quemcunque alium ferro se petentem quis occiderit, non videbitur injuriâ occidisse; et si metu quis mortis furem occiderit. Sin autem cum possit adprehendere maluit occidere, magis est ut injuriâ fecisse videatur.*

665. The Laws of Solon‖, and the proposed Laws of Plato¶, agree with those already mentioned, in making a wide distinction between the modes of resistance permitted against the nocturnal and the diurnal

* Exod. xxii. 2.

† *Dig.* IX. 2. 4. The Law of the Twelve Tables makes slaying a thief detected in the night to be allowable, provided the slayer call aloud on the occasion of the act.

‡ Exodus xxii. 3.

§ *Dig.* IX. 2, 3. A thief detected by day may be slain if he defend himself with a weapon, and if, as before, the slayer call aloud. And if a man slay him who assaults him with a weapon, it is justifiable: and if a man slay a robber, being in fear of his life. But if he was able to apprehend him, and chose rather to slay him, it is not justifiable.

‖ Demosth. adv. Timocrat. ¶ *Legg.* Lib. IX.

thief. It has been discussed among Jurists*, what is the ground of this difference. The reason which they assign is this: that the Law does not allow a man to be put to death by a private hand, on account of an expected loss for which the Law can give redress: but only on account of danger to the person, which may be beyond redress; that therefore by day, when the person attacked can see the extent of his danger, he is justified only to the extent of his danger, and so far as the wrongs are of an irremediable kind; but that by night, when the unknown extent of the danger may lead him to believe it extreme, and when aid and testimony are difficult to obtain, he is justified to the extent of his fear. The Law is willing to accept such justification, because it cannot afford him redress in any other way.

666. When a person commits acts of violence against another, having received extreme *Provocation*, but not being in danger, by the Law of England, the provocation *mitigates*, but does not justify the offense. The Mitigation is not available, if there have intervened time sufficient for the passions to cool: for if that be the case, the Law itself is ready to redress the injury. Hence, when two persons in cold blood meet and fight, any mischief done by one to the other cannot be excused by alleging previous Provocation. And thus, in the case of a Duel, in which the combatants take measures tending to destroy each other's lives, the Law has fixed the crime of Murder on them.

667. A person committing an act of violence may have others who assist or *abet* him, without their taking the same share in the act which he does himself. He is the *Principal*, they are the *Accessories*. And these are distinguished into Accessories before the Fact, as those who urge a man to commit murder, and provide him with arms†; and Accessories after the Fact, as those who harbour the murderer, knowing the crime to have been

* Grot. B. et P. II. i. 12.

† In general, even a privity to the intention to murder makes a man an accessory before the fact.

committed. Some distinctions are made in the assignment of punishment to Principals and Accessories: but absence when the crime is committed is requisite to make a man an Accessory. Thus the Seconds in a Duel are guilty of murder as Principals in the Second degree.

668. As we have said, the English Law does not allow Provocation to excuse acts of violence, except when there has been no time for passion to cool; and therefore does not acquit either of the combatants in a Duel on the ground of any provocation which he may have received. Yet the administration of the Law has often been so conducted, that it has seemed to recognize the Challenge as an excuse for the attempted Homicide. This inconsistency, between the letter and the practice of the Law, has, perhaps, in some measure, arisen out of the customs which prevailed in Europe some centuries ago, when Duels were permitted openly by Christian States; and the person who did not seek redress, by such means, against any expression of contempt or menace uttered against him, incurred general blame and contempt as a coward.

669. Among the justifiable acts of violence, we may notice those which the Law not only permits, but authorizes and commands; as the Imprisonment of criminals, and their Punishment by stripes, wounds, maiming, exile, or death. But in such cases, nothing is allowable which the Law does not require. To kill the greatest of malefactors extra-judicially, that is, not according to the prescribed course of the administration of the Law, is Murder. Hence, if the judge who condemns, be not lawfully authorized to do so, he is guilty of murder. And the judgment must be executed by the proper Officer, for no one else is authorized by law to do it. The Judge may condemn, but must leave it to the Sheriff or his deputy to execute the sentence. Even if the Officer alters the manner of execution, as if he beheads one adjudged to be hanged, it is murder.

670. Other cases in which Homicide is justifiable, because committed for the furtherance of the law, are these: when an officer, in the execution of his office,

kills a person who resists him:—when prisoners assault the gaoler or officer, trying to escape, and he kills them:—when an assembly of persons (that is twelve, or more) become riotous, and being required to disperse by the proper magistrates, refuse to do so. But it is added, by the expositors of these laws, that there must be in such cases an apparent necessity on the officer's side in order to justify him. It must appear that the culprit could not be apprehended, the prisoner could not be kept in hold, the riot could not be suppressed, in any other way.

671. There is another class of actions which may assume the aspect of infringements of the Rights of the Person, but which are justified in virtue of the Authority which the Law recognizes as residing in the persons who commit the acts. According to the English Law, the Father has an authority over his Children which entitles him to strike or constrain them, under certain conditions. A Master has a like authority over his Apprentice, and a Schoolmaster over his Scholar. In these cases, it is justifiable to beat or confine the pupil in a moderate degree, in the way of *Chastisement* or *Correction*. In cases of voluntary service, the Employer is allowed to exercise constraint over the hired Servant or hired Labourer, in whose services he for the time obtains a Right. Thus, I prohibit my Servants from going out of my house except at stated times, and when I do not require their services. I have a Right to continued and active labour from the workmen whom I have hired.

672. In some countries, the Master has a legal Right to inflict stripes or other violence upon his Servant, the Landlord upon his Tenant, or one Class of the inhabitants upon another. In these cases the Class thus subjected possess in an imperfect degree the Rights of the Person. Such classes have been called by various names, in various ages and countries, according to their history and circumstances: as *Helots*, *Vassals*, *Serfs*; and when entirely divested of Rights, *Slaves*. We do not here inquire how far it is really consistent with

justice and humanity that men should be thus partially or entirely deprived of Rights. But even when such Classes legally exist, the Law limits the power of the Master over the Dependent. Some such Dependents can be sold with the land, but cannot be separated from it: they are *prædial* Slaves, *Serfs*, *Ascripti Glebæ*. Other Slaves may be sold off the land, and disposed of at the will of the Master. These may be kept in the house for menial services, as *domestic* Slaves; or employed in various labours for the Master's benefit and at his pleasure. Thus the ancient Greeks and Romans employed slaves as their Artisans.

The relations between Master and Servant, are thus connected with the relations between Landlord and Tenant; and thus point out to us a close connexion between the Rights of the Person and the Rights of Property.

CHAPTER III.

THE RIGHTS OF PROPERTY.

673. As we have already said, the existence of the Right of Property is requisite as a condition of the Free Agency of man, and the Peace and Order of Society (79). Accordingly, in all Countries such Rights do exist. In every form of Society, there are circumstances under which the necessaries and comforts of life,—food, clothing, tools, arms—are held to belong to a man, so as to be *his Property*. The Rights of Property being established, the Sentiment of Rights and the Sentiment of Wrongs (98, 99) give great force and stability to the institution. We cling with strong and tenacious affection to what is our *own*. We earnestly approve the rule which makes it ours, and which consequently makes yours what is yours. A regard for the distinction of *meum* and *tuum* prevails. A reverence for Property is felt. The necessity of its existence, as a condition of human society, is generally perceived, and this perception gives force to the Rules by which Property is defined.

These Rules are, in each particular case, supplied by the Law of the Land. The Law determines what shall belong to one man, and what to another.

674. With regard to some Kinds of Property, when they are thus assigned, the Right of the *Proprietor* or *Owner* shows itself in a distinct, visible form. The objects are taken hold of, carried about, used, consumed; as for instance, *clothing*, *food*, *tools*, *arms*. Things of this kind are *moveable Property*. Moreover, such Property may be retained by the Proprietor, or given by him to another person, at his pleasure. It may be given either absolutely, or on condition of receiving a return; that is, given in Barter or Exchange. Thus, Property leads to Exchange; and Exchange again leads to the establishment of some general Instrument and Measure of Exchangeable Value; that is, to the use of *Money*. The natural Measure of the Exchangeable Value of any objects is the labour of producing, or the difficulty of procuring the objects. Gold and Silver have been most commonly used as Money, because they are procured with a tolerably uniform degree of labour; because they perish very slowly when kept; and because they are easily divisible into definite portions.

675. When mankind have settled employments, and settled habits of intercourse, the natural Value in Exchange, either of these, or of any other objects, can never long differ from the Standard, or Measure, of which we have spoken; the labour of producing and difficulty of procuring them. For if the Exchangeable Value of any class of things were less, proportionally, than the Labour of producing them, men would turn themselves from this kind of Labour, to other employments, in which an equal Exchangeable Value might be obtained with less labour; and thus, the number of persons employed in producing this class of things being diminished, the difficulty of other persons procuring them from the producers would be increased, and the Exchangeable Value would rise. And in like manner, if the Exchangeable Value of any class of things were greater, proportionally, than the Labour of producing

them, other persons would turn themselves to this kind of Labour, and the value of the class of things would fall. Thus if the exchangeable value of gold and silver were greater than that of other objects, obtained with equal labour, men would turn their exertions to the collecting gold and silver, as the easiest way of obtaining the other objects of their desires. And though the intercourse of men, and their power of changing their employments, may not be so unfettered as to produce this result immediately; yet, in the long run, the Measure of Value in Exchange will be the amount of Labour employed in producing the objects.

676. But, besides Moveable Property, consisting of objects which the Proprietor can hold, remove, consume, or transfer in a manifest manner; there is Property of another kind, which cannot be removed or destroyed, or possessed in a visible manner; and which yet must be, and by the Laws of every Country is, vested in Proprietors. We speak now of *Property in Land.* It is requisite that such Property should be established; for in every Country man subsists on the fruits of the Earth, or on animals which are supported by the Earth; and in order to live, he must have, on the face of the earth, his dwelling-place, and the source of his food and clothing; he must have his house and his field. In most countries, the earth does not supply man with what he needs, except by cultivation; and the *Cultivator* must be stimulated to perform his task, by having his portion of the fruits of his labour assigned to him as his Property. But whatever amount of Cultivation be necessary, the produce of the earth, and the soil itself, are, in every country, assigned to some class of *Landlords* as Property, or are assumed as Property by the State itself.

677. The assignation of Landed Property to its owners, as of all other Property, is defined and determined by the Law of the Land. But in Landed Property, the acts of Ownership are less obvious, natural and effective, than they are in other kinds of property; and therefore Property in Land is more peculiarly and

manifestly determined and directed by the Law, than Property in Movables.

The ancient Law of England treats Land as that *Thing* which is eminently and peculiarly the subject of Laws concerning Property, while all other Things are considered as only appendages to *Persons*. Hence, Land is termed *Real* Property; everything else is *Personal Property*.

678. In most countries, the Cultivators are a different class from the Proprietor of the Land; whether the Proprietor be another Class, or the State itself. The Rights of the Cultivator and of the Proprietor are determined by Law, or by Custom equivalent to Law, and are various in various countries. The share given by the Cultivator to the Proprietor is *Rent*. He who *holds* the land is the *Tenant*, in contradistinction to the Landlord, who owns it.

679. In the greater part of Asia*, the Sovereign is the sole Proprietor; and as such, receives a fixed portion (commonly one-fifth) of the produce from the Cultivator; who is, in India, called a *Ryot*. In Russia, and a great part of Germany, the Cultivator supports himself on a part of the Land; and pays a *Rent* to the Landlord in his *Labour;* being obliged, during a fixed portion of his time, (as for instance, during three days in the week,) to work in the cultivation of the Landlord's exclusive share: such Cultivators are *Serfs*. But these Labour-Rents sometimes became unlimited, and the Serf approached in condition to a Slave. In other parts of Europe, as in Greece, Italy, and France, in ancient and in modern times, the Cultivator has been supplied by the Landlord with the means of cultivation, and has paid to him a fixed portion of the produce; generally one half. Hence such Cultivators are called *Coloni Partiarii*, *Coloni Medietarii*, *Metayers*. In a few spots on the Earth, of which England is an example, there are, between the Landlord and the labouring Cultivator, an intermediate class, the *Farmers;* who pay a *Money-Rent* to the Landlord, *Wages* to the

* Jones *On Rent*.

Labourer, and have for themselves the whole produce obtained from the Land. The Farmer must be able to subsist the Labourer, while he is toiling so as to raise a future crop of produce: therefore he must possess a *Stock*, or *Capital*, already accumulated. The amount of the produce which the Farmer has, after paying Rent, Wages, and other expenses, is the *Profits* of his Stock.

680. These various forms of the distribution of the wealth produced by the soil of each Country affect very greatly other Rights, as well as the Rights of Property (672). The Serf generally possesses in a very imperfect degree the Rights of the Person against his Lord; but against other persons, his Lord is supposed to afford him protection. In modern Europe, there prevailed, for several centuries, a System of Tenure of Land with such mutual Rights and Obligations; namely, *the Feudal System*. According to this system, Land was held on the conditions of Protection from the Superior, and Service from the Inferior; and according to these conditions, a series of Persons, each subordinate to the one above him, had a modified Property in the Land. Each such person was the *Vassal* of the one above him, his *Superior Lord* or *Seignior*. Each Lord had a Right to certain Payments or Dues from his Vassals; and the Vassal, being marshalled as a Soldier under his Lord, was enabled to protect himself and others. The Land thus granted by a superior to an inferior was called a *Feud* or *Fee*. None of these Feuds or Fees was an absolute Property; all were held of the Sovereign, at least in England. He was the only *Landlord;* and the highest Title of Ownership under the Feudal System was *Tenant in Fee Simple*. Besides Tenants of various kinds, there were mere Labourers who held no Fees, and were called *Villeins*. At first, this Cultivator in England was precisely in the situation of the Russian Serf*. In the three centuries beginning from about A.D. 1300, the unlimited Labour-Rents paid by the English Villeins for the lands allotted them were gradu-

* Jones *On Rent*, p. 40.

ally commuted for definite services, still payable to the Lord. Out of this grew a legal *Right* of some of the cultivators to the occupation of their Lands, which were registered in a list kept by the Lord. Hence these were called *Copyhold Tenures*, in distinction to the usual possession of the Soil by a freeman, which was a *Freehold Tenure*.

681. The relations which the Tenure of Landed Property establishes among different classes continue to influence the Laws, and still more the Forms of Law, in each country, long after their original force has been lost. Two hundred years have barely elapsed since the personal bondage of the Villein ceased to exist among us. Copyhold Tenures are still familiar. The Lord of the Manor, the representative of the Feudal Seignior, has still various Rights, due to him from Copyhold Tenants: as Heriots, payable on the death of the Tenant; Fines, payable when the Land is alienated by the Tenant to another person; the Rights of pursuing Game, which are reserved to the Lord of the Manor, even in Freeholds. And the phrases used in transferring Landed Property still have many traces of the Feudal System.

682. In like manner, in the Roman Law the conditions of Property and the modes of transferring it retained to a late period traces of the earlier modes of Tenure. In the earliest known stage of the Roman Law, Lands, with the Slaves and Cattle requisite for their cultivation, were transferred by a ceremonious form called *Mancipatio;* and the Quirites, or original Roman citizens, could not transfer the ownership of these things in any other way. Hence arose a division of *Res Mancipi*, things which must be thus transferred, and *Res nec Mancipi*, things which need not*. But though a man could not acquire Quiritarian ownership or *Dominium* of a *Res Mancipi*, without this process, he might have *possession* and *use* of such a thing without such ownership; and the later jurists recognized this

* There was however, besides *Mancipatio*, a formal legal process, called *Cessio in jure*, by which *res mancipi* might be transferred.

kind of Right*. They say†, There is among foreigners only one kind of ownership (*dominium*), so that a man is either the owner of a thing, or he is not. And this was formerly the case among the Roman people: for a man was either the owner *ex jure Quiritium*, or he was not. But afterwards the ownership was split; so that now one man may be the Owner of a thing *ex jure Quiritium*, and yet another person may have it in his possession (*in bonis*). For instance, if in the case of a thing which is *res mancipi*, I do not transfer it to you by mancipatio, but merely deliver it to you, the thing indeed becomes your possession (*in bonis tuis*), but it will remain mine *ex jure Quiritium*, until by continued possession you make it yours (*donec tu eam possidendo usucapias*). When that is complete, it is yours absolutely (*pleno jure*).

683. Upon the conditions of tenure of land, depend the *Title* or evidence of ownership; the modes of *Conveyance* or Transfer by Contract; the modes of *Succession* on the death of the Proprietor, whether by his *Testament*, or *ab intestato:* the judicial *Remedies* for Wrongs: and the like. A person's landed property so much determines his condition, that we commonly speak of his land as his *Estate*. The possession of a house, or habitation, is important to man in his social condition, not only as a means of shelter and bodily comfort, but also as giving him a fixed local position in the Community. By such possession, he is a *Householder;* and for many important purposes the State or City is considered as consisting of Householders. The place, neighbourhood, city, or country in which a person has his habitation, is his *Domicile* (*Domicilium*). A person's Domicile, for the most part, places him under the Laws of the State in which it is situated.

684. As Property in Land, and in the fruits produced by the cultivation of the Land, is established and

* Hence *mancipium* is used for full property, as in the line,
Vitaque mancipio nulli datur omnibus usu. *Lucret.*

† Gaius, II. 40, who lived in time of the Antonines.

realized by the Laws and Customs of each country; in like manner is established Property in other objects, which can be distributed and assigned to special persons; for instance, in flocks and herds, and their produce; in the produce of the interior of the earth, as mines; in all that we fabricate by fashioning into a new form the materials thus produced,—wood, stone, metal, and the parts of plants and of animals. With regard to all these, and other forms of material or corporeal Property, the Law in every Country recognizes certain modes of acquiring, possessing, and transferring them, as conferring Rights.

685. The Wrongs, or Injuries by which the Rights of Property are violated, are distinguished and classed by the Law according to their circumstances. The Command, *Thou shalt not steal*, is the basis of all Laws on this subject. The definition of *Stealing*, or *Larceny* (*Latrocinium*), in the English Law*, is "the felonious taking and carrying away the goods of another." The definition of the Roman Law† was nearly the same. "Furtum est contrectatio fraudulosa, lucri faciendi causâ, vel ipsius rei, vel etiam ejus usus possessionisve." The English Law further distinguishes *privately Stealing*, as for instance, picking the pocket; and open and violent Larceny, which is *Robbery;* this the Roman Law‡ calls *Bona vi rapta.* Another crime against property is *Burglary* (*Burgi Latrocinium*), or nocturnal House-breaking; for the Law considers the crime if committed by night as much more heinous than the like act committed by day; as we have already seen that it makes a difference in the Right of self-defence in the two cases.

686. The crime of Theft, as above defined, includes only the cases in which the Thief furtively or violently takes the material object: but besides these, a person

* Blackstone, IV. 229. The definition, by some modern lawyers, of Theft is, A taking or removing of some Thing; being the Property of some other Person and of some value; without due Consent (to be separately defined); with intent to despoil the owner, and fraudulently appropriate the thing.

† *Inst.* IV. 1. ‡ *Dig.* XLVII. 8.

may be despoiled of his property by *Fraud;* as for instance, when an Order to deliver goods is fabricated or forged by some one who has no Right to give such Order. This is *Forgery.* In the Roman Law* it was *Crimen Falsi.* "Lex Cornelia *de falsis* pœnam irrogat ei qui testamentum aliudve instrumentum falsum scripserit, signaverit, recitaverit, subjecerit; vel signum adulterinum fecerit, sculpserit, expresserit, sciens, dolo malo." We need not here attempt to enumerate the various forms of fraud and deception by which a person may be deprived of his property. They are all included in the term *Cheating.*

687. According to the English Law, Larceny applies only to moveable Property; for landed Property, by its nature, cannot be taken and carried away. And even of things that adhere to the Land, as Corn, Grass, Trees, and the like, no Larceny can be committed by the Common Law of England. The Severance of these from their roots is an Injury against the real Estate, which is termed a *Trespass.* But this state of the English Law has in several instances been altered in modern times†.

688. There are some further distinctions with regard to Property, which it may be useful to notice. According to the Roman Lawyers, the power of individuals over their property, which they termed *Dominium Vulgare,* was subject to the power which the State, or the Sovereign had, to prescribe the conditions on which they were to hold and enjoy their possessions: this power was *Dominium Eminens.* The State, which defines and establishes the Rights of the Owner, always

* *Inst.* IV. 18. 7. "The Law of Forgery appoints a punishment for a man, if knowingly, and with fraudulent intent, he has written, sealed, recited, or procured to be executed a false testament or other instrument: or if he has, with like knowledge and intent, forged the signet of another person, by carving or moulding."

† The ultimate conclusion at which English Lawyers have arrived on this subject is, that it would be desirable to abolish the distinctions of the Law of Theft with regard to things severed and not severed from the realty. See *Act of Crimes and Punishments,* Chap. XVIII. Sect. 1. Art. 6.

limits those Rights; either by national maxims, as in Asiatic Empires, where the Sovereign is the Proprietor of the Soil; and in Feudal Kingdoms, where the King is the Sovereign Lord of every Fee*; or by cases of public necessity and convenience; as when a man is compelled by the State to part with his house, that the street may be improved.

689. Again: besides Private Property, *Res Singulorum,* the Roman Lawyers reckoned various kinds of Public Property; thus, among *Res Publicæ* are highways, streets, bridges, the walls and gates of a city; public gardens, grounds, fields and estates; markets, courts of justice; prisons; docks and harbours; fleets and their furniture, and the artillery, arms, and carriages of public armies; also the wealth of the public Treasury; and many other kinds of property, according to the various institutions and modes of administration of different states.

690. There are other things, which are common in their use, hence called *Res Communes;* but incapable of being appropriated, hence also called *Res Nullius;* as air, running water, the sea, the shore. These can be used by each person without any hurt or loss to other persons, and are hence said to be things *quorum innoxia est utilitas.* Yet these are not, in all cases, reckoned *Res Nullius.* States claim a property in their navigable rivers, and even in the sea near their shores. And by the English Law, although a person can have no property in running water, he may possess as property a lake or river, under the designation of "so many acres of ground covered with water." He may also have a property in the *use* of running water: but this belongs to property of another kind, which we must now notice.

691. Private property is *corporeal* or *incorporeal.* Corporeal property is such as we have mentioned, both moveable and immoveable: the immoveable being lands,

* In England, since the time of William the Conqueror, the king has been the sovereign lord of every fee: but in some other feudal countries there appear to have been *allodial* lands which the proprietor did not hold of the king.

houses, mines, and the like. But besides these kinds of property, a man may have a property in the *Use* of land or its adjuncts. This is the case, for instance, when a man has a Right of way over another's lands; or has a water-mill, of which the water flows through another's estate: for he has a Right to the flow of the water; and the owner of the other estate is not allowed to stop or turn aside the stream which drives the mill. Such Limitations of the Proprietor's Right, by the Right of another to some use of the property, arising from neighbourhood (*vicinage*), or other relations, are called in the Roman Law, *Servitutes*, Servitudes or Services; and are treated with great detail and distinctness by the Roman Lawyers. Such Property is termed by English Lawyers *incorporeal* Property. Servitudes of a Property for the convenience of a neighbouring property are called in English Law, *Easements*.

692. Before the statute of the twelfth year of Charles the Second (the *first* year after the Restoration, the years of the Commonwealth not being reckoned) the tenures of land in England, as derived from the Feudal System, were *free* or *not free*. The principal free tenures were *knight service* and *common socage;* the principal tenure that was not free was *copyhold*. The free tenures were charged with several services, as homage, ward, marriage, relief, and military service: but this latter, the service of following the lord to the wars, was usually commuted for an *uncertain* or varying pecuniary payment (*escuage*). In *socage* the payment was *certain*. The statute of Charles II. converted knight service into socage, and abolished the burdensome incidents which had accompanied knight service. Socage lands are now commonly called *freehold* to distinguish them from *copyhold*. Yet even freehold Proprietors still owe certain Services to the *Lord of the Manor*, who now stands in the place of the Feudal Lord. Services, due from land, and other kinds of Incorporeal Property, are capable of being inherited, and are termed in English Law, *Incorporeal Hereditaments*. Such incorporeal property necessarily

be an adjunct to corporeal property: it must have a corporeal subject, land, or something else, in which it inheres. For Property is of the nature of a Thing (45).

693. There are some things, with regard to which the Definitions of Law, as to whether they are private property or common things, are very various. Tame animals, *animalia domitæ naturæ*, as horses, cattle, and sheep, are the subjects of direct Property. But wild animals, *animalia feræ naturæ*, as fish, and several kinds of birds which are not housed or domesticated, are not my property by the Roman Law, except I exercise upon them some act of appropriation. Wild birds and wild beasts, when they quit my land, are not my property; and even while they continue there, are mine only by the Right which I have of pursuing them. The Roman Law gives a Right to such creatures, when taken even in another man's land. "Occupanti conceditur: nec interest, quod ad feras bestias et volucres attinet, utrum in suo fundo aliquis capiat an in alieno." The Jurists appear to have given such Rules, from a wish to exemplify their doctrine, that there are things which become property by the act of taking them. Such a Rule would be very inconvenient in a well-cultivated country. Accordingly, later commentators (as Heineccius) add "modo non prohibeamur ingressu fundi a domino." By the ancient law of England the Game, so long as it is on the land, belongs to the owner of the land *ratione soli*. But this state of the Right was interfered with by royal and other privileges. A *licence* from the State was required to kill game; and at one period, none were allowed to do so without the *qualification* of possessing certain property. The Right of taking the game still remains, in many instances, not a Property commonly transferred with the land, but a Service under the control of the Lord of the Manor; and in our Game Laws, we have a laborious system of Enactments for the purpose of protecting this Right.

694. The property of things which have no apparent owner, ἀδέσποτα, has been variously assigned

by the Laws of various Countries: such things, for instance, as hidden Treasure found by accident, which is called in the English Law *Treasure Trove*, and is given to the King, or the Person to whom he grants it. Another instance is, land left dry by some alteration in the course of a river. The Roman lawyers laid down various Rules according to which they assigned this land to the Proprietors of the adjacent banks. More modern writers give it to the State*.

695. In like manner, the Law determines what length of time of undisturbed possession or enjoyment of things is to be considered as conferring the Right of Property. In the early Roman Law this mode of acquiring the Right of Property is termed *Usucapio*. Gaius† says, "Usucapio mobilium quidem rerum anno completur; fundi vero et ædium biennio; et ita Cap. XII. tabularum cautum est." And he gives the reason for this‡: "Quod ideo receptum videtur ne rerum dominia diutius in incerto essent: cum sufficerit domino ad inquirendam rem suam anni aut biennii spatium." But this refers to the formalities of the Roman Law in its early stages. The more general term for this mode of acquiring a Right by lapse of time was *Præscriptio*, or *Temporis Præscriptio*. This is regulated by various laws; for instance§: "Præscriptione bona fide possidentes adversus præsentes annorum decem, absentes autem viginti muniuntur." In the English Law, Prescription is made a valid source of Right by the Statutes of Limitation, that is, Acts of Parliament which limit the time within which actions for Wrongs may be brought. The period of unquestioned possession which establishes a Right is in different cases, sixty, fifty,

* Grot. B. et P. II. 8. 8. † Gaius, II. 42.

‡ Id. II. 44. "Prescription in moveables is established by a year's possession; in land and house by two years. Which seems to have been made the rule in order that the ownership of property might not be longer uncertain. For one or two years was time sufficient for the owner to ascertain his property." There are important points of difference between *Usucapio* in Roman, and *Statutes of Limitation* in English Law.

§ Cod. VII. 35. 7.

thirty and twenty years*: and the Commentators state that the reason of these Statutes of Limitations is to preserve the peace of the kingdom, and to prevent the frauds which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. To this effect, they quote the maxim of the Jurists†: "Interest reipublicæ ut sit finis litium."

696. Besides the ownership of a thing, by which a person is entitled to use it, there are cases in which a person is recognized as the owner by law, and yet bound to give to another the advantage of the use of a property. Property so committed to a person is called in Latin, *fidei commissum*, in English, a *Trust:* the person to whom it is committed is *fiduciarius*, a *Trustee.* A Trustee possesses and administers property for the benefit of others; generally, on certain conditions and according to certain rules.

697. The Right to Moveables generally‡ implies a *Right of Alienation;* that is, of transferring them to another by Gift, Sale, or Barter. The Right to Immoveables does not so universally imply a Right of Alienation; for the *Dominium Eminens* (144) of the State or the Sovereign may come in, and may prohibit or limit such a transfer. Thus a Feudal Tenant could not alienate his Fee to another Person. The Fee must be granted by the Lord only.

698. Again; the State regulates, by special Laws and Customs, the *Succession to Property;* that is, the disposal of a man's property after his death, whether moveable or immoveable. It determines whether he

* Blackstone, III. 307. The last Statute of Limitations assigns twenty years as the period for land; and various periods from six years downwards are fixed as to personal actions.

† It is for the public good that there be an end to lawsuits.

‡ The beneficial interest both in moveables and immoveables, is often completely severed from the right of alienation. This severance between the right of alienation and the right of enjoyment has, in the English system of jurisprudence, been carried to a great extent, and given rise, in the hands of our equity lawyers, to a peculiar body of doctrine. The whole doctrine of *trusts* and *powers* rests upon it.

shall have the power of disposing of the whole, or of part, by his *Will* and *Testament*. And if the man die *intestate*, the Law determines in what manner his property shall be assigned to the members of his family, or to other persons. In some States, as in ancient Rome, the property was equally divided among the children; in others, as commonly in England, there is a *Law of Primogeniture*, by which a larger portion, or the whole (so far as landed property is concerned), is given to the eldest son. Such differences depend upon the different views of the relations of Families, and their Property, to the State, which prevail in different times and Countries. See (735) &c.

699. To give, or alienate Property, some external act is requisite; for we are now speaking of Laws which deal with external acts. The Law must define what *Act*, (including words in the term *Acts*) shall constitute giving or alienating. It must determine, for instance, whether *Words of Transfer* be sufficient for this purpose; and if so, with what publicity they must be uttered, in order to be valid; or whether some *Act of Delivery* be also requisite. The latter was the case in the Roman and in the English Law; at least in the most formal kinds of transfer.

Also an *Act of Acceptance* on the other part is requisite; for it would be intolerable that a person should, without my consent, have the power of giving me what might be in the highest degree burdensome or troublesome; as if he were to give me a wild beast*. And the act of acceptance must also be defined by Law.

700. Questions have been discussed among Jurists as to the Rule which is to be followed when the Right of Property comes in conflict with the Needs of Personal

* Perhaps the reason why an act of acceptance is necessary might be given in a more juristical form by referring to the general principle that my condition or *Status* can never be affected except by my own act or that of the state. The act of another individual or of other individuals, (*res inter alios acta*) cannot make my condition jurally better or worse. I can give no right, nor lose any, without my own consent, express or implied.

Safety. For instance; When, in a ship, the common stock of provisions fails, is it allowable for the Passengers to use that which belongs to one of them in spite of his will? When a fire is raging in a town, is it allowable, in order to stop it, to pull down a house without consent of the owner? When a ship runs foul of the cables of other ships, is it allowable for the captain to cut these cables if his ship cannot otherwise be extricated?

In such cases, it has been decided by the Roman Law, and its Commentators, that the Right of Property must give way. Necessity, they say*, overrules all Laws. But this is to be required only in extreme cases, and when all other courses fail. To which is added, by most Jurists, that when it is possible, restitution is to be made for the damage committed. A like Rule is recognized in the English Law†.

It has been held, by some English Lawyers, that a starving man may justifiably take food; but others deny that such necessity gives a Right; inasmuch as the poor are otherwise provided for by Law‡.

* Grot. II. 2. 6. 4.

† Kent's *Commentaries*, II. 338. ‡ Bl. IV. 32.

Chapter IV.

THE RIGHTS OF CONTRACT.

701. We have already (50) spoken of the necessity of mutual understanding and mutual dependence among men; and the consequent necessity of the fulfilment of Promises, as one of the principal bonds of Society. The necessity of depending upon assurances made by other men, gives birth to a Right in the person to whom the assurances are made. A person has, under due conditions, a Right to the fulfilment of a Promise. The Law realizes this Right, and must therefore define the conditions. The mutual assurances, which the Law undertakes to enforce, are called *Contracts**.

702. The Law, which enforces Contracts, must determine what Promises are valid Contracts. To show the necessity of recurring to actual Law on this subject, we may remark how vague, arbitrary, and inconvenient are the maxims on this point, which Jurists have attempted to draw from the nature of the case. Thus it has been asserted†, that of the three ways of speaking of the future: *I intend to give you: I shall give you: I promise you:* the two former do not give a Right to the person addressed; but the third does. It is evident that this distinction is as arbitrary as any merely legal one can be: and if such rules are arbitrary, they must be established as a matter of fact, not of reasoning: that is, they must be established by actual Laws.

703. But according to the Roman Law, even the last formula, *I promise you*, did not necessarily convey

* A Contract gives rise to an Obligation, namely, the Obligation to fulfil the Contract. This the Roman Law calls an *Obligatio ex contractu*, and it gives the following definition of obligation: "Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendæ rei secundum nostræ civitatis jura." *Inst.* III. *De Obligationibus.* "An Obligation is the jural Bond which makes it necessary for us to discharge something according to the laws of the tate of which we are citizens."

† Grot. B. et P. II. 11. 2.

a Right. The Roman jurists distinguished Contracts, which were universally binding, from Pacts, which were not binding except when clothed with special circumstances. A bare Promise was a *Nudum Pactum*, and did not establish a legal obligation.

In thus refusing to recognize a bare Promise as creating a Right, the Law proceeds with a due regard to the gravity of Rights. Relations so important must be brought into being only by acts of a calm and deliberate kind. If a verbal promise, however hasty, informal, and destitute of reasonable motive, were to be sanctioned as creating a Right, the Law must carry into effect the most extravagant proposals of gamesters; as for instance, when a man stakes the whole of his fortune on the turn of a die: for the meaning of such an act is, "I promise to give you so much, if the cast is so." But the Law, whose purpose is to produce and maintain a moral and social condition of man, in which human actions are deliberate, rational and coherent, refuses its sanction and aid to such rash, irrational, and incoherent proceedings*.

In the Roman Law, one ground for withholding legal force to certain promises or agreements, was the absence of a *Cause* or *Consideration*†: "Cum nulla subest causa propter conventionem, hic constat constitere non posse obligationem. Igitur nuda pactio obligationem non facit." And the same is the case in the English Law: in which a Contract is defined ‡, "An agreement

* This view of the grounds for not giving legal validity to Nude Pacts is held by eminent jurists and moralists; (for instance, Leibnitz;) but by the English common Law, a wager is a good contract, and, *exceptis excipiendis*, money won on a wager may be recovered in a court of justice. Excepted cases are, wagers on games, wagers tending to disturb the public peace or to encourage immorality, or which hurt the feelings or character of persons not parties to the wager. But it is obvious that a wager not coming under any of these heads may be as inconsiderate and unwise a transaction as a wager on the turn of a die.

† *Dig.* II. 14. 7. "When there is no consideration for the agreement, there can be no obligation. Hence a nude pact does not establish an obligation."

‡ Bl. II. 445. But it appears to be erroneous to state the presence

of two or more persons, upon sufficient *Consideration*, to do or not to do a particular thing:" and the Consideration is necessary to the validity of the Contract.

704. The Law, though it requires a Consideration on each side as a Contract, does not undertake to provide an equality of advantage to both; but is contented with any degree of reciprocity, leaving the force of the Consideration to be weighed by the contracting parties. Thus money paid is a valuable consideration: but a good consideration also is that of blood, or of natural love and affection*. And, according to English Lawyers, as a Consideration is made necessary by the Law, in order to avoid the inconvenience of giving legal force to mere verbal promises, the Contract may be made in so solemn a manner that the Law will, for some purposes suppose a Consideration, though it be not expressed. This is the case for certain purposes in the

or absence of a consideration as the general distinction between Contracts and Pacts. According to Walter (Geschichte des Römischen Rechts, B. III. c. XIII.) the leading distinction of Pacts from Innominate Contracts was that they were one-sided in their beneficial effect, and hence required especial formalities to give them legal validity. Such formalities were *Stipulation* and *Literal Obligation*. These were *clothed Pacts*. As opposed to these were the informal *nude* Pacts, which, generally speaking, afforded no ground for an action.

But though nude Pacts did not convey a right of action, they might give a defense to an action. "Nuda pactio Obligationem non parit, sed parit exceptionem," says Ulpian, *Dig.* II. 14. 7. When a person says "I promise you not to sue for my money which you owe me;" this is a mere pact: no action can arise out of it; but if I sue you, the pact "parit exceptionem" leads the judex to find for you. With regard to such Pacts, the Judge says, "Pacta Conventa quæ neque dolo malo, neque adversus leges, plebiscita, Senatus consulta, edicta Principum, neque quo fraus cui rerum fiat, facta erunt, servabo." *Dig.* II. 14. 17. "I will enforce Pacts which are made in conformity with the Laws, the Decrees of the People and of the Senate, the Edicts of the Emperor, in good faith, and with no fraudulent design." Pactum conventum is the full legal phrase for *Pacta*. Contracts are binding *jure civili*. Pacts are not. The Prætor here declares his intention of giving effect, under certain conditions, to the latter.

* Bl. II. 297.

English Law, when a man executes a bond under his seal*.

On the other hand (as restraining the efficacy of a Consideration) the Law will not recognize a Contract which binds either of the parties to perform an illegal act†: "Quod turpe ex causâ promissum est veluti si quis homicidium vel sacrilegium se facturum promittat, non valet." And the like is said of Pacts‡: "Pacta quæ causam turpem habent non sunt servanda." And the English Law§ recognizes a number of cases of this kind, as annulling Contracts.

705. *Contracts* are *void* also when made under violence and constraint. In such cases the person so constrained and compelled is, in the language of the Law, in *Duress* (*Durities*). The Law also recognizes *Durities per minas*, *Fear* arising from threats, as a circumstance which invalidates a contract made under its influence. But this fear must be of a serious kind; fear of loss of life, or of limb; and this upon sufficient reason; or, as an ancient English Law-writer expresses it‖, "Non suspicio cujuslibet vani et meticulosi hominis, sed talis quæ possit cadere in hominem constantem." A fear of being beaten, though ever so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away or destroyed; because, in these cases, a man may obtain redress; but

* On a promissory note or bill of exchange, want of consideration cannot be pleaded against the *maker* of the note by the *indorsee* (see Sect. 713), who gave full value for it, nor yet by the *acceptor* if the indorsee bring his action against him. But between the original parties to the note or bill it may. See Hovenden's *Blackstone*, II. p. 445.

† *Inst.* III. De Inutil. Stipulat. 24. "What is promised for a criminal cause is not valid; as for instance, if any one promise that he will commit homicide or sacrilege."

‡ *Dig.* II. 14. 17. Pacts for a shameful consideration are not to be enforced.

§ Kent's *Com.*, II. 466.

‖ Bracton, quoted Blackst. II. 131. "Not the suspicion of a light-minded and timorous person, but such as may fall upon a man of firm mind." This is taken from the *Digest.* IV. 2. 6.

no sufficient compensation can be made for loss of life or limb.

706. Contracts are also void, from the want of that free agency which the law requires, when the deficiency arises, not from violence or threats, but from the condition of the party as to age or understanding. Persons under the legal full age, called *Minors* or *Infants* by the Law, cannot make a valid Contract. By the English Common Law the *Wife* also is incapable of binding herself by Contract; her interests being supposed to be so inseparably bound up with those of her Husband, that she cannot act independently of him. A Contract made by a person not having the use of Reason, *non compos mentis*, is void. The Contracts of *Lunatics* are void from the time when the Lunacy commences. It has also been settled by the English Law*, that a Contract made by a man in a state of intoxication, if his state be such that he do not know the Consequences of his conduct, is void. Imbecility of Mind is not sufficient to set aside a Contract, when there is not an essential privation of Reason, or an incapacity of understanding and acting in the common affairs of life.

707. Contracts may be rendered void by *Deception* or *Fraud* practised on one side; but it is a matter of no small difficulty to lay down consistent Rules on this subject. The Roman law does not enforce Contracts which are made *dolo malo*. And this is further explained†: "Dolus malus fit calliditate et fallaciâ. Dolo malo pactum fit quoties circumscribendi alterius causâ aliud agitur et aliud agi simulatur." But it is easier to lay down Rules on this subject when Contracts have been distinguished into different kinds.

708. The Roman Jurists have divided Contracts into Kinds, according to the Consideration and the mode of expressing it. Some are called *nominate* Contracts—*Contractus nominati*—in which there are

* Kent, II 151.

† *Dig.* II. 14. 17. "Fraud is the use of trick and deception. A pact is fraudulent when, for the purpose of circumventing some person, one thing is done and another simulated to be done."

familiar names for the acts on each side; *Buying and Selling; Letting and Hiring; Partnership; Commission:—Emtio Venditio; Locatio Conductio; Societas; Mandatum.* Others are called *innominate* Contracts—*Contractus innominati:* such as are expressed by the four Formulæ: *Do ut des; Facio ut facias; Facio ut des; Do ut facias.* The Nominate Contracts comprehended the most common transactions of men, and hence they had assigned to them at an early period settled forms of action which bore the name of the contract: and these agreements were specially called *Contractus*, others being *Pacta**.

709. By the Roman Law, some of the Nominate Contracts become valid merely by the expression of the mutual agreement, and are hence called *consensual*†. Such are *buying and selling; letting and hiring; partnership;* and *commission* (*Mandatum*): other Contracts, though nominate, do not take effect except there be a delivery of the thing agreed about: such are, *borrowing* and *lending*, *deposit* and *pledge:—Mutuum*, *Commodatum*, *Depositum*, *Pignus.* These were called *real* Contracts, because they became valid by act, not by word. In these, *re integrâ*, before delivery, the parties were allowed to retract. But in Sales, in order to remove any doubt which might arise, as to whether the Sale was completed, the practice was sometimes adopted of giving *Arrha*, *Earnest*, a portion of the price; which, however small, was evidence of the Contract. Among the Northen Nations, shaking the parties' hands together had this efficacy; and a sale thus made was called *handsale;* whence *handsel* was also used for the earnest of the price‡. In the same manner a *symbolical delivery* of the goods was introduced: as for instance, the delivery of the key of the warehouse in which they were contained.

710. Borrowing and Lending, is a Contract, in which the Romans distinguished two different cases,

* Heinec. Elem. Jur. Civ. § 774. 779. But see the note to (703) for Walter's view.

† Ib. § 895. ‡ Blackstone, II. 448.

which we confound under one term. *Mutuum* was applied to the lending of those things which are reckoned by number, weight, and measure; as wine, oil, corn, coined money, of which the borrower receives a stated quantity which he may use, consume, or part with. *Commodatum* was that which was lent, to be restored identically the same; as a book, a harp, a horse. And the Law made a distinction in the responsibility of the borrower in these two cases. The person who had received a thing as *commodatum*, was bound indeed to keep it with as much care as if it were his own, or with more, if more were possible: yet if it were lost or destroyed by no fault of his, he was not bound to make compensation. But if he had received a thing as *mutuum*, it was to be repaid at any rate, in whatever way it had been consumed or lost*. Paley† calls things which may be the subject of *commodatum*, *inconsumable property*. The other kind, *consumable property*, is also termed *Res fungibiles* by the Civilians; for one portion can discharge the office of another. "Res ejus generis functionem recipere dicuntur; id est, restitui posse per quod genere idem est‡."

711. Besides the Hiring of Labour, *Locatio Operis faciendi*, there is *Locatio Rei*, the Letting of a Thing to hire, as letting a house. In this case, also, the Hirer is bound to ordinary care and diligence, and is answerable for neglect: but the extent of his Obligations, as to Repairs and Expenses, must be settled by express Rules of Law or Custom.

712. When the Obligation of one party to pay

* *Inst.* III. 15. The principle of the distinction by which *mutuum* and *commodatum* are opposed, as to liability of risk in the case of loss, is the principle of ownership: *Res perit domino*, in case of innocent loss, is a general rule. In *mutuum* the property is transferred to the Borrower: in *commodatum* it remains with the Lender. Therefore the loss in the first case falls on the Borrower, in the second on the Lender.

† *Moral Phil.* B. III. c. 3.

‡ Grot. B. et P. II. 10. 13. *Functio*, or *discharge*, means payment by something *of the like kind*, and is distinguished from *solutio*, or *money* payment.

Money to the other is established, and not yet performed, the money to be paid is a *Debt*, due from the Debtor to the *Creditor*. Hence Debt may arise out of any of the above kinds of Contract, as Sale, Hiring, and the like.

713. Among many forms of Debt, we may notice those recorded in writing: thus, when I write, *I promise to pay to A. B. one pound*, I acknowledge myself indebted to A. B. to the amount of one pound. This is a *Promissory Note*. When I write to M. N., *Pay to A. B. one pound*, I become contingently indebted to A. B., indebted namely on the contingency of the *drawee* M. N. refusing to *accept* or ultimately failing to *honour* my bill. This is a *Bill of Exchange*. The benefit of this contingent debt, and of M. N.'s obligation to pay, which commences when he accepts the bill, may be transferred from hand to hand, as may also the Debt acknowledged in a Promissory Note, by transfer of the Documents. This may be done by making them payable to A. B. *or Bearer;* or by their being made payable to A. B. *or Order*, and then *indorsed* by A. B. when he transfers them to C (the *indorsee*); by C when he transfers them to another; and so on. Bills and Notes thus transferable, and still unpaid, may answer the purpose of Money; they may constitute a *Paper-Money*.

714. We need not dwell upon other kinds of express or implied Contract, which are enumerated in the Roman Law: as *Pignus*, a *Pledge* or *Pawn* for a Debt; *Depositum*, a Deposit without Reward. Delivery of Goods from one person to another on trust is called by the English Lawyers *Bailment**, and the Goods are said to be *bailed* to him who receives them.

715. With regard to Contracts of Sale, Questions occur, How far the Seller is obliged to make good the *Title* (683) to the thing sold: How far he is responsible for its quality: How far, in making the bargain, he is bound to disclose all circumstances which may affect the price.

* Sir W. Jones, *On Bailment*, classes the scale of liabilities.

With regard to the Title, by the Roman Law* the Seller was responsible, "Sive tota res evincatur sive pars, habet regressum emptor in venditorem†." The same is held to be the case in the English Law: a fair price implies warranty of Title‡.

As to the Quality of the goods sold, the Seller is not responsible, when they can be judged by the Purchaser's own discretion§. The rule then is *Caveat emptor*. If goods ordered, be found not to correspond with the order, the Purchaser is required immediately to return them to the Vendor, or give him notice to take them back: otherwise he is presumed to acquiesce in the result.

716. The Obligation of disclosing the circumstances which affect the price of a thing sold, has been a matter of great discussion among Jurists and Moralists. Cicero‖ states such a case. A merchant of Alexandria brings a supply of corn to Rhodes in a time of great scarcity and dearth. He knows that many other merchant-vessels laden with corn are also on their way to Rhodes, which the Rhodians do not know. Is he bound to disclose this circumstance? As a matter of legal obligation, which is the point now under consideration, it is agreed that the Seller is forbidden to misrepresent the intrinsic qualities of his wares. But it is pronounced that he is not obliged to disclose all extraneous circumstances which may affect their value¶. "Venditorem,

* *Dig.* XXI. 2. 1.

† "If it be proved that the Title is bad, either for the whole or part, the Buyer has his remedy against the Seller."

‡ Kent, *Com.* II. 478.

§ There is however a difference between the case of warranty and of simple sale. In the case of warranty the seller is liable for all defects; in simple sale, for those only of which he knows and uses some art to conceal. Hovenden's *Bl.* II. 451.

‖ *Off.* III. 12.

¶ "So far as the rules of Civil Law go, the Seller must disclose the defects of his wares: as to the rest, he must act without deceit: but, being a seller he must wish to get the best price. 'I bring my wares to market; I offer them for sale; I sell what is my own; not dearer than others; perhaps cheaper, as I have a larger stock. Whom do I wrong?'"

quatenus jure civile constitutum est, dicere vitia oportere; cætera sine insidiis agere; at, quoniam vendat, velle quam optimè vendere. Adduxi, exposui, vendo meum; non pluris quam cæteri; fortasse etiam minoris, cum major est copia. Cui fit injuria?" In the same manner it has been decided by an English court*, that the Purchaser of an estate was not obliged to disclose to the Seller his knowledge of the existence of a mine on the Estate.

But it is further stated to be law†, that the Seller is liable, if he fraudulently misrepresent the quality of the thing sold, in some particulars in which the Buyer had not equal means of knowledge: or if he do so, in such a manner as to induce the Buyer to forbear making the enquiries, which, for his own security and advantage, he would otherwise have made.

717. It has been attempted‡ to express all Rules on this subject by saying that the Rule of Contract is *Equality:* "Ut ex inæqualitate jus oriatur minus habenti§." But this maxim must not be carried so far as to destroy the nature of a Contract: for by that, we do not agree, generally, to give and receive equal things; but we determine *what* we are to give and receive. The Rule is rather to be sought in the intentions and expectations of the parties contracting. Each is obliged to do that which he gives the other reason to expect, and knows that he does expect. This is expressed by saying, that the transaction is *bonâ fide, in good faith.*

718. Yet in many cases, the estimate of the intentions and expectations of the parties must be vague and obscure; and instead of attempting to regulate the course of law by these, it may be more proper to apply strict rules of interpretation to the language of Contracts. Hence the Roman Law makes a distinction of actions *bonæ fidei*, and actions *stricti juris.*

Rules of *Interpretation* of the Language of Contracts

* Kent, II. 489. † Ibid. II. 487. ‡ Grot. B. et P. II. 12.

§ "So that he who receives the less has a claim arising from the inequality."

have been laid down by Jurists; and are an important part of the doctrine of Contracts, in its applications. These Rules, for the most part, have for their object to combine good faith with exact Law. Such are these, for instance: that common words are to be understood in a common sense; Terms of Art in their technical sense: that when it is necessary, words are to be interpreted by the matter, effect, and accompaniments: and the like*.

719. The wrongs which violate the Rights of Contract are *Fraud*, of which some cases have been considered; and *Breach of Contract*, against which the Law provides Remedies, by actions of various kinds; but on these we need not further dwell.

CHAPTER V.

THE RIGHTS OF MARRIAGE.

720. WE have already pointed out (79) that one of the most powerful Springs of action in man is the Desire of Family Society, which grows out of his Appetites and Affections. The needs of man's condition so operate, that he cannot exist in a social and moral state, except there be, established in Society, Rights which sanction and protect the gratification of this Desire. Such Rights, with the corresponding mutual obligations, are given to the Husband and Wife, united in a legitimate Marriage; and the Rights thus vested in the Husband, and in the Wife, are the *Rights of Marriage*.

Marriage and Property are termed *Institutions;* inasmuch as they imply the establishment of General Rules, by which, not only the special parties are bound, (as in Contracts); but by which the whole Society also is governed. These two Institutions are the basis of Society. The Right of Personal Security is requisite,

* Grot. B. et P. II. 16.

in order to preserve a man from hour to hour, and from day to day; the Institution of Property is requisite, in order that man may subsist on the fruits of the earth from year to year; the Institution of Marriage is indispensable, in order to the continuance of the community from generation to generation.

721. The Desires and Affections, growing out of the Institution of Marriage, tend to balance the action of the elementary Desires and Affections, and to maintain man in a moral and social condition. The Elementary Desires and Affections, which lead to the Union of the Sexes, are refined and tranquillized by the marriage tie. The Mutual Confidence, and the identification of habits and interests between husband and wife, which marriage, in its most complete form, tends to generate, give a new charm and a new value to life. When such a conception of a happy married life is formed, it is universally approved of; and thus the Moral Sentiments confirm the Conjugal Affections. Each successive generation of young persons, catching the like sentiments, and susceptible of the like affections, looks with hope and desire to this image of a happy marriage, as an important part of the business and object of life. Thus there is produced a National Sentiment respecting Marriage, which makes the Institution still more efficacious in its influence upon the moral and social condition of those among whom it prevails.

722. The Children which Marriage produces give rise to Affections which still further tend to bind together the Community by Moral and Social links. In the first period of their existence, Children are a common object of Affection to the parents, and draw closer the ties of their mutual Affection. Then comes the Education of the child; in which the parents have a common care, which further identifies their sympathies and objects. The Brothers and Sisters of the child, when they come, bring with them new bonds of affection, new sympathies, new common objects. The habits of a Family take the place of the wishes of an Individual, in determining the habitation, the mode of living, the meals, and the like;

and thus, these circumstances are determined by influences, more social and more refined than mere bodily desire. *The Family* is one of the most important elements of the social life of every Community.

Familia is the word by which the Romans denoted the persons thus collected in the House, along with their parents: and also, along with the servants of the House. (*Famuli*). The head of the family was called *Paterfamilias;* his wife, in general, was *Materfamilias**.

723. The nature and extent of the Rights, which Marriage gives, have been different in different ages and countries; and the national conception of the conjugal bond has often fallen short, in various degrees, of that complete and permanent union of one man with one woman, which we have pointed at. Polygamy, Concubinage, and arbitrary Divorce, have been tolerated in many States; but still, the notion of a complete Marriage appears always to have been, the union of one Husband and one Wife for life. Although Polygamy existed in the earlier periods of the Jewish nation, we find, in the Scriptures, that, beginning with man, at his creation, a single woman was given to him as his helpmate. And though Solomon is related to have had many wives, as the custom of Asiatic Sovereigns has generally been; in the description of a good wife which is inserted in his Book of Proverbs†, she is represented as sole mistress of the household, and as the object of an entire trust and respect, inconsistent with her being one of several wives. And though Moses permitted to the Jews more than one wife, he prohibited many‡; which "many" is believed by the Commentators to be more than four. This permission was rather a concession to an existing practice, than a law consistent with the general scheme of the Laws of Moses. The practice of polygamy is said§

* "Genus enim est uxor: ejus duæ formæ; una matrum familias, earum quæ in manum convenerunt; altera earum quæ tantummodo uxoris habentem." Cicero, Topica. The *in manum conventio* was a condition of the wife usually resulting from marriage in the early ages of Rome.

† Prov. xxxi. ‡ Deut. xvii. 17.

§ Michaelis, *Law of Moses*, II. 12.

to have ceased entirely among the Jews after the return from the Babylonish Captivity.

724. Polygamy was not a Grecian practice. The Heroes of Homer appear never to have had more than one wife; though they are sometimes represented as living in concubinage with παλλακαί. According to the views of Greek Legislators and Philosophers, Marriage was to be considered as having for its object the maintenance of the State, by the continuation of the race of citizens: and we see, in the Republic of Plato, and elsewhere, indications that they could tolerate extravagant deviations from the more complete domestic conception of marriage, if the political object was provided for.

725. The Roman Law, however, approached closely to the conception of a complete marriage, which has been noticed. The Definition given in the Institutes is this*: "Nuptiæ, sive Matrimonium, est viri et mulieris conjunctio, individuam vitæ consuetudinem constituens." In another place† it is described as "Consortium omnis vitæ: divini et humani juris communicatio."

726. The English Law goes further, and considers the Husband and Wife as one Person. As the Lawyers state it‡, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated in that of her husband: under whose wing, protection, and cover, she performs everything; and is therefore in our Law French a *feme-covert*, *fœmina viro co-operta;* and her condition during marriage is called her *coverture*. Hence a man cannot grant anything to his wife by a legal act, or enter into covenant with her; for this would be to covenant with

* *Inst.* I. 9. Marriage or Matrimony is the union of a man and a woman so as to constitute an inseparable habitual course of life.

† *Dig.* XXIII. 21. "A partnership for life, (or rather, as to all the interests and relations of life,) with a joint participation in all Rights human and divine."

‡ Blackst. I. 442. But perhaps it would be more just to say that the principle which limits the Rules of Law, as between Husband and Wife, is not that of the union of the two, but of the conjugal supremacy of the Husband.

himself*. The husband is bound by law to provide his wife with the necessaries of life; if she incur debts for such things, he is obliged to pay them. Even if the debts of the wife have been incurred before marriage, the husband is bound to discharge them: for he has espoused her and her circumstances together. If she suffers an injury, she applies for redress in her husband's name as well as her own. If any one has a claim upon her, the suit must be directed against her husband also. In criminal prosecutions, indeed, the wife may be indicted and prosecuted separately; for the union is only a civil union. But even in such cases, husband and wife are not allowed to be Evidence for or against each other: partly, say the Lawyers, because it is impossible their testimony should be impartial; but principally, because of the union of Person. For being thus one Person, if they were admitted witnesses *for* each other, they would contradict one maxim of Law†; *Nemo in propriâ causâ testis esse debet:* and if *against* each other, they would contradict another Maxim: *Nemo tenetur se ipsum accusare.* In the Roman Law, in its later periods at least, the Husband and Wife were considered as two distinct Persons, and might have separate Estates, Debts, Contracts, and Injuries. And hence, in the Ecclesiastical Courts of England, which derive their views and maxims from the Roman Law, a woman may sue and be sued, without her husband.

727. According to the System of Law which we have been describing, the husband is the Head of the Family, and the Wife is subordinate to him. He represents the Family in its legal relations; and in such matters she has no Rights against him. He has a Right

* The husband can however grant to his wife, and often does, through the intervention of Trustees.

† *No one can be a witness in his own case. No one is bound to accuse himself.* But perhaps it would be more just to say, that the principal reason is not that of the identity of person; but that community of *interest*, which prevents their being evidence *for* each other; while the public policy of preventing domestic quarrels, prohibits their being evidence *against* each other.

to act for her; and even, in some cases, to coerce her. The Roman Law allowed the husband, for some misdemeanours*, "Flagellis et fustibus acriter verberare uxorem;" for others, only† "Modicam castigationem adhibere." Something of the same kind was allowed by the old Law of England; for, say the Lawyers, since the husband is to answer for her misbehaviour, the Law thought it reasonable to entrust him with the power of restraining her. And the Right to obedience, from the Wife, is vested in the Husband, for the sake of preserving Order in the Family, and of protecting and benefiting all the Members of it.

728. The inequality between Men and Women, which thus appears in the ancient conceptions of Marriage, is shown also in the established notions of the Wrongs, by which the Rights of Marriage are violated. *Thou shalt not commit adultery*, is the fundamental Law on this subject; but this was commonly applied only to the offense committed by or with the wife. By the Jewish Law‡ the adulterer and the adulteress were to be put death. By the Old Roman Law, the adulterer was at the mercy of the injured husband, and might be prosecuted by any person; but under the emperors, the Right of prosecution was limited to the husband, or the near relatives of the adulteress. The adulteress was to be repudiated and otherwise punished. In England, adultery, as a public crime, is under the jurisdiction of the Ecclesiastical Courts; but the Common Law also gives, to the Husband, Damages from the person who was guilty of Criminal Conversation with his wife.

729. The Right of the Parent to the obedience of the Child is a fundamental Rule in all the ancient Forms of Society. The Law of Moses, *Honour and obey thy Father and thy Mother;* is recognized in all nations. The ancient Roman notions carried this so far, that they gave the Father a Right over the life of the Son. Even in the latest times, the Son is contemplated as entirely *in the power* of the Father; and this expression

* "To beat his wife severely with whip or stick."

† "To apply moderate correction." ‡ Levit. xx. 10.

implied that the Father was invested with the Right to act for the Children upon all legal occasions. The Institute says*: "Qui ex te et uxore tuâ nascitur, in tuâ potestate est: Item qui ex filio tuo et uxore ejus nascitur, id est nepos tuus et neptis, æque in tuâ sunt potestate; et pronepos et proneptis, et deinceps cæteri. Qui autem ex filiâ tuâ nascuntur, in potestate tuâ non sunt, sed in patris eorum." And this went so far that the Son could have no Rights against his Father. All that he acquired became, not his, but his Father's. Some Jurists refer this to a legal fiction of the unity of the Father and the Son; others, to a maxim that the condition of the Master of the Family might be made better by the acts of the other members of the Family, but could not legally be made worse.

730. The English Law does not go so far as the Roman in this respect; but still invests the Father with considerable Rights over his Son. He may correct him in a reasonable manner. He may delegate part of this parental authority to a Tutor or Schoolmaster, who is *in loco parentis*†. He has the benefit of his children's labour so long as they live with him. He has, however, no power over any property which the son has acquired, except as Trustee or Guardian.

The Rights with which the head of the Family was thus invested carried with them corresponding obligations. As we have already stated (726), the husband is bound to provide his wife with the necessaries of life, and also to pay her debts. Also, the Father is, by the English Law, bound to provide maintenance for his own

* *Inst.* 1. 9. "He who is born of you and your wife is in your power: also he who is born of your son and his wife, that is, your grandson and grand-daughter, are likewise in your power; and so your great-grandson and great-grand-daughter; and in the same way, for the succeeding steps. But they who are born of your daughter are not in your power, but in their father's."

† Perhaps it would be more correct to say, that the Schoolmaster's authority is not delegated from the parent, but analogous to the parent's. It depends on some of the same reasons; and exists where there is not a parent to delegate, as well as where there is.

offspring. By the Roman Law* this obligation was reciprocal. "Si quis a liberis ali desideret, vel si liberi ut a parente exhibeantur, judex de eâ re cognoscet." The Head of the Family was the Supporter, Protector, and Director of all the other members. The Education of Children, so that they may, in their turn, become good members of new Families, and good Citizens, is contemplated as an important object by most legislators; but is, in a great measure, left to the unforced care of parents. To neglect this office, is rather the omission of a Moral Duty, than the violation of a Legal Obligation.

731. The Family Affections, and the Moral Sentiments connected with them, make both men and women look with grief and indignation upon the violation of female chastity, in those who are under their care and protection. The woman who gives up her person to any other man than her husband, is conceived to be destitute of the proper affections and sentiments of a wife; and therefore, unfit for the proper destination of a woman. To seduce her to this condition, is to bring her to disgrace, and to make her marriage with another man almost hopeless. To force her person, brings upon her some portion of this disgrace and calamity, in addition to the injury which is involved in all violence. The laws of most countries recognize these Wrongs against Female Chastity, *Rape* and *Seduction*. Thus by the Jewish Law†, the Man who forced a betrothed woman was to be put to death. If she was not betrothed, he was to make her his wife, without being allowed afterwards to put her away. The Roman Law justified homicide, when committed by the woman in defense of her chastity; or by a man, in defense of his relatives, when force of this kind was offered. The English Law, likewise, excuses a woman killing a man who attempts to ravish her; and the husband or father

* *Dig.* xxv. 3. 5. "If any one requires to be supported by his children, or if children require to be maintained by the parent, the judge will take cognizance of the matter."

By the English Law also, a son is bound to support his parents.

† Deut. xxii. 25, &c.

is justified in killing a man who attempts a Rape upon his wife or daughter. The Roman Law, in the time of Justinian, refused to make any distinction in the guilt of the violator of chastity, whether the woman consented or not*: "Si enim ipsi raptores, metu vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti sive non volenti, peccandi locus relinquetur: quia hoc ipsum *velle* mulierum ab insidiis nequissimi hominis qui meditatur rapinam, inducitur."

732. The English Law punishes Rape with death †, but makes it a necessary ingredient in the crime that it be committed against the will of the woman. It is sometimes assigned as a reason for the capital punishment, that the offense is a destruction of the woman's moral being. But the English Law has no direct punishment for the moral offense of Seduction, as we have seen that it has none for Adultery. These crimes are punished indirectly, as Loss inflicted, on the Parent and the Husband. In the latter case, the Husband may receive Damages from the Adulterer, for the Injury done him: in the case of Seduction, the Parent may recover Damages for the loss of his daughter's Services during her pregnancy, by the act of the Seducer, *per quod servitium amisit*. The necessity of taking this course for the remedy of these wrongs, is explained, by considering that the Common Law of England has, for its main objects, the security of person and property; and therefore does not undertake to treat offenses according to their moral depravity, or the grief and indignation which they produce.

733. According to the ancient legal views of the Family, in most nations, as we have seen in the cases of the Roman and the English Law, the possession of property in land is an attribute of the Family, rather than of the individual; the right of the wife and children

* Cod. IX. 13. "If through fear, and in virtue of the severity of the punishment, seducers abstain from such offenses, no woman, willing or unwilling, will have an opportunity of transgressing. The will of woman is itself forced by the arts of the ravisher."

† This has not been the case since 1841.

being merged in, or derived from, that of the Head of the Family. Following the same view, the Law directs that, on the death of the Father, the land shall descend to the children: for they then, in their turn, one or more of them, become Heads of Families, and take the place of the Father, as members of the State. Accordingly, in the Roman Law, when the Father died, those of his descendants who were then under his power (*in patria potestate*), were his proper heirs (*sui hæredes*), and divided his possessions among them; all other heirs (except his slaves) were *hæredes extranei*. In England, on the establishment of the Feudal Constitution, by William the Conqueror, the law of primogeniture was established, by which Lands descended to the eldest son alone. In this view, the Property was considered as a Fief to be held by military Service; and the whole property was assumed to be a proper means of supporting the dignity of the holder. The younger sons were supposed to be provided for by the eldest, and by their own exertions in the various professions which were open to them, military, civil, ecclesiastical, and mercantile. It is consistent with the view which this Rule assumes, that the Rule was not extended to personal Property; for such property was not held as a Fief. In this, no primogeniture is allowed, all males and females of equal degree sharing equally.

If direct and proper heirs failed, the same view, of the transmission of Property in the Family, led to Rules of Law which determined the persons to whom it was to be given; but upon these Rules, and their differences in different states, we need not now dwell.

734. In most Systems of Law, though the Law has assigned a Rule for the disposal of a man's property after his death, the proprietor has been allowed to vary this disposal, partly or entirely, on declaring his intention before proper Witnesses. Hence, the Declaration so witnessed is called *Testamentum* in Latin, *Will* in English. The ground of this Right of the Testator is, that a man, previous to his death, may dispose of his property, and may exercise an authority over his

children; and that the continuity and order of the Family were supposed to be preserved, by allowing this Right to operate through the time of his death, and therefore after that moment. Yet the Right of the Testator, like the other Rights of Property, is limited by Rules of Law. The Roman Law says*: "Testamenti factio non privati sed publici juris est." In the early times of Rome the citizens made their Wills at the Public Assemblies (*Calata Comitia*), although afterwards, other modes of procedure were introduced.

735. The Right of disposing of property by Testament was not unlimited†. From a comparatively early period a testator was obliged, in order that the provisions of his will might be carried into effect, either to *institute* or to disinherit by express words, his children *in potestate*‡ (see Sect. 733). Other restraints as to his heirs, and as to the distribution of his property between them and mere *legatees*, (see Sect. 738), were gradually introduced, partly by express enactment, and partly by the Edict of the Prætor. When a son or other near relation who would without a Testament have inherited, being passed over in silence in the Testament, had a claim by Law, the Testament was called *inofficiosum Testamentum*, as being made *non ex officio pietatis*.

736. In England, the power of disposing by Will of a portion of a man's moveable property was recognized by Magna Charta§: but until modern times, a man could leave only one-third of his moveable property away from his wife and children. No Will of lands was permitted till the time of Henry the Eighth; and then, only of a certain portion‖: nor was it till after the Restoration of Charles the Second, that the power of

* *Dig.* XXVIII. 1. 3. "The Right of making a Testament is not a private Right, but a Right by public Law."

† By the Law of the Twelve Tables the right of disposing of property by will is said to have been absolute: "Paterfamilias uti de re sua legassit ita jus esto."

‡ His will was besides liable to be rendered void by the birth of *agnation* of a posthumous child.

§ Bl. IV. 423. ‖ Ib. II. 12.

devising became so universal as it is at present. By the English Law, a man's Heirs were contemplated as interested in his property, as well as the man himself. Property, from this attribute of being inherited, was called *Hereditaments*. Hence it was held, by the Lawyers, that no estate of inheritance in land could be conveyed, without the use of the word *Heirs*. If Land be given to a man for ever, or to him and his Assigns for ever, this vests in him but an estate for life. This limitation was founded upon a view borrowed from the Feudal System, according to which the estate was given in consideration of the Tenant's personal qualities, to be held by personal service. The limitation was upheld by a maxim of the Roman Jurists: "Donationes sunt stricti juris, ne quis plus donasse præsumatur quam expresserit."

737. Although at present the Proprietor in England has, in general, the Right of disposing of the Estate by Will, there is an exception to this, in the case of *entailed* Estates. This power of entailing was established by the Statute of Westminster, the Second, (in the thirteenth year of Edward I.), which is commonly called the Statute *De Donis Conditionalibus*. This law gave the Proprietor a power of transmitting to his Heirs the enjoyment of the Property, without their having the Right of transmitting it to any one, except the Heirs who should come after them. Property, thus limited, was termed *Feudum talliatum*, a curtailed fief, *feetail;* from which expression the word *entailed* comes.

738. Besides the power of disposing of the whole Estate, both the Roman and the English Law allow the Proprietor the power of giving *Legacies* (*Legata*) to special persons. But all such Bequests are limited by the condition, that the Testator's Debts must first be paid.

739. There are other distributions of property, which, according to the laws of various countries, arise out of Marriage; as the *Dowry*, or *Dower* of the Bride*, (*Dotarium*, *Douaire*), in the Roman Law,

* The English term *Dower*, technically used, does not represent

Dos: and the *Jointure* of the widow; (*Junctura*, a joint possession). On these it is not necessary here to dwell.

740. As the Law, in the general case, directs that the heir should receive the benefit of his Father's property (*Patrimonium*) after his death, so it also directed that he should, if it were necessary, receive the benefit of his Father's guidance. In the Roman Law, the Father had power to appoint, by Testament, a person to exercise parental care and responsibility for his son or daughter after his death, so long as the child was of unripe age (*impubes*). This Guardian was called *Tutor;* the child was his *Pupillus*. Without the sanction of the Tutor, the Pupillus could do no act by which he diminished his property. But the care of the person of the child belonged, in a great degree, to the Mother, as the care of the property did to the Tutor. When the Father did not appoint a Tutor by his Will, the Law of the Twelve Tables gave the *Tutela* to the nearest relatives*; "Legitimæ Tutelæ lege XII Tabularum agnatis delatæ sunt, et consanguineis; item patruis: id est, his qui ad legitimam hæreditatem admitti possunt: hoc, summâ providentiâ, ut qui sperarent hanc successionem, iidem tuerentur bona, ne dilapidentur." The view of the ancient English Law was quite different. It also gave a Guardian to a minor; but the Guardianship devolved upon the next of kin who could *not* inherit the Estate. The Law, it is said†, judges it improper to trust the person of an infant (*Minor*) to a person who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.

Dos. It is the widow's right to one third of the real estate for life. The *Jointure* given by Settlement before Marriage and in lieu of Dower has in practice superseded it.

* *Dig.* XXVI. 4, 1. Guardianship by (or at) Law is by the Twelve Tables given to the father's relations and to relations by blood, that is to those who may have a legal claim to the inheritance. And this was prudently done, that those who are allowed to look for the succession may see that the estate is not dilapidated.

† Bl 1. 461. But this relates only to socage tenures.

741. An English Law of more modern times, (the twelfth year of Charles II.) allows the Father to appoint a Guardian to his Son, by Deed or Will, so long as he is a Minor, that is, under the full legal age. This age is in England twenty-one: Scotland agrees with England, both probably copying the old Saxon Rules which prevailed on the Continent. By the Roman Law, a youth could perform certain legal acts at the age of fourteen; but up to the age of twenty-five, he could not dispose of property, without the intervention of a *Curator* or Trustee*.

742. All that has been said of the Rights and Obligations of a Man with regard to his Wife and Children, apply only to such wife and children as the law recognizes: to his *lawful* wife, and his *legitimate* children, born of a lawful marriage. What a Lawful Marriage is, the Law must define.

Marriage is a Contract; and though it is, in most countries, a Contract of a special character, solemnized with peculiar ceremonies, it must be, in many respects, governed by the general Rules of Contracts. Thus, the persons marrying must be of sound mind; of the age which the Law considers as mature; and free from other legal impediments, such as an inconsistent previous Contract. They must also understand each other to intend that perpetual union which Marriage implies.

743. By the Roman Law, the essence of Marriage was Consent; the Consent "both of those who come together, and of those under whose power they are." This Consent was commonly manifested by some public act; for instance, Declaration before friends, and afterwards Continued Cohabitation for a year†. (*Usus*). The effect of *usus* was to produce a *conventio in manum viri*, that is, by it the wife became a *sua hæres* to her husband, passed into his *gens*, and became *in loco filiæ*. But

* *Dig.* IV. 4. 1.

† The effect of continued cohabitation for a year was to produce, in the early ages of Rome, a *conventio in manum viri*; but in Gaius's time this doctrine of *usus* was in desuetude.

before the usus was accomplished, (which by interruptions, called *usurpationes*, might be indefinitely deferred,) the woman was a wife no less than afterwards. *Confarreatio* was a solemn marriage ceremony, perhaps exclusively patrician in its origin. *Coemptio* was another mode of producing the *in manum conventio*.

744. By the old Law of England*, a Contract made *per verba de præsenti*, by words in the present tense, was a valid marriage: thus, *I take thee M. for my husband: I take thee N. for my wife.* The same is still the case by the Law of Scotland. Also, a promise of marriage *per verba de futuro;—I will marry thee;*— became a valid marriage by cohabitation; in the same way in which some contracts concerning goods became valid by the delivery of the goods. By later English Statutes, marriages in England were, for many purposes, not allowed to be valid, except such as were celebrated after due notice (*Banns*) or by *Licence*, in some parish-church or public chapel; and by a person in Sacred Orders. But this restriction has since been enlarged, so that the religious part of the ceremony is no longer necessary.

745. With reference to the grounds on which Marriage has very generally been accompanied with a religious sanction, we may remark, that the Conjugal Union is contemplated, not as a mere Contract for Cohabitation, but as an engagement binding the parties to mutual affection, and to a community of the scheme and ends of life. Hence a mere legal Contract, which must regard actions alone, cannot express its full import. The Sentiment of Duty must be brought into operation, and the appeal to this sentiment belongs to the province of Religion (450).

746. *Divorce* is the Separation of the Marriage Union. According to the Roman Law, as the Consent and Conjugal Affection of the parties was an essential part of a marriage, their acquiescence was necessary to its continuance. Either party might declare his

* Bl. 1. 439. He says only, "valid to many purposes."

or her intention to dissolve the connexion*; and no judicial decree or interference of public authority, was requisite in order to carry this purpose into effect. Yet such separations were generally made with some form. A Marriage by *Confarreatio* was originally dissolved by death only; and the *Diffarreatio* which dissolved it, involved fearful rites, and is thought to have been a kind of symbolical death†. For dissolving other marriages there was no definite form fixed before the *Lex Julia.* If either by *usus* or by coemption an *in manum conventio* had been produced, it was got rid of by *emancipatio:* but this related to an incident attendant on marriage, not to the marriage itself. *Repudium* denoted not only the dissolution of a completed marriage, but also the rejection of a Marriage promised by *Sponsalia* (*Betrothing*), but not completed. The practice of Divorce was afterwards checked by Law (the *Lex Papia Poppæa*). Under the Christian Emperors it was punished in various ways; but still the power remained, subject to certain forms in its exercise.

747. There is no Law of England which authorizes Divorce. Every particular case must be the effect of a Special Act of Parliament. Even the gravest violation of the Rights of Marriage, Adultery, is, by the English Law, only cause of separation *from bed and board;* it does not lead to a dissolution of the Marriage. The reason given for this by the Commentators is, that if Divorce were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent. The Ecclesiastical Courts, which have the whole direct jurisdiction concerning Marriages, in virtue of the religious character of the ordinance, can, upon due grounds, grant a separation, not only *a mensâ et thoro*, but a total Divorce *a vinculo matrimonii.* But this must be for causes of impediment existing before the marriage. When these are shown, the marriage is declared null, as having been unlawful *ab initio*, and

* Gibbon supposes Divorce to have been originally "the manly prerogative." Decl. and F. c. xliv.

† Walter, Gesch. des R. R. B. III. c. vii.

the parties are separated *pro salute animarum*, that they may not endanger their Souls by living in a state of known sin. But still the Ecclesiastical Law, like the Common Law of England, grants no Divorce for any Supervenient Cause; according to Commentators*, it deems so highly, and with such mysterious reverence, the nuptial tie, that it will not allow it to be unloosed for any cause whatever that arises after the Union is made. But it is mainly moved to take this view of marriage by the authority of religion.

748. As we have already seen, the only kind of Marriage which is recognized by the Roman Law as complete, is that of one husband with one wife. Climate does not necessarily occasion any exception to this Rule. Thus the Law of Justinian, promulgated by the Romans in the climate of modern Turkey, is express†: "Duas uxores eodem tempore habere non licet."

Yet the Laws of several Countries in various ways take note of other unions arising from the irregular operation of those Desires and Affections which lead to Family connexions. There are various provisions in the Laws of Rome respecting Concubines; and in our own Laws, with regard to Illegitimate Children, or Bastards‡.

It depends upon the law, and the general structure of each State, whom a citizen is allowed to marry. He may be prohibited from taking a wife beyond a certain circle. He may be forbidden to marry a stranger. He may be compelled to marry, not only within his own Nation, but within his own Tribe.

749. On the other hand, men and women are, in almost all countries, forbidden to marry *within* a certain circle of relationship. Marriages within these limits

* Blackstone, I. 440.

† *Inst.* I. 10. 6. It is not lawful to have two wives at the same time.

‡ By the Roman Law, a true marriage could only take place between Roman citizens: "Justas nuptias inter se cives Romani contrahunt qui secundum precepta legum coeunt." *Inst.* I. 10. 1. "That is a true marriage which is contracted between Roman citizens who come together in the manner directed by the Law." No other unions were complete marriages.

were forbidden by the Romans as *Nuptiæ incestæ;* and the union of persons so related is *Incest.* Such unions were those of Parents and Children, Brothers and Sisters*. "Nuptiæ consistere non possunt inter eas personas quæ in numero parentium liberorumve sunt, sive proximi sive ulterioris gradus sunt, usque ad infinitum." The degrees of kindred between which marriage is prohibited have been different in different times and places. But everywhere incestuous unions have been looked upon not only with condemnation, but with horrour. It has been conceived that there is a Divine curse upon them.

The chastity of woman, which, as we have seen (731), is so highly prized, requires to be guarded and supported by the sympathy and reverence of her Family for this treasure. Her relatives, with whom she familiarly lives, especially her Father and her Brothers, are the natural Guardians of her purity. In the intercourse between men and women not withheld by any impediment, the thoughts often turn to the union of sexes. Men are prone to solicit, and women apt to yield, when the union is one on which the thoughts are allowed to dwell. The opportunity and authority which near relationships usually give, would add to this tendency, if the belief of a Divine curse upon transgression did not keep the thoughts and affections in harmony with the reverence for the woman's chastity. The Law supports this tone of the thoughts and affections, by its prohibition of incestuous marriages.

* "Marriage cannot take place between those persons who stand in the relation of parents and children, whether of a near or of a more remote degree, to any number of steps."

CHAPTER VI.

THE RIGHTS OF GOVERNMENT, OR STATE RIGHTS.

750. WE have already stated (79), that among the most powerful Springs of Human Action is the Desire of Civil Society; and that man cannot exist as man except he exist in Civil Society, under the sway of Rules of Action really enforced by some of the Members of the Community. Those Members of the Community, whose office it thus is to enforce the Rules, through which the Community subsists, are, for this purpose, invested with Rights, which are here termed *Rights of Government*. The possessor of these Rights is spoken of as having *Authority* in the Community.

751. We have rights of this kind even in the Family; and especially in Families where the paternal Power is most ample. As we have seen (729), in some countries, the Father has exercised a power of Life and Death over the Son. We may, in such a case, conceive the Father laying down Rules for the conduct of the Family, and enforcing them by any penalties which he may appoint.

When the Children of such a Family grow up, and when they themselves marry and have children, we may still conceive the habit of obedience to the Head of the Family to remain. As the Family extends, it becomes a Family in a wider sense; a House, a Tribe, a Clan, a Nation; but it may still continue to recognize a Supreme Right to obedience in the common parent. Such is a *Patriarchal Government*. The Right of Government is here vested entirely in the Patriarch. The other members of the Community have only the Obligation of Obedience towards him.

752. The Patriarchal Government is naturally broken up by the death of the Patriarch. We may suppose a Patriarchal Government to be continued

generation after generation, by some agreement in the Family, as to who is to inherit the Patriarchal Authority: but such a government, though it may exist as an Institution, is no longer the natural result of the Family habits of affection and obedience. To obey a brother, a nephew, or a remoter relative, is not a natural, necessary, and universal rule. The Patriarchal Form of Society being broken up, the mixtures of Families, their migrations and various fortunes, still further loosen and destroy the bonds of Patriarchal Government, and form men into Nations, according to various conditions of race, dwelling-place, and history. The *National Government* then takes place of the Patriarchal.

753. The person or persons in whom the Supreme Authority in each nation resides, are determined in every case by the History of the nation (97). The whole past History of each nation has terminated in the Fact of its present Government. In the Course of History, the Governing Authorities of Nations have passed into various hands, have been variously distributed, and have assumed many various forms. Nations which were formerly separate, are now united under the same Supreme Authority: Nations which were formerly united as one, have now separate governments: the Lines of Succession of Governors, the modes of appointing them, the way of their exercising their authority in each nation, have changed. The Laws by which they govern have also changed. But in every Nation, so far as it is subjected to Rules of Action; so far as its members really possess Rights and Obligations; there is some *Supreme* Authority, in which the Rights of Government are vested.

754. The Supreme Authority may reside in one Person, or in many. It may be exercised by one Person, under conditions depending upon the consent and co-operation of others. In almost all nations, there is a *Difference of Ranks*, connected with the conditions of the exercise of the Supreme Power. Besides the highest Governor, (King, Consul, President, or in whatever other name he governs,) there are Nobles, Senators,

Lords, Citizens, Aliens, often Slaves. Some of these Ranks have Authority, which, like that of the highest Governor, is the result of the History of the Nation. They have Rights with reference to each other, determined by Laws and Customs, traditionally received, or historically instituted.

The structure of a Society considered with regard to this Difference of Ranks, is its *Political* Structure. The Laws and Customs which determine the Rights of different Ranks, and their share in the Supreme Authority, are the *Constitution* of the Nation.

In every Constitution, the Supreme Authority is termed also the *Sovereign* Power. As the Constitution places the Sovereign Power in the hands of One, or of a few men of Rank, or of the General Body of the Citizens, the State is a *Monarchy*, an *Aristocracy*, or a *Democracy*. These are the *Simple Forms* of Government.

The Sovereign Power executes the existing Laws, and on all occasions, both in reference to the citizens within the State, and to persons and states without, acts for the State. These are the *Executive* Functions of the Government.

755. It is the existence of a Supreme Authority, or Government, which gives reality to the other Rights; —the Rights of the Person, of Property, of Contract, of Marriage. The Government acts as the *State* (94), and carries into effect the Laws by which Rights and Obligations are defined. The Government also, by means of its tribunals and Judges (94), decides disputed questions which arise among its citizens concerning their Rights and Obligations. These are the *Judicial* Functions of the Government.

But the Definitions of Rights and Obligations, though given by the Law of each nation, are not arbitrary and capricious (648). They are intended in all nations to be *right;* that is, conformable to the Supreme Rule of Human Action. They are intended to be *just*, that is, conformable to the Moral Idea of Justice, as well as to the actual Fact of Law. Such Moral Ideas, in their

application to Laws, will be the subject of our consideration hereafter.

756. Offenses against the Rights of Government are *Rebellion*, when subjects openly and by force resist the Governors: *Treason*, when by combination and contrivance they seek to dispossess them: *Sedition*, when they attempt to transfer some of the functions of Government from the Governors to other hands. In many free states, where the citizens have a considerable share in the government, they are divided into *Parties*, which act upon opposite or different maxims in the administration of the State. When a party acts not for the good of the State, but for its own advantage as a Party, it is a *Faction*.

757. Since, in all Nations, the Definitions of Rights and Obligations are intended to be right and just, it is natural that there should be much that is common in the views and determinations of all nations on these subjects. The rules concerning Rights and Obligations which exist among men in general, so far as they are conceived to be the result of the nature of man, are termed *Jus Naturæ;* so far as they are conceived to be common to all nations, they are termed *Jus Gentium*: That which is peculiar in the Law of a particular State or City, is called *Jus Civile*, or *Jus Municipale*. We may distinguish these two kinds of Jus as *Natural Jus* and *National Jus*. *Jus Civile*, *Civil Law*, is often used to denote *Jus Civile Romanorum*, the *Roman Law*.

758. Nations or States are, for the most part, independent bodies, with no common authority to which they can refer. Each is a *Sovereign State*, acknowledging no Superior. Hence there is no Authority which can define or enforce their Rights which they claim against each other. But the general rules and analogies of Natural Jus (757) lead to determinations of the Rights and Obligations of Nations, which form a body of acknowledged Law. This body of Law is *Jus inter Gentes*, and may be termed *International Jus*.

759. Though the existing Government in each

Nation is a Fact, the result of preceding historical Facts (753), it is not *merely* a Fact. Governments for the most part claim to exist by Justice, as well as by Power. They recognize the Rules of Natural Jus and International Jus of which we have spoken; and assert themselves to be Governments *de jure* as well as *de facto*. Moral Ideas, and the Sentiments combined with them, have great force among the springs of action (56); and thus the opinion, generally prevalent, that any person or body of persons does or does not possess the Government of a Nation *de jure*, will very materially affect the support and obedience which men will render to it, and will thus determine the historical fact of its standing or falling. The existing Government is a Fact; but it is a Fact determined by the previously operating Idea of Justice. Its power rests on the general opinion of its Authority. Might does not make Right; the opinion of Right makes Might; and the Might thus generated determines all subordinate questions of Right.

760. Although we at first, while treating of Jus, consider the Laws of each State as absolutely fixed and given (648), yet Laws are intended, as we have said (755), to be just. Hence the State has, for one of its offices, to remove out of the Laws all that is unjust, so as to make them more and more just. That part of the Governing Body which is by the Constitution (754) thus invested with Authority to make and alter Laws, is the *Legislative Body*, or *Legislature*. The Executive and Judicial branches of Government, of which we have already spoken (754, 755), and the Legislative Branch now spoken of, form the three great Members of every Constitution.

761. It will be our business hereafter to consider the Moral Idea of Justice as influencing Law, and its consequences; but we may already easily discern cases in which the general analogy of Natural Jus would lead to a modification of Laws. If, for instance, one Nation have made war upon another, invaded the Country, and reduced the inhabitants to slavery: (as in ancient times was the Rule of International Jus;) when the conquered inhabitants

have lived as slaves for many generations, it would be agreeable to Natural Jus to annul the Laws which keep the slaves in bondage (this being done, of course, by the proper legislative authority). For the ancient conquest, in which the condition of the slaves was founded, was a transitory and accidental event, and cannot properly be the basis of an eternal Law. Indeed, the progress of time not only obliterates the effect of such events, but overthrows even the Rules of International Jus, by which the events formerly produced such effects: for it is now no longer a Rule of International Law, that when one nation conquers another in war, it makes slaves of the inhabitants.

By following such changes, States may aim at constantly making their Laws continually more and more just. In doing so, they tend to bring together the *Idea* of Justice and the *Fact* of Law. The Laws are rendered just; and they are actually carried into effect because they are the measures of Justice.

762. The Idea and the Fact cannot be separated. We cannot have Justice without Law, that is, without actual historical Law. For Justice requires us to give to each man his own, and Law alone determines what is each man's own. If we draw inferences from the notion of Justice, without taking account of the traditions of Law and History, we shall be led to contradiction and confusion. Thus, if we say that Justice implies Equality, and if we thereupon attempt to make the Property of all citizens always equal, we destroy the conception of Property. If, on the like ground, we declare that no man shall lose by a Contract, we destroy the conception of a Contract. Justice implies Property, and Property implies permanent actual possession, historically established. Justice implies Contracts; and a Contract implies that a transaction which takes place at one time, determines arbitrarily what follows. If we do not take the historical definitions of Property, Contract, and the like, the things themselves disappear; and there is no longer any material for the Idea of Justice to act upon.

And on the other hand, we cannot be content with

the mere Fact of Law, without the idea of Justice. Power without Authority, Might without Right, give Possession, but do not give Property. In order that Law may be looked upon as Law, it must be combined with Justice.

763. Actual and fixed Laws are requisite as means for the moral education of the members of the State. For the Moral Ideas are educed in man by his being made to understand the Terms denoting Moral Conceptions; and these Terms become intelligible by being applied under definite conditions. Moral Conceptions cannot be applied, without assuming the jural Conceptions of Property, Contract, Marriage, and the like. A child cannot learn that he ought not to take what is not his own, except he be made to understand what is, and what is not, his own. The Laws being, as in many States they are or have been, familiarly made known to young persons, form an important part of their education. And the Reasons commonly given for the Laws, involve the Idea of Justice, and serve to educe that Idea in the minds of the citizens.

764. Among the ancient Romans, the earliest Laws, and the Maxims and Formulæ of Laws, were thus inculcated in the earliest years of life. Their children were made familiar with these expressions, as our children are with Nursery Rhymes. Cicero says* to his brother: "A pueris enim didicimus *Si in jus vocat*, atque ejusmodi alias leges nominare." And again†: "Nostis quæ sequuntur; discebamus enim pueri XII (Tabulas) ut carmen necessarium." And it was the office of the higher class of Romans to expound the application and interpretation of the Law to their *Clients*. The familiarity with the Law, thus generated, joined with a belief that the Roman Law was the perfection of justice, constituted a Moral Education for the Romans.

* *De Leg.* II. 4. "From the time of our boyhood we learnt, *If a man sues you at Law*, and other Laws of that kind, by rote."

† Id. II. 23. "You know what follows, for when we were boys we learnt the Twelve Tables like a familiar rhyme."

In like manner, the habitual use of expressions implying moral qualities and moral sentiments, calls up moral notions and moral sentiments in those who thus learn the language of morality. But moral notions and moral sentiments can have no definiteness and fixity, except the Rules by which their objects are determined are definite and fixed; and these Rules are Law and Custom.

Each successive generation, deriving its education from the existing Laws and Customs of the Nation, and being imbued with a belief that these Laws, and the Maxims which they imply, are right and just, will transmit the same education to the next generation. And thus the stability and consistency of the State will be preserved.

765. Thus the Laws of each country must be in a great measure fixed and permanent, in order that the Moral Education of the citizens may go forwards consistently, and in order that the Stability of the State may be preserved. But the Laws, if they are to be just, cannot be absolutely fixed; because if they were so, they would involve arbitrary elements, depending entirely upon the accidental events and Istitutions of former times; and this mixture of an Arbitrary Element is inconsistent with the Idea of Justice.

The Idea of Justice, so far as it has operated in forming the Laws of any State, has operated in each generation upon the materials which the existing state of the Community supplied, and has thus more or less modified the Laws in each generation. It would not be the Idea of Justice, if it did not produce such modifications; for it is not just that there should be *arbitrary* inequalities among men. But *differences* among men and classes of men, arising from the events of former times, can never be removed; because the present condition of men is, in all cases, determined by their past condition: and among the features of this present condition, are their convictions as to their Rights and Obligations, which necessarily are derived from the past. For example, it is not just that there should be *arbitrary* differences in the distribution of Property. But there

must be vast *inequalities* in the distribution of Property; for Property being a permanent thing, the inequalities of its distribution go on accumulating for ages; and this is not unjust. Yet still, these Rules of permanence in Property must not be regarded as absolutely fixed. Justice or Humanity may require such fixed Rules to bend; as we have seen that fixed Rules of Law bend in cases of necessity, as self-defense and the like (664). And it may be just or humane, not merely to make an exception to the Law, but to alter the Law; and the Law itself may thus become more just and more humane.

766. Thus the Law, in so far as it is a given fixed Fact, is a means of Education, by giving shape and substance to our Ideas. But again, it is to be a means of *Moral* Education, and is to give shape and substance to our Ideas of Justice: and for this purpose it must be fixed only so far as Justice makes it fixed. The Law must perpetually and slowly tend towards the idea of Justice;—slowly, because it must always be fixed enough to afford a standing ground for our thoughts and a means of education;—perpetually, because there will never cease to remain some portion of the arbitrary historical element, on which it is its office still to operate.

Since we are thus brought to views in which the Idea of Justice comes under our consideration in its application to Laws, (and by the like reasonings we should be led to the like application of other Moral Ideas,) we shall now proceed to the part of our subject to which these Ideas so applied belong,—Polity.

767. Before we proceed, it will be proper to observe that there are other Classes of Rights, which we have not yet considered, because they are of a less extensive and fundamental kind than the Five Principal Classes. Of these we may briefly notice the Right of Reputation.

The Right of Reputation.

768. We have noticed the Desire of Esteem, and the Fear of Condemnation and Infamy, as Springs of Human Action (59). Although the objects to which these Desires tend are notions which are not unfolded in our minds without the operation of reflection; they are, still, so universal, that the tranquillity of man in society cannot subsist, except the objects of these, as of other Desires, are established as Rights. Contumely, the expression of condemnation and scorn, naturally provoke acts of violence; and may often, on that account, be prohibited, as the first step in a violation of personal Rights. To take away a man's Good Name, or Good Repute, may prevent his neighbours trusting him, and may bring on him great loss. Hence the law forbids such acts*. "Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, ediderit, dolove malo fecerit, quo quod eorum fieret, etiamsi alterius nomine ediderit, vel sine nomine, uti de eâ re agere liceret." But the Commentator adds, that this is punishable only if the infamy be undeserved†: "Eum qui nocentem infamaverit, non est bonum æquum ob eam rem condemnari; peccata enim nocentium nota esse et oportere et expedire." But a man's good Reputation, when deserved, is protected as a personal right‡: "Est enim famæ, ut et vitæ, habenda ratio." In like manner, the English Law takes cognizance of injuries affecting a man's Reputation, committed by malicious, slanderous, and scandalous words, spoken, or otherwise published,

* *Dig.* XLVII. 10. 5. "If any one shall have written, composed, put forth, or by any trick caused to be written, composed, or put forth, any book tending to the defamation of another, even though it be put forth in the name of another person, or without a name, he may be proceeded against."

† *Dig.* XLVII. 10. 18. "For defaming a guilty man, it is not right and fit that a man be condemned: for the crimes of guilty men ought to be known."

‡ *Dig.* XLVII. 10. 18. "For reputation, as well as life, is to be protected by Law."

and tending to his damage and derogation. The Rule with regard to the words which the Law thus considers injurious, is, that they are such as may endanger a man by subjecting him to the penalties of the Law; may exclude him from Society; may impair his Trade, or may affect him as a Magistrate, or one in public Trust*. But it is added by the Lawyers, that mere Scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with any hurtful effects, are not punishable by the common Law. Scandals are however cognizable in the Ecclesiastical Courts; as for instance, to call a man an adulterer or a heretic. By the Common Law, words uttered in the heat of passion, as to call a man a Rogue or a Rascal, if productive of no ill consequences, are not punishable. Nor are words of advice or admonition punishable, in consequence of any ill spoken of the person admonished; for, say the Lawyers, they are not maliciously spoken. Moreover, if the person who has spoken ill of another, be able to prove the words to be true, he justifies himself, even though special damage have ensued; for then it is no slander or false tale; as we have seen is the provision also in the Roman Law.

* We speak here of *civil* liability. The English Law, in this case, makes a distinction between words *spoken* and words *written*. Besides this process, calumny may be the subject of *criminal* indictment as tending to provoke a breach of the peace. In this case, truth is not generally a defense.

BOOK V.

POLITY.

THE DUTIES OF THE STATE.

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THE DUTIES OF THE STATE.

CHAPTER I.

THE RIGHTS OF THE STATE.

769. WE have already (369—379) spoken of *The State*, as a Conception applicable to every Community of Men, among whom Rights and Obligations really exist. The State is the Origin of the Law, and of the powers which execute the Law; and hence, is the Source of the reality of Rights. The State is Supreme, or Sovereign over all persons and authorities within it. The State is single and permanent, while its subjects are many and mutable. We have also seen that the State so conceived is a Moral Agent: it has Duties; and among these Duties, we have been led to notice especially the Duty of Educating the people (378). We have now to consider more fully the Duties of the State in general, and this Duty of Education in particular.

770. In the case of individuals, Duties are extensions of Obligations, and Obligations imply Rights. The same is true of States; and therefore we have to consider in the first place the Rights and Obligations of States.

We have already spoken of the Rights of Government, and the Obligation of Obedience on the part of the governed (750). These Rights are Rights of the

State. It is from the State, that all persons placed in Magistracies and Offices of Command derive their Right to the obedience of subordinate persons. It is as representing or possessing the Authority of the State, that they are Persons *in Authority*. The Obedience which is rendered to the Magistrate, is rendered to the Law, and to the State, which is the Source of the Law. The State is the origin of Rights in general, as we have said; but it is the origin of other Rights, by having the Rights of Government. Other Rights, as Rights of Property, it assigns to its subjects; the Rights of Government, it asserts to itself.

771. The relation between the Rights of individuals and the Rights of the State, has been variously presented by different Moralists. Some, as we have said (373), have considered the Rights of the State as formed by the addition of the Rights of Individuals. According to this doctrine, individuals constitute a State, by uniting themselves, and contributing to a common stock the Rights which they naturally possess; sharing this stock of Rights among themselves by common consent, and establishing Officers and Laws to carry their agreement into effect.

We have already (373) pointed out the untenable character of this Doctrine. Rights cannot exist without the State. Individual Rights cannot be supposed anterior to the State; and thus, State Rights cannot be hypothetically constructed out of Individual Rights. But further: there are some State Rights in particular, which are more evidently, from special considerations, not aggregates of individual Rights. These peculiar State Rights we shall proceed to describe.

772. The State has a *Right to the National Territory*. Individuals derive their Rights to their Special Property in Land, from the State, according to the Law of the Land; but they could not derive those Special Rights from the State, except the State had a general Right to the whole. An Englishman has a Right to his landed Property in England, because the Law of England gives it him. A Frenchman has a Right to

his landed Property in France, because the Law of France gives it him. But this assumes that the English State, which speaks its Will in the English Law, has a Right to the Soil of England; and in like manner, the French State is assumed to have a Right to the Soil of France. An Englishman may possess land in France; but this is, still, by the Law of France; and implies the Right of the French State to the French Territory. There can be no property in Land, except what is derived from the State to which the Land belongs.

773. We may illustrate this further. Suppose any *County* in England were conceived as detached from the State; as no longer owing obedience to the English State, or deriving Rights from it. What Right, on this supposition, have the inhabitants of the County to the land on which they live? It may be said, that they have the Right of Possession. But Present Possession can confer no Right, on such a supposition. Present Possession is a fact, which may be succeeded, at any moment, by the opposite fact of Dispossession; and then the Right is gone. Suppose the inhabitants of this County to be dispossessed violently by a body of new settlers from any place, at home or abroad; of what wrong can they complain? When dispossessed, they have no longer the Right of present Possession. If they urge the Right of past Possession, how is this a Right, and by what Laws regulated, when the Law of the Land is rejected? How have they themselves acknowledged the Right, either of present or past Possession? Their ancestors, Saxons, Danes, and Normans, seized the Land by violence, disregarding both present and past Possession. This historical event is a good foundation for the Right of Property, if we assume, as men, in thinking of Rights, always do assume, that a population, organized as a State, have a Right to the Territory which they occupy: for the imperfect and undecided organization of the English State, which, in the times of the struggles of the Saxons, Danes, and Normans, might leave questions of Right doubtful, has long since passed away.

But if men reject this foundation of Rights, the ancient Wrongs, from which they derive their claims, will prevent them from consistently complaining of Wrongs, if, in modern times, acts of violence be done to their damage, like the ancient acts of violence of which they now enjoy the profit. The only good ground of the complaint of Wrong, when the Right of landed Property is violated, is the Right of the State to the Soil of the Country, and the Will of the State expressed by the Law of the Land.

774. The Principle just referred to; that the members of a Community, organized as a State, have a collective Right to possess Territory; and that Individuals cannot acquire Property in Land, except by derivation from a State; is often carried further; thus showing how entirely the Principle is accepted. It is maintained, for instance, that a Civilized State, on discovering a country of Savages, may take possession of it; and that the possession of the Savages must be regulated according to the Laws of the Civilized State. But these are questions of International Law, which we shall not here discuss.

775. Another Right of the State is *the Right of making War* on other States. This Right is necessary to the existence of the State, as a distinct and independent agent, which is sovereign over all its subjects within it, and protects them against all harm from without. If its subjects be injured, or its independence assailed, by a foreign State, it has no resource but remonstrance; which may inevitably lead to War; since States have no common tribunal before which injury done by one to the other can be inquired into, and redress given.

776. This Right of making War is not a Right arising from the combination of the Rights of individuals. England has a Right to make war on France, on due grounds; but no one or more Englishmen have a Right to make war on any selected number of Frenchmen. In the case of a National War, individuals commit acts, which would be murder and robbery, if they were not

committed under the Authority of the State. It is true, there have been rude times in Europe, (and there may still exist such in other countries,) when the Right of Private War subsisted. But even in these times, this Right did not exist as an original Right of individuals; but as a Right given by the Law, and limited by the Law; and if any one used violence out of the limits of the Law, he was treated as a malefactor. The Right of Private War was especially subordinate to, and limited by, the Right of National War. So far as sovereignty had its power, the Sovereign, when he made War upon another Sovereign, forbade Private Wars among his Subjects, and forbade Private Treaties of Peace with the Subjects of the enemy. Thus, even in the times of Private War, the Right of the State to make National War was the Fundamental and Paramount Right. But we must further add, that a State, which recognizes Private War, is very imperfectly organized. Under such a State, men possess in a very incomplete degree, the Rights, of Protection from Violence, Security in their Property, and the like. As the Nation more entirely assumes the genuine attributes of a State, the Right of Private War declines, till it is extinct. But the Right of National War, during this progress of improvement, undergoes no diminution. The most completely organized State possesses this Right at least as fully as the Sovereign of a body of Feudal Lords ever did. And thus, this Right belongs to the State, as a State; and not in virtue of any mode of composition, by which the State may be supposed to have assumed its existence.

777. We may remark further, that the Right of the State to the National Territory, of which we have already spoken, necessarily carries with it the Right of making War, when the National Territory is infringed, if no redress or defense can be had in any other Way. The Right of each man to his Property, is realized and enforced by the power of the State; but the Right of each State to its Territory, if contest arise, can be realized and enforced only by Treaty; or if that fail, by

the power of the Sword. And thus, a State has, as one of its characteristic attributes, the Right of making War on other States, on due occasions.

778. Another Right peculiarly a State Right, not derivable from any supposable Rights of individuals, is the Right of inflicting Bodily Punishment, and especially *the Right of Capital Punishment*. In exercising the Right of War, the State necessarily assumes a Right to put in peril, and to expose to destruction, the lives of its subjects, who serve it as soldiers. But in that case, it is not that the State inflicts the blow, but that it cannot avert it, under the circumstances. In the case of Capital Punishment, the State itself takes away the Life of its subject, inflicting a sudden and violent death. The Right of doing this is universally assumed in States. And it is assumed necessarily. Without the exercise of this Right, the State could not discharge its office. Its business is, to give reality to the Rights of men in Society. But Rights cannot have reality, except they be as real as the other springs of human action. In order that Rights may be real for me, the Rights of another man must be as real in my eyes as the Objects of Desire. To each man, his Obligations towards other men must be realities, as well as his own Appetite, Anger, Avarice, or Ambition: the former must influence his hopes and fears in the same manner, stimulate and restrain him in the same manner, as the latter. But the highest and most real of the objects of men's hopes and fears are Life and Death, accompanied with Honour and Shame. A violent and ignominious Death fills the full measure of the object of man's fear. The force of Desire, Appetite, Anger, and the like, is fully expressed, when a man loves objects as his life, and dreads them as such a death; but it is not fully expressed by anything short of this. Hence, Rights and Obligations will not be real in Society, to the same extent as other objects of action are real, if they be not sanctioned by the prospect of Life and Death, as depending upon the observance or violation of Obligations. If the sanctions of Rights stop short of this, there will

be some region of human action, in which the lawless springs of action are not balanced: some province of human nature, in which the extreme forms of passion, appetite, anger, and the like, are not governed by any efficient authority.

779. The necessity of the Right of Capital Punishment being vested in the State, will also appear from the following considerations. If the State do not assume this Right, such a Right may nevertheless be assumed by another body of persons, who by that very assumption become more powerful than the State, and may seize all the powers of the State. If there were no Capital Punishment for Treason, and the like crimes; an association of men might arm themselves, and, making death the punishment for opposing them, might compel the citizens to obey them, and to disobey the legal authorities. For what would other inferior punishments avail, to avert such a result? Who will be found ready, unarmed, to inflict imprisonment or exile on a body of armed and resolute men? It is plain, therefore, that, in extreme cases at least, Capital Punishments are necessary to the existence of the State: and therefore, the Right of inflicting such Punishments must belong to the State.

780. The Right of Capital Punishment is a special and original State Right, and does not arise from any combination of individual Rights. This Right cannot be conceived to be a Right arising from a common consent, and given to the State by an understood compact between it and individuals; each person conveying to the State a Right over his own life, in case of his committing a capital crime. For, in the first place, the assumption that man, as an individual, has such a Right, is contrary to common Morality. If a man have a Right over his own life, he may cast off life when he pleases, and Suicide is no sin. And even if it were allowed that a man has a Right over his own life; the further assumption, that he has transferred this Right to the State, by a transaction of which he was unconscious, and in which he had no choice; is so

extravagant, that it cannot afford a satisfactory basis for Rights. Thus, we reject the notion of this Right arising from consent or compact, and consider it as a special and original State Right.

781. Again, there is another Right which is exercised by all States; *the Right of imposing Oaths;* for instance, Oaths of Testimony, and Oaths of Office. This Right, also, is necessarily exercised by States. Such Oaths identify the Citizen's Obligations with his Duties. As a Witness, to give true testimony, as a Judge, to administer justice, are always Duties. By means of Oaths, these Duties become legal Obligations imposed by a distinct Contract, and accepted by a solemn Engagement. And if there be not this identity of Duty and legal Obligation in general, the State cannot subsist. For the State consists of men, who are moral beings; and who cannot, without an intolerable violation of their nature, go on continually discharging legal Obligations, which have no connexion with their Duties. The essential part of the business of the State must be regarded with the solemnity which belongs to moral acts; otherwise, the State itself cannot be a permanent reality, in the minds of moral men. And, as we have already said (610), the natural way of acknowledging and marking this moral solemnity, among religious men, is by acting, and declaring that we will act, as in the presence of God; that is, by taking an Oath to act rightly. The thoughtlessness of men, and the excuses which, in common life, they make for falsehood, deceit, injustice, partiality, inconsistency, passion, and the like, are such, that it is requisite, for the essential business of a State, to demand of them another frame of mind than that which is usual in their common intercourse. If the Witness were to give his Evidence, the Jury their Verdict, the Judge his sentence, with the carelessness and perversion of truth and right, which men often allow themselves in common conversation; the administration of justice would be impossible. If the Witness told his tale, and the Judge gave his opinion, with the levity which prevails at a convivial meeting, how could

a moral citizen bear a part in a court of Justice? On such occasions, then, men must be grave, must be thoughtful, and must engage to be so. The occasion and the acts must be marked as solemn; and this, as we have said, is necessarily done, among religious men, by the Witness narrating, and the Judge deciding, as in the presence of God. And the occasion is marked as solemn, by each person declaring that he does this; that is, by the Oaths of the Witness, and of the Jurymen, taken at the time of the trial; and by the Oath of Office, which the Judge has previously taken.

782. The necessity of the Right of administering Oaths being vested in the State, will also appear from the following considerations. If the State do not exercise this Right, a body of the Citizens, bound together by their common belief in God and in his Judgments, may administer, to each other, Oaths to co-operate in their common purposes; and may thus, when their purposes become inconsistent with, or hostile to, the existing Government, overthrow the Government, and take the Authority of the State into their own hands. For a State, not claiming a moral reality for its acts, by means of religious solemnities, could not stand against a great body of citizens bound together by religion. If such citizens be brought before the tribunals for hostility to the government; the witnesses, the jury, the judge, may be of the religious party; and, not being bound to their official act by religion, they will act so as not to be the effective agents of laws which they deem unjust and cruel. And if the laws be still enforced, by the agency of citizens acting without any acknowledged tie of religion, the laws must soon cease to be regarded as just: for morality cannot long subsist in men's minds without religion. When this has taken place, and the laws are no longer supported by an opinion of their general justice, the empire of the law becomes the empire of mere force, which the moral nature of man will not allow to continue long among men.

Thus the ground of the necessity of Oaths in a State is, that Morality cannot long subsist in men's minds

without Religion; that for the efficacy of Religion, a recognition of it by the State is requisite; and that this recognition is especially requisite on certain solemn occasions, such as judicial proceedings, the assumption of important State offices, and the like.

783. If it be said that Religion may be efficacious in making men true and just on solemn occasions, without being publickly recognized and referred to; we reply, that though this may be so with some persons, the State can never know which persons are, and which are not, of this number, without the use of some Formula referring to Religion: nor can it be known, without the use of some such Formula, whether any particular person considers the occasion a solemn one or not.

784. The State, therefore, necessarily has the Right of administering Oaths, of Testimony, of Office, and the like. And this State Right, like the others, is a special and original Right of the State, not derived from any Combination of individual Rights. For though men, in a Contract or other transaction, may be willing to accept Oaths from one another; no one man can be conceived as having any Right to impose an Oath upon another man. If there be any difficulty in ascribing to the State a Right to question or limit a man's actions on account of his religious belief or religious sentiments, there must be a much greater difficulty in ascribing such a Right to any individual. And as no individual could have any portion of such a Right, no collection of Individuals could have the Right: and the State Right to impose Oaths cannot arise from the combination of the Rights of the Individuals, of whom the State consists.

785. It may perhaps be said, that an assemblage of religious individuals, associating themselves for their mutual advantage, might exclude from their body, all who would not, upon due occasions, make certain religious declarations. And this might be so; but we cannot conceive this as the origin of the Right of the State to impose Oaths. For to imagine this, would be

to suppose the State to be, not only a voluntary association of individuals; but of individuals in whose minds religious belief and religious sentiments were already established, and who were drawn together by their religious sympathies. But this is an impossible supposition: for we cannot conceive Religion without Morality, or, generally speaking, Morality without Society already established. We know that the State does not derive its religious belief from the spontaneous religious sympathies of individuals; but that individuals derive their religious sentiments, in a great measure, from the Society in which they are born and live. Men bind themselves by Oaths, under the direction of the State, not as if it were part of a social contract that they should do so; but looking upon the State as a Divine appointment, and a channel through which the forms of the most solemn engagements must necessarily be derived.

786. We are thus led to reckon, as Rights of States, besides the general Rights of Government, these four: the Right to the National Territory; the Right of War and Peace; the Right of Capital Punishment; and the Right of imposing Oaths. These Rights are all necessary to the continued existence of States; and, as we have seen, they are not derivative or cumulative attributes, but original and peculiar. We have called them *State* Rights, in order to distinguish them from *Individual* Rights.

To Individual Rights correspond Obligations; and it may be asked whether the State has any Obligations corresponding to its Rights. The answer to this Question will occupy the next Chapter.

CHAPTER II.

THE OBLIGATIONS OF THE STATE.

787. THE State is, as we have said, the Source of Law and of Authority, and the Realizer of individual Rights. The State Rights exist, in order that the State may discharge this its office. And hence, the Obligation corresponding to the State Rights is, that the State shall *be* the State; that it shall deliver and administer Laws, and thus realize Rights. And this it must do, not for a short time merely; not for one generation only; but permanently, and with a prospect of permanence. Hence, to provide for this permanence is an Obligation of the State. This we may describe as *the Obligation of Self-preservation.*

788. We more frequently hear the *Duty* of Self-preservation ascribed to the State: but we shall, in general, use the term *Obligation* in speaking of this subject: not only because Obligation is the term corresponding to Right; but also, because this Obligation is enforced by a real Sanction, as individual Obligations are: for if the State do not fulfil this Obligation of Self-preservation, it will not be preserved, but will be dissolved, and will cease to be a State. If, however, we wish to retain the term *Duty* in this case, we may speak of the Duty of Self-preservation as the *Lower* Duty of a State, in comparison with other Duties, such as the Duty of rendering its subjects moral and intelligent, which are its *Higher* Duties.

789. This State Obligation of Self-preservation divides itself into several branches; related in some measure to the different State Rights of which we have spoken. Those Rights are assigned to the State for certain purposes; and the State is under Obligations to employ them for those purposes.

The Right of making War is a necessary appendage to the Right to the National Territory; and is to be used, when necessary, for the purpose of defending the Nation from every intrusion of an enemy upon its soil;

and also, for the purpose of protecting the citizens from all other violence and injustice, inflicted by strangers. The State is obliged to take measures which may have such an effect; and this is *the Obligation of National Defense.* All individual Rights stand within the fence of the National Right; and the State is bound to keep this fence entire and substantial. For this purpose, the State is bound to provide an Army, or the means of raising an Army, when the need arises; and to provide the means also of supplying its Army with Officers, and with Munitions of War. The State is bound, also, to keep a watchful eye upon the movements of other States; and if it sees them preparing any evil for itself, to avert the danger by timely precautions. For this purpose, Negotiations with other States may be requisite; and hence, Embassies, Treaties, and the like. Such Negotiations, in the discussions to which they lead, necessarily assume the existence of Rights and Obligations between Nations; and thus, we are referred to an *International Jus*, of which we shall hereafter have to speak. The Obligation of National Defense is the first Obligation of a Nation, for it is necessary to the existence of a Nation. Without the fulfilment of this Obligation, a State cannot exist, even in the most imperfect form. A State which used no means of defending itself, would soon be blotted out of the Map, by the pressure of surrounding States.

790. The next branch of the State's Obligation of Self-preservation is *the Obligation of upholding Law.* The last-mentioned Obligation regarded foes without the nation; this regards citizens within it. In the former case, we spoke of maintaining the external fence which protects the National Existence; we now speak of keeping up the internal barriers of Individual Rights. These Rights are to be realized by the Law; and except they are made real by the enforcement of the Law, they cease to exist, and the citizens cease to be citizens. In this case, the State is destroyed by the dissolution of its internal organization, as completely as if it were obliterated by external violence.

791. There are, however, various degrees of such Disorganization, according as the Laws are enforced with more or less vigour and steadiness. Looking merely to the Self-preservation of the State, if the Rights of the more powerful Class of the citizens be upheld for them, the State may long subsist, although there are other Classes whose Rights are neglected, or gradually encroached upon. That to do this is a violation of the Duty of a State, we shall hereafter see. But that the long-continued existence of a State is not inconsistent with the continued prevalence of illegal oppression of some classes of the community, the history of many nations abundantly shows. Still, so far as such practices prevail, the organization of a State is imperfect; its functions do not proceed in a healthy manner. The imperfect or unequal administration of the laws may not be the immediate Death of the State, but it is a grievous Disease, however long it may be protracted. A State, in order to preserve its full vitality, must make the laws to be respected; and respected alike by all classes, high and low; rich and poor. So far as power and wealth can shield their possessors from the hand of the law, such men are placed above the law; and the State has a tendency to fall to pieces, and to cease to be a living State.

792. Another branch of the Obligation of Self-preservation belonging to States is *the Obligation of repressing Sedition.* By Sedition, is meant any course of action separating the citizens from the State, and transferring to a Rival Body the obedience due to the State. When this Rival Body places its strength in external force, it is an *Armed Sedition;* when it rests its pretensions upon defects in the Right of the Governor, it is a *Political Sedition.* Of whatever kind the Sedition be, it tends, so far as it attains its object, to a destruction of the State. The establishment of a Rival Body, whose officers and Law are obeyed, rather than those of the State, necessarily interferes with and disturbs, and in its natural result, puts a stop to, the functions of government. In this case, as in the others just mentioned, the Life of the

State, the body politic, is destroyed; and as its destruction from defect of national defense, may be represented as death by External Violence, and its destruction from defective administration of the laws, as death by Internal Disease; so the destruction of the State by sedition, may be compared to the fatal effect of an Excrescence which grows in the body, and draws to itself the nutriment which should supply the vital powers.

793. It is a part of the Obligation of Self-preservation belonging to a State, to suppress Sedition, so as to avert this tendency. And this Obligation has always been acknowledged and acted on by all States. The highest form of Sedition is *Treason*. This, in the English Monarchy, is defined to be an offense committed against the security of the king or kingdom; as to compass the death of the king, or to levy war against him, or to adhere to his enemies, or give them aid, within the realm or without. In all monarchies, such crimes have been visited with the severest punishments. But in other forms of government, no less than in monarchies, attempts to overthrow the existing Government have universally been treated as Crimes of the highest order. In free States, attempts to crush the Freedom of the People, have been commonly considered as no less atrocious crimes, than attacks upon the Sovereign Authorities: and where the usual course of law has been insufficient to resist and punish such attempts, extraordinary acts, on the part of some members of the State, have been often and generally looked upon as necessary results of the State's obligation to preserve its free condition; such acts were *Tyrannicide*, and the putting to Death, or sending into Exile ambitious men in ancient times; such acts have been the *Impeachment* of statesmen in England for attempting to render the royal power absolute.

794. The word Treason (*trahison*, *proditio*) implies, not only hostile intentions, but fraud, and breach of trust: and generally, *treachery*, a word of the same origin. These notions are, in this general manner, com-

bined with the notion of hostility to the State or the Sovereign; because Fidelity to the State, and to the Sovereign, are reckoned among the duties of all citizens. A man who joins with strangers, in harming his own Country, is considered as breaking those bands of national duty and affection, which, in their hold upon good men, come next after the ties of family duty and affection: and hence, is looked upon with the same kind of sentiments with which we look upon a man who joins with strangers in harming his father or his mother. A man who is hostile to his country may, it would seem, be treated as a public enemy; he deserves not to receive the benefit of his country's laws, or to be protected in his property or other rights. And hence, the existing Government, which, in order to justify and protect its own existence, must identify itself with the Country, treats its own enemies as the enemies of their country, and punishes them as Traitors.

This view shows itself in the distinction made between domestic and foreign enemies: for foreigners coming into the country in a hostile manner are to be dealt with as enemies; and if taken, executed by martial law. A foreigner cannot be executed for Treason, say the English Lawyers, for he owes no allegiance to the King.

795. Sedition aims at its objects by *Conspiracy*, the mutual understanding established as to a *Plot*, or Plan of proceeding; and by *Rebellion*, the open use of armed force against the Government. If a Government do not put down Conspirators and Rebels, it must soon cease to be a Government; the State, as represented by the Government, must perish. And thus, as we have said, the repression of Armed Sedition is an Obligation incumbent upon the Government, as essential to its Self-preservation.

796. The repression of *Political Sedition* is, in some of its forms, generally acknowledged as a part of the State's Obligation of Self-preservation. For instance, if, in a monarchy, a man declare and maintain that the king

is an usurper, and has no title to the crown, such discourse must be conceived to have a tendency to incite the king's subjects to rebellion, and is criminal. The English law makes it a grave misdemeanour to print or publish *Seditious Libels* against the King or his Government. But the genius of free governments, which tolerates a considerable difference of opinions with regard to the justice and wisdom of the acts of the Government, and the Institutions of the Country, will not allow everything said against the Government and its acts to be treated as Seditious. Accordingly, the English Law permits a man to discuss the measures adopted by the King and his Ministers; but requires this discussion to be conducted fairly, temperately, and with decency, without attributing corrupt motives.

797. It must not be forgotten, however, that proceedings which are Sedition in the eye of the State may often arise from defects in the State itself. If the Laws, or the administration of the Laws, be contrary to Justice, Liberty or Humanity; and if all applications made in constitutional ways for the reform of such defects and abuses, be obstinately resisted by the Government, those who still persevere in the attempt to produce this reform, are naturally led to modes of action which go beyond the limits marked by the constitution, and come within the legal description of Sedition. And though the repression of seditious proceedings is an Obligation and a Duty of a State at all times, being a part of the Obligation or Duty of Self-preservation; yet the Governors of the State, who have to perform this Duty, should ever bear in mind this possibility;—that the prevalence of a tendency to Sedition among the citizens may be occasioned by a really existing need of the reforms which are demanded, and may be best averted or remedied by introducing such reforms. This consideration is recommended to the Governors, even by their *lower* Duty, the Duty of Self-preservation; for a sedition which can fully assert that its object is only a demand for Justice, Liberty and Humanity, must be really dangerous to the State in

which it exists. And it is further to be considered that the *higher* Duty of the State is to make the Laws just, liberal and humane; both that they may be a means of good Government, and also that they may be a means of morally educating and morally elevating the citizens. And as it is the Duty of a man, so is it the Duty of a State, to carry on a constant and interminable progress in Justice, Liberty, Humanity, and other virtues; so that the State can never hope to arrive at a point in which no improvement is possible and no reform necessary: and therefore this Duty of averting the most dangerous kind of Sedition by timely reforms of Laws and improvements in the State itself, can never cease to have a claim upon those who administer the affairs of the State.

798. The most complete moral culture of individuals must be that which is connected with their religious culture. For this religious culture of the citizens the State may offer facilities and helps; but since religious culture consists in what passes in a man's own soul, it must necessarily be in a great measure removed from all which the State can do; and in order that such a culture may go on largely, men must, as to the prosecution of their religious culture, be left free from constraint on the part of the State. But the fact universally is that each person does not pursue his own religious culture and his own religious exercises individually and separately, as a matter between God and himself alone. By their religious feelings and opinions men are drawn into bodies. They have a Common Worship, and in most cases, a Religious Organization;—they have ministers, and ecclesiastical governors, to whom authority is assigned in spiritual matters. And the influence of religious sentiments and of religious ministers and governors in the course of human events, almost inevitably extended from spiritual to temporal concerns. Religious views, and still more Religious Institutions, can hardly fail to be much concerned in questions as to what is just, liberal, humane, and the like. In this manner those who demand reforms in

the State and improvements in the Laws may be persons who are bound together by their religious sympathies: and opinions respecting religion and ecclesiastical matters may be connected with discordances among the citizens, even when they go to the length of Sedition: for instance, if there be a Party who teach, on religious grounds, obedience to a Supreme human Power, the rival of the Sovereign Power in the State; or if there be a Party which teaches, on religious grounds, resistance to the Laws. If there be a Spiritual Supremacy asserted which interferes with and overpowers the temporal Sovereignty, the State is in danger of utter dissolution. We have spoken of a Sedition in general, as an Excrescence, which diseases the body politic by drawing to it the nutriment which should support the bodily life. Retaining the same image, we may say that a Seditious Religious Party in the Social Body, is a Spiritual Excrescence; which, though not immediately visible in a material form, may destroy the health; as a vehement and ungoverned train of thoughts may affect the texture of the brain, and produce the most fatal disease.

799. It may be urged that the State has not a Right to take measures against a Religious Party, on the ground of its being also a Seditious Party, since this would be contrary to what has been said (798), that men must, in matters of Religion, be left free from the constraint of the State. But it is evident that such an argument makes the Rights of individuals supreme, while it tends to the destruction of the State, which is, as we have seen, the only authority by which the Rights of individuals are realized and upheld. The State may rightly make its maintenance of the Rights of its subjects dependent upon any conditions which its own preservation requires. If a citizen refuse to acknowledge the sovereignty of the State, he has no injustice done him if the sovereignty be not exerted in his behalf. If he will not give his allegiance, he cannot justly complain that he does not receive Protection. The absence of state constraint which men need for their religious culture does not involve permission

to use seditious means for the overthrow of state authority.

800. The absence of Religion in a large portion of the citizens, as well as the prevalence of religious views hostile to the Government, may be dangerous to the State; since, as we have seen (782), a respect for the national laws cannot long subsist without a national religious sympathy. If Religion be opposed to Law in men's minds, the Law cannot long keep that hold on men's minds which the healthful existence of the State requires. This consideration makes it a Duty of the State, even with reference to its own preservation, to give to its citizens a religious teaching which may establish a perception of the consistency of Religion with obedience to the Law. The Duty of the State to promote the religious education of its citizens on higher grounds, will come under consideration hereafter.

801. One form of Errour respecting Religion has been made punishable by most States, on the ground of its being an opinion dangerous to all government: namely, *Atheism;* the Denial of the truth of all Religion, and therefore of all religious Sanctions of Morality. We have already shown (782) that all States have claimed, and must claim, the Right of exacting from men declarations in the most solemn form in which they can be given; and the form employed has always contained a reference to the existence and providence of God. A man who denies, and teaches men to deny, the existence of God, may be considered, so far as he is successful, as setting up a Sedition which makes all continued Government impossible. But whether this Sedition is so dangerous as to require the Laws to make such opinions criminal; or whether their prevalence and danger may not better be prevented by Religious teaching, of which we have spoken, as a Duty of the State; will be better examined hereafter.

Chapter III.

THE MORAL CHARACTER OF THE STATE.

802. We have spoken of the State, as having Obligations, or lower Duties; and we have also referred to its higher Duties (788). The questions naturally occur; since the Actions and Thoughts of States are necessarily compounded of the Actions and Thoughts of individual Persons, upon *what Persons* these Obligations and Duties fall, and in *what manner?* We may make a few remarks on this subject.

803. The Governors of the State act for the State; and upon them the Obligations of the State fall; they fall upon the Sovereign ultimately; but, in the first instance, upon the Officers and Magistrates of the State, who receive their authority from the Sovereign, and are held by him to the discharge of their Official Duties. The Obligations of National Defense, of upholding the Laws, and of suppressing Sedition, all belong, in a general form, to the Executive Department of the Government (754). But the first of these Obligations, in its details, is devolved upon the Army and its Commanders; the second, upon the Magistrates and Judges; as is also the third; and in some measure, so far as the prevention of Religious Sedition is concerned, upon the Religious Teachers of the Nation. The State Obligations fall upon the persons who occupy these offices respectively, as Obligations, and therefore as Duties. It is the Duty of the Sovereign to provide for the defense of the country; it is the Duty of his Ministers, and of the Estates of the Realm, to advise and aid him in this purpose. It is the Duty of the Commander of the Forces to use, for this purpose, with his best ability, all the means which are placed in his hands: it is the Duty of every military Officer and Soldier, according to his condition, to exert zeal, skill, and courage, in this cause. And the like may be said of the other departments of the State. It is the Duty

of all Persons in Judicial positions, according to their position, to join in administering the Laws; and of all Magistrates and their Officers, to do their part in carrying judicial decisions into effect, and by other appropriate means preserving the Order of the Community. We have already said (171) that each man has the Duties of his Station; and among the most distinct of such Duties, are those which fall upon each man, as his share in the fulfilment of the Obligations of the State.

804. The State has Duties, as well as Obligations (378). Thus all States have Duties of Truthfulness and Honesty; they ought to observe their Treaties and pay their Debts. They have Duties of Justice and Humanity: they ought not to oppress or enslave the unoffending inhabitants of other countries. They have Duties of Self-culture: they ought to learn and to adopt true Moral and Political Doctrines. Some of these Duties will be acknowledged by all Moralists as Duties of States; and thus, the moral character of the State as an agent capable of Duties, cannot be denied. States may act rightly or wrongly; and hence their actions are subject to the Supreme Rule of Action, the distinction of right and wrong.

The Question then occurs, as we have said, Upon whom do the Duties of the State fall, and in what manner?

805. It is evident that they must fall upon the Governors and Administrators of the State, for these act for the State. They fall upon these persons as Duties. It is the Duty of the Governors of the State to be truthful, honest, just, humane, rational, on the part of the State. But it must be observed, that this is something different from the Duty of being truthful, honest, just, humane, rational, as individuals. The actions, by which these qualities are exerted, on the part of the State, must be the acts of the State, and not merely of the individual. The Governor of a State, in order that, on the part of the State, he may be faithful to the Treaties which the State has made, must be able to direct its armies and navies to shape its commercial

and fiscal regulations, as the terms of the Treaties stipulate. In order to be honest on the part of the State, he must be able to obtain, from the citizens, money to pay the State debts. In order to be able to put an end to acts of violence or oppression on the part of the State, he must be able to persuade, or to force those citizens to desist, who are concerned in such acts. In order that he may, on the part of the State, learn and adopt true Doctrines, he must be able to induce the other Members of the Government, or other Representatives of the Will and Thought of the State, (if there be such Representatives), to join with him in the adoption of such Doctrines. The individual dispositions, intentions, and convictions, of any man or set of men, whatever be their position in the State, are not necessarily those of the State itself. There is and must be a difference between what Statesmen feel and think, in their private capacity, and their sentiments and opinions as Statesmen. Their designs, as virtuous Statesmen, may be very different from their wishes, as virtuous individuals. For as virtuous Statesmen, they can design only such things as the State can perform with safety, consistency, and a due regard to the claims of its own subjects. A man who is truthful, honest, just, humane, and reasonable as an individual, will endeavour, if he be a Statesman, to be also truthful, honest, just, humane, and reasonable on the part of the State. But he will often find many impediments, which will prevent his directing the acts of the State, in such a manner as to conform to the Duties of Truth, Justice, and Benevolence, and to the dictates of Reason. He has to overcome rooted habits, vested interests, ancient prejudices, and natural diversities of opinion, among those whose consent is necessary to action. He has to guide himself by a due regard to the past actions of the State, and the nature of its moral agency, as distinct from that of individuals. These are difficulties, not arising merely from accident, or from something wrong, but necessarily belonging to the nature of the case. For instance, if the humane

Statesman finds that the citizens of his State hold in cruel captivity a population of predial slaves; he will wish and endeavour to abolish this slavery. But however absolute his power, he cannot do this by a word of his mouth, or a stroke of his pen; by a command, or a law. He must provide, for the owners of the slaves, compensation for the loss which they suffer by their emancipation. He must prepare the slaves for the safe exercise of their liberty. If he do not do this, he obeys the impulse of his humanity at the expense of justice, and in neglect of that prudence which is requisite for the right direction of his humanity. For to emancipate slaves, on grounds of humanity, by a law which should throw all the loss upon the owners, would be unjust: since the inhumanity of the previous law, which protected such property, was the sin of the State, and not of the owners. Moreover, slavery, as we have already seen (424), has existed, pure or modified, in many countries; and the perception of the inhumanity of the practice has been very slowly unfolded in men's minds. Where slavery exists, it is, by a large part of the community, regarded with favour, or with indifference. And this prejudice the Statesman has to overcome, so as to carry with him, in his views, the Representatives of the State, if the constitution of the Country require that he should have their co-operation in his acts. And thus, the humanity of the Statesman, acting for the State, may often take a very different course, and especially, must often work in a more slow and gradual manner, than the humanity which belongs to him as an individual; and the same must be the case with other moral quaitiles.

806. And as this is the case with those acts of a State which indicate a Moral Progress; so is it, also, the case with those acts which mark an Intellectual Progress. In these also, though the Statesman thinks, and reasons, and discovers, and adopts truths, for the State, he will often be compelled to adopt truths, on the part of the State, much more slowly, and much more imperfectly, than he himself acquires and possesses them in his own mind. He may, in his own thoughts,

see the truth clearly, and follow it rapidly; but the State, although in a great degree represented by him, will seem to lag behind him in the intellectual race; and cannot, in its public acts, display the intellectual clearness and quickness which may be shown by an individual. The State, from its nature, cannot do this; for the acts of the State are those in which the Members of the State, according to their respective positions, share, at least, by assent and sympathy, if not by joint action. And a number of persons can rarely, or never, participate in the clearness of mental vision, and agility of mental action, by which one man may pass on to new truths. However certain, and however demonstrable may be the new truths, they must require some time for their communication to the minds of many men. Repeated explanation, discussion, proof, may convey to the minds of many, that conviction, which was at first confined to one, or a few; but it can only be by degrees, that the conviction can take such hold of the members of the community, that it can be properly expressed by any act of the State, as *its* conviction.

807. Thus the judgment of the State as to what Doctrines are true, may differ very widely from the judgment of those who are, for the time, its Governors; and yet the Governors will rightly make their conviction of truth (so far as it concerns matters of State) become the judgment of the State, as soon as they can make it take this form by constitutional means. A Statesman, who has obtained a clear view of new and important truths, deeply affecting the morality and wisdom of public acts, cannot fail to wish to make these truths take their place, as grounds of the State's acts; he can hardly fail to introduce, into the acts which he has to perform on the part of the State, an assertion of or reference to these truths: and, if he acts in conjunction with colleagues, he will endeavour to convince them of these truths. But he knows that new Truths cannot, in one instant, become the principle of action of a Nation, nor even of a Body of men; and therefore, he is content to intro-

duce the new Truths by degrees, into the conduct of public affairs. He is content that the State should act, in a great degree, upon principles which it has long recognized and assumed. He knows that the existence of a State is continuous; and that its Moral Character is, in like manner, continuous. Its acts must have a coherence. Its life is its History; and in its present acts, it must have a regard to its past history; so as not to interrupt the vital connexion of one period with another. The State may reform its conduct, and improve its views; and it may do this rapidly, and even suddenly; but it must preserve some identity through the change; else the State's Moral agency vanishes in the supposed reformation. If each person, who successively occupied the place of Governor, might at once proclaim his own views, as the doctrines of the State; the act would be of little or no value; since the proclamation of to-day might be superseded by a contrary one to-morrow.

Thus there is, for States, as there is for individuals, a Duty both of Moral Progress, and of Intellectual Progress: and these Duties, belonging to the State, fall upon the persons who administer the Government, as Duties belonging to them. But they do not fall upon them, in such a manner, that the Moral Progress and the Intellectual Progress of the State are to be identified with those of the individual. The Governors are to aim at a Virtue and a Wisdom on the part of the State, which are not merely their own personal Virtue and Wisdom; which are shown in the Acts and Declarations of the State; which belong to *its* agency, not merely to theirs; which are parts of a national life, regulated by Moral Principles, directed to Moral Objects, begun before they had any share in State acts, and to be continued, on the same Principles, when they have ceased to live.

808. The Moral Character of the State has been generally recognized by Moralists, and has been expressed in various forms of language. In one of these forms, the State is described as having not only a Moral

Character, but a *Conscience**. On this phrase we may take the liberty to remark, that it is not at all necessary in order to express any moral Truths belonging to Polity. We can speak intelligibly and fully of all the Duties of the State, including the Duty of adopting and maintaining moral and religious Truths, without speaking of the Conscience of the State. And this expression is, in some respects, unsatisfactory; for it appears to imply a false relation between the Duties of the State, and those of the individual on whom they fall. The individual takes his share of the Duties of the State, as we have seen, knowing historically what the State has done; and trying to make the State, for the present, act morally, so far as the coherency of its being will allow. And all the individuals who share in the acts of the State, have to act thus, with historical knowledge and moral intention. But there is nothing in this process which can with propriety be called the Conscience of the State. Statesmen are not *conscious* of the past history of their country, however they may be cognizant of it. The English Statesmen of to-day are not *conscious* of the purposes and convictions of the State at the time of the Revolution. Men, contemporaries or successors of each other, may add together their knowledge, and may correct it by their discussions; they may combine their intentions, and may thus carry out a common plan: but they cannot properly be said to add together their Consciences, and thus make a Common Conscience. We have indeed (271) spoken of the Common Conscience of Mankind; namely, the Supreme Law of Man's Being, which each man contemplates in his own Conscience: but we have also said (273), that we may more properly render the moral reasons for actions by referring them to the moral Ideas of Benevolence, Justice, Truth, Purity, and Order, than by speaking of Conscience. The Conscience of a Nation, if it be spoken of at all, must be conceived to be, like the Conscience of an Individual, the stage at which it has arrived in its advance towards a full

* Vattel, *Law of Nations*. Prelim. § 21.

possession of the Fundamental Moral Ideas. But the stages at which different individuals have arrived, in such an advance, must be very various; and it does not appear that we gain any thing by calling the result the National Conscience.

But in whatever way we express it, the State undoubtedly possesses a Moral Character; and has Duties, as we have intimated, of the same description as those of individuals:—Duties of Humanity, Justice, Truth, Purity, Order; the Duties of Moral and Intellectual Progress. These latter Duties, in the case of individuals, include, as we have seen (586), the Duty of Religious Belief. We shall have to consider, hereafter, whether the same be true, with regard to the State. But we must first consider some of the other Duties of the State.

Chapter IV.

THE SOCIAL CONTRACT.

809. We have spoken of the manner in which the Nature of the State imposes Duties upon the Governors; we must now speak of the manner in which it imposes Duties upon the Governed. Of some of the Duties of the Governed, we also formerly spoke (236); namely, willing obedience to the Laws, an affection for the country, a love of its institutions and of its constitution; a loyalty to its Sovereign. That men shall possess such feelings as these towards the Government of their country, is a general Moral Rule, of great extent and great importance. But we have already stated (367), that in the course of the intellectual progress of mankind, Moral Rules require to be improved by a fuller development and elucidation of the import of the terms which they contain. We have already endeavoured (369, 380, 415) to unfold, for this reason, the conceptions of the State, Justice and Humanity: we must now do the same for the conception of *Govern-*

ment; and for this purpose, must explain some of the views which have been successively taken by writers, of the Moral Nature of Government, and the grounds of men's Duties towards it.

The view which we have already given of the foundation on which Government rests is this (94): that Government is a necessary condition of man's Moral Nature; for Government is necessary to the existence of Rights; and Rights are requisite to the existence of Duties and Virtues. Or as we have otherwise expressed it, that our Idea of Moral Perfection involves an Idea of Order (162): and that this Idea of Order cannot be realized, without fixed permanent external Laws, or Rules for human Actions. The Rules which the Idea of Order thus implies, are Facts external to the human Agent; but they are Facts requisite in order to mould his acts into a definite moral form.

810. But though the external Facts which embody the Idea of *Order* are thus requisite, in order that man's actions may have a moral form; there is something also requisite, in order that they may be Moral Actions: namely, an internal Principle of activity, *Freedom* to act (438). Without the Combination of these two elements, Order and Freedom, Moral Action cannot take place. And Government, which has it for its office to supply the element, Order, in this combination, must do so in such a manner as not to expel or destroy the element, Freedom. The external fact must not annihilate the internal act. The internal act must modify the external fact. Public Order and Individual Freedom must subsist together.

Thus Government, in order to be what it essentially is, a necessary Condition of man's moral agency, must include a Principle of Order, and also a Principle of Freedom. These two Principles are in some respects opposed to each other, and have been so considered, in the course of man's intellectual progress. We shall first observe some of the consequences of this opposition, before we attempt to trace especially the development of the Ideas themselves.

These abstract Ideas, Order and Freedom, have been the Objects of sentiments in men which are described as the Love of Order and the Love of Freedom. Under the influence of these Sentiments, the affairs of various nations have been variously conducted; and the Conception of Government itself has been presented under various points of view. We must consider how these are related to each other.

811. Since Government, as we have seen, includes an external Fact independent of man's Will, and an internal Will modifying the external Fact, it may be regarded mainly in the one or the other of these two lights: and thus have arisen two different, and in some respects opposite views, of the nature of Government, and of the Duties which relate to it.

One view represents civil Government as an *External Fact*, which men must take as they find it, and conform their actions to it, without having anything else to do with it. We are under a Government; we are to obey it; this is our Duty, and this is the whole of our business as subjects. The claims of Government upon our Obedience are universal and irresistible.

812. This view borrows one of its main illustrations, from a kind of Government which is undoubtedly an External Fact independent of our Will: which all men find, and must take as they find it; which is a universal condition of human nature, and claims obedience with irresistible power; namely, the Paternal Government. The child is placed by nature in the power of the parent. He obeys him, and must obey him, at least for some portion of life; and no one questions that he ought to obey him. The obedience, thus begun, is naturally continued through life, and extended to successive generations, as we know was the case in the early periods of society; and thus was produced a Patriarchal Government. This, the natural and original form of Government, presents to us the true nature of Government: and other kinds of Government are to be explained and justified by their derivation from the *Patriarchal System*.

813. This view, or one nearly resembling it, is sometimes expressed in a different manner. Government, being an External Fact which we find universally annexed to our condition, by no agency of our own, is to be accepted as a part of the scheme of Providence, which we must not think of altering. It is a portion of the Divine Order of things, to which men must conform. Men's Duty of Obedience to their Civil Governors is their Duty of Obedience to the Will of God; and hence, Governors have a *Divine Right.*

814. The opposite view to this looks not to the External Fact, but to the *Internal Fact*, the Will; as that which must determine man's condition. His moral position must depend upon himself. He makes Government what it is; and obeys it because he Wills to do so.

815. This view, again, borrows one of its main illustrations from a class of transactions in which a man does determine the circumstances of his condition by the acts of his Will; and in which the External Facts which regulate his actions, do so because he chooses, and as far as he chooses, that they should do so; namely, Contracts. A man may, by a Contract with other men, unite with them and bind himself to obey certain Rules mutually agreed upon; and so long as the Contract stands, the Rules are binding. It is held, that Government may be likened to such a Contract, and that the Laws which Government upholds, are binding in virtue of this likeness. Government is a special kind of Contract, the *Social Contract;* and it is a duty of men to conform to the Rules of this Social Contract, because it is a Duty to fulfil the Covenants of all Contracts.

816. This view looks to the *Rights of Man* as Man; it recognizes the Rights of Government, not as anything Divine, or in any way different from any other Rights; but simply as a necessary condition for the establishment of other kinds of Rights.

817. The adherents of these opposite views of Government—the Patriarchal System, and the Social Contract—have attempted to apply their respective

Theories to existing forms of Government. But both the one Theory and the other require to be much modified, before they can be made to agree with the circumstances of most of the States which history exhibits to us.

818. In scarcely any age or nation, have men accepted their Government as an Existing Fact, with regard to which they had nothing to do but to obey. The most absolute Governments of ancient and modern times have, in some degree, approximated to such a condition; but even in these cases, there occur, from time to time, attempts to improve the Laws, revolutions which overthrow the Governors, and other manifestations that men cannot be prevented from exerting their own judgment, and their own will, in shaping their own circumstances.

819. Indeed, the image which, as we have said, is the standard illustration of this view of the nature of Government, itself suggests that Obedience cannot be unlimited and interminable. For the child, when grown to manhood, though he may continue to treat with deference the commands of his parent, will yet have a will of his own; and will claim a right of acting for himself, in a large portion of his actions. The Patriarchal view itself leads us to ask, when the children of the State arrive at the independence of manhood.

820. Again: if we attempt to derive National Government from a supposed Original Patriarchal Government, we fall upon other questions, which show how impossible it is to apply this Theory in its simple form. When the Patriarch dies, upon whom does his power devolve? Upon the eldest son? or all the sons alike? or sons and daughters? or according to which of numerous other obvious Rules? The choice among these Rules cannot be determined by the Patriarchal Theory, in its simple form. Obedience to an elder brother, and that, continued through life, is not at all a part of the natural and necessary order of a family, as obedience to a parent is. Nor does any Rule, on this subject, naturally and necessarily flow from the

Theory itself. If, on the other hand, we say that the Rule of Succession is determined by tacit or express Agreement among the members of the Society, we thus admit, to a certain extent, the opposite Theory of the Social Contract.

821. Again: in the case of Usurpations and Revolutions, such as have happened in every country, when the family line of the Governors is broken through; are we to reject all the subsequent actual Government, as LOT rightly derived from the Patriarchal System, and therefore wrongful? Or are we to allow that long undisturbed Possession may obliterate the wrong of Usurpation? If we take the former side of the alternative, the Patriarchal Theory is not applicable to any existing case of Government: for in all countries there have been Usurpations and Revolutions. If we take the latter side, we acknowledge a new element in the Right of Government, namely, long Possession, or Prescription; and we shall have to make this, in almost every case, the predominating element.

822. Thus, the Patriarchal Theory cannot be applied to actual Governments, without such modifications as render the Patriarchal Condition by no means the most important part of the Theory. And the same may be said of the Doctrine of the *Divine Right* of Government. For if we grant that the Rights of the Governors are Divine, as resting upon the Will of God; we may still ask *what* Rights are included in the Rights of Governors, and in *what persons* these Rights reside. These questions are in no degree answered, by calling these Rights, Divine Rights. To which we may add, that there appears to be the same reason for calling the Rights of the Subjects, as those of the Governors, Divine.

823. But the opposite Theory, that of the Social Contract, offers no less difficulty, when we attempt to apply it to the greater part of actual Governments. For it is not true that, in any actual social condition, the circumstances of men, and the Rules which they obey, are those which have been determined by their

own Will. In some of the cases, in which men have freely combined to found a new and independent Colony, some approximation to this condition may have occurred; but even in those cases, the relations among the Colonists, and the Laws by which they are bound, are determined, in a considerable degree, by their position in the States of which they were previously subjects; and take their course independently of the Will of individuals in the Colony. And in the usual conduct of nations, it is not true that a man, by his own acts, determines all the circumstances of his social condition. Man is really, as those assert who borrow their illustration from the Family, born, fostered, taught, and governed, with little or no regard to his own will. And even in respect to Civil Government, the greater part of the circumstances of a man's condition exist before him, and independently of him: for example, the institutions, the laws, the customs, the character of the nation, in which he must share, and by which his own habits and actions are mainly regulated. And his Relation to the Government being determined by these External Facts, and not by himself, it seems to be a groundless and inapplicable fiction, to speak of that Relation as founded upon a Contract, to which he is a party.

824. The Assertors of the Theory of a Social Contract have sometimes replied to this objection, by a further assertion; that a man, by continuing to live under a Government, after he arrives at manhood, gives his tacit consent to the Contract by which the Government is established; and is, therefore, bound by its Laws. But this answer leaves abundant room for other questions; as to whether such a tacit consent may reasonably be assumed; and if so, at what period, and under what conditions; and further and especially, what are the terms of the asserted Contract? And, upon the answers to these questions, will depend all the important Doctrines which concern the Rights of the Governors, and of the Governed; and, the theory of the Social Contract, if it be retained in discussing these

questions, is little more than a form of expression which leads to no peculiar results.

825. The same may be said of the other forms of expression, which are used to convey the same views. Thus if it be said that the Rights of Government must be regulated by the *Natural Rights of Man;* the question still recurs, *What* are the Natural Rights of Man? We have already (412) stated, that all which have been called Natural Rights are so far limited and modified by the Laws of States, that they cannot be treated as universally Natural Rights. The Rights of Man, in each State, are determined by the Laws of the State; and although, as we have also attempted to show (418), Humanity requires that states and men should constantly endeavour to extend to all men the Cardinal or Primary Rights of Man, this Principle will, in a very small degree, aid us in determining the Duties of Subjects towards Governments.

826. Thus the Theory of the Patriarchal nature of Government is, both by the analogy of the Family itself, and by the universal course of human action, compelled to admit a Principle of Freedom; and the Theory of the Social Contract must include family ties, established institutions, tradition, and assumed consent, as Principles of Order. Each of these Theories is drawn towards the other, in the attempt to make it correspond with the actual condition of nations.

827. But though the Doctrine of the Social Contract has no advantage over the rival Doctrine, as a Historical Theory, it may be a convenient form for the expression of Moral Truths. And this it may be, if we can answer satisfactorily the questions, which convey the objections to the Theory; namely, What are the terms of the Social Contract? under what conditions the consent of men to this Contract may be assumed? and the like.

828. We must, however, recollect, that though we may find convenient modes of stating and discussing Moral Truths, by speaking of the Social Contract, as the ground of the Rights of Government; yet that, in

fact, Government has Rights which no Contract among the subjects could give. We have already (786) described these Rights as State Rights; and have shown that they cannot (in ordinary cases at least) be bestowed upon the Government by any agreement among the individuals of which the nation consists; namely, the Right to the National Territory; the Right of Making War; the Right of Capital Punishment; the Right of Imposing Oaths. These Rights are Articles in the Social Contract; but they are Articles such as no Contract among individuals under ordinary circumstances could contain. It is not because it is *A Contract*, but because it is THE SOCIAL CONTRACT, that the Foundation Deed of Human Societies contains these Covenants.

We may now proceed to consider the Questions above stated: What are the Terms of the Social Contract? and the like. We may observe that English Writers very generally speak of the Social *Compact* instead of Contract, but in exactly the same sense.

CHAPTER V.

THE SOCIAL CONTRACT IS THE CONSTITUTION.

829. BEFORE we attempt to determine what are the Terms of the Social Contract, since we are to use the expression for the purpose of expressing moral and political Doctrines, let us consider what Doctrines it has commonly served to express.

The most noted instance in which this Contract was referred to, was in the Vote of the Houses of Lords and Commons of England, which deposed James the Second, declaring that he had "broken the Original Contract between king and people." And this case exemplifies the purpose for which the phrase has generally been used in this Country; namely, to express that there are

cases in which the subject's Duty of Obedience is annulled, and Resistance to the Governors becomes justifiable. When this is alleged to have happened in consequence of some violation of liberty or justice by the Governor, he is said to have "broken the Original Contract." And this phrase serves well to express, in a plain and forcible manner, the condemnation of the transgression, and the steps which it is held to justify.

830. For the breach of a Contract is an offense on which all men look with hatred and anger: and when a Contract is broken, in a fundamental manner, by one of the parties, the Obligation of the other party to perform his share of it ceases. Those who have to speak for the People, want to say, that the King's crimes have made Obedience cease to be a Duty of the People; and they cannot say this, in any more intelligible or plausible way, than by saying, that the King has broken the Original Contract of King and People.

831. But this language, when used as a justification of Resistance to the Governors by their subjects, has this disadvantage; that while it refers to general Rules of Law, it makes one Party the Judge in their own case, which is against all Rules of Law. For if the People allege, against the King, a charge of Breach of Contract, they ought to bring the case before some Tribunal where justice may be done to both Parties. And if, before this is done, they resist the King's authority, he may, with at least equal plausibility, charge the offense of Breach of Contract upon them. They may charge him with Tyranny, and he may charge them with Rebellion; and these charges are not made more intelligible by calling them Breaches of the Original Contract.

832. It may be of use to recollect here what was formerly said (317) of Cases of Necessity; of which Rebellion, justified by Tyranny, is one. We cannot lay down beforehand any exact moral Rules for such cases, nor is it desirable to do so. We have already said (316), that we cannot define the circumstances of Cases of Necessity, because they must be those in which a

good man does not violate the general Rule without great struggle and reluctance. For, (to repeat the arguments there used), if we were to define beforehand the conditions under which Resistance to Governors, and Rebellion, are proper, and were to give Rules for such cases; those who accepted our Rules would, when the occasion arrived, take the course of Resistance and Rebellion without reluctance or compunction; and even before the time came, would be inquiring whether they had arrived at a point where they might cast off the Duty of Obedience and the Affection of Loyalty. And further, when these Cases of Necessity arrive, men are not calm and tranquil enough to apply Rules of action; and would, in practice, pervert any Rules which we would give. We cannot pretend to give a Formula for the justification of Rebellion; and the phrase of "the King having broken the Original Contract," so far as it is merely a Formula, cannot be a justification; although, if there really be a justifying necessity, this phrase may serve to express it.

833. Since we are thus compelled to abstain from laying down Rules for Cases of Political Necessity which justify Resistance, it may be allowable to illustrate, by example, the manner in which such cases are to be regarded. I will take, as my example, the writings of a very able man who considered himself compelled, by the necessity of the case, to join in the Resistance to Charles the First, namely, Philip Hunton. He wrote a Book "On Monarchy in General; and the Monarchy of England in particular;" and in this, among other points, he treats of the question of Resistance to the Monarch rendered necessary by his transgressions. He does not employ the phraseology of the Original Contract Theory, which at that time had not become familiar. But he discusses the Question, which, in that or any other form, is one of extreme difficulty: Who is to be Judge when the Contract is broken? As he states the question, it is, "Who shall be Judge of the excesses of the Sovereign Lord in Monarchies of this composure?" that is, in Mixed and Limited Monarchies. In reply, he says,

that this cannot be the Monarch himself, for then you destroy the frame of the State, and make it absolute: since to bind a Prince to a Law, and to make him the Judge of his deviation from that Law, is to absolve him from all Law. Nor can the Community and their Deputies be the Judges in such a case; for then we put the Supreme Power in that body, and destroy the essence of the Monarchy: for the Ruler is the immediate Minister of that Power to which he is accountable for his actions. "So that," he says, "I conceive, in a limited legal Monarchy, there can be no stated Judge of the Monarch's actions, if there grow a fundamental difference between him and the community. But you will say," he adds, "it is all one way to absoluteness to assign him no Judge, as to make him his own Judge." Hunton answers, "I say not simply in this case there is no Judge: but that there can be no Judge legal and constituted within that frame of Government: it is a transcendant case beyond the provision of the Government, and must have an extraordinary Judge."

834. He then proceeds to deliver his own Judgment on such a case; which is this: "that if the transgression of the Sovereign be of lesser moment, it is to be borne by public patience, rather than endanger the being of the State by a contention between the Head and Body politic. But if it be mortal, and such as, suffered, dissolves the frame and life of the Government, and Public Liberty; then the illegality and destructive nature is to be set open, and redress sought by Petition;" which failing, the author pronounces that "prevention by Resistance ought to be." But yet he once more repeats his cautions and preliminaries: "First, that the case is such, must be made apparent: and if it be apparent, and an appeal be made, *ad conscientiam generis humani*, especially of those of that community, then the fundamental Laws of that Monarchy must judge, and pronounce the Sentence in every man's Conscience; and every man, as far as concerns him, must follow the evidence of truth in his own soul, to oppose

or not to oppose." This power of judging in such a case, he adds, implies no civil superiority in those who judge; being, not authoritative and civil, but moral; belonging to us, not as citizens, but as reasonable creatures.

835. I have made these quotations from Hunton, because it is desirable to show how far the struggles of mind of a conscientious man, in a particular case in which resistance to the Government seemed to become necessary, are removed from the familiarity and positiveness with which Rules of such cases, in the general form, are sometimes laid down, by writers on Morals. Hunton's judgment, that under the English Constitution resistance to the Sovereign might become necessary, has the more weight, because it is combined with a strong admiration of the "Architecture" of the English Constitution; "whereof," he says, "I must declare myself to be so great an admirer, that, whatever more than human wisdom had the contriving of it, whether done at once, or by degrees found out and perfected, I conceive it unparalleled for exactness of true policy in the world." His grief at the necessity of discussing such questions is strongly expressed. "O let no Son of this State," he says, "account it presumption in me, for putting in my judgment, and speaking that which I conceive might, if not remove, yet mitigate this fatal distemperature of our common Mother: at another time perhaps it might be censurable, but in this exigence, laudable."

836. We conceive, then, that Cases of Resistance to Government are Cases of Necessity; and as such, Cases for which no Rule can be given. The use of the phrase "Original Contract" does not enable us to give any special Maxims on this subject. Still, as we have seen that the object of the Social Contract was to secure Order and Freedom, we may say that the Resistance may be used when it is necessary to preserve the Order and the Freedom which are guaranteed by the Social Contract.

This leads us again to inquire what the terms of the Social Contract are: but before we answer this question,

we shall consider another purpose for which this, or equivalent phrases, are employed.

837. Such phrases have, in modern times, been used in the Preambles of various Codes of National Law; and especially in the Prefaces to the Constitutions of the States of North America. Thus the Constitution of New Jersey begins by declaring that "All the Constitutional Authority ever possessed by the kings of Great Britain over their dominions was by Compact derived from the people, and held of them for the common interest of the whole Society." The Constitution of Connecticut declares that "all men, when they form a social Compact, are equal in Rights;" and the Constitutions of some of the other States have like expressions. Now here it is plain that the word "Compact" is employed in order to conciliate to the Law the regard of men fond of Freedom. The Lovers of Liberty can readily obey a Law which is a Compact among themselves; though they would resist with indignation a Law imposed by another. And accordingly, the Laws, which are thus prefaced, are rigorously enforced, without exciting any discontent, among the freemen of North America.

838. Now if, in these instances, we inquire what are the terms of the Compact which is thus spoken of, the answer will evidently be, that the Compact is the *Constitution* itself, of which we have quoted the introductory phrases. The written Constitutions of the respective United States, which thus begin by speaking of a Compact, by which Civil Society is held together, do themselves contain the Articles of this Compact. In these Cases, we have the Social Contract in a distinct, manifest, and compendious form.

839. Further: it is plain that in these cases, the Social Contract, is not merely, like the "Original Contract" referred to in the Act which deposed James the Second, a Contract between the King and People. Nor is it a Contract between the Governors and Governed; for the Governors, in such Constitutions, cannot be looked upon as a separate party. The Contract is a Compact among the Citizens in general, expressing the political relations of

each to each. It is a Contract between every man and all others within its compass. And accordingly, this is expressed in the Constitution of Massachusetts: "The body politic is formed by a voluntary association of individuals. It is a Social Compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain Laws for the common good." The Social Compact, that is, the Constitution, determines the Rights and Obligations, not merely of the Governors, but of all persons and all Classes; at least so far as the Fundamental Rules and Maxims of Rights are concerned.

840. But since, in these States, the Terms of the Social Contract, concerning which we were inquiring, are to be found in the Constitution, we must, for the like reasons, look for the Terms of the Social Contract of any other State in *its* Constitution, that is, in the Collection of the Fundamental Rules and Maxims of Rights, and especially of Political Rights (754). For that the Constitution of any Country has not been authoritatively promulgated in a compendious written form, but is to be gathered from various Sources, in various forms, does not alter the nature of its obligation. If the Social Compact of New England be its Constitution, the Social Compact of Old England must be *its* Constitution. The Constitution is, in each case, the Collection of Fundamental Rules and Maxims of Rights, and especially Political Rights; in each case, it is the Common Understanding by which the Laws of Order and Freedom are bound together.

841. Thus the Social Contract, being the Constitution of the Country, is different in different Countries, and in all, contains a great number of Articles and Clauses. The Social Contract is not merely some one or two Maxims, respecting Protection, or Property, or Personal Liberty, or the like. It is a wide and complex collection of Arrangements and Provisions for defining and securing to men their Rights. The security of the Rights is the *object* of the Contract; the Contract itself is the Collection of Arrangements and Provisions.

842. Moreover, if some one of these Articles or

Clauses be violated by any party, the Contract is not thereby annulled. For all the other parties, it is not even disturbed; and the party who is guilty of the breach of Contract is not necessarily to be punished by declaring the Contract void for him; but is to be judged by the rest of the community; and visited with penalties provided by the Constitution itself, if such there are; or else, if none are provided, is to be treated according to the exigence of the occasion.

843. And this is the manner in which the Social Contract has been understood in this Country, even when it has been referred to in seasons of Resistance and Revolution. In the deposition of James the Second, though *he* was deposed as having "broken the Original Contract of King and People," still the Original Contract, which gave the Houses of Parliament, and the Magistrates of the Land, their Authority, was looked upon as undisturbed; and all parties, except the King, retained and exercised the powers of their Stations. The English Constitution, like that of Massachusetts, of which we have quoted the description (839), was held to be a Compact by which each citizen covenants with the whole people, and the whole people with each citizen; and those who had adhered to their Covenants were still entitled to all the benefit of the Compact.

844. This view of the Constitution of each Country, as a Compact among the citizens, by no means tends to diminish the reverence and affection towards it, which we have stated to be one of the Duties of a citizen (232). Even a common Contract is, to a moral man, an object of most careful fidelity and respect; and to a religious man, an object of religious reverence; it is *sacred*. But the Social Contract is *not* a common Contract. It is a Fundamental Contract, by which all the Rights of men are defined and secured, all the most important and dearest social relations protected. It is a Contract with the whole body of our Community, dictated by the universal voice, devised or assented to by all the wisest and best of our Countrymen. Whether it be the result of the wisdom of man, or of the wisdom of ages, that is,

of the good guidance of Providence, it has made our Country, and all that we value in it, what they are. Whatever were its origin therefore, the Constitution of our Country is a worthy object of our fidelity, reverence, and affection.

845. This also is recognized in the States of North America. Thus the Constitution of Rhode Island says: "In the words of the Father of his Country (Washington), we declare that the basis of our political Systems is the Right of the People to make and alter their Constitutions of Government: but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all." And in accordance with this feeling, the Members of the General Legislatures, and of the respective State Legislatures, and all Executive and Judicial Officers, swear to support the Constitution of the United States, and also the Constitution of their respective States. With what reverence and love the Constitution of England has been looked upon by Englishmen in general, it is not necessary to say.

846. Thus, the description of *the Constitution of the Country as its Social Contract*, serves to express the Doctrine that all Members of the State have mutual obligations which they may incur heavy penalties by violating. It expresses this in such a manner as to conciliate the good-will and assent, both of the Lovers of Order and of the Lovers of Freedom; and without any tendency to diminish the reverence and affection with which the Constitution is regarded.

Before we quit this subject, it may be proper to notice some of the objections which are sometimes urged against the Doctrine of the Social Contract.

Chapter VI.

OBJECTIONS CONSIDERED.

847. It is proper to consider the arguments which Paley has urged against the Doctrine of the Social Contract in his *Moral and Political Philosophy*, both on account of the currency and authority which that work possesses; and also, in order that we may thereby further explain the effect of the Doctrine; and may compare it with the Doctrine which he propounds as fit to supersede it, namely, the Doctrine that the foundation of Government, and of the Duty of Obedience to it, is Expediency.

848. Paley's principal arguments against the Doctrine of an original Compact are: that such a Compact is not a Fact; and that if not a Fact, it is nothing: that if it were a Fact, yet that the Compact, as it affects the generations after the origin, can be of no force, because the subjects of States in our generation are not conscious of such a Compact, and have had no liberty of assent or refusal with regard to it.

849. To the first objection, we reply, that even if the Original Compact of Society be not a Fact, it by no means follows that the Conception of such a Compact, as the Result of Facts, and the Source of Duties, is of no value. There are several such conceptions which though, not historical facts, are appealed to by moral and political writers, as valuable moral realities. When we say that the Governors are *Trustees* for the benefit of the Governed, or that all Property is a *Trust* for the benefit of the Community, it might in like manner be objected, that no Deed of Trust was ever executed in such cases, and that Kings reigned, and Proprietors held their possessions, before any such views were taken of their tenure. But still, the doctrine that Sovereignty and Property are Trusts, is held by Moralists to be highly important;

and is the source of Moral Maxims which cannot be so distinctly conceived, or so clearly expressed, in any other way. And in like manner, the Doctrine that men are held together in Society by a Compact, even if we cannot point to any event, recorded or conjectural, as the Original Transaction by which the Compact was made, may be a very important and necessary moral and political Reality. And it is so; since it expresses, in one phrase, the mutual relations of the Governors and the Governed, and of all classes one with another; the reciprocal Character of their Rights; the possibility of the obligations of one party ceasing, in consequence of some act done by another party; the Duty of fidelity and respect to the Constitution; and the condemnation of those who violate or disregard such Duties.

850. But we reply further: that the Original Compact *is* a Fact, if we accept, as the terms of the Compact, those Principles of Polity, those fundamental Political Laws and Maxims, which have been generally accepted and approved in all ages of the history of the Country; and which, though occasionally forgotten or transgressed, have constantly resumed their authority, when the influence of force or party interest was removed. The aggregate of such Laws and Maxims, in other words, the Constitution of the country, *is* a Fact; and has always been so regarded; not by theoretical writers only, but by men accustomed to deal with Facts; by lawyers, statesmen, and Englishmen of all classes. Whatever doubts may exist, with regard to some of the Rules and Maxims so asserted, it is plain that such a set of Principles have, as a Fact, existed in the Collective Mind of the Country; as appears by the Constitution having grown out of them. And if it be urged, as an objection, that the maxims which make up the Constitution have been adopted in succession, as the result of struggles between conflicting parties, and different Classes in the State; we reply, that this is so far from showing that there is no Social Contract, that it gives to the result still more the character of a Contract; for in other Contracts, also, it constantly happens, that each party

to the Contract recedes from its original claims; and the conditions of the Contract are different from the pretensions put forwards on either side, in the course of the negotiations.

The Social Contract therefore, which we assert as a moral Doctrine, is not to be rejected because it is not a Fact in the sense in which the objector requires it to be so, namely a single Historical Fact; and it is a Fact, so far as is requisite for the purpose of its being a true Moral Doctrine.

851. But it is further objected by Paley, that the Doctrine of a Contract is false and useless, because men in general have not actually given their consent to the fundamental Rules of the Government under which they live, and have had no opportunity of giving or refusing such consent.

852. In order to determine how far this objection is valid, we must consider what the analogy of Contracts in general teaches us, with regard to consent which may be supposed or implied, though not actually given. Now on this subject, we have not the smallest need to follow any other teaching than that of Paley himself, in order to assert an Original Contract. In speaking of the Administration of Justice, he says, "The law of nature, founded in the very constitution of human society, which is formed to endure through a series of perishing generations, requires that the just engagements a man enters into should continue in force beyond his own life; it follows that the private Rights of persons frequently depend upon what has been transacted in times remote from the present, by their ancestors or predecessors, or by those under whom they claim, or to whose obligations they have succeeded." But this, which he here asserts of *private* Rights, may, with exactly the same reason, be asserted of *public* Rights. Public Rights and Obligations, no less than private, may depend upon what was done by our predecessors, and upon their Rights and Obligations. And the examples which he offers, further show this. They are such as these: the questions which arise between Lords

of the Manor and their Tenants; between the King and those who claim Royal Franchises; questions of Tithes; and the like; which, as he says, depend upon ancient Grants and Agreements. "The appeal," he adds, "to those grants and agreements is dictated by natural equity, as well as by the municipal law." This is asserting, in the most decided and extensive manner, that the present generation are bound by Contracts to which they have given no actual consent. But further: he asserts this, even of mere hypothetical Contracts. "Concerning the existence," he says, "or the conditions of such Old Covenants, doubts will perpetually occur, which give employment to the Courts of Law*." But having taken the case in which the present generation are required to allow themselves bound by ancient Contracts, of which the existence or the meaning are doubtful, does he declare the supposition of such Contracts to be absurd or useless? By no means. On the contrary, he assigns this as a reason (among others) why the general precepts of Morality are not sufficient guides for the business of life, without our having Courts of Justice besides. And for the like reasons, and in the same manner, we maintain that the general Principles of Political Morality, whether we state them as Order, Liberty, and Justice, and the like, or with Paley, as Expediency, are insufficient to point out the boundaries and the force of political Rights and Obligations, without referring to a Court of Natural Jurisprudence, which deals with these as the Conditions of an Ancient Covenant, to be made out by a calm estimate of the evidence which Law and History offer us.

853. We have stated it, as among the advantages of the Doctrine of a Social Contract, of which the terms are the Articles of the Constitution, that this Doctrine harmonizes well with the love and reverence for the Constitution which are among our Duties. And accordingly Paley, while he is rejecting the Doctrine, rejects also these Duties. He says, truly, that the original

* Paley is, in this part of his work, speaking of the necessity of Courts of Law. Book VI. chap. 8.

conditions of the Social Compact are understood to be the fundamental laws of the Constitution. He rejects the notion of such fundamental laws, as having any peculiar force; and speaks with slight of those who "ascribe a kind of transcendental authority or mysterious sanctity to the Constitution, as if it were founded in some higher original than that which gives force and obligation to the ordinary Statutes of the realm, or were inviolable on any other account than its intrinsic utility." Now the persons who have ascribed an exalted authority to the English Constitution, have spoken of it with reverence, and have defended it as inviolable, are all the greatest statesmen, lawyers, and patriots, who have adorned this country; and in proportion to their ability, their legal knowledge, and their patriotism, they have been copious, earnest, and pointed, in appealing to the principles of the Constitution as something of paramount authority and value. They have ascribed to the Constitution, not so properly a "mysterious sanctity" which Paley speaks of, as a moral sacredness: and we have seen the Americans, in the midst of their most emphatic assertions of their liberty, have done the same thing. When a writer is thus led by his doctrines to speak contemptuously of the emotions of moral reverence and affection which have thus prevailed for generations, in the nation and the race, he cannot be, to them, a moral teacher; and as far as he gains their attention, he can only perplex them. If we are to accept a doctrine which tells us that no special reverence and authority belong to the Constitution, we must suppose all our public Jurists, from Fortescue and Coke to Blackstone and Burke, to have had confused and superstitious notions of the English Government. And if the study of English Law and History leaves so wide a space for practical errour in its most diligent students, we can have little trust in the permanence of any new doctrine on such subjects.

854. There are two other objections urged by Paley against the Doctrine of an Original Compact;—

That if such be the ground of Government, despotic Governments can never be changed or mitigated, because Despotism is in the Compact, and the Subject is bound by it; and thus in this Theory, recourse to arms for the sake of a better constitution cannot be justified:—and again, That since every violation of the Compact destroys it, this Theory offers ready arguments for reposing obedience to Government, and "has in fact always supplied the factious with a topic of seditious declamation."

855. To the first of these objections, we reply, that the Laws of no State allow the citizens to have recourse to arms for the sake of bettering the Constitution; that our Morality does not give Precepts for such armed attempts at improvements; and that a system of Morality which lays down, for the citizens of States in general, rules contradicting the Laws, cannot be fit for the general guidance of mankind. If an English Moralist might go into any State which he deems Despotic, and preach to the citizens the duty of bettering the Constitution by an armed insurrection, English morality would be rejected by the Moralists of all other countries, as inconsistent with Order and Humanity. Not that we allow that despotic governments are never to be improved; but they are not, as a general Rule, to be improved by armed insurrections, but by improving the condition of the people; by promoting the moral and intellectual culture of the Governed and of the Governors; by strengthening all the elements of the Constitution which contains a germ of Liberty; (for almost all Governments, however despotic, have such elements). By such courses, despotic Governments, and all Governments, may be improved, without any contradiction of the Social Compact. For the Social Compact, according to all moderate interpretations of it, is not an unchangeable Rule; but is capable of modification from age to age, by constitutional proceedings; changes so produced being understood as changes in the terms of the Compact, made with the consent of the parties. In the progress of improvement, violence and resistance may occur; yet

violence and resistance can never be justified as results of general Moral Rules, but only as the resource in a case of Necessity which forms an exception to general Rules.

856. As to the objection that the Doctrine of a Social Contract offers, and has supplied, ready arguments for Sedition, this is no more than inevitably belongs to every doctrine which recognizes Civil Liberty as an important object. If every obnoxious proceeding of the Governors of a State may be represented as a violation of the Social Contract, it may also be represented as a violation of Natural Justice; and in whatever manner the consequences of Natural Justice are described, the description may be used as a means of inflaming seditious dispositions.

857. It is by no means true, that the Doctrine of the Social Contract has been *especially* used for purposes of sedition or rebellion. When it was brought into prominence at the Revolution in 1688, it was used to justify resistance to the Sovereign in a case of necessity, and not as a general Rule. Those who, in modern times, have most freely urged the Right of Resistance to the Government, though they may have occasionally spoken of a Social Contract, have not really applied the Doctrine. They have not usually dwelt upon any special transgression of the Governor, as a violation of the Compact dissolving its tie; but have commonly denied and derided the authority of those ancient Laws and Maxims in which we read the Contract.

858. How far the Doctrine of an Original Contract is from being "captious and unsafe," as Paley calls it, may be seen by the mode in which its adherents in this country have employed it since 1688. One of the most prominent of the occasions on which this was done, was the prosecution of Dr. Sacheverell for seditious doctrines in 1710, the prosecution being managed by the leaders of the House of Commons. These managers all took occasion to speak of the Foundations of Government; and they all agreed in putting forward, in the most distinct and emphatic manner, the doctrine of an Original

Contract. It may suffice to quote one of them. "The nature of our Constitution," said Mr. Lechmere, "is that of a limited Monarchy, wherein the supreme power is communicated and divided between Queen, Lords, and Commons, though the executive power and administration be wholly in the crown. The terms of such a Constitution do not only suppose, but express, an Original Contract between the Crown and the People; by which that supreme power was, by mutual consent, and not by accident, limited and lodged in more hands than one. And the uniform preservation of such a Constitution for so many ages without any fundamental change, demonstrates the continuance of the same Contract. The consequences," it is added, "of such a form of Government are obvious. The Laws are the Rule for both; the common measure of the power of the Crown and the obedience of the Subject." It was added, that "if the executive part endeavours the subversion and total destruction of the Government, the Original Compact is broken, and the Right of Allegiance ceases: that part of the Government thus fundamentally injured hath a right to save or recover that Constitution in which it had an original interest." But such a breach of Contract is not contemplated as a general or ordinary case; but as an extreme case; a case of necessity; a case about which no rules can be laid down, and which can never be drawn into precedent, except in a case of the like necessity. The doctrine of the Original Compact, put forwards in this case by Lord Somers and all the most zealous lovers of liberty of the time, showed no traces of the seditious tendency which Paley ascribes to it.

859. Burke quoted these passages at a later period, in his "Appeal from the New to the Old Whigs," in order to show that the lovers of freedom in England had always asserted the cause of freedom in this measured and balanced manner, and thus to justify his own consistency in doing the same. And he himself, also, refers to the Social Contract as the Foundation of Government. Thus he describes the succession of the crown as "derived from an authority emanating from the Common Agree-

ment and Original Compact of the State, *communi sponsione reipublicæ;* and as such, binding on the king and people too, so long as the terms are observed."

860. The absence of any tendency to foment sedition or rebellion, in the Doctrine of the Social Contract, will further appear if we compare it, as Burke did, with other Doctrines which prevailed at the time of the French Revolution; and which represented the People as the source of Political Power. To this representation, Burke replied, that if by "The People" be understood the mere assemblage of individuals without any social organization, laws, or magistrates, the term describes something so vague, obscure, and arbitrary, that no intelligible proposition can be asserted concerning it. "The People," so understood, has no means of collecting or delivering its convictions and intentions: it has no Rights, not even a Right to the soil on which the individuals happen to be living. An assumption is commonly made, by those who thus put forwards "The People," that the numerical majority of the People are to act for the whole: but the assumption that a numerical majority of an assemblage shall decide or choose any thing, is altogether arbitrary. The Rule of a majority governing a minority, is a creature of civil society, not the origin of it. The Rule is entirely artificial; is learnt only by early training; and when applied, is applied with arbitrary limitations; for instance, with the exclusion of women and children. A far more natural course of action, for a rude nation, is to follow their Natural Aristocracy;—those whom their character, and property, and history, and habits, and education, have made most fit to lead, and have disposed others to follow them.

861. Thus the doctrine, that Political Power is bestowed by the People, cannot be realized without assuming some organization natural or arbitrary. In order to bestow power, the People must have some mode of assembling, debating, and voting; and this is, to have, to some extent, a Government, for the form of which we still have to find reasons. If we resolve the nation into

its counties, or its parishes, we shall still have to give reasons for the boundaries which we thus draw, and for the officers whom we assume to exist: and our reasons will necessarily be drawn from history and usage, not from the choice and will of the existing individuals. And thus we are brought, in the partial elements of any possible national act, to conventions which must govern men, though not made by themselves, but transmitted from previous generations. And thus, if we reject a National Social Contract, such as we have spoken of, namely, an historical Contract, into which we are born; we are driven to a Provincial or Parochial Contract of the same description. And if we were to reject these conceptions as artificial, we should resolve society into Families, in which men unavoidably exist under relations into which they are born, and which they have not selected by their will; and which yet imply both obligation and duty. And thus the Conception of "the People" as the Source of Government, in order that it may be in any degree distinct and applicable, must be moulded into form by means of the two Principles which we have stated as the grounds of Rights and Obligations; the Relations arising from circumstances of Birth; and Relations which are of the nature of Contract.

862. Having considered the objections commonly urged against the Doctrine of a Social Contract, I shall make a few Remarks on the assertion that the sole foundation of Government is Expediency, or Utility:—that Government is to be upheld solely on the ground of the Benefits and Advantages which it produces to men. In reference to the latter statement, we may assent to it, with this explanation, that if we are to support Civil Government on account of the Benefits it confers, the nature of our support must correspond with the nature of the Benefits: as the Benefits are moral Benefits, the support must include moral Affections. The Benefits which Civil Government confers upon men (if that expression is to be used) are, that it is the Source of Order, Freedom, Justice; the necessary condition of Rights, and therefore of Duties and Virtues. That anything is the source of

these Benefits, is certainly abundant reason for supporting it; and so long as the nature of the Benefits which Civil Government produces is borne in mind, we may be content to say that it depends for its claims upon these. We have endeavoured to show that it produces these Benefits by being of the Nature of a Contract among men; but whether this be assented to or not, it may suffice for our moral reasoning, if Government be regarded as the necessary Condition of all Duty and all Virtues.

863. In this sense, we might also allow that the foundation of Government is its Expediency, or its Utility. But as we have already said (459), when men rest their approval of any general rule or principle on its Expediency, or its Utility, they commonly mean to put out of sight all differences in the value of the *objects* for which things are expedient or useful. When a man says that it is *expedient* to speak the truth, we suppose that he considers truth and lying to differ *only* in being more or less expedient. Now this mode of speech cannot satisfy the purposes of Morality. We cannot be content to say that we support Civil Government for its Expediency, when we mean that we reverence it as the necessary condition of man's moral being. We cannot be satisfied to talk of the Utility which results from the existence of Government, when in our notion of Utility, we must include, Order, Freedom, and Justice.

864. The unsatisfactory effect of the language applied to this subject by Paley is, I think, generally felt. For instance, when he discusses the Question of the Right of Resistance to Government, he expresses himself in a mode which has startled most of his readers. On this question, his sentence is: "That the established government is to be obeyed so long as it cannot be resisted or changed without public inconvenience, and no longer." And he adds, that, to the question, "Who shall judge?" on this subject, "The answer is, Every man for himself."

865. This decision must be understood to reject, as mistaken feeling, all affection towards the existing Constitution of the Country. All loyalty to the sove-

reign, and affection towards the other Governing bodies, can only be impediments in the way of forming this judgment, which every one is called upon to form, whether the Government may not be resisted or changed without public inconvenience. The condemnation with which both law and common opinion regard Faction, Sedition, and Treason, can have no place in the bosom of a consistent Moralist of this school. Such a one would rather be led by his views to deny that there was any harm in Sedition and Treason; since these might be necessary means of attempting improvements. There may be always ground to hope advantage from change; and those forms of attempting it which the law calls Sedition and Treason, may be natural results of a wish to promote the public convenience; and therefore, even if errours, are no proper objects of indignation.

866. It is true, that Paley and his followers do not really draw, from their doctrines, such conclusions as these. They assert Expediency as the sole basis of the Rights of the State, and of the Obligations of the Citizen; but then, they assume Expediency to be a sufficient ground of strong love for existing expedient things: and of strong condemnation of those who attempt to change them for things less expedient. Though professedly so open to proposals of change, they really cling with affection to the claims of usage. And though deriding the value set upon the Constitution by others, Paley is often led to refer to it himself as an important subject of consideration.

867. Thus, he says, in speaking of his doctrine of Resistance to Government, "Not every invasion of the Subject's rights or liberty, or of the constitution: not every breach of promise or of oath; not every stretch of prerogative, abuse of power, or neglect of duty by the chief magistrate, or by the whole, or any branch of the legislative body, justifies resistance, unless these crimes draw after them public consequences of sufficient magnitude to outweigh the evils of civil disturbance." And again, as a reason for especially resenting and punishing violations of the Constitution, he urges that "a well-

known and settled usage of governing affords the only security against the enormities of uncontrolled dominion." Here, the Constitution is become a valuable reality. In the same manner Paley, after he has said that "an act of parliament can never be unconstitutional, in the strict and proper acceptation of the term," as if startled by the hardihood of his own assertion, adds; "that in a lower sense it may; viz. when it militates with the spirit, contradicts the analogy, or defeats the provisions of the laws made to regulate this form of government." This spirit and this analogy form a large part of what has always been understood by the Constitution.

868. The same thing may be noticed in other passages. Thus Paley asks, "Why is a Frenchman bound, both in law and conscience, to submit to many things to which an Englishman is not obliged to submit?" He replies, "Because the same act is not the same grievance, where it is agreeable to the constitution, and where it infringes it." "And this," he adds, "is sufficiently intelligible without a Social Compact." But when he thus explains the case by reference to the Constitution, and to the wrong inflicted by its violation, he approaches very near to the meaning and the language of those who hold the Doctrine of a Social Compact expressed in the Constitution of the Country.

869. Indeed, we may remark in general, that in Paley's mode of treating moral questions, although Expediency is proclaimed as the basis of all Duties, Obligations, and Rights, yet that when these asserted results of Expediency have assumed the forms of Duty, Obligation, and Right, they are forthwith represented as the occasion of affections and sentiments which it would, by most persons, be reckoned absurd to found upon Expediency alone. The earnest love of what is right, and indignation at what is wrong, are professed by the disciples of Paley, as feelings in which they, no less than any other men, have a share. Yet how strange does the description of these feelings sound, when translated into the proper phraseology of the school;—when they are called the "earnest love of what is expe-

dient," and the "indignation at what is inexpedient." The insufficiency of the notion of Expediency, as a basis for moral affections, and moral sentiments, proves that it is not the true basis of Morality. And this further appears, by the mode in which it is employed by its assertors. While we read Paley's pages, we find, that when he comes to particulars, the things which he treats as Realities, and by reference to which he discusses special cases, are the things which he has rejected in his general discussions;—Constitution, Supposed Ancient Covenants, Established Usage, National Rights; while the Expediency, which is asserted in general as containing the essence of moral and political philosophy, is put out of sight as an element of discussion, and becomes merely an occasional form of expression.

CHAPTER VII.

NATURAL PROGRESS OF GOVERNMENT.

870. CIVIL Government exists as the necessary condition of man's moral being. It combines the conditions of Order and Freedom; and corresponds to its Idea the more completely, in proportion as it more completely realizes those conditions. In the history of different nations, we may discern various successive steps towards these combined conditions of Order and Freedom; and some of these steps it will be proper here to notice.

In the earlier kinds of Government which prevailed in human Society, Order was the leading character, and was regarded as their main purpose. Man had to learn and practise Obedience to Rules, before he could learn to use his Freedom. The first form of Obedience, is Obedience to Parents: the first kind of Government, is the Government of the Family. When, by the growth of succeeding generations, the Government of the ori-

ginal Family became the Government of many Families, there came into existence *the Patriarchal State*, in which the Supreme Authority resided in the Partriarch, the Head of the Original Family. And when the Original Patriarch died, the habit of filial obedience was retained, and the obedience transferred to the new head of the complex family, however selected. In this kind of Government, we hardly see Freedom as a distinct element: for Freedom of thought is so subdued by Filial Reverence, that it hardly appears as a Principle of action opposed to Rule. Yet under the Patriarchal Rule, we may suppose the members of the Family to have their distinct Rights of Personal Security, Property, Contract, Marriage. And if any wrong were done by one member to another, the Patriarch would be the natural Judge; he would determine who was the wrong doer, and pronounce the sentence of redress or punishment, according to his judgment of the equity of the case; or it might be, according to express Rules which he had promulgated among his children for their guidance.

871. By the migrations of men in the earliest times, the original families of mankind were separated, and settled in various parts of the earth's surface; they were divided into races; the races were again separated into nations, tribes, clans. These nations acquired a property in the territory which they occupied; it may be, according to the appointment of the Patriarchs of the race, dividing the land among their descendants; or it may be, by a series of mutual agreements between the heads of neighbouring tribes, like what is recorded of Abraham and Lot (Gen. xiii. 9): *If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left.* The heads of tribes and clans, and other persons also, might, in such a state of things, acquire wealth in cattle, and food, and raiment, and ornaments, and other objects of desire; and might have many followers and servants, obedient to them, because dependent upon them for subsistence or enjoyment. The Natural Rulers of men,

in such a state, would be those in whom the remnants of the Patriarchal Authority were supported by the inheritance of a large portion of the Patriarchal possessions. An *Aristocracy of Birth and Wealth* combined, would be the Government of Nations in such a Condition.

872. In such a kind of Government, however little Freedom poor and common men may possess, the Chiefs have considerable Freedom to act, and means of manifesting the differences of character and purpose which prevail among men. The chief of one tribe may make war upon the chief of another: they may lead their followers to battle; may show courage, skill, energy, sagacity, perserverance in war. One Chief may be a Conqueror of many others. He may, by his actions, excite fear, admiration, and enthusiasm. He may be regarded as a *Hero;* and the empire over men's minds which he thus acquires, may make them submit to him, and obey his Commands. In this case, the Government may be termed *Hero Sway.* And this Sway may be acquired, not merely by success in war, but by any of that superior power in overcoming great difficulties and executing great designs which subjugates the minds of other men. Those who are subject to such Government are not free; they are, as it were, fascinated, and their obedience is a kind of Worship.

873. Such Government therefore cannot unfold the moral nature of man. For this purpose the opposite Principle must be called into action. In order that man may be a moral agent, he must not be subjugated and fascinated, but freed and enlightened: he must be governed and directed by something, not because he *does not* understand it, but because he *does.* He must be directed not by mere external Will, but by intelligible Rule. He must obey, not a creature of superhuman power, but the dictates of our common Human Reason. The Reverence for *Ideas* must take the place of the Worship of Heroes.

874. It is only when Government assumes this character, that it becomes fitted for man. Man, when

his moral faculties are awakened, requires that his Government be just; and submits to it willingly, in proportion as he sees embodied in it this Idea of Justice. He is not satisfied to be ruled by a Hero, except he be also a just *Judge*. He must have not merely Commands which all obey, but Laws which all observe.

875. But neither is men's Conception of Government satisfied by the abstract Idea of Justice, administered so far as its Rules are universal. In the actual world, we never can have the Idea liberated from the Fact. The History of man, as a series of facts, must be combined with this conception of Justice, as the rule of his moral being. There will still remain the traces of the original tribes of men, and of the actions of the Heroes who conquered their lands, or founded their cities, or ordained their mode of life. Their Languages will bear the marks of the distinctions thus introduced among them. Men are divided into *Nations;* each Nation has its Speech, its History, its usages, its Laws, its National Character.

876. A Nation requires not merely to have Justice administered, but also to act *as a Nation*. It must have a Governor to act for it; to foresee, design, execute, on the part of all; as well as to keep each from wronging each. If it be governed by Judges only, it will ask for *a King*.

The King represents the Nation, both as to Facts and Ideas. He exercises the Will and Power of the Nation, and acts its part in History; and he is also the Source of Justice, the Preserver of Order, the Assertor of Rights, the Punisher of Wrongs.

877. But within the nation also there may remain traces of ancient actual distinctions; which the national union, though it has comprehended and superseded, has not obliterated. Ancient conquerors and heroes, and rich and historical families, may have their successors; who continue to retain a portion of the ascendancy over men's minds which belonged to Patriarchs and Heroes at earlier periods; and may also have power from their present wealth. These *Nobles* form a Natural

Aristocracy in the Nation. There may be several Ranks and Conditions of persons. The individuals of a Nation are thus distinguished variously as Noblemen and Common men, Patricians and Plebeians, Rich and Poor, High and Low. But in almost every Nation, there is to some extent or other this *Difference of Conditions*, or *Classes*.

878. This Difference of Conditions will enter into the consideration of questions of Right between the members of the Nation. For the Definitions of Rights of all the Citizens are necessarily historical facts; namely, the historical facts which have established the differences of which we have just spoken. The same series of facts which has made one field belong to Caius and the next to Titius, has made Caius a Patrician and Titius a Plebeian.

879. This difference of Ranks is accompanied with a difference of Political Rights. The history which has produced Patricians and Nobles, has also, in general, left them some portion of the power of Aristocracy. They have some share in the Government. The Government is compounded, variously in various countries, of Aristocracy and Monarchy.

880. Although the King is, as we have said, conceived as the representative of Justice and Order, and the assertor of Rights, the person who is at any time King, becomes so by the course of historical facts, and not by any process which makes him necessarily conformable to the Idea of a King. As a matter of fact, he may be unjust in his judgments between his Subjects, and in his actions towards them. He may take advantage of their habit of obedience, for his own personal gratification. Or he may act, on the part of the nation, in a way which does not at all represent the will of the nation. He may wish to use its power for war, when all his subjects wish for peace; or may neglect the defense of the Country, or the administration of the Laws, or any other National Obligation.

881. In the Cases in which any portion of the government remains in the hands of any other part

of the nation, as the Elders, or the Nobles, this portion may be used by them, on the part of the Nation, for the purpose of preventing that neglect of the National Obligations, or Violation of Personal Duties, which the King would otherwise have committed. If, for instance, there be a Senate, without whose consent the King cannot make war or peace; or by which unjust Judges can be punished; such a Senate will be a *Check* upon the power of the King. It will *balance*, in some measure, his authority; and may thus prevent the results of unjust intention or perverse will in him.

882. The Senate are in the Condition, both of Governors, and Governed: they are subjects of the King, and Rulers of the People. For them, the Government combines the conditions of Order and Freedom, at least to some extent: for they are, in some respects, not only free to act for themselves, but also to act for others, and to exercise a share of command over others. They are not irresistibly controlled by the will of the King, for they have a power of resisting it, and even, in some degree, of controlling it.

883. But the People, who are thus subject to the King and the Senate combined, are they free agents, such as their moral nature requires them to be?—If the sway possessed by the King and the Senate be exercised mildly and temperately, the People may be, for a long time, free, so far as almost all the purposes of Morality require. Under the paternal sway of good and kind men, acting without check, as King and Senators, the subjects have the means of acting as good children. But such a sway cannot answer all the purposes of Morality. Men cannot feel themselves free, when their freedom depends upon the arbitrary will of others. They are not free, if their freedom may be taken from them to-morrow, without their having any power of resistance. They are not free, if they have no security for their freedom; no means of asserting and defending it, should it be assailed or infringed; in short, they are not free, if they have not some Political Rights; some Rights in relation to the Government. And not being

free, their moral career cannot be complete. They cannot carry on their moral and intellectual culture, in the hope of bringing into intelligible harmony with themselves all the circumstances of their condition; for there is one element of their condition, the Government, on which they have no power of acting, and which does not allow itself to be scrutinized and understood. They cannot go on constantly and indefinitely in the realization of their moral ideas; for when they would extend this realization from private to public life, they find themselves stopped by the impassable barrier which separates them from the ruling classes.

884. Thus, without Political Rights securing the Liberty of the People at large, Government incompletely attains that Combination of Order and Freedom which is requisite as the Condition of man's moral being. For this purpose, besides the checks and balances which a Senate may offer to the injustice or imprudence of a King, there must be some security of Popular Rights, some protection of the Liberty of the Subject. The Monarchy must not only be balanced by an Aristocracy, but must also recognize a Democracy.

885. Thus the State, in order to answer its purposes completely, must contain a combination of Monarchy, Aristocracy, and Democracy. The Aristocracy stands for Order, and the Democracy for Freedom in the Combination: the Monarchy gives unity to the Combination. The Aristocracy stands for Order; for the Sovereign Power cannot subsist except it be supported by the natural Aristocracy of the Community; if not by the Aristocracy of Birth and Wealth, by the Aristocracy of Prudence and Force. The Aristocracy represents the actual Past; the events which have taken place and left their effects: the Democracy represents the actual Present; the events which the powers of men, acting freely, are bringing into being. Monarchy is an Ideal Power which binds together these elements; acts for the State in present history, and is the source of the Order and Justice which the State must realize.

886. Thus, these three kinds of Government must

be combined in the Idea of a State; and they have, in general, been mixt together, in the States which have best answered their moral purposes. But yet, from various circumstances, one or another of these elements may become so obscure, as to seem to lose its nature; and still, the Government may have a long and tranquil existence. If a State be established by actual contract among a number of men meeting as equals, it has no past, and need have no Aristocracy. For the moment, the Aristocracy and the Democracy are identified. Every man is at the same time Governor and Subject, bound to Order, and possessed of Freedom. And if the Constitution be wisely framed, such a condition of things may long continue. The natural tendency of the progress of time is to generate an Aristocracy; but this tendency may be counteracted by the activity of the Democracy. Again, the Democratic element may be so feeble that the nation may be entirely governed by the past;—by an ancient Aristocracy, or an ancient line of Monarchs. Where Freedom is thus extinguished, the State, as we have already said, answers its moral ends imperfectly. Again; the Monarchical element may be enfeebled in various ways: as by dividing the executive from the judicial character; by presenting the State itself, not the King, as the source of Justice, and by distributing the Sovereign Executive Power. The Executive Power may be held but for a short time, as by Consuls or Presidents for a year, or a few years. By such means, Democracy may be established, with very small evident mixture, either of Monarchy or Aristocracy.

887. In nations which have subsisted for many centuries, the Aristocratic element is generally conspicuous and powerful, having on its side accumulated property, the habit of command, superiority of culture; and in its favour on the other side, the habit of respect for historical families, and of obedience to existing authority. But on the other hand, where there is a germ of freedom to begin with, there are strong influences on the Democratic side. For the influence of

the past becomes constantly weaker by the lapse of time; and the balance, which at first was kept steady by the weight of old families, is disturbed by the rise of new men, who grow in wealth, or in some other form of power. And as the love of power on the one side, so the love of freedom on the other, may become a craving for more. Thus there are tendencies which may produce a struggle between Aristocracy and Democracy: such a struggle has taken place in most old countries, and has occupied many centuries.

888. In the contest between Aristocracy and Democracy, the Aristocracy represents the Principle of Order; for the authority of the existing laws is the inheritance of the past, and belongs to the heirs of the past. But the Principle of Order may also be embodied in a line of Kings, as well as in families of Nobles; or in the two conjointly. In this case, the Monarchy derives its force from the actual past, as well as from the Idea of a National Will and a National Justice. On the other hand, where the people have already acquired Political Rights, the Democracy represents, not only the Principle of Liberty, but the Principle of Order also; for they assert their Rights, as fixed by existing Laws. Hence we do not find in the History of Nations, the Cause of mere Order and of mere Liberty opposed to each other. The Democratical party assert the necessity both of Order and of Liberty: the opposite party, whether Monarchical or Aristocratical, respect Liberty, so far as it is established by Law. Yet still there is an opposition; the one party make a stand for Order combined with Liberty, as it is by Law established; the other party contend for an extension of Liberty, which they hold to be reconcileable with Order. The one is the Cause of Authority, the other of Relaxation. The one Party are a *Conservative* Party, who contend for the position of equilibrium of Order and Liberty, which already exists; the other are a *Movement* Party, who seek a new position, in which a larger share of Liberty enters.

889. The forms which such struggles take, and

the means which are employed in them, are very various. Popular Rights are embodied and protected by Laws, which give to the people security of person and of property; by a share in the election of Magistrates; by Magistrates who are the special defenders of such Rights; (as the Roman Tribunes of the Plebeians;) by men of the People holding Magistracies; by the People having a share in making the Laws; and the like. The Assemblies, whether Senates or General Assemblies, in which such questions are discussed and decided;—in which Laws are passed, Magistrates elected, the National Acts determined upon;—are the especial scenes of the struggles of Parties: either of the Conservative and the Movement party, which universally exist in such cases; or of Parties, which, without being guided by any fundamental Principle, have for their object Power; namely, the Power of directing the national acts. If such Assemblies be moderately numerous, and if the citizens who take part in them, really aim at Order, Liberty and Justice, the balance of the Constitution may long subsist. And if, on the increase of wealth and intelligence in the People, a large share of Popular Rights is pressed for, the Conservative Party may, by yielding slowly and yet holding steadily, find the new position of equilibrium which is suited to the new condition of the community.

Chapter VIII.

THE REPRESENTATIVE SYSTEM OF GOVERNMENT.

890. When a nation becomes very large, such a balanced Constitution, as we have just spoken of, in its simple form, becomes difficult or impracticable. The General Assemblies of the citizens become too numerous and too mixed, to deliberate and to act with order, freedom, and virtue. When freedom has existed in large nations, it has existed under more complex Constitutions; and the struggle between Established Authority and the demands for Enlarged Liberty have assumed corresponding forms. Sometimes the struggle has been between the King and the Nobles, the Nobles contending for Liberty for themselves; while the question of Liberty between their dependents and them is left to be settled afterwards. Thus the Barons of England, as the assertors of English Liberty, obtained Magna Charta. Or the struggle may be between the King, and certain Classes of the Community, collected (they or the principal persons of them) in Assemblies, Class by Class. Such Assemblies are the *Estates* of the Realm: thus in England the three Estates were anciently, the Spiritual Body, the Temporal Lords, and the Commons. The Members of the Estate of the commons, the Third Estate, may be appointed by the People in various ways; but in all its modifications, this Estate is a *Representative* Assembly. And in nations where Classes of Society with broad historical distinctions have never existed, or where the distinctions have been abolished, the whole body of the people may be divided into Electoral Districts; and the Representatives of these Districts may form assemblies by which free government may be exercised for a territory, perhaps, of unlimited extent.

891. The Principle of Representation in government is entirely of modern origin. In the ancient world we nowhere find it brought into play. As we

have just said, it is a necessary condition of the freedom of a great nation; for the whole body of the citizens could not, in any other way, have their share in the Government. But the conduct of national business by Representative Assemblies, has advantages much beyond its making freedom merely possible for an extensive and populous country. It prevents the tumultuous meetings and rash proceedings of large popular assemblies. It also, by reducing the number of the deliberative assembly, increases the calmness and reasonableness of their discussions and decisions. The members of the assembly, not having found their place into it by chance, but being chosen for their real or supposed merits, act with a greater sense of responsibility; and will be, really, a wiser and more trustworthy set of men, than the citizens taken at hazard. Their being few in number, selected for merit, the object of public notice, makes them more likely to act for right ends, and less likely to be seduced by the prospect of personal advantage to oblique and selfish courses. The Members of such an assembly also attend to their public business more regularly and carefully than the people at large would do or could do. The Members of the Assembly become statesmen by profession, and attend to their work with a professional care and skill. They guard both order and liberty, the Rights of the State and of all citizens, more watchfully and better than the citizens would guard their own Rights.

892. On the other hand, in the Representative System, the people at large are liberated from the task of managing the Government, which they could not execute well; and are charged only with a business to which they are fully competent, that of electing those who are to govern. The citizens who would be wholly unfit to be trusted with the decision of a question of foreign polity, or domestic economy, or jurisprudence, may be qualified to choose a person as their Representative. In this manner, the whole people have a share in the government: both the masses of population in the towns, too numerous and too ignorant to rule

directly; and the people of the country, too scattered otherwise to act at all in public business. For these two may be brought together without difficulty on such occasions as the choice of a Representative.

893. We see, then, that this Modern Step in Polity, the introduction of the Representative System, makes a combination of Liberty and Order possible upon any scale however large, and brings with it other vast advantages. But for this purpose, the Representative must not be merely a Delegate, who reports to the Central Assembly what his constituents have directed him to say; nor must be a Senator for life, who, once elected, is no further responsible to the electors; nor must be a Patron, who has the people whom he represents, not for his Electors, but for his Clients; and finally, he must be a Representative in an Assembly which acts for the Nation; for it is of National Government that we are speaking. Hence it has been rightly stated* as essential to Representation, that in electing him the power of the People must be parted with, and given over, for a limited time, to Deputies chosen by the People; the Deputies fully and freely exercising Power instead of the People.

894. After the Representative System is fully established, the Struggles of Parties, and especially the Struggles of the Conservative and the Movement Party in each Country, are mainly carried on by means of Debates in the Representative Body. The leading Ideas of these two opposite Parties are, as we have seen, Order and Freedom. In the historical course of the struggle, these Ideas are exemplified and embodied in special forms; in Coercive Laws on the one side, and Popular Rights on the other; and the Struggle is carried on with reference to a series of special and subordinate objects of this kind.

895. When men begin to direct their thoughts and actions, not towards a Practical Order and a Practical Freedom, to be attained by the removal of Special Disorders and Special Grievances, but towards a general

* Lord Brougham, *Polit. Phil.* Part III. 33.

Notional Order and *Notional Freedom;* these Notions are too vague to direct their actions safely, while the very largeness of the Notions makes them disturb the tranquil progress of men's thoughts. And thus, the enthusiasts of both sides strain after a Visionary Polity, in which they think they could realize their Notional Order or their Notional Freedom; but without making any real progress towards the Object. In Polity, as in the Inductive Sciences, every large ascent towards Truth consists of a number of small ascents; and is to be forwarded only by struggling with the difficulty at which we have arrived; not by tracing in our minds a visionary scheme of the Science, which conducts us to some complete body of knowlege. Bacon has remarked that though the human Intellect naturally tries to reach the ultimate Truth at a single flight, yet that the only way in which truth can really be attained is by a gradual progress through many intermediate steps*. The same is the case, for the most part, in the historical progress of nations towards a realization of the combined Ideas of Order and Freedom.

896. By means of the Representative System, Freedom has been established in some of the Monarchies of Europe, in the Democracy of the United States, and in some of the British Colonies. In all these cases, however, there has been, in addition to the Assembly directly representing the People, another Assembly, a Senate, or a House of Peers, consisting of persons, either not at all, or not so directly, elected by the people. The joint assent of this Upper House and of the Lower Assembly has been made requisite for the validity of the measures of the State. And there appears to be strong reason to believe, that without such an Upper House, the balance between Order and Liberty in a State could not long be preserved. For an Assembly, chosen by the People, and brought directly into conflict with the established Authority in its highest form; if it be strong enough to struggle at all, will be enflamed by the struggle, and will act hastily, angrily, and im-

* *Nov. Org.* I. Ax. xix. xx.

moderately. The assent of another Assembly in its proceedings, if required for their validity, secures a deliberate and calm survey of the question, by men not heated and blinded by the same contagious passions and interests. With three bodies in the State; the Sovereign, the Senate, and the Representative Body, it is probable that two will be against the one which would disturb the balance of the Constitution.

897. Yet the balance is sometimes disturbed in most States. It is only by a rare felicity, that the struggle between the Conservative and the Movement party is carried on from age to age without producing such oscillations as overturn the balance. To yield slowly and firmly, to advance steadily and moderately, are rare virtues in Political Parties. Moreover, as we have said, besides the struggles of Parties from Principle, there are struggles of Parties for Power. It may happen that the Established Authority uses its Power to crush Established Liberty; and that the forms of the Constitution fail in providing adequate means of resistance. It may happen that Established Authority refuses all concessions, till the sense of practical grievances becomes intolerable, and leads to popular violence. It may happen that when the popular Party is strong, men's minds are enflamed with a Love of Notional Liberty, which no practical concessions can satiate; and then, the popular Party itself violates the Constitution. In these and many other cases, we may have *Revolutions*, or violent and anomalous Changes in the Constitution. They are, as we have said, Cases of Necessity; to be justified only by their necessity.

Chapter IX.

ACTUAL PROGRESS OF GOVERNMENT IN ANCIENT ROME AND IN ENGLAND.

898. The history of ancient Rome is an example of a long-continued struggle between an aristocracy and a democracy. According to the views of the most philosophical historians, the Patricians alone had a place in the original constitution of the Roman State. The Senate was the Administrative Council, with the King, and afterwards, with the Consuls, at its head; the Senate and the People (*Senatus Populusque Romanus*) had the Legislative Authority, exercised in the *Comitia Curiata*, the Assemblies of the *Curies* or Wards of the Patrician Houses (*Gentes*). The Plebs was a populace occupying a portion of the city, but not admitted to any place in the Senate, the Magistracy, or the Comitia, although forming a considerable portion of the army. Servius Tullius, the sixth King, gave a legal organization to the Plebs, by dividing it into thirty Tribes; and gave it a place in the Constitution, by the institution of Classes divided into *Centuries*, including, as the army included, Patricians and Plebeians together; and by the introduction of an Assembly of these, *Comitia Centuriata*, with authority for certain purposes. But it was long before the Plebeians obtained the advantages which such a Constitution seemed to promise them. They were still oppressed and kept under by the Patricians. They were excluded from the Consulship, the Senate, and most Magistracies, and from intermarriage with Patricians. The Patricians had the profitable occupancy of the land (*ager publicus*), which nominally belonged to the State; and in many cases, lending money to the impoverished Plebeians, acquired personal power over them, in virtue of the severe Roman Laws respecting Debtors.

899. This inequality of Rights and Advantages led to a Sedition, in which the Plebeians began, in a

body, to separate themselves from the Roman State. They were brought back by concessions, that the debts of insolvents should be cancelled, and that they should have two magistrates appointed as their protectors; Tribunes of the Plebeians; whose persons should be inviolable, and who should have the power of interposing, so as to arrest any legal proceeding. From this time, the Plebeians, by struggles of various kinds, obtained many of the Rights from which they had at first been excluded. The practice of voting according to Tribes, in the Comitia Tributa, was employed: and by this means the power of the Plebeians was very greatly increased. *Connubium*, the intermarriage of Patricians and Plebeians was allowed; the Senate was thrown open to the Plebeians; afterwards it was ordained that of the two Consuls, always one should be a Plebeian. The Plebeians succeeded in their attempts to carry Agrarian Laws, for an equal division of the public land. At length the remaining Magistracies were thrown open to Plebeians; the decrees of their assemblies (*Plebiscita*) were invested with the force of Laws; and the distinction of Patricians and Plebeians ceased to have any political value. The Polity of Rome had been changed by these struggles, from a rigorous Aristocracy, to a combination of Aristocracy and Democracy. This may be looked upon as the golden period of the Roman Constitution. It is at this period that it obtained the admiration of Polybius: who describes the Constitution as exhibiting, in the combined institutions of Consuls, Senate, and Commons, a happy mixture of Regal Power, Aristocracy, and Democracy.

900. When Rome had become Mistress of the whole of Italy, new struggles arose, in consequence of the demands of the Italians claiming to be admitted into the privileges of the Roman Constitution. If the practice of modern times had been introduced, according to which the Citizens of free States act their political part by their Representatives, it is possible that Italy might have long flourished under the mixt Roman Constitution. But the attempt to make all Italy one City, in

a political sense, soon led to confusion. The Democratic portion of the State was too numerous for orderly action; and mobs of armed men, and armies, soon took its place. The evils of this state of things were so intolerable, that after a few transient changes, the Romans, in order to obtain tranquillity and security, were willing to resign their Liberty. They acquiesced in the sway of the successful General, bestowed upon him all their Constitutional Magistracies, and acknowledged him as their Emperor (*Imperator*).

901. The *Imperium* from which this designation was especially borrowed, was the military power which the Commander of the Army had assigned to him over his troops in the field. It was of the most absolute kind, and was made obligatory upon each person by an oath (*Sacramentum militare*), that he would be faithful and obedient to his General, saving the fidelity he owed to the Roman Senate and People. On the destruction of Public Liberty, this Oath was taken to the Emperor, as Commander-in-chief; but the Clause in favour of the Senate and People was omitted. Instead of being limited to the Soldiers, the oath was extended to all magistrates and citizens, and ultimately to the provincials. And thus, the Roman Emperors had unlimited power, both by the accumulation of all civil authority in their persons, and by the military authority thus declared.

902. Accordingly, the Emperor had legislative as well as executive power. The Roman Jurists say*, "Quod Principi placuit legis habet vigorem, utpote quum Lege Regia quæ de Imperio ejus lata est, Populus ei et in eum omne suum imperium et potestatem conferat." Religious as well as Civil authority was given to the Emperor; a sacredness and a kind of divinity were ascribed to him. After Christianity became the Religion of the Roman State, high religious dignity was

* *Dig.* I. 4. *Inst.* I. 2. § 6. *Gaius*, I. § 7. "The command of the Emperor has the force of Law; for by the Royal Law respecting his authority, the People gives to him and confers upon him all its authority and power."

still attributed to the imperial condition. In imitation of the Jewish kings, he was anointed with oil, and consecrated by a priest; he was declared to hold his crown by the Grace of God, and was spoken of as the Vicar of Christ over Christian people. And thus, the monarchical office was elevated to a transcendent supremacy and ideal perfection; it was the Source of Order, Justice, and Right; and absorbed and superseded all other powers and Rights which had existed in the Constitution.

903. Very different from this view of the chief ruler of the State, was that which prevailed among the northern nations who gradually took possession of the provinces of the Roman Empire. In the most considerable of the Germanic tribes, the form of Government was republican. Some of these had a Chief, to whom the Romans gave the name of King; but his authority was very limited. The Supreme Authority of the nation resided in the Freemen of whom it was composed. When a national war was undertaken, one of the Chiefs was selected to command the army, but his authority expired with the return of peace. But when these tribes settled as conquerors in the Roman provinces, they adopted, in many respects, the customs and the legal language of those whom they subjugated. The superiority of the Romans over the Barbarians in intellectual and literary culture, the advantages attendant upon fixed laws, and laws already fixed, strongly promoted this result. And after a time, the servility of men's language infected their thoughts; and the subjects of the kingdoms which arose out of the empire not only spoke, but in some measure thought of their King, as the Romans had been accustomed to do of their Emperor.

904. But there was another especially Germanic element, which modified the feelings of men towards their Chief. Every German Chief had a band of Followers, who had voluntarily attached themselves to him*. From him they had received their recognized

* Tacit. *De Morib. Germ.* Cap. XIV.

place as warriors; at his table they feasted; to his service they were devoted. In war, *he* fought for victory, *they* for their chief. But they received from him occasional presents, as horses and weapons. From an ancient Teutonic word signifying their *trustiness* to him, they were called *Antrustiones*. They were also called the Chief's *Vassi*, his young men, or his men*: as the act of a person declaring himself a superior's *man* was afterwards called *homage*, by a derivative from the Latin. This connexion was regarded as the most sacred which could subsist between one man and another. The usage of this personal connexion the Germans carried with them into the countries which they subdued, and it became one of the chief bonds of political union in the Governments which they established. The connexion was commonly confirmed by an oath, promising fidelity, *fealty* or *allegiance*, on the part of the inferior, and sometimes, by an oath promising protection and justice on the part of the superior. The feelings connected with this ancient relation of superior and inferior have given a peculiar character to *loyalty* towards a Sovereign, as conceived in modern times.

905. But there was another important element which entered into the constitution of that Feudal System, which was established on the ruins of the Roman Empire. The Chiefs appropriated to themselves districts of the conquered territory, and they granted portions of these their possessions to their followers, the obligation of reciprocal fidelity and protection being connected with this tenure of land. The Chief and his followers became the *Seignior* and his *Vassals*. The lands thus granted were termed Benefices, (*Beneficia*,) and afterwards Fiefs (*Feuda*). They were held by

* This derivation of the word *vassalus*, adopted by Sir Francis Palgrave, makes it come from the Celtic word *gwas* or *was*. Another derivation deduces it from the Teutonic word *gesalle, companion*. M. Guizot inclines to believe that it comes from *gast, guest*. He finds *vassus* used in old documents apparently as equivalent to *conviva*. *Essais sur l'Hist. de France*, p. 102.

military service*. Those who thus held benefices or fiefs often granted portions of them to inferior Vassals on the like condition of military Service; and this *Subinfeudation* of Vassals and *Arriere Vassals* was continued through several degrees. The subordinate holders of feudal benefices possessed some of the privileges of feudal *lords*. In the course of time, Fiefs became hereditary.

906. Thus the *Feudal System* was established; and gave to the relation between the Governors and the Governed a new form. Instead of the single transcendental authority of the Roman Empire, before which all Liberty was annihilated, there was, along with Monarchy, a Military Aristocracy, in which the Superiors and Inferiors, from the Sovereign downwards, had mutual Rights and Obligations, of Protection and Service; and in which there were, therefore, for them, Elements both of Order and of Liberty.

907. It is true that this Order and this Liberty were very imperfect, being only such as are maintained in a state of peace which is looked upon as subordinate to a state of war. The lowest members of the Feudal System were liable to great oppression. Moreover, the peaceable part of the community, the inhabitants of towns, and generally, those who had no place in the army, were not provided for in this System. So far as

* Some writers discern in the practices of the Roman Empire itself the germ of this element of the Feudal System, the tenure of land by military Service. Even while the empire was only commencing, Sylla and Augustus assigned lands to their Veterans; and a little later, lands were granted to the *Limitanean* or *Ripuarian* Soldiery, on condition of defending the boundaries of the empire. These were commanded by the *Dukes* and *Counts* of the Provinces. Under Constantine, the *Count of the Saxon Shore* ruled from Norfolk to Sussex, while the *Duke of Britain* governed the remainder of Britain. These military Counts and Dukes were the Magistrates, as well as the Commanders of the Soldiery. The Military, so organized, constituted a distinct and ruling Class, both in consequence of their privileges, and of the right which they exercised of electing an Emperor upon some occasions. They were, in short, a Military Aristocracy.

they were concerned, there was no Security and no Liberty. Hence, from this time, the struggle between Monarchy, Aristocracy, and Democracy, takes a new form. We have the Feudal Aristocracy in conflict with the Imperial Doctrine of absolute Regal Power; and we have the Burgher Democracy in conflict with the Feudal Aristocracy and the Monarchy.

908. Our own country exhibits to us an exemplification of these conflicts. The Feudal System was fully established in England by the Norman Conquest; but the Conqueror gave to it a more monarchical character than it elsewhere had, by requiring, not only those who held *in chief* of the crown, but also their tenants, to swear personal fealty to the King. On the other hand, the exorbitance of the royal authority was resisted, not only by the rights of feudal tenancy, but also by a spirit of Freedom which the Anglo-Saxons had derived from their German Ancestors, and by the Anglo-Saxon Laws and Institutions, which embodied this Freedom. The Anglo-Saxon Kings were guided, in the main acts of their government, by the great Council of the nation, which bore the title of *Wittenagemote*, or the Assembly of Wise Men. All the Laws expressed the assent of this Council. It was composed of Prelates and Abbots, of the Aldermen of the Shires, and, as it is expressed in the Laws themselves, of the Noble and Wise of the kingdom.

909. After the Norman Conquest, when the Anglo-Saxons were for a time, not only subjected to rigorous feudal servitudes, but reduced to the condition of a subjugated race, they looked back with an affectionate regret to the *Laws of Edward the Confessor*. William the Conqueror was induced to relax the rigour of his rule, so far as to grant his subjects a Charter, in which he professed to restore the Laws of the Confessor, and to relieve, or at least to limit, the feudal burthens. Similar Charters were obtained by the subjects from succeeding kings; and after various struggles, there was won, from the crown, the *Great Charter* of King John, which determines the character of the English Constitution.

military service*. Those who thus held benefices or fiefs often granted portions of them to inferior Vassals on the like condition of military Service; and this *Subinfeudation* of Vassals and *Arriere Vassals* was continued through several degrees. The subordinate holders of feudal benefices possessed some of the privileges of feudal *lords*. In the course of time, Fiefs became hereditary.

906. Thus the *Feudal System* was established; and gave to the relation between the Governors and the Governed a new form. Instead of the single transcendental authority of the Roman Empire, before which all Liberty was annihilated, there was, along with Monarchy, a Military Aristocracy, in which the Superiors and Inferiors, from the Sovereign downwards, had mutual Rights and Obligations, of Protection and Service; and in which there were, therefore, for them, Elements both of Order and of Liberty.

907. It is true that this Order and this Liberty were very imperfect, being only such as are maintained in a state of peace which is looked upon as subordinate to a state of war. The lowest members of the Feudal System were liable to great oppression. Moreover, the peaceable part of the community, the inhabitants of towns, and generally, those who had no place in the army, were not provided for in this System. So far as

* Some writers discern in the practices of the Roman Empire itself the germ of this element of the Feudal System, the tenure of land by military Service. Even while the empire was only commencing, Sylla and Augustus assigned lands to their Veterans; and a little later, lands were granted to the *Limitancan* or *Ripuarian* Soldiery, on condition of defending the boundaries of the empire. These were commanded by the *Dukes* and *Counts* of the Provinces. Under Constantine, the *Count of the Saxon Shore* ruled from Norfolk to Sussex, while the *Duke of Britain* governed the remainder of Britain. These military Counts and Dukes were the Magistrates, as well as the Commanders of the Soldiery. The Military, so organized, constituted a distinct and ruling Class, both in consequence of their privileges, and of the right which they exercised of electing an Emperor upon some occasions. They were, in short, a Military Aristocracy.

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This Charter, from the time of its being granted, was always considered as a primary and fundamental law of the nation. Mr. Hallam says *, "This is still the keystone of English Liberty. All that has since been obtained is little more than as confirmation or commentary: and if every subsequent Law were to be swept away, there would still remain the bold features which distinguish a free from a despotic monarchy." Like preceding Charters, this redresses the worst grievances of the military tenants; but its more important clauses are those which protect the personal security and Rights of Property of all freemen. "No freeman shall be taken, or imprisoned, or disseized of his freehold, or liberties, or freecustoms; or be outlawed, or exiled, or any otherwise destroyed. Nor will we pass upon him but by the lawful judgment of his peers and the law of the land. We will sell to no man justice and right; we will not deny or delay them to any man." Other clauses restrain excessive and arbitrary demands of those pecuniary aids which the Feudal System authorized the Lord to claim of his vassals.

910. But the great Council of the Nation, as well as the Charters of the Kings, became a bulwark of Liberty. In the Saxon and in the Norman period, the King legislated with the advice of his Great Council or Parliament. It was a principle of the Feudal System that within the limits of his fief, a Vassal could not be bound by a law made without his consent†. New taxes, like other new laws, required the sanction of this Assembly; but the King had many old established claims upon his vassals, as *Escuage*, a commutation for the personal military service of his tenants; *Tallage*, a tax on his demesne lands and royal towns; *Customs*, on certain imports and exports. The Great Charter restrained escuage imposed without consent of Parliament; and the successors of John never pretended to a general right of taxation without this consent. This part of the Con-

* *Middle Ages*, III. 447.
† Hallam, *Middle Ages*, I. 247.

stitution attained a more definite form under Edward the First. His *Confirmatio Chartarum* not only gave to previous Charters most solemn sanctions, and universal circulation; but gave to private property that security against the aggressions of the crown, which Magna Charta had given to personal liberty. By this Statute the "aids, tasks, and prizes," previously taken, are removed as precedents; and the King grants to his Clergy, Peers, and to all the Commonalty of the land, "that for no business from henceforth we shall take such manner of aids, tasks, or prizes, but by the common assent of the realm, and for the common profit thereof."

911. But here the progress of the Constitution towards a balance is further marked by the appearance of the Commonalty, as well as the Nobles, in Parliament. There is a House of Commons as well as a House of Peers.

The earliest known writs of summons to cities and boroughs to send members to Parliament, are those issued by Simon De Montfort, Earl of Leicester, acting as Sovereign of the kingdom; after he, at the head of a confederation of Barons, had defeated Henry the Third at the battle of Lewes. The deputies of such places were finally and permanently engrafted upon Parliament by Edward the First. These formed a Council, in addition to that of the Barons and higher Peers; and Knights, sent by the Shires, were associated with the Burgesses, at least from the time of Edward the Second. In the course of that and the following reign, the efforts of Parliament established upon a firmer footing three essential principles of the Constitution: the illegality of raising money without consent of Parliament; the necessity that the two Houses should concur for any alterations of the Law; and the Right of the Commons to inquire into public abuses, and to impeach the King's Counsellors.

912. From this time, the importance of Parliament was shown by its becoming the battle-field of conflicting Parties in the State. In the Reign of Edward the Second, it was not Parliament, but the Barons, who had

the principal share in opposing the Government. But in the end of Edward the Third's reign, an opposition, headed by the Prince of Wales, urged their grievances by means of the Petitions and proceedings of Parliament. And Richard the Second, the son of this Prince of Wales, after a reign full of contests with his Parliaments, in which he repeatedly promised redress of grievances in return for Subsidies which they voted him, was compelled to abdicate the throne, and Henry the Fourth was acknowledged King in 1399.

913. In the reigns of the three kings of the House of Lancaster (Henry IV. V. and VI.) the powers of the Parliament to protect the Liberty of the Nation were more fully unfolded. The exclusive Right of taxation by Parliament was maintained, and their Right also to direct and check the public expenditure. They exercised the Right of making their supplies depend upon the redress of grievances; they secured the people against illegal ordinances and interpolations of Statutes; they controlled the royal administration in matters of peace and war; they punished bad ministers; and finally, they established immunity of person, and liberty of speech, for themselves in their parliamentary capacity. Some of the most eminent maxims of parliamentary law were established in this period: for instance, that the Commons possess the exclusive Right of originating Money Bills; and that the King ought not to take notice of matters pending in Parliament.

914. Under these circumstances, the election of Members of Parliament became a very important Duty and Privilege of Englishmen. It was in the eighth year of Henry VI. that the Elective Franchise of Voters for Counties was determined to belong to freeholders of lands or tenements of the value of forty shillings. The proper Constituents of the Citizens and Burgesses sent to Parliament appear to have been Chartered Boroughs, and Towns belonging to the demesne of the Crown, and all places of eminent wealth and importance, even though not incorporated. But probably no Parliament ever perfectly corresponded with this Rule.

915. Thus, many centuries ago, a Constitution was established in England, in which Monarchy, Aristocracy, and Democracy, balanced and controlled each other. There were many Institutions, Laws, and Customs, which were a security against arbitrary power; protecting both the rights of the Commons and of the Nobility; while yet the Government, in its whole tone and character, was Monarchical. In the language of the Law, all seems to grow out of the King, and is referred to his advantage and benefit. The voice of the Commons towards the Crown was, in its form, humble and deferential. The royal prerogative was always named in large and pompous expressions. This monarchical tone still more pervades our law-books. Hence perhaps it is, that some writers, as Hume, have fallen into the mistake of believing that the limitations of royal power in this country, during the fourteenth and fifteenth centuries were unsettled, both in law and in public opinion. But the gradual development of the constitutional practices of parliament, in the way we have described, shows that there was nothing unsettled or ambiguous in their general character, as real securities of the National Liberty.

916. Accordingly, the English Constitution is described as free, and is put in contrast to despotic governments, by intelligent writers of those times. Sir John Fortescue, who was Chief Justice of the King's Bench under Henry VI., and afterwards Governor to the young Prince of Wales, wrote a Treatise, entitled, "Of the Difference between Absolute and Limited Monarchy," in which the English Government is his example of a Limited Monarchy. He also wrote a Treatise "De Laudibus Legum Angliæ," in which he inculcates this doctrine upon his royal pupil: "A King of England cannot at his pleasure make any alteration in the Laws of the Land: for the nature of his government is not regal, but political [or, in more modern phrase, not absolute, but constitutional]. Had it been merely regal, he would have had a power to make what innovations and alterations he pleased in the laws of the Kingdom,

impose tallages and other hardships upon the people, whether they would or no, without their consent; which sort of Government the Civil Laws point out, when they declare *Quod principi placuit legis habet vigorem.* But it is otherwise with a king whose government is constitutional; because he can neither make any alteration or change in the laws of the realm without the consent of the subjects; nor burthen them against their will with strange impositions; so that a people governed by such Laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other."

917. To the same effect speaks Philip de Comines* in the reign of Edward the Fourth. "The King of England is not able to undertake things of great importance without calling his Parliament, which is in the nature of our Three Estates; and consisting for the most part of sober and pious men, is very serviceable, and a great strengthening to the King. At the meeting of this Parliament, the King declares his intention, and desires aid of his subjects, and they supply him very liberally." And elsewhere† he says, "In my opinion, of all the countries of Europe where I was ever acquainted, the Government is nowhere so well managed; the people nowhere less obnoxious to violence and oppression, nor their houses liable to the desolations of war, than in England; for there those calamities fall only on their authors."

918. The expressions exalting the King's authority to absolute power, though borrowed, as we have seen, from the Law of the Roman Empire, and inconsistent with English history, yet being retained by lawyers and others, perhaps stimulated the Kings of England to arbitrary conduct and imperious language, such as often proceeded from the Tudor princes. In opposition to this, the house of commons did not fail from time to time to make declarations, and to take measures, in

* B. IV. c. 1. † B. V. c. 18.

favour of the liberty and laws of the land: and though often overborne by power, they never surrendered the Cause of constitutional government. Even in the Act passed in the 28th of Henry VIII., which gave to the King's proclamations the force of law, this was limited, "so that they should not be prejudicial to any one's inheritance, offices, liberties, goods, and chattels, or infringe the established laws:" and the very passing the Act, implied the recognition of Parliament as the legislative Authority. Even in this reign, in 1532, the commons refused to pass a bill recommended by the crown*. In the following reigns, of Edward VI. and Mary, the House of Commons recovered its independent powers: and the course which the Court took, in order to strengthen itself, was, to conciliate the assembly. Queen Elizabeth frequently spoke to her Parliaments in an imperious manner; but they too had members who spoke boldly on the other side; and though she exercised a large power in some instances, she yielded in others. The voice of English freedom was never silenced in the houses of parliament, nor the voice of English law in the Courts of Justice. In this period, the House of Commons established some of their most important privileges; the exemption of their members from arrest during their Session; the right of determining contested elections of their own members; the right of punishing offenses against themselves by imprisonment of the offenders. The Government of England was still, as it had long been, recognized as a Monarchy limited by law.

919. In opposition to Hume, who, to show the despotic character of the English Government, has quoted from Raleigh a passage of servile flattery addressed to the Queen, Mr. Hallam quotes Aylmer, who wrote a reply to John Knox's "Blast of the Trumpet against the monstrous Regiment of Women." In this work (in 1559), it is stated, as an undoubted doctrine, that "the regiment of England is not a mere monarchy, as

* Hallam, *Eng. Const.* i. 59.

some for lack of consideration think, nor a mere oligarchy nor democracy; but a rule mixed of all these, wherein each one of them hath or should have like authority. The image whereof, and not the image, but the thing indeed, is to be seen in the Parliament house, wherein you find these three Estates: the King or Queen, which represent the monarchy; the noblemen, which be the aristocracy; and the burgesses and knights, the democracy. If the parliament use their privileges, the King can ordain nothing without them: if he do, it is his fault, and their fault in permitting it."

920. There were, no doubt, persons who held that the Sovereign of England possessed, in a sense more or less strict, Absolute Power; and the opposition between these persons, and the assertors of constitutional government, became more and more marked under the Stuarts. James I. had dissensions with his parliaments, which lasted during his reign: and these led to the famous *Protestation* of the Commons, of December 10th, 1621, which is to the following effect; its various clauses referring to controversies with the crown which had occurred at various times: "That the liberties, franchises, privileges, and jurisdictions of parliament, are the undoubted birthright and inheritance of the subjects of England:"—(this was in opposition to the doctrine asserted by the King, that they proceeded from the royal grace:) "That the arduous and urgent affairs concerning the King, State, and defense of the realm, and of the Church of England; the making and maintenance of laws, and redress of mischief and grievances, are proper subjects and matters of counsel and debate in parliament: That in the handling and proceeding of those businesses, every member of the house hath, and of right ought to have, freedom of speech, to propound, treat, reason, and bring to conclusion, the same:" with other clauses of the like nature*.

921. Charles I. was in conflict with his parliament from the beginning of his reign; but in 1628, he gave

* Hallam, *Eng. Const.* i. 501.

his assent to the *Petition of Right*, which embodies many of the most important parts of the Constitution. This Statute recites the various laws which had established certain essential privileges of the Subject, and enumerates violations of them which had recently occurred in the points of illegal exactions, arbitrary commitments, quartering of soldiers or sailors, and infliction of punishment by martial law; and then prays the King, "That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; and that no freeman in such manner as is before mentioned be imprisoned or detained; and that your majesty would be pleased to remove the said soldiers and marines; and that your people may not be so burthened in time to come; and that the aforesaid Commissions for proceeding by martial law may be revoked and annulled; and that hereafter no Commission of the like nature may issue forth to any person or persons to be executed as aforesaid, lest by colour of them any of your majesty's subjects be destroyed or put to death contrary to the laws and franchises of the land." Proceedings inconsistent with this law were resisted; as in the case of Ship-money, in which Hampden refused payment of the illegal exaction. And though the decision of the majority of the judges was against him, this judgment was annulled by the Parliament as soon as it was allowed to meet.

922. But the Parliament, which had so long been the defender, now became the assailant of the Constitution; and from this time, through the diseased and troubled period of the Civil War and the Usurpation of Cromwell, the public acts, both of Government and of Parliament, no longer express the national judgment of what was just, right, and constitutional; and have been repudiated by subsequent acts of the nation. Yet even in this time of conflict, we see the reverence with which the forms of the Constitution were retained. The Parliament employed the name of the *King*, even in acting against him; and the King assembled a *Parliament*

at Oxford, denying the name to that which sat at Westminster. Even when Cromwell had, by the aid of the army, usurped the power of the Government, he retained the general forms of the constitution; a Parliament elected by and representing the nation; and a House of Lords. And he was constantly told by the lawyers,—That his authority could never be truly valid till he assumed the title of King; which was, to use their words, a wheel on which the whole body of the law was carried; which stood not on the top, but ran through the whole veins and life of the law:—That the nation had ever been a lover of monarchy, and of monarchy under the title of a King:—That, in short, this title of King was the title of the supreme magistrate which the law could take notice of, and no other.

923. The restoration of the Stuart line in Charles II., introduced no change in the principles of the Constitution; for Charles assumed the throne as King of England by law; and therefore, as bound by all the laws which preceding Parliaments had made, till they were repealed. The Convention Parliament, which restored him, not having been called together by royal authority, the validity of its acts was doubtful, till they were confirmed by the succeeding parliament; but from this time, the monarchy resumed its ancient course. The frequent session of parliament, and its high estimate of its own privileges, furnished a security against illegal taxation; and from this time we have no more of that grievance, hitherto so common. The power of the Commons to impeach a minister, even for acts performed by the King's command, was established in the case of the Treasurer Danby; and this led to the decision of several important points, respecting the effect of such impeachment. In this reign, also, the ancient Right to a writ of *Habeas Corpus*, by which Englishmen are protected from illegal or arbitrary imprisonment, was invested with new securities and facilities. The encroachments on the legislative supremacy of parliament, and on the personal right of the subject, by means of Proclamations

issued from the Privy Council, which had been frequent under former princes both of the Tudor and of the Stuart families, fell with the odious tribunal the Star Chamber, by which they had been enforced.

924. It is true, that some persons still held that the Royal Power was absolute, and could not be limited by opposite acts, or length of usage. But these doctrines, were not those of the parliament; the attempts to exclude James II. from the throne, showed how large a portion of the sovereign power was held to reside in other branches of the government. And the Revolution, which placed William the Third on the throne, involved a complete repudiation, on the part of the nation, of the doctrines of the Absolute Power, and the indefeasible and imprescriptible Rights, of the King of England. Yet the assertors of the liberty of England, even in this extreme case, attempted to divest their act, as much as possible, of the aspect of violence. The great vote of Jan. 28, 1689, was to the effect that King James II. had "abdicated the government, and that the throne was vacant." In this, it was not pretended that the word "abdicated" was used in its ordinary sense, to denote a voluntary resignation of the crown. It was a somewhat gentler term than "forfeited," which was the notion really intended. But the national act, in this case, went beyond even the meaning of forfeiture; for it disregarded the rights of James's Heirs, and appointed another Sovereign. The modern constitutional writer whom we have mainly followed in our historical survey, says, on this occasion*, "It was only by recurring to a kind of paramount, and what I may call hyper-constitutional law; a mixture of force, and regard to the national good, which is the best sanction of what is done in revolutions; that the vote of the Commons could be defended. They proceeded, not by the stated rules of the English Government, but the general rights of mankind. They looked not so much to Magna Charta, as the original compact of society, and rejected Coke and Hall for Hooker and

* Hallam, *Eng. Const.* III. 134.

Grotius." As we have said (897), Revolutions cannot be justified by stated Rules of Government, but must be defended as Cases of Necessity. The defense of the Revolution of 1688 was, that the constitutional liberty and national independence in matters of religion, which by the historical education of Englishmen were become necessary to their moral agency and moral progress, could not subsist under princes whose views of the national constitution and national religion were those of the Stuarts: and the proof of this incompatibility, which had been gaining strength ever since the accession of James I., was completed by the last acts of James II. A Revolution of which this is the true defense, conducted calmly, resolutely, and peaceably, to its object, may very fitly be called *Glorious*.

925. This great occasion of the assertion of the liberty of England was signalized by the *Declaration of Rights*, which gave judgment on the past, and maxims for the future acts of the crown. It contains a recital of the arbitrary acts which James had committed, and a condemnation of them as illegal. In this important act, it is declared: "That the pretended power of suspending laws, and the execution of laws, by royal authority, without consent of parliament, is illegal: That the pretended power of dispensing with laws by royal authority, without consent of parliament, is illegal: That the Commission for creating the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of the like kind, are illegal and pernicious: That levying of money for or to the use of the crown by pretence of prerogative without grant of parliament, or for longer time, or in other manner than the same is granted, is illegal: That it is the right of the Subjects to petition the King, and that all commitments or prosecutions for such petitions are illegal: That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is illegal: That the subjects which are protestants, may have arms for their defense suitable to their condition, and as allowed by law: That elections of

members of parliament ought to be free: That the freedom of speech, or debates in parliament, ought not to be impeached, or questioned in any court out of parliament: That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted: That juries ought to be duly empanneled and returned, and that jurors which pass upon men in trials of high treason ought to be freeholders: and That for the redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held frequently." This Declaration was confirmed by the *Bill of Rights*.

926. After the Revolution, the Constitutional Liberty of England seemed to be sufficiently secured; and was so: yet the care of parliament was still employed in devising and enacting further Securities. The appropriation of the revenue by Parliament was carried into further detail, by the separation of the Civil List, and of the Navy, Army, and Ordnance Department, from each other. "This measure has given the House of Commons so effectual a control over the executive power, or more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for*." The *Mutiny Bill* also, by which alone martial law can be administered in the army, was from this time passed only from year to year.

927. The *Act of Settlement*, by which the Electress Sophia, after the death of Queen Anne, was declared to be the stock of the Royal line, contained further provisions, intended to secure the nation against arbitrary acts of the Court: especially the exclusion of pensioners, and many of the officers of the Crown, from parliament; and the protection of the independence of the Judges, by making their commissions continue *quamdiu se bene gesserint*, during life or good behaviour, instead of *du-*

* Hallam, *Eng. Const.* III. 159.

ranto bene placito, as long as the crown chose, which had been the practice.

928. Thus, so far as Parliament was the guardian of the National Liberty, the cause of liberty was fully vindicated; and the doubt might occur, whether, according to the Constitution so modified, Parliament might not sometimes be led, by some special object, to interpose its power so as to obstruct the acts of the crown, and to make government impossible. Order seemed to have been sacrificed to Liberty. But this was not the case. The balance between Order and Liberty was preserved by the struggle which took place within the boundary of Parliament itself. The Influence of the Crown and of the Aristocracy was in that field exerted in favour of Order; and with more steadiness and care, than can be expected, on that side, from the Democracy. The efforts of the Democracy soon began to be directed to diminish or extinguish this Influence. One of the points, which thus came into conflict, was the mode of electing the Members of the House of Commons. By the theory of the Constitution, as it had been commonly stated, these Members were the Representatives of the Common People; but the advocates of popular Rights asserted that in fact, they were not so; and that the House of Commons ought to be *reformed*, so as to bring the fact into nearer accordance with the theory of Representation.

929. By the ancient Constitution, the House of Commons was supposed to contain representatives of all the parts of the Empire which were subject to English laws and parliamentary burthens. Henry VIII. extended the right of election to the whole of Wales, the counties of Chester and Monmouth, and even the towns of Berwick and Calais; and thus added thirty-three members to the Commons*. Edward VI. created fourteen boroughs, and restored ten, that had disused their privilege. Mary added twenty-one, Elizabeth sixty, and James twenty-seven members. But the design of

* Hallam, *Eng. Const.* III. 50.

the great influx of new members from petty boroughs, in these later reigns, seems to have been to secure the authority of government, which such members were likely to support, rather than to follow out a democratic principle of the Constitution.

930. Four different kinds of Electors of the Representatives of Boroughs appear in our Constitutional History. (1) *Members* of Corporations; the municipal magistracy or governing body of the incorporated place; (2) *Freemen* of Corporations, to whom the elective franchise was given by charters of incorporation; (3) Electors by *Burgage Tenure;* where the right was annexed to certain freehold lands or burgages, and did not belong to any persons but such tenants; (4) The inhabitant householders paying *scot and lot*, which include local and general taxes. This was the original form of the right as enjoyed by Boroughs in the time of Edward I., and was applied to all of a later date, where a franchise of a different nature was not expressed in the charter.

931. These varieties in the elective franchise, the various growth and decay of ancient Boroughs, and in some cases the rise of insignificant hamlets into great and wealthy towns, have at all periods produced great deviations from regularity and consistency, in the representative structure of the House of Commons. So long as the struggle of the House with the Crown was an external war, these irregularities were not considered as very prejudicial to the cause of Liberty. Taking the House altogether, the various classes of the Community were virtually, if not actually, represented, as to their interests, arguments, and purposes. But when the battle between Authority and the claims of a larger Liberty was to be fought within the body of the Commons, the mode of electing the individual members became a matter of great moment in the struggle. Those who wished to enlarge the Liberty of the People demanded a Reform of the Parliament, a correction of the Anomalies of its composition, and a more faithful application of the Principle of Representation. Such reforms in special

cases would have been consistent with previous history; but the establishment of a new Rule for all cases, was giving a new basis to the House of Commons, and was resisted as a perilous experiment, by the adherents of the ancient forms of Authority. The act for such a new basis of the House of Commons was, however, carried in 1831. In the preamble it is stated to have for its objects "to deprive many inconsiderable places of the right of returning members, to grant such privilege to large, populous, and wealthy towns, to extend the elective franchise to many of His Majesty's subjects who have not heretofore enjoyed the same." By this Act, the voters for Knights of the Shire were to be, in addition to the old electors, the forty-shilling freeholders, copyholders to the extent of ten pounds a year, and other tenants to the extent of fifty pounds. The voters for Boroughs were to be persons occupying a house in the borough of the value of ten pounds a year. A number of boroughs (sixty) were disfranchised as inconsiderable places; the criterion adopted being, that the population was less than 2000. A number of other boroughs were allowed only one member, the population being less than 4000. Instead of two members to each county, there were assigned to some of the more populous counties three, to some, four, according to their importance. To towns containing more than 10,000 inhabitants, one representative was given; and two to places which had 20,000 inhabitants or more.

932. This is now the condition of the electoral franchise. The passing of the Act by which it was established is perhaps the largest attempt ever made at once to bring the Constitution nearer to a theoretical symmetry; but it is to be recollected, on the other hand, that the deviations of the composition of the representative body from the representative principle had become enormous. One caution, however, is suggested to the admirer of the English Constitution by this circumstance; In proportion to the largeness of the step made in the Reform Bill, should be the length of time which is allowed to elapse before any new Move-

ment of an extensive nature is attempted. The New Part of the Constitution must have time to incorporate itself with the Old, before the body politic can bear with safety any new experiments. It may be that the Constitution has in this case drawn in a new life by a deep draught of the cup of Liberty; but it is requisite for the health of the nation that this strong potion be allowed time to assimilate with the system, before the draught be repeated.

Chapter X.

DUTIES OF THE STATE IN GENERAL.

933. We have stated (377) that the State is a moral Agent: it has Duties; as Duties of Justice, Truth, Humanity and the like. It has also a more general Duty; the Duty of the Moral Education of its citizens. We must now consider further these Duties, and the means of performing them.

Some persons may be disposed to say, that the only Duties of the State are the Duty of protecting the Persons, the Property, and the other material interests of its citizens. And it is true, that all these Duties are Duties in a more rigorous sense than the Duties of Humanity, and the like; they are *Obligations* of the State, and are included in the Obligation of upholding the Laws (790). But the practice of States, in all tranquil and cultured times, has pointed out other Duties of another kind, as belonging to them. If the protection of Person and Property be the stricter, they are also the lower Duties of States: and States in general have recognized higher Duties, in addition to these. They have recognized the Duty of paying their debts, a Duty of Justice; they have recognized the Duty of keeping their Treaties, a Duty of Truth: they have recognized the Duty of preventing Cruelty and Oppression, as in the prohibition of the Slave-trade,

a duty of Humanity: they have recognized the Duty of prohibiting obscene and indecent acts and publications, a Duty of Purity: they have recognized the Duty of assisting and rewarding the progress of science and literature, as for instance, by means of Universities, Observatories, Voyages, and the like, a Duty of Intellectual Culture: finally, they have very generally recognized the Duty of morally Educating the young, of punishing and suppressing immoral books, and of uniting the citizens in general by the ties which common moral instruction produces; and this is a Duty of Moral Culture. I purposely abstain now from speaking of Religious Culture.

934. If any one were to assert the protection of Person and Property to be the sole duties of States, we should ask, whether he asserts the States to have done wrong, which have recognized the Duties above enumerated. Perhaps some would answer that some of the above Duties, as paying National Debts and keeping National Treaties, are necessary to a good understanding with other Nations, and therefore, necessary to the Duty of national Self-defense, which is a duty of the State in the strictest sense. To this we must reply, that to pay debts and observe contracts, without any love for Justice and Truth, and merely for the purpose of being trusted, is to have a lower standard of Morality than can satisfy most men, even when applied to the State. But we add, that the answer does not apply at all to the instance of Duties of Humanity performed by States, as in the prohibition of the Slave-trade; nor to the other Duties mentioned. If the only Duties of the States are the protection of the Persons and Property of the Citizens; then the suppression of cruelty towards defenseless foreigners, the suppression of profligacy and mere vice at home, the encouragement of art, science, and literature, in all their higher forms, the education of children, and of all, except so far as teaching them the Law, must be proceedings with which the State has nothing to do; and those States which have employed themselves in aiming at such objects by Laws,

or by the expenditure of the national wealth, have been altogether in errour.

935. The necessity of the State undertaking such Duties, in addition to the Obligations of protecting person and property, may be further illustrated. If we suppose a State which undertakes to protect the persons and property of its members, but disclaims all higher Duties of Humanity, Purity, and the like; the members, when they have attained to a moderate degree of moral culture, will not be satisfied with the range of action of the State; and will not acquiesce in the State, as the highest representative of their common action. They will form themselves into Associations for purposes of Justice, Humanity, and other similar objects. These Associations may become so numerous and united, as to elect the magistrates, control the national acts, change the laws, or defeat their execution, and the like; and thus, may be something exercising higher powers than the State, and reducing that which is formally the State, to a mere mode of action of these Associations. Moreover it is probable that Associations thus bound together voluntarily by a sympathy in Justice and Humanity, will become so powerful as to control or direct the acts of the State, if their Standard of Morality is much higher than that by which the State acts; and if they, consequently, look upon the formal course of action of the State with no approval or sympathy. For instance, the State may give its members property in slaves; but if the general body of individuals have arrived at a point of Moral Culture in which they look upon Slavery as unjust and inhuman; when a man seeks to obtain possession of a slave by course of law, witnesses, judge, and jury (or some of these), will probably act so as to evade, or even to contradict the law; or the law will soon be altered. Perhaps even the Association may be powerful enough to compel the nation to interfere in behalf of slaves of other countries; and thus, in such a case, the voluntary Association, and not the Body which is formally the State, acts as the Nation. And in the same manner, if the State do not attempt to give to the young

a moral education, there may be Associations which undertake to do this; and such Associations, as part of their teaching, may inculcate the injustice or inhumanity of the existing laws. Thus, so far as their teaching is effective, these Associations may produce fundamental changes in the laws, and may direct the National Action in some of the most important points. But further: Moral Education must necessarily depend upon Religion, and will always take the form of Religious Education. Men cannot think much of their Duties, and their Destination, without being led to think of, and to adopt Religion. Religion binds them into Associations, in which they have common convictions, and common privileges, which they earnestly wish to transmit to their children, and to others whom they love. If Classes and Bodies, charged with such objects, be not involved in the composition of the State itself, Societies will be formed, as an addition to the State; and these will exercise such power, that the State will be subordinate to them, or will be destroyed by them. In the history of States we have many instances of a Religion, independent of the State, displacing the Religion previously adopted by the State; though the latter has exerted the formal powers of the State in its defense. In several such cases, the struggle between the old and the new Religion has been long and obstinate. But then, the main strength of the defense of the old Religion lay in its being a Religion, satisfying in some degree men's religious needs, and binding them to its cause by religious ties. If the struggle were between a new Religion and no Religion in the State, the success of the Religious Association in obtaining its ascendancy over the State would be, we cannot but suppose, much more rapid. It may, indeed, happen, that in consequence of the existence of several rival Religious Associations in the State, no one of them obtains a complete Ascendancy over it. In this case, the power, which the Religious Associations in every State possess, is not extinguished, but divided and balanced. But even in this case, Statesmen will find it necessary to recognize, on the

part of the State, those Duties, which all the kinds of Religion agree in enjoining. And thus, the State cannot omit to recognize its higher Duties, without putting in the hands of those who do recognize such Duties, the means of combining men into Associations more powerful than the State; the means of converting the State organization into their instrument; the means of acting for the Nation in spite of the State.

936. The necessity of a State recognizing its higher Duties, and especially the Duty of imparting or confirming the religious instruction of its members, appears also by considering the Right of imposing Oaths, which, as we have said, is exercised by all States (781). By the imposition of Oaths, the citizen's Obligations are identified with his religious Duties; and the State relies upon this identity, as necessary to give it a real hold upon men, and to make them do its business in a sincere, serious, and solemn spirit. If the State cannot obtain this result, it will necessarily tend to dissolution. But religious Duties can have no force for men who have no Religion. The State therefore, in order to provide for its own preservation, must maintain the Religion of the citizens in such modes as it can; for instance, by the religious education of the young, and by arrangements for keeping up the religious convictions and religious sympathies of all. If the State do not, by such means, or by some means, keep alive the religious convictions to which it appeals in the Oaths which it imposes, the Oaths will be rejected, or regarded as unmeaning. In such a Case, men, thinking lightly of Oaths, will think lightly also of Duties and Obligations; and the State will be dissolved by the destruction of all the ties which bind its members to it. Or else, such Oaths will be looked upon as a sinful profanation of true Religion; religious men will refuse to take them, and will give all their efforts to the support of their own Religious Association, which is opposed to the Religion of the State; and thus the actions of such men will tend to destroy the Religion of the State, and perhaps the State itself. It may, indeed, happen, as we have just said,

that there are several rival Religions in the State; and in this case, there are especial difficulties in employing Oaths for the purposes of the State, and in keeping up the religious convictions which give Oaths their force. In this case, if all the Religions allow that obedience to the Civil Authorities is a religious Duty, Oaths may still be employed, to promote the lower aim of the State, its own preservation; but the higher aim of the State, the moral and intellectual culture of its members, will necessarily be pursued under great disadvantages; for the moral and intellectual culture of men cannot be prosecuted without employing Religion; and Religion can be employed for such purposes, only by accepting it as true. The State therefore cannot employ, for its higher purposes, Religions which contradict each other; and in such a case as we have spoken of, the State may be prevented from pursuing its higher purposes at all; or may be much impeded in doing so. But even in such cases, the State has those Duties which all the rival Religions agree in recognizing; and has, besides, the Duty of promoting moral and intellectual culture, in conjunction with the true Religion, as far as circumstances permit.

937. Thus, in all cases, States have Duties. The Duties of States may be arranged under the same heads which we have already had before us. Besides the Duties of Order, by which, especially, the State is the State, there are Duties of Justice, Truth, Humanity, Purity; and there is also the higher and more comprehensive Duty of moral and intellectual Self-culture. The State obtains moral and intellectual Culture for itself, by obtaining it for its members. And thus, the highest and most comprehensive Duty of the State is the moral and intellectual Education of its members. This Duty, as belonging to the State, modifies, in an especial manner, its other Duties; and must be considered in conjunction with all of them, as we shall have occasion to see.

Chapter XI.

DUTIES OF THE STATE—JUSTICE AND TRUTH.

938. The Duties of Justice and Truth, as belonging to States, point out the same course of action which they point out for individuals: they direct the State to abstain from infringing the Property or Rights of other States; to pay its Debts; to observe its Treaties; and the like. In these instances, the Duties have analogy with the Legal Obligations, rather than with the Moral Duties of individuals; and accordingly, these Duties are the subject of an especial branch of Law or *Jus*; which we may term International Law, or *International Jus*, and which we shall treat of afterwards.

939. But the Duties of Justice and Truth, as belonging to the State, have also their Sphere of Action within the State; they require, for instance, that both the Laws, and the Administration of the Laws, be conformable to Justice and Truth. We have already stated (397) a general Maxim of *Justice*, which applies especially to Legislation: namely, that Justice requires us to aim constantly to remedy the inequalities which History produces. And this maxim applies to all the matters with which Law deals; to personal Rights, to Property, to Education. In these matters, Justice does not require Equality. Any attempt to establish Equality would tend to destroy all Property, all Law, and all Right; for if Rights be permanent, their permanent subsistence will produce Inequality. But Justice aims constantly to remedy Inequality. Hence Laws should aim continually to enrich the poor, to strengthen the weak, to elevate the low, to instruct the ignorant. But they should do this, in such a manner, as not to shake at all the permanence of Rights. They should enable the poor to enrich themselves, the low to rise, the ignorant to learn, by the use of their own Rights, and without trespassing upon the Rights of any other

Class. Just Laws will not transfer Property from one Class to another, merely in order to restore equality. Just Laws will not direct the poorest to be educated in the same degree as the richest. But Just Laws will not allow a condition of the community, in which any Class is condemned to a degradation, or poverty, or ignorance, from which they cannot escape. Just Laws will provide openings for the rise of the lower ranks into the place of the higher, as soon as they become fit for such a rise; and will assist such an event, by promoting, among the higher ranks also, such views as will make them regard this event, not as an evil, but as a good.

940. The regard of the State for the Duty of *Truth* will be shown both by the simplicity and sincerity of its own proceedings, and by its encouraging and promoting this Duty in individuals. For instances of the former kind, we may take the abolition of legal fictions and the removal of forced constructions of old laws by means of improved laws. Such steps make the language spoken by the State more true. Yet in the case of States, much more than in the case of individuals, we must take account of the Conventions (297) by which words, phrases, and processes, acquire a meaning different from their obvious meaning. This is more necessary in the case of States, because it is impossible for States to accommodate their language to each case, as individuals may do. States must act by stated forms of procedure and language, in which forms a complex multitude of interests are implied; and any alteration of the forms, since it will require a consideration of all these interests, and an agreement upon the alteration by the legislating bodies, cannot take place frequently and lightly, nor ought it to do so. Legal fictions, and forced constructions of the language of old laws, cannot be altogether avoided. They have existed in all countries in which laws have long subsisted; and to attempt to avoid them entirely, would be to make the legislator instantly conform to all changes, however capricious, of language and practice. Law Language, and Law Forms, must have an antiquated cast, for this reason;

that they must have in them a principle of steadiness and permanence beyond our daily speech and common manners.

941. The State promotes and inculcates the Duty of Truth in individuals, by requiring from them a punctual and faithful performance of Contracts and other Engagements. Yet here also, the consideration of other Duties comes in; and limits, in some degree, the extent to which the State insists upon the performance of Engagements. We have seen that the Roman Law did not compel the performance of a *nudum pactum* (703), a mere promise made for no reasonable consideration; and that the English Law takes the same course. The Law will not, for instance, in general, sanction or enforce an engagement to win and lose money according to the events of a game of chance. To insist upon the performance of such engagements, would be to encourage a reckless spirit, which loves to depend upon casual superiority, or upon mere accident, rather than on rational foresight and self-guidance. The State, in such cases, teaches its citizens that Property is a Trust of more value than the Veracity of such rash and reckless promises. The State, in doing this, does not slight the Duty of Truth; on the contrary, it sometimes condemns the whole proceeding, by making such Gambling a crime. Besides; such engagements are so frequently and so naturally connected with Fraud, as well as Folly, that Honesty, as well as the rational use of Property, would be damaged by the legal recognition of such Engagements.

942. In another kind of Engagements, Promises of Marriage, the Law teaches the Duty of Truth, by punishing the violation of the Promise; and sometimes, even when it has not been made in express words, but only implied in the general course of the language used between the parties. And though, here also, there may be room for Mistake or Delusion; to punish the Levity or Duplicity which can trifle with so serious a matter, is a moral lesson which it becomes the State to give.

CHAPTER XII.

DUTIES OF THE STATE—HUMANITY.

943. THE Duty of Justice on the part of the State is universally allowed: that the State has a Duty of Humanity, is perhaps not so generally understood. But we have seen (412 and 418), in speaking of Justice and of Humanity in general, how near the Duties belonging to the two approach each other, and how difficult it is to draw the boundary line. It is a Principle of Humanity, and, in an extended sense of Justice, a Principle of Justice also, that all men should possess the Natural Rights of man; namely (418) the Rights of Personal Security from violence; of Sustenance and Property so far as is requisite for moral agency; and of Marriage. Such Rights, in every State, are actually possessed by the citizens only so far as the Law allows them; but the question now before us is, what the Laws *ought* to be; what Civil Rights it is the State's Duty to give to its citizens.

944. We have already seen (426) that the existence of Slavery is contrary to Morality. Such a condition of the community is a violation of the Duty of Humanity which belongs to the State; and wherever it exists, Humanity requires that the State should take steps towards its abolition. But we have also said (434) that the abolition ought to proceed by legal and constitutional means; and must often be attained only by many steps, and by slow degrees. Still, it must be again repeated; delay in this course can be tolerated by the Moralist, only so far as it is inevitable. Every State which acquiesces in the existence of Slavery among its members, as a permanent and stable condition of things, neglects the great Duty of Humanity, which is incumbent upon States as upon individuals. A State cannot neglect such Duties, without divesting itself, to an extent shocking to all good men, of its moral character, and renouncing its hope of that moral progress which is its highest purpose.

945. Slavery involves the denial of all Rights to the man, and especially of the Right of security from arbitrary personal violence, and the Right of Property. But even in States where these Rights are allowed by the Law to all, it often happens that there are Classes of persons who do not practically enjoy them. With regard to the Right of Sustenance, and such Property as is requisite to make the man a moral agent, there are large bodies of the people, even in States conspicuous for their general freedom, who hold these necessary means of moral being very precariously, and occasionally lose them altogether. Men perish of hunger in opulent cities. Many are mendicants, who are supposed to have nothing of their own, and depend for sustenance upon the casual bounty of their fellow-citizens. Many, belonging to the industrious classes, are frequently destitute; though willing to work, they can find no one to hire them, and they have expended all their previous earnings. Does the Duty of Humanity in the State admit of its tolerating the existence of such things? To pass by the Right to sustenance, in cases of extremity, which, as we have seen (700), the Humanity of the old law of England allowed, is it possible for the State to put an end to Mendicancy and Destitution? and if this be possible, is this the Duty of the State?

946. We find, in this case also, other Duties of the State which may interfere with the Duty of Humanity, and may limit or prevent its operation. It is the Duty of the State to leave room for the exercise of the Humanity of individuals; for this is an important part of their Moral Culture. If the Beggar obtains alms on which he can live; if the poor Labourer be supported through his seasons of destitution by the benevolence of his richer neighbours; the men so provided for are not degraded from the rank of moral beings; and the givers are probably morally improved by what they do. Such dependence of the poor upon the rich, has existed in all communities; and it is not necessarily contrary to the Duty of the State to tolerate such a condition of things, which includes the means

of a valuable Moral Culture of Benevolence. Moreover, it is the Duty of the State to teach Foresight and Thrift to the poor, as well as Benevolence to the rich. Beggary, destitution, and want of work, may arise from improvidence, carelessness, prodigality, idleness, and perverseness. By letting the consequences of these bad habits fall upon those who are guilty of them, the State teaches useful lessons. If the State were to maintain in comfort all who chose to beg, or all labourers who remained unhired, the produce of the labour of the industrious and provident would be given to the idle and improvident; and this might proceed to such an extent, as to destroy the rewards of labour and the value of property.

947. But if it appear that the destitute are not provided for sufficiently by the benevolence of individuals, what then is the Duty of the State? If, when room is thus left for the Humanity of the rich to act, it appears that there is still a large class of starving poor, what is the course to be taken? If benevolent individuals do much, but still not enough to prevent the existence of extreme distress among numbers of men, is it the Duty of the State to do the rest? And if so, how is this Duty to be limited, so as not to interfere fatally with the other Duties of the State which we have mentioned? Ought there to be a State Provision for the poor? and if so, upon what Principles?

948. To the first of these questions the Moralist must needs reply, that taking the case as here supposed, the spontaneous bounty of the rich being insufficient to keep the poor from starvation, it is the Duty of the State to interpose, and to make, by taxation, or in some other way, a provision which shall save them from the extreme of want. This is a Duty of Humanity on the part of the State in any case. If the deficiency of private bounty arises from the want of benevolence towards their poor neighbours on the part of the rich, it is the business of the State to be humane for the rich, both in order to discharge its own Duty, and to teach them theirs. If the prevalence of distress arise, not so much from

men's wanting the benevolence to relieve the distress which is brought before them, as from the multitude, density, and variety of the population, which conceals large classes of sufferers from the eyes of their fellow-citizens; it is then proper that the State should be humane for all and towards all, in order to supply, for the benevolent citizens, that which they cannot do for themselves: for the State has the means of reaching all classes; and can diffuse relief more widely than private givers can.

949. With regard to the Principles on which such public Relief is to be given, we may remark; First, that the Relief ought always to be contemplated as *temporary*. For the object of humanity is, that the man be preserved as a moral agent; but man, in a state of unlimited and hopeless destitution, is not capable of moral agency. He has not the means of self-guidance and advancement, which are requisite to his moral being. If a man, by accepting public relief, is placed in a condition in which there is a permanent bar to his becoming again an independent and thriving labourer, the object of humanity is defeated, and the man is reduced to a kind of servitude. Hence, it would be a mistake to require a man to sell or part with the tools of his trade, or the furniture of his house, before he receives public relief: for the want of these things will be a most serious obstacle to his resuming his character as an independent workman. On the other hand, in order that the State may not teach lessons of improvidence and idleness, it is necessary that the public relief be given on harder terms than the wages of independent labour. For the poor must be taught to earn their subsistence independently, as long as it is possible; and to recur to public charity, only in cases of necessity. These conditions appear to be satisfied if we make public relief come to the labourer, in the shape of wages for labour at some public work; the wages being smaller than those of the independent labourer, and yet sufficient for subsistence. In such a system, it may be supposed that men would claim public relief, only so

long as it was necessary; and would gladly return to independent labour, as soon as it was possible; while at the same time, relief to the extent of necessary subsistence, would always be within their power.

950. There can hardly be much difficulty in devising works which might be so conducted; especially if it be recollected that the question is not, whether such works will pay for the labour, but whether they will pay better than supporting the labourers in idleness. As instances of such works, we may mention making and repairing roads, harbours, canals, leveling obstacles, reclaiming wild land, draining morasses, building public edifices, ships, and the like.

951. It may be a question whether the relief of *Paupers* (as poor persons relieved by the State may be termed, for the sake of distinction) should be administered by the general Government; or whether the paupers belonging to districts, as Parishes, should have relief administered each by his own Parish. The latter scheme appears, at first sight, better suited, to make the relief—both a lesson of humanity to the givers, since it is bestowed on their neighbours, whose distress they know—and a lesson of industry and economy to the receivers, since, if they are idle and improvident, their neighbours, who know their conduct, will be disposed to show them less favour, in the public relief which they give them. If indeed there be a *Poor Law*, which gives the unhired labourer a Right to a sufficient relief, whatever be the judgment which the Parish Officers form of his willingness to work, the relief may be considered by the givers as an unmerited boon, and by the receivers as an undeniable right; and thus, may produce unkindly feelings on both sides, while it encourages improvidence and idleness as much as the most ineffective benevolence would do. On the other hand, humanity rejects the notion that the destitute should have no right to a subsistence. A mode of avoiding these opposite inconveniences, retaining the administration by Districts, appears to be that already mentioned; the employment of the unhired labourers upon a public work, at wages

below those of the independent labourer, and yet sufficient for subsistence. But here an inconvenience of another kind may come in. If the administrators of the poor-laws be also the employers of labour, they may agree to employ the unhired labourers upon their private work, instead of public work; and may, thus, bring them into competition with the independent labourer; they may thus lower the wages of all, while they pay a part of the wages of their private work out of public funds. This might be remedied, if there were in each parish, or in each district, a work really public, and if the independent labourer were always at liberty to seek work there. For then the employers of labour would always be compelled to give to labour the wages which it deserved.

952. But this plan is applicable, only when the number of persons to be provided for out of public charity is small, compared with the whole number of labourers. If a large portion of the labouring population were to ask for public relief, the condition of the community must be considered diseased: for by our supposition, public relief supplies only a bare subsistence; and, while it lasts, takes away a man's free agency, and suspends his moral advancement; besides which, it might be difficult to find in every district an unlimited supply of public work. In such a case, when great numbers of the poor are unemployed, what is the State to do?

953. We may remark, that there appears, at least at first sight, to be a tendency to such a state of things, in consequence of the improvements constantly going on in the productive powers of labour, and especially of agricultural labour. Our rural districts employed more labourers in ancient times, when a rude husbandry raised a scanty produce, than they do now. The produce of the land is much greater, but the portion of it assigned as wages to the agricultural labourer is smaller. The surplus goes to the Farmer as Profit, and to the Landlord as Rent. And this arises, generally, not from any want of humanity in the Landlord or in the Farmer

but from the progress of agricultural improvement. If the Landlord diminish his Rent, the Farmer puts the allowance in his pocket. If one Farmer pay his labourers higher wages, or employ a greater number, the Relief to the general body is small: for the general rate of wages will be determined, not by considerations of Humanity, but by the operation of the Demand and the Supply of Labour. We cannot expect a universal agreement among the Employers of Labour to increase the amount paid in Wages. A great number of them could not do this, without annihilating their profits, and subjecting themselves to positive expense; and if partially done, it would produce little effect beyond a rush of labour from one employment to another. Hence, the State cannot require that men should show their Humanity by lowering their Rents, or their Profits, or increasing the Wages which they pay. It may be well that individuals should do this; both as an exercise of humanity, and of moderation with regard to wealth. But the nature of such self-discipline requires that it should be spontaneous, and unforced by external control. The State must leave Rents, Profits, and Wages, to be regulated by their appropriate influences.

954. What then is to be done with regard to the numbers who may be expected to be thrown out of agricultural employment by the improvements in agriculture? If we consider what form of society would be ideally the best under such circumstances, the system which we should picture to ourselves would seem to be something of this kind. We should conceive that, while the poor portion of mere labourers, actually required, was constantly diminishing, the structure of society, both with respect to the conduct of the powers of labour, and the habits of domestic life, should change, so as to provide many new ranks and stages in the community, on which men might stand; and many new employments, by means of which they might obtain their share in the increased sustenance and comfort produced by the improvements in labour. Instead of merely the Landlord cultivating his own acres, with his

Hinds and Labourers under him, in home-made clothing amid home-made tools and instruments; we may have many classes arising between these two, each living in some degree of comfort, and even ease. The Farmer steps in between the Landlord and the Labourer. He employs the Wheel-wright and other makers of agricultural implements; the Corn-dealer; the Carrier. His attire is furnished by Growers, Spinners, Weavers, Clothiers of various kinds. His house is furnished with implements of wood, iron, brass, silver, gold, glass, porcelain. The manufacturer or tradesman, who supplies each article, has many men working under him, and is himself surrounded by the like luxuries. There are many gradations of tradesmen of each kind; many manufactories subordinate to each tradesman, many tradesmen to each manufacturer. Classes so complex require many persons to facilitate and regulate their intercourse; Brokers; Factors; Notaries; Men of Law; Commercial Travelers; and all these classes, thus introduced, are, in gains and habits, much above the mere labourer. And thus, so far as the growth of these employments goes, there is a constant opening for those who are no longer needed as labourers. When the proportion of mere labourers in a community diminishes, in consequence of improvements in the art of labour, it is not that any are extinguished or extruded; a portion, who, if the state of the community had continued unchanged, would have been labourers, are elevated into something more. There is a constant current upwards, in a thriving society; and the multiplication of intermediate classes provides for the increasing distance between the highest and the lowest. The agricultural classes produce food for an increased number of persons in addition to themselves; and the multiplied occupations bring forward persons who receive their share with advantage to all.

955. We have evidence that in England the advance of which we here speak has gone very far, in comparison with most countries. In all other countries, the agricultural classes are the largest share of the popula-

tion. In France, for instance, they are two-thirds of the whole. *Two* agriculturists support *one* non-agriculturist, besides themselves. But in England, the non-agricultural is twice the agricultural population. *Two* agriculturists support *four* non-agriculturists*. And these four receive their support, as members of some or other of the various trades and occupations which have gradually grown up, amid the increased activity and multiplied bearings of our industry.

956. I have spoken of the increase of the productive powers in *agricultural* labour, because that labour belongs to the earliest condition of mankind, and is always the most indispensable. But improvements may be made in other kinds of labour also, by which its powers may be increased, and at least for a time, a number of persons may be thrown out of work. And this is more likely to happen in manufactures than in agriculture; because improvements are always slowly and gradually introduced in agriculture, but in manufactures often suddenly and rapidly. But on the other hand, the desire for manufactured goods may be extended much further than the desire for food, which is confined within moderate limits; and therefore, it may often happen, that when a body of labourers have been at first thrown out of work, by some improvement in manufactures, which dispensed with their labour, they may have been again absorbed by the manufactories, in order to provide for the increased sale of manufactures to which the diminished prices had given occasion.

957. But we can hardly venture to assert that the multiplication of trades, and the extended use of manufactures taken together will always provide an adequate employment and subsistence for the numbers thrown out of work by the improvements in agriculture and manufactures. And even if agriculture be unprogressive, and manufactures of small amount, the numbers of the people may multiply so that it is difficult for them to procure subsistence. If this happen, under a

* Jones, *On Rent*, p. 230.

Government in which the sense of Duty is not unfolded, or in one in which it is rejected, the people will be left to struggle with their needs for themselves; and the hard discipline of want or famine, will limit their increase, or dispose of the superfluous numbers.

958. It has been sometimes said, that when the number of the labouring population are too great, it is the consequence of their own improvidence; that they ought not to marry and produce children except they have a reasonable prospect of being able to support them; that they have the remedy in their own hands; since, by abstinence from marriage, they may limit their numbers, and reduce them to that amount for which the condition of society has need, and which it will willingly support.

959. But this, though sometimes said by very humane persons, appears to be contrary to all consistent humanity. To expect that the labouring classes shall, by general consent, take the course thus recommended, is to expect that they, the most ignorant and helpless class, shall act for the State; and shall act with more foresight, combination, and self-denial, than any State has even yet acted. And if it be merely meant that each poor man should, for himself, act thus; it may be true, that such Forecast is a Duty; but to this may be opposed in many or most cases, other Duties; the Duty of chastity and the Duty of promoting the happiness of those we love. For it can hardly be meant that a poor man shall never love. We may add, too, that when a man looks to little more than a subsistence for himself and his family, he may, under the influence of love and hope, frequently reckon upon so much when he does not find it; and often his destitution may come by some change which no forecast could have divined. But supposing there be a great number of unemployed poor who have neglected such duties as these; still the question recurs, What is the State to do respecting them? To say that they have neglected their Duty, besides being of no use in pointing out the remedy for the evil, has the fault of being a one-sided censure. For it is equally probable that their richer neighbours also

have neglected *their* Duty; in not employing them for humanity's sake, as well as for the sake of gain; in not warning and superintending the poor; in not helping them at an earlier period; and the like. And both parties being thus to blame, there appears a kind of cruelty in applying the censure to the party who are already suffering the consequences of their fault, in the bitterness of want and destitution, and with no power of deriving present relief from the course suggested to them.

960. To the question, What is the State to do in such a case? we reply, that if the number of the destitute be so great that they cannot be employed upon public works at home, as we have suggested, it appears to be well worth consideration whether a number of them might not be encouraged to emigrate to some foreign country, uninhabited or slightly cultivated, in which their labour might procure them an abundant subsistence. Such Colonies have, in all ages, been frequently established as a vent for the overflowing population of a State; and in most instances, with mutual benefits to the Mother Country and to the Colony. Such lands are easily found, and may be occupied for such purposes, with a just regard to the claims and interests of the original inhabitants.

961. But though the Emigration of labourers may thus be a highly beneficial resource, if there be a temporary superabundance of that class, and no vacant occupation for them at home; it appears very doubtful whether the State ought to reckon upon Emigration as an habitual resource against the evils of a too rapidly growing population. So far, indeed, as Emigration is the spontaneous act of individuals, it belongs to the habits of the people and is taken into account by families, and heads of families, in forming their scheme of life. But an Emigration on a large scale, conducted by the State, and composed mainly of destitute persons, makes too abrupt a change in the community to be entirely wholesome, and must needs be an expensive mode of providing for the emigrants. For they must be supported, not only on the voyage, but till they can support them-

selves in the Colony. A policy more generally wise, appears to be, to facilitate as much as possible that rise of men from the lower to the higher classes of society by which the lowest are prevented from being too numerous; and to encourage that increased use of manufactures of all kinds, which, as we have said, is the most general resource against the temporary inconveniences arising from increased manufacturing power.

962. I have discussed the question of Poor-laws so far, with reference to able-bodied labourers, because if it be allowed to be the Duty of the State to make provision for them, it will hardly be denied with regard to the aged and infirm. Yet even with regard to these, there are not wanting important considerations which may modify this Duty. It is desirable, as an exercise of prudence and forethought, that labourers, as well as others, should save in the season of health and manhood something on which they may subsist in sickness and in age. It is desirable, as an exercise of family affection, that aged and infirm persons should be supported and nursed by their children and near relatives. If the State be too ready to take upon itself the burthen of aged and infirm persons, children may feel less responsible for the comfort of their aged parents; parents, for that of their sick children; and other members of families, in like manner, with respect to each other: and thus, the family affections may be chilled, and family claims disregarded. And this danger is so far worth attention, that if a parent, or child, or wife, or husband, of persons who have enough and to spare, apply for public charity, the State may properly reject the claim, and cast the applicant upon the care of his relatives; not relieving him except when his necessities have stamped his relatives with the disgrace of want of natural affection. And the lesson of the Duty of natural affection, and love of independence for our relatives as well as ourselves, which the State thus teaches, is to be extended as far as may be, even among the poorer classes. If, however, at last there remain aged and infirm persons not duly cared for

by their relatives, they are proper objects of the care of the State.

963. We have been proceeding, all through the argument, upon the supposition that voluntary charity is insufficient to relieve the distress which exists: but in every community, the question may be asked, Is this so? Is legal provision for the poor necessary, because voluntary charity is insufficient? And it has been urged that the connexion may happen to be in the reverse order; that voluntary charity may be insufficient, because legal provision is established. For men, it is said, if they are compelled by law to contribute to the support of the poor, think their Duty towards them quite fulfilled; and will not exercise voluntary, as well as involuntary bounty; but if they be left to the workings of their own hearts, and to the influence of the distress which they witness among their neighbours, they will give kindly, the poor will receive gratefully, and the effects will be better than any which a compulsory provision, a Poor-law, could produce. And this real charity to neighbours, which is exercised in the absence of a Poor-law, will not be confined to the rich; even the poor will give to those who are still poorer than themselves, and all ranks will be bound together by ties of kindness.

964. Whether the State provision for the poor shall or shall not freeze the spontaneous charity of individuals, as here asserted, will depend much upon whether those who are taxed, on this account, look upon the State as acting towards the poor *for* them, or for the poor *against* them. If the former be the case, which is what we have supposed; if the State be looked upon as executing the benevolent intentions of the citizens, and thus, as supplying the inevitable deficiencies which must occur in the practical working of the charity of private persons, however benevolent and however vigilant, there appears to be no reason to fear that the public stream will stop the private sources. We do not find that the State's taking into its hand the enforcement of Ownership or of Contracts weakens men's habits of Justice and

Truth; except that in cases where the Government is hated, men are willing to defeat the administration of the Law. Where men look upon the Laws as conformable to Justice, they readily help to enforce them; and in cases which the Law does not reach, they are the more likely to act justly, on account of their having promoted the administration of justice by the Law. In like manner, if men look upon a Poor-law as humane, and approve it on that account; they are likely both to make the law effective for the purposes of humanity; and when the law falls short of the measure of their humanity, to supply its defects by their own voluntary acts. They are the Nation; the law is *their* law; it is one part of their dealings towards their poorer friends and fellow-citizens, but necessarily one part only.

965. The example of England appears to show that a legal provision for the poor does not extinguish the disposition to spontaneous charity. In this country, all lands and houses are taxed for the relief of the poor; and this tax may be considered as a condition of the tenure of property. And yet there is, perhaps, no country in which there is more spontaneous charity; especially if we include, in this expression, the relief of the poor in the various forms in which it is undertaken by Charitable Societies. These Associations are something intermediate, in their nature, between the State and an individual; and they show, that the humanity of Englishmen does, as we have intimated, look upon the relief given to the poor by the State, as insufficient; and seeks to supply the deficiency, by the agency of supplementary bodies. These Associations, again, do not supersede the Duty and the necessity of individual charity. The charity of each person to his immediate neighbours is especially a Duty; for of their distresses, he sees something, and gives to them because he feels for them. Not only no act of the State, but no participation in Associations, can supersede this Duty, as a necessary part of our Moral Culture. We may add also, that it does not seem likely that individual charity, in addition to the operation of Societies, will ever cease to be needed, or will ever be less needed,

in order to relieve the distress which prevails in various forms. The forms of misery multiply so fast, and the number of the distressed is so great, that charity is never entirely victorious in her struggle with them. Or rather, all the exertions which we make are quite insufficient to bring the distressed part of the people into a condition which our humanity can contemplate with any satisfaction. All that we do, serves to show us, among other things, this; that both the State and individuals must cultivate the Principle of Humanity within them to a far higher degree than they have yet done, in order that their moral condition may correspond to the actual condition of things, and in order that the continued moral and intellectual progress of the nation may be possible.

966. If we can see, even by the light of rational morality alone, the necessity of thus cultivating our Humanity by acts of kindness and bounty to the poor, this is still more strongly brought to our conviction when we take into our account Christian Morality. The teaching of Christ and his Apostles accepts all the precepts of this kind which prevailed among the Jews, and carries them further. Yet in the Jewish Law, bounty to the poor was largely enjoined. The Jews were forbidden to glean their vineyards, and commanded to leave something for the poor and the stranger (Lev. xix. 10). They were directed to lend to their poorer neighbours, even when likely to lose what they lent (Deut. xv. 9). And almsgiving was among them one of the most necessary practices of a good man. Christ exhorted his disciples to carry this practice still further (Matth. v. 42): *Give to him that asketh thee.* He himself was in the habit of giving money to the poor (John xiii. 29). The early Christian congregations made frequent contributions for the poor (Rom. xv. 26; Gal. ii. 10, &c.). And this was often urged as a duty in Apostolic injunctions. The Christians were recommended to lay aside something for this purpose on the first day of the week, according as God had prospered them (1 Cor. xvi. 2). And such a collection on the Lord's day has continued to be a very general practice of Christian congregations, up to

our own time. In England, indeed, it has been generally discontinued; perhaps in a great measure in consequence of the absolute right to relief which the laws gave to the poor. But there appears to be no reason why the Humanity of the State should supersede the Christian Charity of the Congregation. There is, as we have said, abundant room for the exercise of both. We have already seen (496, 508) how strongly benevolence to the poor is urged upon us as a part of Christian Morality.

967. There is another way in which the Laws of some States, and of England among the number, express the humanity of the humane citizens, and teach a lesson of that virtue to those that need it: namely, by forbidding cruelty to animals, and making it penal. This is a remarkable kind of Law, as being a very distinct instance of Laws dealing with manners, as evidence of vicious dispositions, where no Rights are violated. For animals can have no Rights. And if it be said that humane men have a Right not to be shocked by the sight of wanton cruelty, it may be said on the same ground that truth-loving men have a Right not to be shocked by wanton lying; and the like; which probably no one would assert as a ground of legislation.

Chapter XIII.

DUTIES OF THE STATE—PURITY.

968. The Duties of the State connected with Purity are principally those which concern the Institution of Marriage, which is the foundation of the notion of Purity, so far as regards the Intercourse of the Sexes. The State takes the course which the Duty of Purity prescribes for it, when it establishes and sanctions the Marriage Union, punishes Offenses against it, makes it a source of Rights to the married Persons and to their children. But a regard for Purity imposes still other Duties on the State with respect to this Institution. It is the business of the State, aiming at moral purposes, not only to sanction Marriages such as belong to the manners of any stage of society, but also to purify and elevate the conception of the Marriage Union itself. Marriage must be, for instance, a union of the married persons upon equal terms, so far as the conditions of the two sexes allow; with an identification of their interests, and an engagement of permanent and obligatory community of life. The Law teaches this, by prohibiting Polygamy; and by denying the Rights of children to the offspring of mere Concubines.

969. The closeness of the jural and moral union between two married persons may still further be taught by the Law, in its provisions concerning *Divorce*, the release of married persons from the marriage tie. The entire union of interests, affections, and life, which forms the highest conception of marriage, is expressed in Law, by making marriages indissoluble, and prohibiting Divorce altogether. It may perhaps be said, that this is legislating upon a standard of Morality too high for any existing state of society. It may be said, that the man and the woman may, after marriage, find themselves mistaken with regard to the union of hearts, and harmony of dispositions, which they supposed. They may come to hate each other, as much as they ought to love.

Can it answer the purposes of Marriage to prohibit such persons from separating?

970. It may perhaps be further urged, that to shape Laws by this scheme of teaching a pure morality, is visionary and mischievous: visionary, because it will not succeed; mischievous, because the law deprives some persons of Rights, or makes them miserable, in its attempts to teach others. It may be added, that the true way to legislate concerning Marriage, is to treat it as a Contract, which it is; to make such provisions as shall most promote the benefit of the Contracting Parties: and among others, what more obvious than this: that when both the Contracting Parties, who must know best, find the engagement a source of unhappiness, they shall be at liberty to dissolve it?

971. To this we reply, that if we take this Principle simply, that the union of the Sexes is a matter of Contract, and that the Contract may at any time be dissolved by the joint agreement of the parties, we must abolish the Laws against Polygamy, and place illegitimate and legitimate children upon the same footing. For this Principle leaves no distinction possible between Marriage and Concubinage. If *any* voluntary engagement of cohabitation, for *any* time, be Marriage, there is no need for any Law respecting Marriage. The Law, which requires an engagement of permanency, in order that the Marriage may have legal consequences, limits the freedom of such Contracts; and does so, in order that the Marriage Contract may be more nearly what it ought to be. Concubinage and Marriage are distinguished, in order that an entire union of two persons, for social and moral, and not merely sensual purposes, may be honoured and practised. No union is acknowledged as Marriage, which does not profess to be for life. It has been said, that if men and women were left free to settle the terms of the Marriage Contract, they would, in most cases, be led to make it a Contract for life. The number of cases of Concubinage which occur show that this is true only in a very limited sense. But even if this were true, why does the Legislator reject the cases

in which the parties do not wish this? If persons wish to make such a Contract for a limited time, why does he not sanction and enforce it? Why does he, on the contrary, make rules which stamp it with a character of degradation and disgrace? Manifestly, because he wishes to impress upon the citizens the great social and moral dignity of a complete union for life, and its superiority over a temporary or capricious cohabitation. Every Law, then, which establishes Marriage, must have for its object to teach what Marriage ought to be.

972. But Marriage ought to be, not only an engagement of mutual affection for life, but also a provision for rearing a family of children; and this is a further reason against allowing a Marriage, once made, to be dissolved. While the children are young, the continued union of the parents is necessary for the support, protection, and education of the woman and the children. And the necessary offices of mutual service among the members of the Family, cannot be effectually performed, except they arise, not from the terms of a Contract, but from the family affections: and such affections must want the very nature of love, if they can look forward to the time when they can terminate. The ties of Family and Society are not commonly looked upon as the Obligations of a Contract, which may be dissolved at the Will of the parties. The Law of Marriage would be at variance with the general feeling of mankind, if it so treated them. Men do not think those excusable who desert their children, or their parents, in their need, even if it had been previously agreed between the parties that they should be nothing to each other. And further: as we consider it a Duty and even an Obligation of the parents to support and educate the children, it is also a Duty to give them that Family Education which the permanent union of the parents alone can give.

973. In order to show that the divorce of the parents would not deprive the children of necessary support, care, and connexion, it has been urged that marriages are constantly dissolved by the death of the

parties, at all ages of the children; and that this event does not prevent the proper education of the children. And undoubtedly, if the parents be separated, by whatever event, the children may still be brought up, and even excellently brought up. But among the beneficial influences which operate to form their hearts and moral principles, their regard towards their parents must have an important place. And it must make a very material difference in this regard, whether they have to look upon their parents as united by an affection which lasted through life, though one be now taken away: or as separated by a voluntary act, and perhaps living in wedlock with new spouses. If the Law were to lend its aid to the distribution of the children in such cases, as readily and as approvingly as to the arrangements of an unbroken family, it would present to us a Conception of Marriage much lower and less pure than that to which a moderate moral culture directs us.

974. It is said that an engagement to retain our affection through life is absurd, since we cannot command our affections; and that to bind two persons together, who have begun to hate, instead of love each other, is to inflict upon them an useless torment. But though we cannot command our affections, we can examine our hearts before we make the engagement: when this is faithfully done, married life itself, well-conducted, tends to give permanency to affection; and nothing can more impress upon us the necessity of being faithful to our hearts in the choice we make, than the knowledge that the step, once taken, is taken for life. Again, this same knowledge, that the union cannot be dissolved, tends to control the impulses of caprice, ill-temper, and weariness, in married life; and to keep two people together, and on the whole, very tolerably happy, who might have separated on some transient provocation, if Divorce had been easily attainable. And thus, the exclusion of Divorce tends both ways to the promotion of conjugal love and conjugal happiness.

975. All that we have hitherto said, tends to this: not that, in any given state of society, Divorce should

be absolutely prohibited, but that the highest Conception of Marriage is expressed by making Marriage indissoluble; that the Duty of the State, which is, among other Duties, to establish such Laws as may maintain and elevate the Moral Culture of the citizens, requires the Lawgiver constantly to tend towards this Conception of Marriage, and this condition. Whether, at the existing point of the moral progress of this Country, the moral teaching of the Law is made most effectual by prohibiting Divorce in general, (allowing it only as the consequence of adultery on one side, and then with great difficulty,) I shall not attempt to decide.

976. So far, we have considered the subject in the light in which it is presented to us by Rational Morality. If we now take into account Christian Morality, we find that in it the highest view which we can form of the entireness and permanence of the marriage union is confirmed. We have already noticed (527) the condemnation delivered by Jesus Christ against the practice of Divorce, as it then existed among the Jews. It has been most commonly understood, that these expressions contain a condemnation of Divorce under all circumstances, except in the case of adultery. But there have not been wanting those who have explained these passages otherwise. They allege that when it is said, *Those whom God hath joined together, let not man put asunder*, we are to recollect that God has not joined together those between whom there is a settled unfitness for the marriage union, though man may have done so. When it is said that Moses allowed Divorce to the Jews *for the hardness of their heart*, it cannot be meant that he allowed a sin which, according to the common interpretation, is equivalent to adultery. Divorce, they urge, was allowed for the hardness of men's hearts, as all law exists in consequence of the hardness of men's hearts, that is, in consequence of their tendency to do wrong. Divorce was given especially for the hardness of heart of those who abused the privilege at the time of our Saviour, for it was the means of their showing the hardness of their hearts. And when it is said, *Whosoever*

shall put away his wife, and marry another, it is to be understood that these acts were part of the same design: such a design is undoubtedly adulterous. Such are the arguments for the less strict interpretation of this passage. But even with this interpretation, the leading point of Christ's teaching is plain; that the Christian was not to be content with such an imperfect view of the marriage union as was placed before the Jew, but was to aim at that higher view which was manifested, when in the beginning God made them male and female.

977. It may be said, the view we have been taking, that marriage is an entire and interminable union of the pair, would lead us to reject all second marriages; and that the law, in order to express the highest Conception of Marriage, ought to prohibit these. And undoubtedly, a very high view of the sacredness and entireness of the marriage union may easily lead to a disapprobation of second marriages; and among Christians, in every age, there have been those who have condemned them. But yet, when the life of one of the parties is prolonged beyond that of the other, and when after the sorrow of the separation has subsided into calm, the survivor sees before him or her, perhaps at an early age, and after a brief married life, an indefinite remainder of life; the same causes which impel persons to marriage at first, must often operate again with equal power, and supply the same reasons why there should be marriage. And the law, in sanctioning such marriages, divests the union of none of its entireness and permanence; for the engagement is still for life on both sides. When the act of God has dissolved the first engagement, the law does not make that which is past and gone, a fetter upon the present and future; but allows a new origin of conjugal life, making what remains of the person's life, as if it were the whole; which, as to all engagements, it is.

978. Most States have, in some way or other, punished Adultery, at least on the part of the wife. Yet the Law of England, placing Rights as much as possible on the basis of property, gives the injured

husband pecuniary damages from the adulterer; and leaves the public crime to the cognizance of the spiritual courts.

979. There is another subject, on which it is necessary to say a few words; namely, the degrees of relationship within which Marriage is to be permitted by Law. In framing a system of Morality, the Moralist is often compelled to dwell upon subjects from which, on other accounts, he would wish always to turn the thoughts of men away: Incest is one of these subjects. But it will suffice us to treat it in a very brief and general manner.

980. Without attempting to exhibit, in a more definite shape, the reasons and feelings which have made men look with horrour upon any connexion of a conjugal nature, between the nearest family relatives; it may suffice to say, that all family relations make the man the natural Guardian of the woman's purity. This feeling of Guardianship on this subject, commonly infused into the affections, from their earliest origin, extinguishes the very seeds of desire, and leaves only *Fraternal Love*. On the other hand, when no such relation exists, desiring love may grow up; and in societies where men are free to choose their partners, there is a constant and universal feeling of courtship between the sexes, which tinges their manners towards each other. This feeling of courtship, in however many folds it may involve the spark of desire, is yet inconsistent with the chaste guardianship of Fraternal Love. Hence, the necessity of separating the cases in which persons may not marry, because they are relatives, from those in which they may marry.

981. Where the separation line is to be drawn, in any given state of Society, is a question difficult of solution, and necessarily in some degree arbitrary. The rule may be different in different states of Society; for it must depend, in a great measure, upon the Structure of Families, and the kind of the early intercourse of their members with each other, and with other Families. Hence, although the primary family relations must

always have the same consequences, more remote relationships may be subjected to different Rules of intermarriage in different countries; and one Country or Age is no absolute Rule for another: except only, that the long-continued past existence of a Rule, on this subject, is a very strong reason for retaining and observing the Rule; since the separation of the two classes of cases, so necessary to the purity of families, produces its effect by being familiar to men's minds.

982. Some persons have sought a ground for the prohibition of marriages between near relatives in physiological reasons, and in the supposed degeneracy of the offspring when such a practice is continued. But if this result were far more certain than it is, we could not consistently make it a ground of legislation, except we were also prepared to prohibit unions which are far more certainly the cause of physiological evil; as for instance, when there is a great disparity of years; or hereditary disease, or insanity, on either side.

983. A question of prohibited degrees of kindred, which has been much discussed, is this: Whether a man may marry his deceased wife's sister. On this we may observe, that though much argument on the subject has been drawn from the law of Moses, such argument is of no direct force; since, as we have said, one Nation is no Rule for another; and the habits of society, and the relations of families, on which the Rule ought to depend, were very different among the ancient Jews, and in our own country at present. So far as the Jewish law has been the basis of the Rule hitherto received, it has weight; since, as we have also said, an existing Rule is entitled to great respect. As to the grounds of decision belonging to our own state of Society, we have mainly to consider, whether, by marrying one sister, men in general are placed upon the footing of Fraternal Love with the other sisters; and whether it is requisite to the purity of this Fraternal Love (on both sides) that there should be no possibility of its being succeeded by the love which courtship implies. On these two questions, different opinions will be entertained by different

persons. To the first, the manners generally prevalent in this country seem to direct us to return an affirmative answer. Whether Fraternal, may, in the course of a life, alternate with Conjugal, Love, it is more difficult to say. In one order, at least, this appears not to be unusual; since it often happens that a person courts first one sister and then another: but this takes place before the conjugal relation is established: and perhaps tends rather to show that the fraternal condition ought to supersede all other affections.

984. On both sides of this question, arguments may be drawn from the probable consequences. On the one hand, if the brother-in-law is never allowed to become the husband, the sister of the deceased wife may, without incurring reproach, live with him as a brother, and may thus give to the children a mother's care. On the other hand, if the brother-in-law may become the husband, both he and the children may often find, in such a union, a valuable consolation and resource, after the loss of the mother. But the purity which is the object of such Rules, is in danger of some tarnish from the contemplation of consequences; and we shall not attempt to decide the question.

CHAPTER XIV.

DUTIES OF THE STATE—ORDER.

Of Punishments.

985. ALL Legislation in a State may be considered as resulting from the Duty of Order; for all Laws are means of Order. We have considered Laws, according to their purpose, as directed by Humanity, Justice, and the like; and we shall not attempt here to make a separate class of those which have Order more especially for their object. But we may consider, as particularly resulting from the Duty of Order, the Office of the State in giving reality to the Laws by Sanctions, that is, by

Punishments. The Laws of each Community not only lay down certain Rules of Action, commands or prohibitions, for the members of the Community. They do more: they direct that certain *Punishments* shall be inflicted on those who transgress the Law; as Fine, Imprisonment, Bodily Pain, Mutilation, Infamy, Exile, Death. And the Community, by its officers, inflicts these Punishments. It is in this manner that the Laws become real Rules of action; and that in the minds of all men, Law-keeping and Law-breaking become objects which are sought and avoided, with the same earnestness and care as the other objects of the most powerful desires and aversions of men. The Punishment which thus gives reality to the Law, is the *Sanction* of the Law.

986. The Laws command what is in the community deemed right, and hence, Punishments are inflicted upon actions which are deemed wrong; although all wrong actions are not necessarily punished by Law. We have already explained (361, 362) the relation between the National Law and the National Morality. The National Law expresses certain fixed and fundamental portions of the National Morality: but not the whole. Law deals with external and visible acts, such as affect men's Rights; Morality deals, besides, with acts which are right or wrong, though they do not affect Rights; and with internal springs of action. The Law must always be just; but there may be many things which are just, and which yet cannot be enforced by Law. The Law must prohibit only what is wrong, though it may not prohibit all that is morally wrong.

987. Since the Law should always be just, Punishments should be inflicted only on what is morally wrong. It is sometimes said that the sole object of Punishment is the prevention of harm to the members of the community; but this is not the conception of Punishment. Punishment implies moral transgression. Crimes are violations of Law; but Crimes are universally understood to be offenses against Morality also. If, in enforcing any law, of which the sole object were the

prevention of harm to the community, some individuals were subjected to pain, these individuals being morally blameless, the pain would not be conceived as Punishment; if the infliction were to take the character of Punishment, the proceeding would be considered as intolerable. When persons, afflicted with or suspected of contagious disorders, are put in constraint for the good of the community (as in Quarantine), this constraint is not called Punishment. A Law that such persons should be put to death, even though the health of the community might be so best secured, would be rejected by all men as monstrous. An object of Punishment is the prevention of Crime; but it is the prevention of Crime *as Crime*, and not merely as Harm.

988. Thus though an object of Punishment is to prevent the classes of acts to which it is affixed, this does not fully express the object; the object is to prevent such acts, as being *wrong*. And the Laws which affix Punishments to Crimes, prevent them (so far as they do prevent them) by making men look upon them as wrong; or at least by making each man regard them as something which the community deems wrong, and will punish because it so deems. And thus, Punishments, while they have it for their object to prevent certain kinds of acts, aim to obtain this object by making men look upon these acts as wrong. The Object of Punishment, even when it threatens most roughly, is not merely to deter men, but to teach them; not merely to tell them that transgression of the Law is dangerous, but also that it is immoral. Punishment is a means of the Moral Education of the Citizens. We will trace some of the applications of this view.

989. In Laws respecting Wrongs, we see very evident traces of the moral teaching which the Lawgiver, consciously or unconsciously, has had in view. Thus, with regard to Wrongs against the Person, one of the most ancient and general Rules is the *lex talionis*, retaliation; a degree of suffering and harm inflicted upon the wrong-doer, equal to that which he had himself occasioned. Such was the Mosaic Rule (Exod. xxi.),

Stripe for stripe, wound for wound, burning for burning, foot for foot, hand for hand, tooth for tooth, eye for eye, life for life: and still earlier (Gen. ix. 6), *Whoso sheddeth man's blood, by man shall his blood be shed.* Such an Ordinance, by making man feel that which he inflicts, plainly tends to teach him that all men are bound together as partakers of a common nature, and are required to act with a recollection of this community. Such is the mode in which children are still often taught, so as to have unfolded in them the feeling of humanity, both towards other children, and towards animals. And thus, in the earliest measure of punishment, we see a disposition to proportion it to the degree of guilt, as measured by the violence done to the common nature of all men.

990. But it may be said, that the maxims of punishment admitted in later times deviate from this view, and are regulated by the principle that the object of punishment is simply the prevention of crime, and not the moral education of the people. And as examples of such maxims, may be adduced such as these: that Crimes are to be punished with greater severity in proportion to the difficulty and necessity of preventing them; or the facility of perpetrating them; or their being committed by combinations of men. These circumstances, it is said, do not increase the guilt; and yet, in the common judgment of Legislators, they have been made to increase the Punishment.

991. But there is, in this judgment of Legislators, nothing at variance with the doctrine, that the purpose of Punishment is the Moral Education of the people; and that it ought to be regulated by this purpose. For such circumstances as we have mentioned, if they do not increase the guilt of the transgression, at least augment the need which men have of the lesson which the Law gives, and interpose difficulties in the way of making the lesson impressive. If stealing privately in a shop, or stealing from a bleaching ground, or any other offense, can be committed with special facility; those who are placed in temptation require to be taught

the criminal character of the act with special emphasis; which the Law can do only by annexing to it a severer punishment. And on the other hand, if the crime, though one of great moral depravity, be one which is easily provided against, the Law may express its condemnation by a lighter penalty than would otherwise be necessary. Thus a Breach of Confidence, though it must be looked upon as more guilty than a Fraud where no trust has been reposed, is visited with a smaller punishment. And this is quite consistent with the character of the Law as a Moral Teacher. The forbearance of the Law in punishing Breach of Trust, is a significant lesson to the Trustor; inculcating the circumspection, care, and precaution, with which he ought to select and control the depositary of his confidence. And accordingly, when the trust is unavoidable, the punishment is not limited by this double bearing of the lesson; as in the case of a theft committed by a servant in the shop or dwelling-house of his master*; for there it is in vain to preach to the Master a vigilance which could not be effectually exercised.

992. In like manner with regard to crimes committed by Combinations of men, there are strong reasons why the Law should teach the criminality of such acts with a more emphatic voice, that is, by a heavier punishment. For this lesson has to contend against strong influences on the other side; the countenance and encouragement, perhaps it may be, the confidence and enthusiasm, which men engaged in a criminal act derive from their combination. A solitary criminal must feel as if he had all the world against him; but a band of conspirators are a public to one another; and the voice of this public, overbearing or misleading that of the conscience, requires to be itself overpowered by the voice of the Law, teaching with the authority of the whole community. Hence, conspiracies and combinations to do illegal acts, are very properly punished with greater severity than the like acts done by individuals.

993. In order that the Moral Teaching of the

* Paley, VI. 9. *Crimes and Punishments.*

Law may be effectual, it must be in a great measure in harmony with the general opinion of the members of the community. An attempt to throw the strong condemnation of the community upon an act by an extreme punishment, when the community do not sympathize with the severity, will make the criminals objects of pity, and alienate men's minds from the Law. But this is not to be understood, as if the Law could produce no effect, in exciting, or keeping up, a greater horrour of certain crimes, than would prevail if the law were relaxed. If the law be not very strongly at variance with the moral judgments of individuals, there are many citizens who, looking upon the law as being, in general, the support and expression of morality, will have their sentiments, with regard to special crimes, drawn towards an agreement with the law; and will look upon such crimes with especial abhorrence, so long as they are the objects of extreme punishment. In such cases, the relaxation of the punishment may diminish the prevalent abhorrence of the act. Thus, it is possible that the removal of the punishment of death from the crime of incendiarism may make the common people look upon such acts as less atrocious than heretofore. The recklessness and malignity of the crime made men continue to sympathize with the extreme of punishment in this case, so long as the law awarded it; but the mitigation of the punishment may possibly weaken the feeling.

994. The law of retaliation, which we have mentioned as the oldest measure of punishment, is one to which men's feelings still very generally assent. That punishment of death should be inflicted upon murderers, shocks few persons, compared with those who are shocked at the infliction of death in most other cases. Yet Capital Punishment has often been assigned to crimes of mere fraud, as forging bank-notes, coining money, and the like. It may be asked, whether this is consistent with the Principles we have laid down. Without pretending to justify any particular law, we may reply, that laws of this kind teach, and are in-

tended to teach, a very important lesson; namely, the value and dignity of that established order and mutual confidence under which alone coined and paper currency can circulate. With the prevalence of such order and such mutual confidence, a nation may be populous, and its inhabitants may live in peace, ease, and comfort. Without such order and confidence, the land must be full of violence and mistrust; the inhabitants few, and comparatively wretched. He who destroys the order and confidence of society, may be considered as destroying those lives, which if such crimes as his had been common, could never have existed. The Law of ancient times treats the Coiner as guilty of treason against the Sovereign; but the Law, at any time, may treat the coiner and the forger of money as a traitor against the Sovereign Rule of Mutual Confidence, which is, to a prosperous and wealthy Nation, the breath of life.

995. This Lesson, however, applies only to the State currency; which necessarily circulates rapidly, and is taken and given with slight examination. Private bills are to be protected on other principles. And even with regard to State currency, if it can by any means be made impossible, or difficult, to forge or coin imitations of it; it is the business of the State to employ such means, rather than, by means of extreme punishments, to claim, for the existing form of the currency, an importance which does not really belong to it.

996. We may observe, further, that as the consideration of the high value and dignity of the established order of society, and of the security, confidence, and tranquillity which result from it, may justify the Law in asserting the claims of such order in the strong language of capital punishments, if it cannot be made intelligible in any other; so this part of the Law, no less than any other, requires the assent of a good citizen; and, in his proper place, has a moral claim to his co-operation.

997. It may be that sometimes the long duration of an orderly and tranquil state of society, and the comparatively rare occurrence of capital punishments,

may lead men to forget that a disorderly and violent state of society is possible, and that the danger of it is kept off, only by the existence, that is by the enforcement, of laws. This forgetfulness, and the repugnance to the thought of the death and pain of any one, which a life spent in tranquil society commonly produces, may lead men to think with dislike of the punishment of death, and of other severe bodily punishments. But if this dislike operate so as to make citizens neglect, or violate, their duty of co-operating to enforce the Law, the result will be the growth of crime, and the recurrence of a disordered and violent condition of society. Judge, Jury, Prosecutor, Witnesses, are alike bound by this Duty; and alike chargeable with the consequences of its neglect.

998. The degree of co-operation which the State has required of its citizens in the enforcement of criminal Law, has been different at different times. Among the ancient Jews, capital punishment, death by stoning, was inflicted by the hands of the assembled people themselves. In modern Europe, and in the world in general, the infliction of death, or mutilation for great crimes, has usually taken place in public; and has been regarded with sympathy, or at least with acquiescing awe, as a natural act of justice, necessary to the safety of good citizens. The freedom and diversity of opinions which have prevailed on political matters in England, have rendered men less generally ready to sympathize with acts of the State against individuals; and thus, the sympathy for necessary justice has in many persons, grown dull, while a sympathy for the individual is lively. But this disproportionate progress of sympathy, for the good and the bad members of society, may easily go to such an extent as to be a defect in our national moral culture. The humanity is of a partial and perverted kind, which is drawn to the side of the criminal by the necessary consequence of criminality.

999. The prevalent detestation of criminals has been, in most states, one of the holding points of the general avoidance of crime; and consequently, one of

the means of a general moral culture. Some punishments so far take this prevalent feeling for granted, as to make it the instrument of punishment; as when the criminal is declared *infamous;* or when he is put in the *Pillory*, which is infamy added to bodily pain. These punishments are, undoubtedly, very unequal in the weight with which they fall upon different persons, according to the public opinion respecting the person; and this is a defect in such punishments. But it does not appear that orderly society can subsist without assuming, in a great measure, that agreement between public opinion and judicial proceedings which such punishments assume. If acts, which are great crimes by the law, cease to be infamous, or to shock men's minds, the law ought to be altered: if for no other reason, yet for this; that the evils attending the frequency of such acts, being really felt, may excite general anger against such crimes and such criminals, and thus bring men's feelings into harmony with the law which condemns them. If the law, as a means of moral discipline, lose its hold upon men, from being too rigorous, it may regain its hold by being relaxed: but it is to be recollected that the hold thus gained consists in the suffering, alarm, and indignation which crime produces.

1000. Many attempts have been made to render punishment a moral Discipline, not only for society in general, but also for the criminal himself; to reform him, while we punish. And so far as this is compatible with the reality of punishment, it is a Duty to aim at such an object; not only as a matter of humanity towards the individual, but also as a step in the moral improvement of the community: for the persons who are punished by imprisonment, or otherwise, are, after a longer or shorter time, liberated; and these form a part, and in populous States, not a small or unimportant part, of those whose collective moral character is the moral character of the community. How the reformation of criminals is to be aimed at, whether by solitary confinement, by making the prisoner's subsistence or comfort depend upon his industry, or in what

other way, is a question, rather of Prison Discipline than of Morality.

1001. The punishments besides death and bodily suffering, as Fine, Imprisonment, Exile, Deportation to a convict colony, and the like, differ much in the severity with which they fall upon different persons, according to their previous circumstances, and the circumstances of the community. Through the feeling of the repugnance which the infliction of death excites in bystanders, many persons have been led to think that capital punishments ought to be abolished altogether. If other punishments could come to assume such a character as to give to men's Rights their reality, capital punishments might cease. But such an increase in the efficacy of lower punishments, as exile, imprisonment, and the like, must depend, in a great measure, upon the value of those benefits of social life from which the exile and the prisoner are excluded. If the general lot of man in society could be made so delightful, that it would be comparative misery to lose it, Banishment or Imprisonment for offenders might suffice to keep up such a condition. But then, it is to be recollected, that one requisite for our advancing towards a state of society so generally satisfactory, is the establishment of Moral Rules as realities; and to this, at present, there appears to be no way, except by making Ignominious Death the climax of our scale of Punishments.

1002. We have said that there are two kinds of Laws, Laws against Wrongs and Laws against Vice. What we have hitherto said respecting Punishments, applies mainly to the former kind. The general Principle which we have laid down respecting Punishment in such cases, namely, that it is to be regarded as an Instrument of Moral Education, is still more evident with regard to Punishments appointed for acts, which, though vicious, violate no man's Right. Such are Laws against cruelty to animals; as we have said (967); Laws against Indecency and Profligacy; against Profaneness and Blasphemy; and the like. Punishments assigned to such Offenses, evidently have it for their

purpose to mark the judgment of the State as to what is right, and what is wrong; and to call upon the citizens to agree in this judgment. Such Laws are intended, not to protect the Rights, but to mould the Manners of the citizens: not so much to prevent the acts which the Laws forbid, as to foster in the community a disposition the opposite of that which such acts betray. The State forbids cruelty to animals, because it approves, and would cherish, the feeling of humanity. It puts down indecency and profligacy, as far as a regard for freedom will allow it to do so, because it respects, and would diffuse, chastity and purity. It condemns profaneness and blasphemy, because it reverences God, and would lead all its members to share in this reverence. Such Laws are manifestly Moral Lessons. The State, in promulgating such ordinances, plainly comes forward in the character of a Teacher of the Citizens.

1003. But yet, this office of teaching must needs be very imperfectly discharged, if the means which the State can employ for this purpose are only those which we have mentioned. Punishments, when viewed as Instruments of the Moral Education of the citizens, may have a significance which they cannot have under any other point of view; but still, they are Instruments which can carry the work but a little way. We must have something different from the Axe, the Scourge, the Chain, the Branding Iron, in order to raise the minds of men to any elevated standard of morals. The use that is made of them, may show that Moral Education is a Duty which the State acknowledges, and must needs acknowledge; but we must look in another quarter for the only effectual means by which this Duty can be performed.

Chapter XV.

DUTIES OF THE STATE—EDUCATION.

1004. Two main questions may be proposed on the subject now brought before us: Is it the *Right* of the State to educate the People? and, Is it the *Duty* of the State to educate the People?

We reply to the first question, that the State has certainly a Right to educate the People, at least so far as is requisite to one of the objects at which every State must aim, its own preservation. Such a Right is involved in the State Obligation of Self-Preservation, of which we have spoken. The State cannot continue to subsist as a State, except there be in the minds of the People, a certain degree of reverence for Law in general, and for the existing Laws in particular. The infliction of punishment requires in some cases (as in the case of ignominious punishments) the sympathy of the People: in all cases, their aquiescence. The State cannot give to its punishments that force which the maintenance of the existing order requires, except it can diffuse among the People a moral education in some degree corresponding with the Laws. For this end, therefore, the State must have a Right to control, in some degree, the education of the People; at least so far as to suppress all education which teaches them disobedience of the laws, and produces a hatred of the institutions under which they live. Again; the State must necessarily have a Right (781) of requiring, from its citizens, Oaths of Testimony, Oaths of Office, and the like, as means of securing a general coincidence between men's legal Obligations and their Duties. But oaths cannot produce their effect, if men's minds be not religiously educated: the State must therefore desire the religious education of its citizens: and must have a Right to require that they be religiously educated, at least so far as to feel the force of an Oath. Again, the State, in

prohibiting offenses against Person and Property, aims, and has a Right to aim (791), at producing not only quiet, but security. It seeks not only to prevent battery and robbery, which prevention may, in particular cases, be effected by mere force: but also, to make men feel secure that they shall not be beaten or robbed: which can only be done by making the citizens in general peaceable and honest, instead of being pugnacious and rapacious. The State must therefore have a Right of educating the People, or of controlling their education, so that the general Principles of Morality (160), which inculcate such virtues as peacefulness, honesty, and the like, shall be diffused among them. And thus it is the Right of the State—a Right arising out of the Duty of Self-preservation, and of the protection of Person and Property,—to direct or control the education of its citizens, at least so far as is requisite to diffuse among the people a respect for the property and personal Rights of their neighbours, a reverence for the obligation of an oath, and a general deference for Law and for the actual Laws.

1005. But the State has not only a Right to direct and control education so far as this, and on this ground of its Lower Duties, of Self-preservation, and of the Protection of Person and Property. The State has also Higher Duties, as we have already shown in general (933, &c.), and as we have found to be universally recognized by nations in their Laws. For instance, the character of the Laws concerning Marriage in all nations implies that the State must not only aim at the continuance and bodily comfort of its population, but also at the encouragement of chastity and domestic virtue (968, &c.). The care for the destitute and wretched shown in the Laws of many States (943, &c.), shows that the State acknowledges in itself the Duty of Humanity, and naturally implies that the State desires to promote this virtue among its citizens. And thus the actual Laws of nations in general show that the State universally aims at something higher than

the protection of Person and Property; and this higher object may fitly be described as the Moral Education of the People.

1006. There are obvious reasons why states should thus recognize as a Duty the general moral and intellectual culture of their citizens. The moral and intellectual culture of men, (including in this, as we cannot avoid doing, their religious culture also,) is the highest object at which men can aim; and one which they cannot be content to neglect or to have neglected. They require to have their moral, intellectual, and religious sympathies gratified, as well as to have their persons and properties protected. And many modes of conducting this culture, and gratifying these sympathies, are such as naturally draw men into associations which exercise a great sway over their actions. In some respects, the convictions and feelings which bind together such associations, may be said to exercise the *supreme* sway over men's actions: for, so far as men do act, their actions are, in the long run, determined by their conviction of what is right on moral and religious grounds: and a government which they hold to be wrong on such grounds, must tend to be destroyed, so far as its subjects are free to act. And though men may for a long time be subjugated by a government which they think contrary to morality and religion, a society in which this is the general condition of the subjects cannot be considered as one in which the State attains its objects. The State, the supreme authority, must, in a sound polity, have on its side the convictions and feelings which exercise the supreme sway. It must therefore have, on its side, the convictions and feelings which tend to bind men into associations for moral, intellectual, and religious purposes. If this be not so, the State has objects in which it fails, and which are higher than those in which it succeeds: and a portion of the sovereignty passes, from it, into the hands of those who wield the authority of Moral, Intellectual, and Religious Associations. It must, then, be an object of the State, so to direct the education of its subjects

that men's moral, intellectual, and religious convictions may be on its side; and that Moral, Intellectual, and Religious Associations may be duly subordinate to its sovereignty. See (798).

1007. But further, the State has a moral character, which is represented by the moral character of the governors of the state (806), with certain limitations and conditions (807). The Governors of the State will aim at the Moral and Intellectual Progress of the People. It is their Duty to do this, as acting for the State; and thus to promote the moral and intellectual progress of the people is a Duty of the State, inasmuch as the State is represented by the Governors.

1008. The Moral and Intellectual Education of men is closely connected with their Religious Education; and it does not appear that any Education from which Religion is excluded, will answer either the lower or the higher ends of Education as we have described them. For the convictions of men as to right and wrong, duty and virtue, almost universally derive their support and their efficacy from their convictions respecting the Will of God and the Rewards and Punishments inflicted by Him. And even matters which may be regarded as having an interest for the intellect only, inevitably lead men to higher questions which have a religious interest. Thus the study of the material world leads to questions respecting the way in which the world was created and is directed; which are to most minds more interesting than any questions of physical detail. The study of human history leads to questions respecting the providential history of the world, which also are of higher interest than any mere narration, and which are religious rather than historical questions. And thus it does not appear that Education can be either complete or satisfactory, if it exclude religion.

1009. It is not easy to separate Education into two parts of which one shall be intellectual merely, or, as we may term it, *secular*, and the other, religious. Nor, if this were possible, is it likely that a merely secular education would answer the ends which the

State must have in view. An education of the People which should exclude Religion, and the traditionary influence of Religion upon other studies, would not produce the beneficial effect upon the character and spirit of the nation which are commonly expected as the effects of education. If history and poetry, natural history and natural philosophy, have always been considered as important parts of education, they have been so considered because these studies have hitherto been pursued by almost all the masters of them in a moral and religious spirit; so that all the knowledge and thought which the pursuit of them brought in the learner's way, co-operated with the influence of morality and religion. Even reading and writing, as branches of education, have been considered mainly valuable because they bring the learner into communication with the knowledge and the thoughts which belong to man's moral and religious nature. If this were to cease to be the case, if morality and religion were to be excluded from educational studies, the studies would be no fit education for moral creatures. And as we have already said (1008), it does not appear to be easy to teach morality, with any degree of efficacy or coherence, without combining it with religion.

1010. But on the other hand, this introduction of religion, as an element of education, leads to serious difficulties in carrying into effect the education of the people. For the religious culture of each person is a matter with which the State, of itself, cannot fitly interfere, as we have said (798). And moreover there may be, and in many nations are, different Religious Bodies in the people, which cannot easily, or cannot at all, conduct their religious education in common. And thus the State, and the Governors who, acting for the State, have to aim at the moral, intellectual, and religious education of the people, have to choose among very important alternatives. Shall they promote a moral, intellectual, and religious education, founded on the principles which they themselves deem to be true? Shall they endeavour to separate the moral and intellectual elements of educa-

tion from its religious portion; and promote the former portion in the whole of the population, leaving each religious body to provide for the religious culture of its members? or shall they promote a distinct education, moral, intellectual, and religious, within the limits of each religious body? For we have already endeavoured to prove that they neglect both the Safety and the Duty of the State, if they do not in some manner or other provide for, or promote, the general education of the people.

1011. We shall not attempt to answer in a general manner, these questions; for it does not appear that they admit of any general answers. They involve in each case, historical elements on which the answer must essentially depend. The mode in which each nation ought to pursue its moral, intellectual, and religious culture, depends upon the *History of the Nation;* and must in each case be determined by the past and present condition of the Nation.

1012. Further: the mode in which each nation ought to pursue its moral, intellectual, and religious culture, depends upon the History of Religion, as well as upon the History of the Nation. The History of Religion, (at least, since the coming of Jesus Christ upon the earth, and among Christian nations; and in a wider sense, even beyond these limits;) is the *History of the Christian Church.* And thus the solution of the principal questions which arise concerning the Duty of the State as to the moral, intellectual, and religious education of the people, are to be determined with reference to the History of the Church. And we are necessarily led to speak of the Relation of the State to the Church, which will be the subject of the next Chapter.

1013. Before we conclude the present Chapter, however, we may observe that the moral and religious culture of men, both as it stands among the aims, and duties of the State, and among the functions of the Church, includes the teaching of moral and religious truths to men and women, as well as to children. It includes not only the education of the young, but also the instruction of the adult: preaching as well as teaching, and whatever

is, in its effects, equivalent to preaching; that is, all discussion, exposition and admonition relative to the great question of Morality and Religion:—as the grounds and limits of right and wrong, of Duty and of Virtue;—the Rewards and Punishments of well and ill doing;—the providential government of the world;—the work of its creation and preservation. All such teaching affects men's moral character, and consequently, is a matter of interest to the State: all such teaching has to speak of the Laws and Government of God, and consequently, is a matter of religious truth. And thus, the State and the teachers of the nation necessarily come into contact, and require to have their Relation determined, not only as regards the business of education strictly so called; but also so far as regards moral and religious teaching in the widest sense; whether it proceed from the pulpit or the press, the chair of the professor, or the cell of the solitary writer. In Christian nations, however, the Teachers and Ministers of the Christian Church deserve, on every account, a more special and prominent consideration than any other set of Teachers, as being by much the most important both for their influence in the nation, and from the history of the Church to which they belong.

Chapter XVI.

DUTIES OF THE STATE—THE CHURCH.

1014. As we have seen, it is the Right and the Duty of the State to aim at the Moral, Intellectual, and Religious Culture of the People: and as we have also seen, this Duty brings the State into contact with the Religious Teachers of the Nation. It must be determined what is to be the relation between Governors and Legislators on the one hand, and Religious Teachers and Ministers on the other.

But this question must, as we have said, be in all cases examined with reference to the history, both social

and religious, of the nation of which we have to speak; and instead of propounding any general doctrines on this subject, we shall consider some of the ways in which the relation of the Religious Teachers of a nation to its Political Governors has been determined in the course of human history.

1015. In the earlier ages of the ancient world, the province of the Legislator and of the Religious Teacher, were conceived as identical. The Legislator was himself the Religious Teacher, or had the Religious Teachers associated with him so that their authority was combined. There was, in such cases, an identification or fusion of Law with Religion. The Precepts of Religion were enforced by State Punishments; the Laws were supported by Religious Sanctions. In such cases, both the Right and the Duty of the State to educate the nation were assumed in the largest and most absolute sense; and were asserted both speculatively and practically: as for instance, in the imaginary Republic of Plato, and in the actual legislation of Lycurgus. In these cases, the education of the young is supposed to be conducted by means of Masters whom the State appoints, and of Rewards and Punishments which it assigns. And the individual citizens are supposed to be led to control all the natural human impulses, in obedience to the Laws, so as to be ready to lay down their lives when the State requires them to do so; which supposition was realized in fact by the Spartans on various occasions. In such cases the nation is educated by the State in a most effective and marked manner. Men's characters are modified and their wills are moulded into a conformity with the general purposes and will of the State. And so long as such a system can be practically maintained, the State secures both its own preservation, and the continuation of that model of human character which has been chosen as the best in the original scheme of the Polity.

1016. But such a state of things, though it might be suitable to the condition of man when his moral and intellectual nature was as yet very imperfectly developed, was after a time found to be intolerable and untenable.

In Greece and in Rome the minds of men could not be restrained from pursuing their own speculations concerning the nature of the gods, and from coming to conclusions different from the belief which the legislator had enjoined: and though punishments were inflicted on this account, as in the case of Socrates, such occurrences only made the pressure of the evil more intolerable: while the diseased condition of the State, arising out of the discrepance between the belief publicly professed and that privately entertained, went on increasing. Moreover the harshness of a polity which took no account of the kindlier sentiments of our nature, became more and more oppressive, as the ideas of benevolence and of justice in its largest sense, were unfolded among men. And when, in addition to these causes of dissolution of such a polity, the Christian religion came upon earth, teaching with convincing evidence the true relation of God to man, and representing kindness and love as the bonds by which men were mainly to be bound together, not merely law and necessity; men accepted Christianity as an internal government more truly corresponding to their wants and their feelings, than the merely external government to which they had previously been subject.

1017. The internal government exercised by religion over the Christians did not immediately come into conflict with the external government of the State; for the precepts of Christianity taught men to obey the existing authorities:—to pay tribute: to submit themselves to every ordinance of man: to render unto Cæsar the things which are Cæsar's (see (541)). But still, in proportion as Christianity became more extensively diffused among the subjects of the Roman empire, the incongruities which flowed from the existence of two governments, the ecclesiastical and the civil, with no acknowledged and definite relation between them, became more and more unsufferable. For the Christians were, by their religion, associated into an organized body. They had their own governors and officers; and their own administration for purposes of justice and order. They had already, from the first, been enjoined (for instance

by St. Paul, 1 Cor. vi. 7) not to appeal to the tribunals of the State in support of their rights. They habitually raised among themselves sums of money, which they distributed among themselves, for the support of their ministers and worship, and for the relief of their poor. They had been allowed to acquire property in lands and buildings, for instance, their churches. The Christian body possessed the power of inflicting a most heavy punishment upon those members who grossly transgressed its Laws, for it could, by Excommunication, exclude them from Christian privileges and hopes. These influences had, in the time of Constantine, made the Christian organization of the Roman state much more real and effective than its traditionary political organization; and it appears allowable to say that the only mode in which health and vigour could then be given to the civil government, was by recognizing, as Constantine did, the authority of the Ecclesiastical Government. The Christian religion was recognized as the national religion of the Roman Empire: the office and dignity of the Clergy were acknowledged; they were excused from several burthens which were imposed on other citizens; Ecclesiastical Jurisdiction was ratified; Assemblies for the purposes of Ecclesiastical Government were authorized; the property of ecclesiastical bodies was secured; religious sanctions were thrown round the most solemn of political occasions; the times and places of Christian Worship were protected by law from interruption; the advice and assistance of eminent Christian Ministers was sought in civil matters. By these steps, the Christian Church was made the *Established Church* in the Roman Empire* (Principally by the Edict of Milan. A. D. 313).

* "During nearly three centuries, the Christian Society was latently forming in the center and as it were in the heart of the Civil Society of the Roman Empire. From an early period it was a real Society, possessing its governors, its laws, its revenues, its expenses. The organization, at first perfect, free and founded altogether upon voluntary and moral ties, was nevertheless stringent. It was at that time the only association which provided its members with the joys which belong to the interior life of man; and which possessed in the ideas and sentiments on which it rested anything

1018. We are now considering the reasons which the State may have to establish the Church; and it appears, as we conceive, that in this instance, such establishment was the only mode of preserving the State from dissolution: and that this was so appears further from the entire failure of the attempt of Julian to re-establish Paganism, although, in the very attempt, we have the recognition of the necessity, then felt, of an Established Religion. But the Church was established by Constantine, not only as a useful Institution, but as the true Church. Constantine himself became a Christian: and even if we were to doubt the sincerity of Constantine's piety, which there appears no good reason to do, yet still the grounds of the necessity and advantage of the establishment of the Christian Church in his time, lay in the Christian belief of the greater part of the persons by whom the State was administered and governed. It was because it was in their eyes the true Church, that its establishment gave security and health to the State.

1019. The establishment of the Christian Church as the true Church, and as a necessary and prominent element in all Polity, alleviated many of the evils which

which could occupy vigorous minds, employ lively imaginations, in short satisfy those needs of man's intellectual and moral being, which neither oppression nor misery can completely extinguish. The inhabitant of a *municipium*, when he became a Christian, ceased to belong to his city, and entered into the Christian Society of which the Bishop was the head. In that Society were thenceforth his thoughts and his affections, his masters and his brethren. To the wants of this new association were devoted, if need was, both his fortune and his personal exertions. Into that Society in short his whole moral existence was in a manner transferred.

"When such a transposition has taken place in the moral order of a nation, it cannot be long in finding its consummation in the material order of things. The conversion of Constantine declared publicly the triumph of the Christian Society, and accelerated the progress of this triumph." Guizot, *Essais sur l'Hist. de France*, p. 19.

I have quoted this to show how completely the establishment of Christianity in the Roman Empire exemplifies the views stated in the last Chapter, art. 1006.

accompanied the decline and fall of the Roman Empire, and led to advantages which have been transmitted into every Christian Nation. The substitution of authorities and systems of administration which men reverenced, and with which they sympathized, for mere external compulsion, gave a new life to Society. The ecclesiastical organization of nations, into Dioceses and Parishes, tended both to disseminate moral and religious teaching, and to uphold social order. The Church was desirous to have religious Teachers, Places of Worship, Schools, diffused over the land. The whole of the People in the land, now made Christians, were recognized by the Church as belonging to her; and she wished to extend her ministrations to all. This was aimed at by dividing the land into small districts, and providing for the Christian instruction of each. The Christian ordinance which appropriated the first day of the week to religious worship and religious instruction was supported by the Law. All the great events of life, Birth, Marriage, and Death, were invested with religious ordinances. Men, bound together by local ties with which Christian feelings were connected, were moved to do good to their brethren as Christian teaching enjoins. They bestowed their wealth in providing present and future relief for the sick and needy, and in the maintenance of Christian ministers and Christian worship among them and their successors. The tenth part of the produce of the land was assigned to ecclesiastical uses*. These appropriations of property to religious uses may be looked upon as a measure by which a certain portion of the wealth of the country was saved from the grasp of mere private caprice and selfishness: for though such property might often be applied to its professed uses in an imperfect manner, and under the operation of mixed motives; still, it was necessarily better bestowed than wealth which was held under no condition or limitation. Ecclesiastical property has undoubtedly, in the course of the history of Christian

* This was confirmed by a Statute of Charlemagne for the Empire. Tithes were established for England by a Law of Ethelwolf, A. D. 855.

Nations, been employed in promoting benevolence, piety, learning and merit, in a far greater degree than any other kind of property. The possessions of the Clergy, held on the condition of the holders being learned, pious, and benevolent, and commonly bestowed upon them, in a great degree in reference to their ability, have been of far greater value in advancing the moral and intellectual progress of society, than any other portion of the wealth of nations. The cases in which the possessions of the Clergy have failed to produce these effects, have occurred where clerical property has been corruptly used; namely, dealt with as if it were private property:—a sufficient evidence how much more beneficial is the operation of the former than of the latter kind of property.

1020. By the establishment of the Christian Church as a part of the Polity of the Empire, the Clergy had naturally authority as well as maintenance assigned to them. The arbitration of the Bishops was ratified and enforced by positive laws; the Clergy were endowed with privileges in the courts of law and exemption from civil offices. It was natural that great weight should be attributed to the advice and judgment of the more eminent Clergy in all matters; and the counsel of Bishops was sought in the conduct of public affairs. And in the course of time the holders of ecclesiastical property, became powerful and important members of the State in virtue of their property, as well as of their character. For a long period, the establishment of the Church and the power of the Clergy led to the sway of moral and religious principles of a better and higher kind than were recognized by mere secular rulers. And the union of all the elements of the religious organization, as members of the *Catholic* or universal *Church*, gave to that organization a strength which enabled it to resist and counteract the destructive and degrading influences which prevailed in the breaking up of the Roman Empire.

1021. But the growing consciousness of this strength led gradually to the assertion of an *Ecclesiastical Supremacy* or *Spiritual Domination;* a form of Polity which thus grew out of the Polity of an Established

Church. According to this Polity, the Christian Church has, here upon earth, a Sovereign Head to which the Sovereign of the State is subordinate. The pretended Head of the Church claimed this authority upon religious grounds, as Vicar of Christ: a claim which was afterwards justly rejected by the most enlightened nations as a baseless usurpation. But for several centuries attempts were made to realize this large and lofty idea of a Universal Christian Church with a visible Sovereign established in it, having all the States of the Christian World for its members. "In this Polity, national and political distinctions were wholly lost sight of. The Vicar of Christ and his General Council knew nothing of England and France, of Germany or of Spain: they made Laws for *Christendom*—a magnificent word and well expressing those high and consistent notions of unity on which the Church of Rome based its system*."

1022. But whenever attempts were made to establish this system of Spiritual Domination in nations of energetic character, already swayed by their political Governors, these attempts led to fierce conflicts between the Ecclesiastical and Civil Power; and the Ecclesiastical Supremacy was nowhere completely established. The Sovereigns of every Nation in Europe succeeded in possessing themselves, practically at least, of the greater part of the temporal Authority which the Popes, in the day of the full manifestation of their system, claimed as belonging to the Head of the Church; such as the Appointment of Bishops, the Control of Ecclesiastical Revenues, the Authority of Supreme Judge, and the like. No nation was completely subjected to the Ecclesiastical Supremacy. Those Nations which recognize the Pope as the Head of the Church on earth, have still, in various degrees, asserted the Liberties of their own Church; and thus, made it a National Church.

1023. But yet, in the degree in which Spiritual Domination was exercised, we see how little fit men are to be entrusted with Authority of such a character. The Dignitaries of the Church, thus placed upon a footing of

* Dr. Arnold.

equal negociation, or rivalry, with Statesmen, by no means carried into action that better Morality in which we might expect religious men to excel politicians. In their political acts, they were, like other statesmen, selfish, ambitious, false, violent. Indeed it might seem as if the absence of superior control, which belongs to unquestioned Ecclesiastical Sovereigns, tended to make men rather bad than good. Some of the most flagrantly wicked characters which history presents to our view, are the Church Dignitaries, and especially the Popes, just before the Protestant Reformation. It was made apparent that the notion of a Christian world, governed in a Christian spirit, by an Ecclesiastical Body, under an Earthly Head, is one which, from the habitual conduct of men, must always be a mere dream.

1024. The resistance which was made to the claims of the Papal Power, led in various countries in Europe to the rejection of that authority altogether. The nation, in those cases, claimed for itself the right of establishing a *National Church*:—a member, in some sense or other, of the universal Church of Christ, but independent of the Pope or any other pretended visible earthly Head of that Church. But the establishment of such Churches involved also a rejection of alleged abuses in doctrine and in discipline which had arisen during the prevalence of the Papal Power. The national Churches thus established were also *Reformed Churches*. In effecting such Reformations, it is plain that the governors of the nation assert for the nation, and for themselves as acting on the part of the nation, the Right and the Duty of judging what is true in Religion, and what is false. The authority of the Romish Church was rejected in the Reformed nations of Europe, not only because the Pope's Power was an usurpation, and a political evil, but because the Romish Doctrines were corrupt and erroneous. In such a Reformation, the Church established in the nation might retain its organization, and become a member of the universal Church of Christ more truly than it was before, by rejecting unchristian errours and corruptions. An *established* Church, thus *reformed*,

and not destroyed in its reformation, may be looked upon as a peculiar boon of Providence: this is the form of Ecclesiastical Polity which we possess in England.

1025. But though a Reformation of the national Church does not deny, but assumes the Right and Duty of the nation to judge of religious truth; it may nevertheless happen that the indirect influence of such a Reformation may make it difficult to exercise this Right and Duty. For the very energy and freedom of mind which lead to the rejection of a system of Spiritual Domination, lead also to further differences of opinion within the nation itself. Thus the aim and plan of the *Reformation*, which established the Church of England, was to reject, both the Polity of Ecclesiastical Supremacy, and the various doctrinal Corruptions and Errours, which the Church of later times taught, along with that Polity. The Church of England retained Liturgies, and an organized Church Government by Bishops. But other Reformers, the Presbyterians, rejected Bishops; others, the Independents, rejected Church Government; and both, for the most, part rejected Liturgies. These Sects, however, did not professedly differ in essential points from the ancient Belief of the Christian Church, and are termed in England *Orthodox Dissenters*. Other Sects have arisen, rejecting more and more of the ancient belief.

1026. The existence of the Sects which thus arose in the various countries of Europe introduced difficulties into the administration of an Established Church in each nation. At first the duty of national religion was universally acknowledged; and the only questions agitated were what the national Faith should be, what its boundaries, and how to be secured. The existence of a great body of Dissenters from the national Church, made the nationality of the Church imperfect. To avoid this evil, it was urged that the Faith and Worship of the Established Church ought to be made as comprehensive as was consistent with a due regard for Christian Truth. At the Restoration of Charles the Second, attempts were

made to modify the constitution of the Church of England so that it should include the greater part of the Orthodox Dissenters. If these attempts had succeeded, perhaps for a time the Church might have been more completely national than it became by the exclusion of such Dissenters; but probably this course would have been attended with great dissensions within the Church itself.

1027. The Polity of an Established National Church was cast in such a form that Dissenters were at first punished as such. This kind of Polity was in England (in 1688) soon succeeded by one in which Toleration was granted to Dissenters, including liberty of worship under certain conditions; but the exclusion of Dissenters from many offices in the State was continued, as a protection to the Church of England. This exclusion has now in a great measure been abolished; yet still the Church of England, by the possession of most of the property, dignities, and functions, which have in former times belonged to the Established Church, continues to be preserved as the Established Church.

1028. In some other countries in Europe, and in America, the difficulties attendant upon the maintenance of an Established National Church, among a people divided by various religious opinions, and possessing free institutions, have led to forms of Ecclesiastical Polity in which there is no Established Church which can be called National. In some of these forms of Polity, all the principal prevalent forms of religion are recognized by the State, and receive pecuniary support from the State, as in France. In other cases, no form of religion receives such support, as in the United States of North America.

1029. In all such forms of Polity the greater part of the advantages which we have noted as belonging to the Polity of an Established Church are forfeited; but as we have said, the question regarding the Ecclesiastical Polity of each country depends upon the history of that country: and it may easily be that in these cases, the

Polity which has been selected has been determined by sufficient, or at least by weighty historical reasons.

1030. We may remark, however, that the establishment of either of these forms of Ecclesiastical Polity; —the System of Indifferent Protection, which supports the ministers of several religious sects, or the Voluntary System, which supports none, leaving them to be maintained by the spontaneous contributions of their own flocks,—does not appear necessarily to remove the difficulties and contentions which arise from the existence of an Established Church in a nation containing a large body of Dissenters. In the former system, the Clergy, though paid by the State, do not necessarily use their authority to uphold the Government. The Clergy of the principal sect may think the Government irreligious, and unworthy of their support, precisely because it does not recognize any distinction of true and false among rival religions. And their influence, in the business of Education, which is precisely that which ought to make their existence useful and valuable to the State, may really be used so as to be dangerous and subversive. And if any attempt be made to avert this danger, by making the support which they receive dependent upon their fidelity to the Government, the consequence will naturally be that they will lose the confidence of their flocks, and with this, their power and their value.

1031. Again, as to the Voluntary System of providing for religious ministrations and religious Education;—if it were introduced so as to supersede an Established Church, it would be likely to lead to some of the difficulties just stated. Those who had considered the Established Church as one of the greatest national blessings, would necessarily have their regard for the Constitution much weakened, when the nation no longer pretended to give a preference to true religion over false. They would consider that by such a step, the nation had repudiated its higher duties. And such an opinion, prevailing extensively among the People,

could not fail to shake the security of the State and endanger the permanence of its institutions.

1032. If indeed we imagine to ourselves a nation where there prevails a strong feeling of pride in the national history and of confidence in the national institutions;—the course of the history having been such as to dissociate these patriotic feelings from all ecclesiastical establishments, and where there prevails also a strong religious feeling among individuals: the Voluntary System may in such a case be quite reconcileable with the permanence of the political constitution and the stability of the Government.

Yet even in such a case there must, it would seem, be serious defects in the religious condition of the country:—for instance, a necessity on the part of the clergy, of courting the favour and adopting the prejudices of their flocks, on whom they depend for their maintenance: and the absence of all provision of religious ministrations and religious instruction for those who do not make such provision for themselves. And this want is no small social evil, since they who need religion most are they who are unconscious of their need; and if there be a large body of the people who from poverty or from whatever cause remain without religion, and therefore, as we have said (1008) without effectual moral instruction, they cannot fail to be dangerous to social order. And if it be said that these classes will be provided with religious instruction by their neighbours, who have Christian zeal, and more abundant means; and who, perceiving and compassionating their needs, will teach them and establish teachers among them:—we may remark that such a system, so far as it tends to completeness and permanence, and has its established order sanctioned and secured by law, becomes of the nature of an Established Church. It was by such steps as these that the Christian Church was originally established among the nations of Europe.

We have hitherto considered the question of an Ecclesiastical Polity as it concerns the State:—as it is determined by considerations drawn from the Duty of

the State to aim at its own permanence and at the moral and religious culture of its citizens. But there are also questions concerning the Duty of the Church, as determined by the precepts of its Founders and Teachers, and these we must briefly consider.

Chapter XVII.

DUTIES OF THE CHURCH AS TO ITS RELATION TO THE STATE.

1033. We have seen that the State had originally strong reasons for establishing the Christian Church; and that still, where an Established Church exists it must be looked upon as one of the greatest of national blessings. We have seen that the State has grounds for offering to the Church many temporal benefits, in order that the Church may co-operate with the State, both in its lower and in its higher objects.

1034. But here the question occurs, Whether the Church can properly *accept* these offers? The Church must direct her conduct by the commands of Christ and his Apostles, and by the Spirit of their teaching. And there are texts which express, or seem to imply, directions to the Christian Minister, not to mix himself with the business of the State. His concern is with men's Souls, not with their bodies or worldly condition. Christ says, *My kingdom is not of this world.* He commands his disciples, when they go forth to preach his Gospel (Matth. x. 9; Mark vi. 8; Luke ix. 3), *To provide neither gold, nor silver, nor brass, nor scrip, nor two coats.* He warns them against taking authority upon themselves (Matth. xx. 25; Mark x. 42), *Ye know that the princes of the Gentiles exercise dominion over them, and they that are great exercise authority upon them; but it shall not be so among you.* So Matth. xxiii.

10, *Be not ye called masters.* And the general tendency of the teaching of Christ and of the Apostles is, to inculcate, both an indifference to human riches and possessions, and a humility, which shrinks from human honours and political power. It may therefore seem to be inconsistent with the Christian temper of the Church, to accept such offers, of maintenance and authority, as we have shown reason for the State making to her.

1035. But we may remark, in the first place, that the injunctions, to disregard earthly possessions and earthly honours, are given, not to Christian ministers in particular, but to Christians in general. We have already (506) considered the importance of these warnings against covetousness; but we have shown (509) that these warnings do not prohibit, and did not in the first ages prevent, distinction of property, and differences of wealth among the Christians. Nor did they prevent property being held in a permanent form. The injunction to take *no thought for the morrow*, was always understood of such thought as might interfere with religious care about spiritual things. There is no religious reason why Christians, and the Clergy as well as the rest, should not possess property on which they may depend for their subsistence and power of action, while they devote their time and labour to their own spiritual progress, and to the teaching and assisting of others.

1036. That the Christian Teachers ought to be supported by their flocks, was a rule which prevailed from the earliest times of the Church. St. Paul says expressly (1 Cor. ix. 14), *The Lord hath ordained that they which preach the Gospel should live of the Gospel;* and he then quotes Christ's expression, used when the Apostles were sent forth (Luke x. 7), *The Labourer is worthy of his hire.* He further urges, as proof of the reasonableness of this Rule, both the ordinances of the Mosaic Law, and the general practice of mankind; according to which, the soldier, the wine-grower, the grazier, live by their respective employments. This he urges, entirely for the sake of establishing the Rule;

for, as he says, here and elsewhere, he rejects the benefit of it in his own case (1 Cor. ix. 7 and 15; 2 Cor. xi. 9; Gal. vi. 6; 2 Thess. iii. 9; Acts xx. 33).

In the earliest times of Christianity, the Ministers received their maintenance from the Hospitality of the Christians, dispersed through all parts of the Empire: but when the Empire itself became Christian, Churches and religious bodies were invested with the right of holding property. And it has been shown that such a maintenance of the Clergy in the form of permanent property, free from the uncertainty and distraction of casual contribution, is opposed to no dictate of religion: if offered by the State, it may be accepted by the Church.

1037. In the next place, as to Dignity and Power conferred upon the Christian Clergy, it is evident that the injunctions above referred to, containing warnings against ambition and rivalry among Christians, do not apply to cases in which the Christian Minister is requested by his Christian brethren to exercise authority in worldly matters, in virtue of the confidence they have in his ministerial character, and in authority exercised according to Christian principles. St. Paul rebukes the Corinthians (1 Cor. vi. 1), while they were but a small part of the Community, for going to law before unbelievers. If, then, he had lived in a Community altogether Christian, it may be inferred, that he would have invested Christians as such with judicial powers, in the name of the State. The Bishops and Presbyters were Judges and Legislators for Christians then; why should they be less so now, when all persons profess Christianity? If the State, on the part of the Christian Community, offer, to the Bishops and Presbyters, such dignity and authority as may make them valuable helpers in the business of the State, there appears to be no ground, nor valid excuse, for their rejecting the offer; especially when it also tends so much to forward that religious Duty, of bringing men to the knowledge of Christ, which is the highest object of their lives.

1038. With regard to such passages as have been referred to, where Christ says that his kingdon is not of this world, and warns his disciples against exercising authority; it is plain, from the context, that these expressions were employed to correct erroneous views of the nature of his kingdom, and of the office of his Apostles and Disciples. When he told Pilate that his kingdom was not of this world, it was in order to disclaim his being a king, in that sense of rivalry to the Roman imperial authority, which would have made him criminal in Pilate's eyes. Accordingly, Pilate, after hearing this declaration, said (John xix. 4), *I find no fault in him.* And the other warning is explained by the occasion on which it was given. When, on his way to Jerusalem, the disciples had had their worldly ambition enflamed, by misunderstanding what he had said (Matth. xix. 23), that they should *sit upon twelve thrones, judging the twelve tribes of Israel.* By this errour, the mother of James and John had been impelled to ask (Matth. xx. 21), that they should sit *one on his right hand, and the other on his left, in his kingdom.* And he then uttered the injunction above quoted, in order to quell these ambitious thoughts; adding, *Whosoever will be great among you, let him be your minister; and whosoever will be chief among you, let him be your servant: even as the Son of man came not to be ministered unto, but to minister**. But this injunction would not answer the end thus pointed out, if the Church were

* See the corresponding passage Luke xxii. 25, *The Kings of the Gentiles exercise lordship over them; and they that exercise authority upon them are called benefactors. But ye shall not be so. But he that is greatest among you, let him be as the younger; and he that is chief, as he that doth serve. I am among you as he that serveth.* It seems strange that this passage should be quoted as of great weight against the recognition of the Church by the State. We might understand its being supposed to forbid Christians to exercise any civil authority; or again, to exercise any ecclesiastical authority. But if it be allowed that one Christian may be a governor in the State, and another a director in the Church, what there is in the above or any similar passage to forbid the former officer recognizing, in its due sphere, the authority of the latter, it is very difficult to see.

so to apply it as to permit her Officers and Governors to *minister* only in those offices of the State, in which their services would be least valuable. Bishops and Presbyters minister to the good of Society, more by acting as Legislators, and as the Guides of their Parishes, in Civil, as well as Religious good works, than they would do as simple citizens: for, as we have seen, without such a union of offices, the State cannot pursue its highest objects. If the Church were thus to repulse the Offers of Honour and Office made to her by the State, as being a State of Christian men who believe that she is the true Church, and that, without true Religion, there can be no true benefit to man, or any blessing from God; she would sin against the command, to do good to all men, *especially to those who are of the household of faith.* With regard to temporal honours and riches, she must *know both how to be abased, and how to abound; how to be full, and how to suffer need* (Phil. iv. 12). And if, in the course of Providence, she has to labour in conjunction with the State, for the moral and religious advancement of men, the duty of Christian humility does not exclude official authority. Christ himself, while he offers himself as an exemplary reproof of unmeet assumption of superiority, was rightly called *Lord* and *Master* (John xiii. 13; Matth. xxiii. 3). And St. Paul, notwithstanding such injunctions, gives various directions to the Churches, and to his disciples, Timothy and Titus; which imply that he expected to be obeyed. And (2 Cor. x. 4, &c.) he speaks strongly of the authority, which he might find it necessary to exercise at Corinth. *The weapons of our warfare are not carnal, but mighty through God to the pulling down of strong holds. And though I should boast somewhat of our authority which the Lord hath given us for your edification, I should not be ashamed.* The kind of authority which a Christian Teacher might claim, in the earliest times, he may accept, when offered by the State, on the part of a Christian community, in all later times.

1039. Thus the Church allows her Ministers and

her Governors, to be invested with authority in the State, in virtue of that very injunction to humility which has been quoted: *Whosoever will be great among you, let him minister.* The Church, in accepting this lot, is not forgetting the declaration of Christ, that His kingdom is not of this world; but fulfilling the prophecy, that the kingdoms of this world shall become the kingdom of God and of his Christ.

1040. We have spoken of this system of Ecclesiastical Supremacy (1021) in which the Bishop of Rome claimed authority over the whole Christian world as being the Vicar of Christ: and of the political objections to which it was found to be liable. But this Supremacy was asserted not only on historical, but on religious grounds: it was not only asserted that such Rights had been ceded to the Pope by Temporal Sovereigns, but that they were inherent in his office by Divine Authority. It was asserted that it is the Duty of all Christian nations to acknowlege the Bishop of Rome as their Ecclesiastical Head.

The Supremacy, or Primacy, which has been claimed for the Bishop of Rome has been grounded on this argument; First: To St. Peter was given by Christ a Primacy, or Supremacy of official dignity and power in the Church, beyond the other Apostles: Second; this Primacy was an Office designed to be permanent in the Church: Third; the Bishop of Rome is St. Peter's Successor in this Office.

1041. But every step of this argument fails. We do not find in the New Testament any Primacy ascribed to St. Peter. Christ gave his promises of future guidance and help, alike to all the Apostles. The power of the keys which was given to St. Peter (Matth. xvi. 19), was given to the other Apostles also (Matth. xviii. 18). The declaration (Matth. xvi. 18), *Thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it;* cannot be understood as if Christ's indestructible Church were to be built upon one particular person different from himself. According to the views of commentators, ancient as well as modern,

and the manifest bearing of the context, the expression *this rock* (ἐπὶ ταύτῃ τῇ πέτρᾳ, not *this Peter*, Πέτρῳ) includes a reference, not so much to Peter's person, as to his declaration, just then made, (ver. 16), *Thou art the Christ, the Son of the living God.* Even many of those among the ancient Christian writers who apply to St. Peter especially the terms, *Thou art the rock, and, I will give unto thee the keys of the kingdom of heaven*, interpret it of St. Peter's opening the preaching of Christ after the resurrection (Acts ii. 22), and extending his preaching to the Gentiles. The narrative, Matth. xx. 25; Mark x. 42, gives an account of the earnest warning which Christ gave to the Apostles, when two of them, John and James, sought a superiority over the rest. In the history of the Apostles, we find no primacy ascribed to Peter. St. James, not St. Peter, spoke in the name of the assembled Apostles at Jerusalem. St. Paul withstood Peter at Antioch, and declares that he was to be blamed (Gal. ii. 11). And in his enumeration of the offices in the church, he says (1 Cor. xii. 28), *God hath set, first, Apostles*, not, *first, St. Peter.*

There is another passage, by which the claim of St. Peter's primacy is sometimes supported; namely, when Christ says to him (John xxi. 13), *Simon, son of Jonas, lovest thou me?... Feed my lambs... feed my sheep.* But here, evidently, Jesus Christ is not conferring a power upon Peter, but giving an admonition. St. Peter himself uses the expression in the same way (1 Pet. v. 2), *Feed the flock of God which is among you.* He also, in the same place, implies a condemnation of assumed superiority: *Not as being lords over God's heritage.*

1042. The second assertion, that the primacy given to St. Peter was intended to continue in the Church in after ages, is generally supported by urging that such a primacy is necessary, to preserve the Unity of doctrine and discipline, in the Church. But we must reject altogether the arguments of a theorist who imagines to himself a constitution of the Christian Church which he conceives to be necessary to its completeness; and on this ground asserts that such a constitution has always

existed. We cannot assert any thing to be necessary to the constitution of the Christian Church which Christ and his Apostles have not declared to be necessary. Nor does it appear that the primacy of the Bishop of Rome is fitted to secure, or has secured, the unity of doctrine and discipline in the Christian Church.

1043. The third assertion; that the Bishop of Rome is the successor of St. Peter in the office of Head of the Church; is contrary to the early history of the Church. The Bishop of Rome was always recognized as the successor of St. Peter in his bishoprick: but the claim of a legislative and judicial power over other bishops and their sees, was never allowed till a much later period; and was never generally allowed, even in those churches which agreed in doctrine with the Church of Rome. The Gallican Church, for instance, always strenuously denied the absolute authority of the Bishop of Rome as Head of the Church.

1044. It is very natural for Christians to desire to see on earth a visible and organized embodiment of the Universal Church of Christ;—that body of Believers, united to Christ as their Head, to which are promised, as we have said (484), unity, perpetual existence, and the possession of Religious Truth through the guidance of the Holy Spirit: to which also is committed the office (609) of constantly labouring to make all men truly Christians. And the defenders of the Romish Church represent their Church as this Universal Church; having the Pope, guided on some occasions by a General Council of Bishops, for its earthly Head; and having Ecclesiastical Governors and Ministers, of various degrees and offices, acting in a regular subordination, in every Christian Country. But the experience of all history shows that, as we have already said, men are not sufficiently pure and spiritual to be entrusted with a *Supernational* Authority. The Papacy, at an early period, usurped temporal power: and ever since, there has been a struggle between the Ecclesiastical and the Political Authority, in every country into which the Romish Church has found admission. The

struggle has, in different ages, turned upon various points, and been carried on by various means; but it has never ceased. The Pope has claimed and exercised, at various times, the Right of deposing sovereigns, of absolving subjects from their allegiance, of excluding whole Nations from a participation in the Ordinances and privileges of the Christian Church, of sole Jurisdiction over all ecclesiastical persons, and the like. Such claims, if allowed by States, would render the whole population of Christendom subjects of the Pope, in temporal as well as spiritual matters. By the very Idea of the Catholic Church, these claims, if they were ever Rights of the Church, must be so still; and may be revived, if a favourable occasion should ever arrive. But in more recent times, the struggle between the Papacy and the National Government has turned upon other matters, as the appointment of Bishops, and their power in the State; but especially upon the question of Education. As we have said (1030), if the Church be protected only, its influence may be subversive of the State. The Romish Church, wherever it is protected, must, by its principles, seek to rule or guide the State. It is the necessary and perpetual rival of the National Government. It does not appear that any position of equilibrium can be found, in which the Romish Church and the National Government are balanced. It does not appear that the Rights of the National Church, considered as a branch of the Roman Catholic Church, can ever be so defined as to produce a tolerable measure of tranquillity. The whole history of Europe, especially from the time of Pope Gregory the Seventh, is, for the most part, the history of the War between the States of Europe and the Papacy. In England this war never ceased to agitate and torment the land, till the time of the Reformation. Perhaps in Countries where the Government is despotic, there may be a treaty of alliance between the Roman Catholic Church and the Despotic State, by which, expressed or understood, the subjects may be retained in tranquillity; but this must be a tranquillity which excludes all

Political Freedom and all Moral and Religious Progress. Where there is a movement party, its dangers and evils may be greatly augmented by its combination with a Romish Party in the same Country (888).

1045. The experience and apprehension of the national evils belonging to the Romish System of Ecclesiastical Polity, joined with a conviction of its religious errours, led many nations in Europe to cast off its yoke, and to establish National Churches. These National Churches are members of the Universal Church of Christ; but, for the most part, they have no established extranational relations and ties; except so far as religious sympathy may be deemed to be such. They have no extranational earthly Head; if they have a visible Head, it is the Head of the Nation, the Sovereign. For since the Religious cannot be made superior to the Political Authority, the Political Authority must be superior to the Religious, in matters in which the Ultimate Authority comes into play. In such National Established Churches, the Ecclesiastical Authorities, as they are upheld by the State, derive their Authority in some measure from the State; this derivation not interfering with the Spiritual Authority which they have as ministers of the Church of Christ; and which they derive from Christ's Commission through the channel of the Spiritual Authorities of the Church. (Matth. xi.; Mark iii. 13; Luke vi. 12. And again, after the Resurrection, Matth. xxviii. 16; Mark xvi. 15; Luke xxiv. 44; John xx. 22).

1046. A National Church affords a position of equilibrium for the Relations of Church and State, in proportion as it is fully and completely established. If the Polity of an Established Church be imperfectly carried out, then there arise great difficulties; especially on the question of Education. These difficulties may draw the Polity nearer and nearer to the Polity of mere indifferent Protection of the Church. But this latter Polity, as we have already said, has its own difficulties and evils, which are, in most cases, greater than those of an Established Church.

1047. By the views which we have explained in the present and the preceding Chapter, we are led to the conviction that the Polity of an Established Church, the intermediate position between the System of an equal Protection of religious truth and falsehood, which can never satisfy a religious nation; and the System of Spiritual Domination, which is inconsistent with national tranquillity and freedom, is the position in which, if the course of history have happily led to it, national safety, national morality, and national progress may most reasonably be hoped for.

BOOK VI.

INTERNATIONAL JUS.

RIGHTS AND OBLIGATIONS BETWEEN STATES.

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CHAPTER I.

INTERNATIONAL LAW.

1048. WE have already spoken of States as Moral Agents, and have treated of their Rights, their Obligations, and their Duties. We have hitherto spoken of these, only so far as they belong to the relation between each State and its own members. But States have also relations towards each other. States are Nations, acting through an organized Government; and Nations, as well as Individuals, may commit acts of violence, make agreements of mutual advantage, possess property with its appendages, and the like. In such actions, there must be a difference of right and wrong: Morality must apply to the dealings of Nations with each other; and before quitting the subject, we shall treat briefly of that branch of Morality.

1049. In the Morality of Nations, as of individuals, Duties must depend upon Rights and Obligations; and Rights and Obligations cannot exist without being defined.

The Rights and Obligations of individuals are defined by actually existing Laws: they have their form and limits, in each State, given them by the National Law; but their general conditions are the subject of an especial

branch of Morality which we have termed *Jus*. The Rights and Obligations of Nations must also be defined by actually existing Laws. The body of Law which gives them their form and limits is *International Law*. But, inasmuch as there exists no single definite seat of authority, from which such International Law can be promulgated, in the way in which the National Law is promulgated by the National Government; the Rights and Obligations of Nations are determined, in a great degree, by a consideration of their general conditions; that is, by *International Jus*. And hence, we give, to this part of our subject, rather the latter name, implying a Doctrine of International Rights and Obligations according to their nature, than the more usual name, of International *Law*, which appears to imply a Code of such Law, already established by adequate Authority.

1050. But it may be asked; If no Code of International Law exists, how can International Rights and Obligations exist? and how can the Morality which assumes their existence be real? since we have already shown that Rights cannot actually exist without being defined, and cannot be defined except by Law. To this we reply, that though there is no Code of International Law, promulgated by any single Authority, there are many Rules, Maxims, and Principles, which have been, at various times, and on various occasions, delivered by various authorities; and which, being accepted and sanctioned by the assent of Nations in general, do compose, in some degree, a body of International Law. It may be added, that in so far as this body of Law is loose and imperfect, Rights and Obligations are also loose and imperfect, and the grounds of International Morality shake under us. It may be added further, that the body of International Law, in the course of the jural and moral progress of Nations, constantly becomes more and more exact, more and more complete; and that, along with this improvement and extension of International Law, International Morality becomes more and more firm in its basis. Nations have the power of pushing onwards their moral and intellectual progress in this direction, no less than in others.

1051. International Law is sometimes called *The Law of Nations:* meaning, by this phrase, the Law *between* Nations. But this phrase may create confusion, from its resemblance to the phrase *Jus Gentium*, which is used by the Roman Lawyers, to denote, not International Law, but Positive or Instituted Law, so far as it is common to all Nations. When the Romans spoke of International Law, they termed it *Jus Feciale*, the Law of Heralds, or International Envoys.

1052. The *Jus Gentium*, the Instituted Law common to all Nations, is sometimes put in opposition to *Jus Naturæ*, the Law of Nature, a Law which it was conceived might be deduced from necessary Principles. Thus Grotius* asserts that *jure naturæ*, subjects are not bound by, nor responsible for, the acts of the Sovereign, but that *jure gentium*, they are. But from what has been said already, we see that this distinction cannot be maintained. For, as we have said, no *Jus*, no doctrine concerning Rights and Obligations, can exist without Definitions of Rights and Obligations; and such definitions must be given by historical fact, and not, by mere reasoning from ideas, as the conception of a *Jus Naturæ* assumes. And as this general reasoning shows that there can be no force in distinctions like the one just quoted, so we can easily show the distinction is untenable in the special instance. The reason which Grotius assigns for the distinction is this: *Mero naturæ jure, ex facto alieno nemo tenetur nisi qui bonorum successor sit:* "By the Law of nature, no man is bound by another's act, except he have the succession to his goods." To this argument we reply, that children are bound by the acts of a parent, not in consequence of any special expectation of succeeding to his goods, but in virtue of the general tie of the Family; and that subjects are, in like manner, bound by the acts of the Sovereign, in virtue of the general tie of the State. The State is a bond which unites men *Jure Naturæ*, in the same sense in which the Family does. Man, considered as a moral agent,

* *De Jure Belli et Pacis*, III 2. 1.

can no more divest himself of the bonds of social, than of domestic society. The assumption of a State of Nature in which family ties, and their bearing on property, exist, while political ties do not exist, is altogether arbitrary. We see this arbitrary character strongly marked in the argument of Grotius. To say that, by the Law of Nature, the succession of children to the goods of the parent is recognized, but the authority of the sovereign is not recognized, is to assume a Law of Nature at variance with the most general Laws of Nations: for all Nations have inforced the latter Rule, but many have rejected, or limited and modified, the former.

1053. But though we are thus led to reject the *Jus Naturæ*, as a source of Rights separate from, and opposed to, the *Jus Gentium;* we are not to lose sight of the truths which Jurists have endeavoured to express by this separation and opposition. And these truths are of two classes. In some of the contrasts of this kind, the Law of Nations stands above the Law of Nature, as being a source of more full and definite Rights. Such is the case in the instance just noticed: for there, the bond that unites the Sovereign and the Subject is spoken of as something added, by the Law of Nations, to Rights and Obligations which man has by the Law of Nature. And the truth here involved is, that however imperfect political society may be, we can conceive man to exist in a State in which political ties are still weaker, and yet not quite to lose his moral nature. If, hypothetically, we take away the mutual relations of the State and its subjects, we can still conceive the relations of Family to remain; and even Property to exist: although, in truth, on this hypothesis, Property can exist only, in so far as the Family takes the place of the State.

1054. But in another class of such contrasts, the Law of Nature stands above the Law of Nations; as being a source of a higher morality than may be exemplified by any given rude state of Law. Thus we may say, that, among the ancients, by the Law of Nations, the inhabitants of a conquered country became slaves; but that there is a Law of Nature, the bond of a com-

mon humanity, which abrogates this cruel Law. And the general truth involved in such assertions is, that the Law of Nations, whatever, at any particular time, it may be, may always be made more just and humane; and ought to be made more just and humane, in order to correspond to man's moral nature. As in the former contrast, it was implied, that the Law of Nations is never so bad as to divest man of his moral nature; so here it is implied, that the Law of Nations is never so good as fully to satisfy man's moral nature.

1055. The Law of Nations, including, in this, International Law, is subject to the conditions of which we have already spoken as belonging to the Law of any one Nation. It is capable (361) of Progressive Standards: it is fixed for a given time, and obligatory while it is fixed; but it must acknowledge the Authority of Morality (365), and must, in order to conform to the moral nature of man, become constantly more and more moral. The progress of International Law in this respect, is more slow and irregular than that of a well-guided National Law; and this circumstance, as well as the feebler and more mixed character of the authority of International Law, may sometimes make the influence of Moral principles more obscure in this than in other departments of Morality. Yet a brief survey of International Jus, in the form in which it is presented by some of the most generally esteemed writers on the subject, will show that it is, in fact, an important part of Morality, and depends mainly upon the Principles which we have already established.

1056. We have said that International Law, in its rudest form, involves a recognition of the moral nature of man. To illustrate this, we may remark, that in the rudest form of International Law, we have a distinction of the States of *War* and *Peace*. This distinction implies a limitation, by common understanding or agreement, of the state of universal war of every man against every man, which we must conceive to prevail, if we consider man as a creature impelled merely by desire and anger. Among animals, we have, properly speaking, neither

war nor peace. Some live together harmlessly, some are in constant conflict, according to their instincts. There may be pauses of the struggle, arising from mutual fear, or satiety. But there is, in such creatures, no consciousness of a common Rule, no apprehension of Rights vested in the parties by such a Rule. The conception of the *Rights of War* introduces the moral nature of man. In our survey of International Rights we shall therefore first speak of these.

Chapter II.

THE RIGHTS OF WAR.

1057. History gives us a glimpse of an ancient state of things in which the distinction of War and Peace had not been established for nations in general. The occupation of the Pirate, who plunders all whom he can overpower, was not less honourable than other occupations; and States granted to other States, or to particular persons, a protection from spoliation (ἀσυλία) as an exception to a general Rule. When peaceable relations were permanently established among the Greek States, this was still looked upon as the result of a Convention, which included them only. In Livy*, the Macedonian ambassadors say, "Cum barbaris eternum omnibus Græcis bellum est, critque." A like state of things is indicated by the Latin word "hostis," which signified alike "a stranger" and "an enemy†." The introduction of the term "perduellis," an enemy *proprio nomine*, indicated the establishment of a distinction between the two, though Cicero interprets the fact the opposite way; namely, that the open enemy was called a *stranger* as a gentler term, "lenitate verbi tristitiam rei mitigante."

1058. It was an important step in International

* B. xxxi. c. 29. † Cic. *Off.* i. 12.

Law, to establish this distinction between War, and Piracy, the practice of general spoliation. And for this purpose, it is proper to give a definition of War. A definition which has been given, and which may serve as the basis of our remarks, is this*, "Bellum est contentio publica, armata, justa." It is necessary to attend to each of these three conditions. War is a *public* contest: it is the act of the State, towards another State; not an act of or towards individuals. Hence, a contest with Pirates and Robbers, who are lawless individuals, is not a War; nor do the Rights of War belong to such persons. Again, War is an *armed* contest: for States, having no common superior who can decide their disputes, have no other ultimate authority to which they can appeal. On this account War has been termed "ultima ratio regum." But still, though the contest is an armed, it is a *just*, that is, a professedly just one. Though War is appealed to, because there is no other ultimate tribunal to which States can have recourse, it is appealed to *for justice*. It may easily happen between States, as between litigating individuals, that each has a just cause. Thus, when Attalus left his kingdom by testament to the Romans, the heir had the Right of legitimate, the Romans, the Right of testamentary, succession. It is necessary that a State should have on its side some such asserted Right, in order that its War may be consistent with International Law. A State which should make war upon its neighbours, without asserting any claim of Right, professing only a desire of conquest, a hatred of its enemy, or a love of war for its own sake, would have no just claim to the Rights of War; and might most fitly be declared a Common Enemy, by all States which acknowledge the authority of International Law.

Under the above conditions, States have a Right to make War, as we have already said (775). This Right may be unjustly, that is immorally, used; as individuals may use their Rights immorally, and may employ the forms of justice for unjust ends.

* Albericus Gentilis, *De Jure Belli*. 1589.

1059. War, so understood, is conceived as a state in which the hostile parties have mutual Rights and Obligations, notwithstanding the efforts they are making for each other's damage or destruction. The Rights of War, among the ancients, extended to the Right of enslaving or putting to death all who were taken prisoners in battle, and even all the inhabitants of a conquered country. Yet the same Laws of War condemned those conquerors who refused Sepulture to the dead bodies of their enemies; the same Laws required a reverence for the Heralds who acted as international envoys, and an exact fidelity in observing Truces and Treaties. Moralists have been blamed for saying that to enslave vanquished, and to kill captive enemies, is not contrary to the Natural Rights of War. Yet we see how natural such practices are, for they occur in all nations at the early periods of their jural career. The proper condemnation of these practices is, not that they are contrary to the Natural Rights of War, but that they are the Rights of War in a rude and savage condition of nations, and are condemned by International Law, when it has made any considerable progress in humanity.

1060. In ancient Greece and Rome, every citizen was considered as a soldier; but in modern times, the *combatant* is distinguished from the *non-combatant* part of the nation, and there are different classes of Rights of War applicable to these different classes of persons.

1061. The Rights of War, as they affect *Combatants*, are purified from much that was savage and cruel in their earlier form, by taking into account the general conception of War; that it is the use of the public Force of the State in order to enforce its asserted Right. The public Force, Armies and Navies with their munitions, act so as to damage, defeat, and destroy the Armies and Navies of the enemy. Armies are defeated by destroying their organization; and hence, as soon as a man, or a body of men, by surrendering, has ceased to belong to the organization of the army, he is no longer an object of active hostility. He is a prisoner.

The same is the case, when a ship, in a fleet, strikes her colours. In the siege and capture of a fortress, the amount of severity exercised upon the defenders of the place, depends upon the obstinacy of the struggle between them and the assailants. If the defense have been very obstinate, and the place is taken by storm, the practices of War, up to the most modern times, partake of the savage and cruel habits of the rudest nations. But though, on such occasions, unresisting men and helpless women may suffer death or violence in hot blood, the voice of all civilized nations condemns, as violators of the Rights of War, the soldiers who commit such deeds *in cold blood*. Sometimes severities are inflicted upon a captured garrison, professedly on account of a resistance too long protracted. In such cases, the severity may be considered as a punishment which the Laws of War entitle the victor to inflict, in return for damage and delay which the defenders have needlessly occasioned him, since their ultimate success was hopeless. The Romans spared the garrison of a place, if it surrendered before the battering-ram struck the walls. To put to the sword the garrison of a captured place, in order to strike terror into other places, and paralyse their resistance, is a course which has an aspect of savage cruelty; yet it is asserted to be conformable to the Laws of War; and has even been defended, as humane, because it tends to bring the war to an end. In like manner, the putting prisoners to death in the way of retaliation, or of punishment for violated faith, has a most cruel aspect; yet if this be not done, how is the cruelty, when commenced on one side, to be punished or stopped? and how can there be any value in the giving of Hostages for the performance of a treaty? That War has necessarily inhuman features, such as these, shows us how much the cause of humanity requires that the operation of War should be superseded in all possible cases.

1062. The Laws of War which limit the modes of action of the combatants, flow from the conception of War,—that it is the Action of one State against

another State, to enforce justice by its public force. The force used is to be public; hence assassins, poisoners, secret incendiaries, are prohibited. Damage done by such means, cannot be avowed by a State; and hence, cannot be a part of the conduct by which the State publicly seeks justice. Also, such damage cannot be used so as to make a State alter its conduct, and therefore cannot be used so as to obtain justice. But this view does not prohibit operations which are clandestine for a time, as an ambush, or a mine; for these are works of an army, and have the same results as other acts of warfare.

1063. Stratagems are frequently employed in warfare; and it may appear difficult to reconcile some of these with Good Faith; as when a general allows his enemy to get hold of letters, or informants, purposely contrived to deceive. But it is to be recollected, that the Rules of Good Faith apply only to those modes of communication with regard to which there is a Mutual Understanding. Soldiers are bound in Good Faith to respect a truce, a flag of truce, a demand of parley, or any other recognized mode of communication between combatants: for these proceedings are conformable to known Laws of War, and tend to the termination of hostilities. But when a general judges of his enemies' intentions by his motions,—the information of neutral persons, intercepted letters, and the like,—he rests, not upon a mutual understanding, but upon his own sagacity and vigilance, in detecting the truth from the appearance. At the same time, the Laws of War allow him to visit, with the utmost severity, any person who intentionally misleads him by false intelligence.

1064. It appears, at first, an inconsistency in the Laws of War that though they do not forbid a general to use Spies, or to tempt the enemy's soldiers to desert, they visit with immediate death any one found engaged in such attempts. But it is to be recollected that in War, the infliction of death is not a punishment, but a means to an end. A general must, from a regard to

his own safety and success, make the task of spies and seducers as difficult and dangerous as possible.

1065. By the progress of the Laws of War, from their ancient to their modern forms, much has been done to make Warfare more humane, or, as it is termed, more civilized. In the middle ages, the practice was introduced of sparing the lives of conquered foes, and giving them their liberty, on the payment of *ransom*. In more recent times, when soldiers yield, they ask for *quarter*, and are made *prisoners of war*. Such prisoners are often exchanged between the two hostile parties by a *cartel* or agreement. And even before a prisoner of war is liberated or exchanged, he often has his liberty allowed him, on giving his *parole*, or word of honour, that he will not serve as a soldier till the War is ended.

1066. In War, as we have said, the destruction of men is used as means to an end; but every step, in the Laws of War, by which bloodshed and violence are, in their extent, limited to their end, the attainment of just terms of peace, is a gain to humanity. Hence it is to be desired that the Laws of War should condemn that wanton and aimless inhumanity which, as has been mentioned, is often perpetrated in hot blood on the storming of a fortress. It is therefore very satisfactory to find an eminent military writer* expressing an opinion, that the plunder of a town after an assault ought to be made criminal by the Articles of War.

1067. In the treatment of *Non-combatants* especially, the modern Laws of War are more humane than those of ancient times. When an enemy invades the territory of a hostile State, it strikes at the State, not at individuals. Its object may be to take permanent possession of the territory on the part of its own State; but at any rate, its operations suppress and exclude the authority of the hostile State; and thus do violence to it, as a State. Hence, the invading army, so far as it succeeds, supersedes the higher functions of the State in the invaded country. It respects private property; but it assumes the right of taxation, and exercises it, as

* Napier, *Hist. of the War in the Peninsula*, Vol. VI. p. 215.

in a case of exigency, by levying a heavy *Contribution*. If the inhabitants pay this contribution, by the Laws of War they are not to be further molested; and are to be protected in the exercise of agriculture, trade, and art. In such cases, the usual Tribunals are, to some extent, superseded by Military Law; because, as we have said, the invading Army assumes the functions of the invaded State.

1068. In War, though *Private Property* is respected on Land, it is not spared at Sea. Merchant-vessels, and their freight, belonging to citizens of hostile States, become the prize of their Captors. There is an evident reason for this difference of the Laws of War, on Land and on Sea; for a merchant's vessel at Sea is not under the protection of the State, in the same manner as his warehouse on land. To make prize of a merchant-ship, is an obvious way of showing that its own State is unable to protect it at sea; and thus, is a mode of attacking the State. It has sometimes been proposed that, in time of war, Private Property should be respected at sea, as well as on land; but there are great difficulties in carrying such a Rule into effect*. Conventions have, however, sometimes been made between nations to this effect.

1069. On the other hand, States often grant to private persons, who are willing to fit out a ship at their own expense, *Letters of Marque*, authorizing them to carry on warlike operations against the enemy. Such persons are called *Privateers*. Such authority is sometimes given under the name of *Reprisals*, as a means of obtaining redress for private wrongs. Such practices make a kind of partisan warfare at sea.

1070. In many other cases, as well as in that of merchants, the fortune of non-combatants is inextricably mixed up with that of the combatants; thus, when a town is besieged, the inhabitants necessarily suffer by the attempts which the besiegers make to overpower the garrison. And sometimes the greatest weight of the misery thus produced may fall upon the peaceable

* Manning, *Law of Nations*, B. III. c. iv.

inhabitants; as for instance, when a town is reduced to yield by famine. The horrour excited by such cases, has led to the suggestion, that it should be one of the Laws of War that all non-combatants should be allowed to go out of a blockaded town; and that the general who should refuse to let them pass should be regarded in the same light as one who should murder his prisoners, or should be in the habit of butchering women and children*.

1071. In order that countries which are the seat of War may enjoy the advantage of the Laws of civilized warfare, it is necessary that they themselves should attend strictly to the distinction of Combatants and Non-combatants. If the inhabitants of an invaded country carry on what is called a *guerilla* or *partisan* warfare against the invaders; the inhabitants, individually, destroying them and their means of action, in any way that they can; such a country cannot be treated according to the more humane Laws of War; for the inhabitants themselves destroy the foundation of such Laws, the distinction of Combatants and Non-combatants. And this restriction need not interfere with the patriotic zeal which the inhabitants feel, to repel the invaders. For they may enlist in the organized army of their own country; and supply the Government with resources for its defense to the utmost of their power.

1072. It may be asked, whether, on these principles, the Laws of War allow the bombardment of an undefended town, or the laying waste a province with fire and sword. Such proceedings are condemned as odious by international jurists†; who, however, do not venture to pronounce them to be violations of the Rights of War. It is evident that, like destroying ships at sea, such acts show that the suffering State cannot defend its subjects. But they belong to a savage and cruel form of war, which all humane and civilized men must desire to see utterly abrogated.

* Arnold, *Lectures on History*, Lect. IV. p. 220.

† Vattel, Book III. § 169.

1073. As War has its Laws, it has also its Formalities, which are requisite as a justification of warlike acts. It ought to be preceded by a *Demand of Redress*, and begun by a *Declaration of War*. This formality the Romans called *Clarigatio*. When war has been declared, Neutrals have not a Right to carry Munitions of War to belligerents: such commodities then become *Contraband of War*. And when a place has been declared in a state of *Blockade*, neutrals have not a right to carry thither any goods or to go there at all. The Blockaders have, even against Neutrals, a *Right of Search*, in order that they may ascertain whether the Blockade is violated. The Conflict of the Rights of Belligerents and of Neutrals, in this and the like cases, give rise to many questions of International Jus. Others arise from doubts, whether enemy's vessels captured were taken in time of War or not, and the like. For the decision of such questions, there have been established Courts, in which International Law is administered; *Courts of Prize; Courts of Admiralty; Courts of Maritime Law.*

1074. Having thus spoken of the Rights of War, I must now notice the International Rights which subsist during Peace, and those which belong to Neutrals. These I must enumerate very briefly, by the aid of well-esteemed writers on the subject: for my object is only to give such a sketch as may show the place which International Jus occupies in a System of Morality.

I shall arrange the Rights of which I have to speak, as International Rights of Property, International Rights of Jurisdiction, International Rights of Intercourse.

Chapter III.

INTERNATIONAL RIGHTS OF PROPERTY.

1075. We have already said (772) that every State has a Right to the National Territory. This is an International Right; and is absolutely and completely valid, as excluding Rights of other States. With regard to the citizens of the State itself, the Right to any part of the Territory is not simple ownership, but that permanent proprietorship which is called *Dominium Eminens* (688), by which the State prescribes the conditions on which individuals are to hold and enjoy their possessions.

1076. Nations have come into possession of their present territories by the migrations of the various tribes of mankind (870); and by various other historical events, as conquests, colonies, and the like. Their present Rights rest upon these previous facts; and the fact of the national possession of any Territory, continued and unquestioned, of itself constitutes a Right of possession. *Prescription*, which is a mode of acquiring a Right for individuals (695), holds also for States*.

1077. European nations have recognized a national property in uncultivated countries, founded upon the Right of Discovery. Where the land so claimed is inhabited by savages, such a claim of Right goes upon the supposition that a population of savages do not form an organized State which can have International Rights. But this limitation of International Law, and consequently of Morality, is rejected by the more humane views of modern times. The claims of European States to possessions in America, Africa, and Asia, originally founded on discovery or colonization, now rest, not only upon prescription, but also, for the most part, upon subsequent compact.

1078. The Right of Conquest, when it is stated barely as constituting rightful possession, belongs to a

* Wheaton, *International Law*, Part I. ch. iv. p. 206.

condition of International Jus more rude and arbitrary than now prevails. A State which would assert the mere Right of Conquest, would also make war for the mere sake of Conquest; which, as we have said, would justify civilized States in declaring such a State a Common Enemy (1058). But a Conquest, made in a just war, may rightly be considered as in the light of indemnity for wrong suffered; and may be either retained, or used in the negociations for peace, in order to obtain just terms.

1079. There prevail among nations several Rules and maxims with regard to the Rights of national territory. These Rules have been established by the gradual usage and successive agreements of nations and jurists; and are to be found, with the reasonings respecting them, in works on International Law. It may serve to illustrate the subject if I extract some of these Rules; which I shall do, principally following Mr. Wheaton's *Elements of International Law*, and Mr. Manning's *Commentaries on the Law of Nations*.

1080. "The maritime territory of every State* extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State." These must be included, in order to make the territorial jurisdiction continuous.

1081. "The general usage of nations superadds to this extent of territorial jurisdiction, a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation†." "The rule of law on this subject is *terræ dominium finitur ubi finitur armorum vis*."

1082. "The exclusive territorial jurisdiction of the British Crown over the enclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the *King's Chambers;* i. e. portions of the sea cut off by lines

* Wheaton, Part II. chap. iv.

† See also Grotius, J. B. et P. lib. II. c. iii. § 10.

drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory." Such regulations are justified on the ground of their being essentially necessary to the security and interests of the State.

1083. Besides such regulations, "a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the republic of Venice over the Adriatic. The maritime supremacy of Great Britain over what are called the Narrow Seas, has generally been asserted merely by requiring certain honour to the British flag in those seas." The Baltic Sea is claimed as *mare clausum* by the powers bordering on its coasts; and the Euxine was so claimed by Turkey, so long as she exclusively possessed its shores. Denmark asserts a supremacy over the Sound, and the Two Belts, which form the outlet of the Baltic. In opposition to such claims, the Freedom of the Seas is asserted by other States. They have asserted the Right to navigate the High Sea (*mare liberum*), as being essential to the Right of Commerce which belongs to all States.

1084. It is said by Jurists, that when a river flows through the territories of different States, the *innocent use* of it for commercial purposes belongs to all the nations inhabiting the different parts of its banks; but that this is an *imperfect Right*, and must be regulated by convention*. Such conventions have been established, for instance, with respect to the Rhine and the Scheldt. We have already said (89) that imperfect Rights are improperly called Rights; and are really moral claims indicating what the other party ought to grant or to do. And it is plain that the general Duty of Humanity would lead a State to allow its neighbours to make such use of its rivers and straits as should be accompanied with no inconvenience to itself. But, as we have already said, by some a general Right of Com-

* Wheaton, P. II. c. iv. § 12.

merce is asserted, which goes beyond this appeal to humanity.

1085. In time of War, this Right of Commerce comes in conflict with the Rights of War; and the conflict has, in modern times, given rise to many questions of international jurisprudence; and especially as regards Colonies of the belligerent parties. For it has been assumed, by modern European States, that they have a Right to direct and limit the trade of their Colonies, as well as of the ports of the Mother-country.

1086. The question of which we have spoken, between the Rights of War, on the one hand, and the Rights of Commerce on the other, implies, among the Rights of War, the Right of seizing the private property of citizens of the hostile State captured at sea. To this Right, of which we have already spoken, belligerents have sometimes added the Right of seizing also the property of neutrals, when taken in hostile ships: and they have expressed their Rule in the maxim, "Enemy's ships make enemy's goods." This Maxim is not inconsistent with what has already been said of the nature of War. All property is in some one's custody; this is in the enemy's custody. We deny their power of custody of property on the sea, and we strike a blow at them as a maritime State, by showing that they do not possess this power. The Neutral must attend to this, and must not place his goods in our enemy's vessels, except he is willing to share their fate. But the more indulgent rule now generally assented to is, that the goods of a friend are not to be confiscated, though found in the ship of an enemy*.

1087. The Rights of Commerce are asserted in a Maxim similar in form to the one just stated; namely this: "Neutral ships make neutral goods;" or, "Free bottoms, free goods." But it is plain that this maxim must be limited and modified, or it might be used as a powerful mode of warfare. Thus† belligerents have a Right to prevent neutrals from carrying to an enemy munitions of war. It is no interference with the Right

* Wheaton, P. IV. c. iii. § 18. † Manning, B. III. c. vii.

of a third person to say that he shall not carry to my enemy instruments with which I am to be attacked. On the contrary, such Commerce is a deviation from neutrality; (or at least would be so, if it were the act of the State). If we allow neutral ships to be inviolable when they carry to the enemy the means of warfare, they, though professedly not parties to the contest, may greatly damage one of the belligerents, and transfer the success to the other side. Hence, belligerents have a Right to prevent neutrals doing this. The Right of Commerce entitles the neutral to carry to either party goods which do not affect him in his belligerent character; but military stores are prohibited, under the title of *Contraband of War*.

1088. Again, belligerents have, by the Laws of War, a Right to put a place in a state of *blockade*, and then to prohibit neutrals from entering it. Neutrals, who violate this Rule, are liable to confiscation for *breach of blockade*. According to modern practice*, in order that a party may be liable to punishment for breach of blockade, three things are requisite to be proved:—the actual existence of the blockade:—that the party offending knew of it:—that he commit some act which was a breach of it. The definition of blockade is given in various Treaties. It is generally agreed, that a mere declaration cannot constitute a blockade: it must be actually enforced by a continued circuit of troops and ships.

1089. The maxim, that "free ships make free goods," has been a subject of much discussion in modern times, having been asserted by Confederacies calling themselves "Armed Neutralities," in opposition to the claims of Belligerents. Belligerents, seizing the property of an enemy on board a neutral ship, have, on their side, both the ancient authorities, and the usually received Principles of the Law of Nations. In opposition to the Right of Commerce, urged on the side of the above maxim, it is replied, that the Rights of War suspend many of the Rights of Commerce, as when they authorize seizure of contraband of war, or confiscation of a

* Manning, B. III. c. ix.

ship for breach of blockade. And the general Rule must be, that all Rights of Commerce are suspended, which, being nominally neutral, are really favourable to one of the belligerent parties. Now to carry goods for an enemy, who is so weak at sea, as not to be able to carry for himself, is to give him a great advantage. It deprives the stronger naval power of the benefit of his superiority. The Belligerent cannot be required to allow this. When it is urged, on the other side, that a Neutral has a Right to trade with both parties; it is replied, that he may trade *with both*, but not *for one*. If he gives his protection to the property of one of the belligerents, who is too weak to protect it himself, he makes himself his Ally, and is no longer neutral. An argument sometimes urged on this side is, that a ship is like a part of the territory of the state to which it belongs, and as such, not be violated by the belligerent: but it is plain that this analogy is too loose to be of any force. If the doctrine were true, it would be a violation of neutral Rights to seize contraband of war in the ship, or to resist breach of blockade. And it is plain that the analogy does not hold in other cases; for when a ship comes into a foreign port, she and all on board are subject to the jurisdiction of the foreign state.

1090. There is another kind of limitation of the maxim, "free vessels make free goods," which has also excited much discussion in modern times. This limitation has been termed the "Rule of 1756*," and is thus stated: "Neutrals are not allowed to engage in a trade with the colonies of belligerents during war, which trade is not allowed them during peace." In virtue of this Rule, the Stronger Naval belligerent Power enforces, during war, in order to distress its enemy, the same restrictions on commerce with the Colonies of the Weaker, which the Weaker itself had during peace enforced, in order to its own advantage. For, in all cases, European governments have, during peace, excluded other countries from the carrying trade between them and their colonies†. But in the Seven-years' War, begun in 1756, the French were prevented, by the

* Manning, B. III. c. v. † Ibid.

maritime superiority of the British, from carrying on their colonial trade themselves. Upon this, they threw open the trade to neutrals; but Great Britain denied that neutrals had a Right to such a trade, and therefore acted upon the Rule of 1756 just stated. The consistency of the Rule with the common Rights of war, is evident. Such an interposition of neutrals as was here attempted, was a manifest assistance to France. It enabled colonies to hold out, which must otherwise have surrendered; supplied the mother-country with colonial produce and revenue; and enabled her to withdraw sailors from her merchant-service to man her fleet. It was a trade which the neutral had not possessed before the war; and possessed, during the war, only in virtue of the British naval superiority; and which they would lose again on the restoration of peace. The neutrals exercise such a trade under the protection of the stronger naval power, and entirely to his damage. The prohibition of such a trade is no doubt a limitation of the Rights of Commerce; but, in this respect, the prohibition of a neutral's supplying the suppressed colonial trade of the weaker naval belligerent, does not differ from the prohibition of a neutral supplying a blockaded town with food, or a defeated belligerent with arms. In such cases, the Rights of War supersede the Rights of Commerce, in order that the operations of War may not become futile.

1091. The Right of Visitation or Search of neutral vessels at sea*, is a belligerent Right, essentia to the exercise of the Right of capturing enemies' property, contraband of war, and vessels committing breach of blockade. Even if the Right of capturing enemies' property be ever so strictly limited, and the Rule of "free ships, free goods," be adopted, still the Right of Visitation and Search is essential, in order to determine whether the ships themselves are neutral. It is conformable to the Law of Nations to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the docu-

* Wheaton, P. IV. c. iii. § 26.

ments on board, whether she is really neutral. Indeed, the practice of maritime Capture could hardly exist without this Right. Accordingly, the writers on the subject concur in recognizing the existence of this Right. But it is to be observed, that we here speak of it only as a Right of Belligerents.

Chapter IV.

INTERNATIONAL RIGHTS OF JURISDICTION.

1092. Within its own territory, every State has complete and exclusive jurisdiction. The Laws are made, and the administration of them directed, by the State; and speaking generally, this administration extends to foreigners, so long as they are in the territory, no less than to natives. The practice and Treaties of nations may have introduced exceptions; but this is the general Rule.

1093. How far the jurisdiction of a State extends over its subjects, when they are out of the limits of all States, as for instance, when they are in a ship on the High Seas, is a question of International Law. As we have already said, it is maintained by some writers that the ship, wherever it may be, is to be considered as a part of the territory of the State; a sort of floating Colony. This is one mode of expressing a Rule which is assented to by all*:—That both the public and private vessels of every nation, on the high seas, and out of the territorial limits of another State, are subject to the jurisdiction of the State to which they belong. But if we say that this is because the vessel is a part of the national territory, we express this Rule in such a way as to contradict other Rules generally agreed to. For if the ship were really national territory, contraband of war, or enemy's goods, could not rightfully be seized within it; which, by acknowledged International Law, they may.

* Wheaton, Vol. I. 152.

1094. A State has an exclusive jurisdiction over its vessels on the high seas, so far as respects offenses against its own laws. But there are certain offenses which are violations, not of the Law of any single State, but of International Law; as *Piracy*. The offense of depredating on the high seas without being authorized by any Sovereign State. This is a crime, not against any particular State, but against all mankind; and may be punished by the competent tribunal of any country where the offender may be found, or into which he may be carried, though committed on the high seas.

1095. Hence, when a State declares an offense to be Piracy, it declares that persons committing this offense may be lawfully captured on the high seas by the armed vessels of any State, and carried within the territorial jurisdiction of the captors for trial. And if the nations of Europe and America were to agree in declaring an offense, the Slave-trade, for instance, to be Piracy, vessels detected in the practice of the Slave-trade might be captured and condemned by any State which had the means of doing this.

1096. The International Law of Europe and America appears to be approaching this point, but has not yet reached it. The Slave-trade has been declared a crime by every Christian nation. It has been declared piratical by many treaties between nations. An American vessel engaged in the trade has been condemned by an English prize-court*. For the trade having been prohibited by the Laws of both countries, and having been declared to be contrary to the principles of justice and humanity, the Judge decided that it was necessarily illegal. But in more recent cases, it has been decided by Judges that the Slave-trade is not a criminal traffic by the general law of nations; that each person can be judged for it only by the tribunals of his own country, except so far as the treaties of nations provide other jurisdictions. The Judge† said that no one nation had a Right to force a way to the liberation of Africa by trampling on the independence of other States; or to

* Wheaton, P. II. c. xi. § 17. † Lord Stowell.

procure eminent good by means that were unlawful; or to press forward to a great principle, by breaking through other great principles that stood in the way. But it must be remarked, on the other side, that there is great moral inconsistency in those States which declare the Slave-trade to be a crime, and express horrour at the atrocities to which it leads; and which yet refuse to join in such an improvement of International Law, as would enable the powerful maritime nations altogether to suppress this traffic.

1097. The suspicion of a piratical character in a vessel, authorizes a stronger vessel to search the suspected ship. For if merely showing the flag of a State at peace with that of the stronger vessel, would suffice to pass the suspected ship unquestioned, no pirate need ever submit to be taken. Hence, the question as to whether the Slave-trade is to be treated as being Piracy by International Law, leads to the question whether the Right of Search for the suppression of the Slave-trade exists by International Law. The Right of Mutual Search for this purpose has been established by treaties between several nations in modern times*; and probably the Moralists of all Countries will agree with the English Moralist†, who said that he felt a pride in the British flag being, for this purpose alone, subjected to search by foreign ships. It had, he said, risen to loftier honour by bending to the cause of justice and humanity.

1098. Besides its jurisdiction over its subjects on the high seas, there are cases in which by the usage of nations, the jurisdiction of one State, more or less modified, extends into the territory of another. Thus, the person of a Sovereign going into the territory of a foreign State in time of peace, is, by the general usage and Comity of Nations, exempt from the ordinary local jurisdiction. And the person of an Ambassador, whilst within the territory of the State to which he is delegated, is in like manner exempt from the local jurisdiction. His residence is considered as a continued residence in

* Manning, B. III. c. xi. p. 376. † Mackintosh.

his own country; and he retains his national character, unmixed with that of the country where he locally resides. Also by particular treaties between Countries, the Consuls, and other Commercial Agents, which a State appoints in a foreign country, are authorized to exercise a jurisdiction on the part of the State which appoints them. The nature and extent of this jurisdiction depends upon the stipulations of the treaties. Among Christian nations, it is generally confined to civil causes among Merchants and Seamen, to matters relating to Contracts and Wills, and the like. But the resident Consuls of Christian powers in some Mahommedan Countries, exercise both civil and criminal jurisdiction over their countrymen; though this jurisdiction is of a limited kind. To these cases of exceptions to the territorial jurisdiction of a State, are added a foreign army, marching through the country, or stationed in it; and foreign ships of war in its ports, the two States being in amity. But the private vessels of one State entering the ports of another, are not exempt from the local jurisdiction, except so far as compact exempts them.

1099. With the exceptions just stated, the two leading Maxims of International Law, as it regards Jurisdiction, are generally admitted: *First*, that the Laws of a State have force within the limits of its own government, and bind all the subjects thereof, but have no force beyond those limits: *Second*, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof*.

1100. Thus the inhabitants of each State are ruled by their own Laws. But this does not suffice for all the occasions of human action. Men of different countries have intercourse of various kinds with each other. Men travel from one country to another. As they move, they carry with them characters and attributes which have been assigned to them by the laws of their own country; as rank, wealth, wife, legitimate children,

* Story's *Conflict of Laws*, p. 30.

contracts. We cannot avoid inquiring how far these characters and attributes are modified by the transition from one country to another, in which the Laws respecting them are different. And here, we find that States in general have agreed to a Maxim, which gives, in all common cases, stability and permanence to the conditions and relations of men. This Maxim (the *Third* in addition to the First and Second which we have mentioned) is as follows. The Laws which are of force within the limits of a State are allowed to have the same force in other States also, with regard to its own citizens, so far as they do not interfere with the powers or rights of those States or of their citizens. This extra-territorial efficacy is granted to the Laws of States, by a general disposition to further each other's ends, which is called the *Comity of Nations*.

1101. It has been thought by some jurists* that the term "Comity" is not sufficiently expressive of the Obligation of a Nation to give effect to the Laws of foreign nations when they do not interfere with its own. It has been said that it is not a matter of Comity, or Courtesy, but of Duty. And undoubtedly it is a Duty of every State to give effect to the Laws of other States, so far as they are means of promoting Justice, Humanity, Truth, Purity, Order. But this Duty cannot be said to amount to an Obligation, (of the kind often called a perfect Obligation;) for if withheld, it cannot be enforced. One Nation cannot assert a Right to have its Laws made effective within the territory of another State, and without the State's Consent. The practice of giving to Laws this extra-territorial effect prevails, not in virtue of the Rights of Nations, but of their Moral Claims on each other, and of their Mutual Duty. And this Duty is called *Comity*, rather than by any name implying a higher Morality, because a State, in carrying into effect the Laws of a foreign nation, does not pretend that they are necessarily good and moral Laws; which, with regard to its own Laws, it does pretend. The great ends of

* Story's *Conf.* 33.

Law, the security of person and property, the observance of good faith, the stability of family ties, these are the common objects of all States in their Laws and Administration. The Laws of foreign States, with regard to Protection, and Property, and Contracts, and Marriages, may be different from our own. We (the State) cannot pretend to say that they are good in the same manner that our own are; but we will not dwell upon this doubt; we will take for granted that they answer the ends of Law; we will recognize and assist their operation on that assumption. This is the spirit in which nations adopt the Maxim which we have stated; and this spirit of action appears to be better described by calling it the *Comity* or *Courtesy* of Nations, than if we were to say that such a practice is followed in virtue of the Mutual Rights of Nations; for these Rights are not acknowledged to this extent; or than if we were to say that it is followed in virtue of their Mutual Duties; for this would imply that it would be wrong not to accept the foreign Law; a doctrine which would too much infringe the special respect with which the State looks upon its own Law. Courtesy is a Duty, but a Duty which must give way, when it comes into conflict with higher Duties, in which the distinction of right and wrong is concerned: and such a Duty is the Comity of Nations.

1102. Since there are thus many Cases to which foreign, as well as domestic, Laws apply, it must often happen that doubts and apparent contradictions occur, as to which Law is to be followed in a particular Case: there will be a *Conflict of Laws*. Examples of such difficulties occur in the following Questions: May a Contract which is valid by the Laws of the country where it is made, be enforced in a country where such Contracts are invalid, or illegal? May a Marriage between persons of full age, according to the laws of one country, be dissolved by their removing into another country by whose laws they are still minors? If a person has Property in one country, and Debts in another, according to what laws are his creditors to be paid? Such questions arise in endless number. They

cannot be decided without the establishment of some general maxims on the subject of the Conflict of Laws. To lay down, however, and to apply such Maxims, is the office of works written expressly on this subject, and to them we must refer. I may notice, as a work of great value on the subject, Judge Story's *Conflict of Laws;* and in this, the reader will find the other standard works on the subject, quoted and discussed.

1103. I may however very briefly state some of the Maxims which have been generally accepted on this subject.

With regard to immoveable property (land and the like) the law of the place where it is situate, governs in everything relating to the tenure, the title, and the forms of conveyance. Hence, a deed or will of real property, executed in a foreign country, must be executed with the formalities required by the local laws of the state where the land lies. This Rule is termed *Lex loci rei sitæ**.

1104. With regard to moveable property (money and goods), the modes of conveyance and the like are principally governed by the home or domicile of the party. This Rule is the *Lex domicilii.*

1105. It becomes necessary to lay down some Rule for the determination of the National Domicile of a person; for there may be instances in which, from change of residence, or from having several places of abode, a person's domicile may be doubtful. The definition given by jurists† is that the Domicile is a person's principal residence, to which, when absent from it, he always retains an intention of returning (*animus revertendi*). To this general Rule, others, applicable to particular cases, are subordinate, but we need not dwell upon such details.

1106. With regard to Contracts, the general Rule is, that a Contract valid by the Law of the place where it is made, is valid everywhere else. This Rule, established by the general comity and mutual convenience of nations, is termed *Lex loci contractus.*

* Wheaton, P. II. c. ii. § 5. † Story, § 41.

1107. But again*, every sovereign State has the exclusive right of regulating the proceedings in its own courts of justice. This Rule is *Lex fori*. And the *Lex loci contractus* of another country cannot apply to such cases as are properly determined by the *Lex fori* of that State where the contract is brought in question. Thus if a Contract made in one Country is attempted to be enforced, or comes incidentally in question in the judicial tribunals of another, everything relating to the forms of proceeding, the rules of evidence, and of limitation or prescription, is to be determined by the law of the State where the suit is pending, and not of that where the Contract was made.

1108. The municipal laws† of most countries prohibit foreigners from holding Land within the territory of the State, because in most countries the Rights of Government are connected with the tenure of land, as was the case in Europe under the feudal system. In that case, the acquisition of land involved the notion of allegiance to the Sovereign within whose dominions it lay, which might be inconsistent with the allegiance which the proprietor owed to his native sovereign.

1109. The right of Succession, like the right of real property, was conceived to depend on the State, and to be a creature of the State. Hence, this right was denied to foreigners dying in the Country; and the Sovereign of the Country took their property. This Right of the Sovereign, as it existed in France, was termed *jus albinatus* (*alibi-natus*), and in French, *droit d'aubaine*. In such cases, the property was also said to *escheat* or fall (*escheoir*) to the King.

1110. Thus Laws which concern Property are, in their international application, mainly governed by the place. On the other hand, the laws which determine the Character and Condition of a person do, for the most part, accompany him with their effects into all places, wherever he may travel or reside. In general‡ the Laws of the State, applicable to the civil condition and personal capacity (*status*) of its citizens, operate upon

* Wheaton, P. II. c. ii. § 9. † Ibid. p. 138. ‡ Ibid. I. 141.

them, even when resident in a foreign country. Such are the universal personal qualities which take effect, either from birth, as citizenship, legitimacy, illegitimacy; or at a fixed time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce, as ascertained by the judgment of a competent tribunal. The laws of the State affecting these personal qualities of its subjects, travel with them wherever they go, and attach to them in whatever country they are resident.

1111. With regard to Marriage, indeed, it has two aspects, since it may be considered either as a contract, or as a personal *status;* and will be governed by the *Lex loci contractus*, or by the original country of the parties, as the one view or the other is taken: the Law of England adopts the former cause. A clandestine marriage in Scotland, of parties originally domiciled in England, who resort to Scotland for the sole purpose of evading the English marriage act, (which requires the consent of parents or guardians), is considered valid in the English ecclesiastical courts. The same principle has been recognized between the different States of the American Union. By the French Law, on the other hand, the age of consent which is required by the code is considered as a personal quality of French subjects, following them wherever they remove; and consequently, a marriage by a Frenchman under the required age, will not be regarded as valid by the French tribunals, though the parties may have been above the age required by the law of the place where it was contracted.

1112. With regard to penal Laws, it is a principle generally acknowledged among jurists*, that the penal Laws of one State have no operation in another State. Hence a person convicted as a criminal in one country is not, on that account, to be treated as a criminal by the Government of another country. Nor does it appear to be a Right generally acknowledged, or a part of the Law and Usage of Nations, that offenders, charged with a high crime, who have fled from the country where the crime has been committed, should

* Story, § 620.

be delivered up and sent back for trial, by the Sovereign of the Country where they are found. But though this *Extradition of Criminals* may not be a matter of general International Law, it is often a matter of compact between States. It is voluntarily practised by certain States, as a matter of general convenience and comity. And it is held by moralists* that it is the duty of the Government where the criminal is, to deliver him up; and that if it refuses to do so, it becomes, in some measure, an accomplice in the crime.

1113. There are some offenses which alter their character, according as they are committed by a subject or an alien. Thus an alien who bears arms against the Sovereign of the Country is dealt with by the laws of war; but the subject who does so is guilty of treason. He violates his *Allegiance*. Hence it becomes important to determine from whom Allegiance is due to each Sovereign, and how far this tie may be cast aside or transferred.

1114. There are two extreme opinions on this latter point. According to one, the tie which connects a man with his country, like the tie which connects him with his family, can never be abolished His original country is his Mother, in spite of all that he can do. According to the other view, a man's connexion with any Community is of a voluntary kind. At a mature age, and with due formalities, he may choose a country for himself. But this latter view, though it has been asserted by theoretical writers, has never been recognized in the practical legislation of States. The ancient Jurists had a maxim that no one can divest himself of his country: *Nemo potest exuere patriam*. The Common Law of England was to the same effect, that all the King's natural born subjects owed him an allegiance which they could not cast off. It is held† that it is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince: nor is it in the power of any foreign prince, by naturalizing or em-

* Story, § 627. † Kent's *Commentaries*, II. 42.

ploying a subject of Great Britain, to dissolve the bond of Allegiance. Entering into a foreign service without consent, is a misdemeanour: taking a commission from a foreign prince, and acting against the King, is treason. The United States of America, and other new States, have made various provisions for admitting new citizens into their community. But they have not, in general, left their citizens at liberty arbitrarily to cast off the tie which connects them with their country. The Federal Courts of the United States have had the subject before them*; and the Opinion which there prevails is, that a citizen cannot renounce his allegiance to the United States, without the permission of government, to be declared by law. Also the Law of France does not allow a Frenchman so far to expatriate himself as to bear arms against his country.

1115. It may be inquired, From whom is this Allegiance due? Who are the subjects of a State? According to the old Law of England, all persons born within the King's dominions are his natural born subjects, and all persons born abroad are aliens. But more recent laws have given the rights of natural born subjects to all children, born out of the King's liegeance, whose fathers, or grandfathers by the father's side, were natural born subjects†. Rules more or less resembling this prevail in other States.

1116. Besides this natural allegiance, jurists‡ recognize a *Local Allegiance*, which is due from an alien or stranger, so long as he continues within the dominions, and therefore under the protection, of the State. And as this Allegiance, by which they are required to abstain from injuring the State in which they reside, is demanded of strangers; so are they allowed, in a temporary manner, some of the Rights of citizens. Thus a subject of one country may, for commercial purposes, acquire the Rights of the citizen of another. He has a *Commercial Domicile*, and this domicile determines the character of the party as to trade§.

* Kent, II. 48.
† Blackst. I. 373.
‡ Ibid. I. 370.
§ Kent, II. 49.

Chapter V.

INTERNATIONAL RIGHTS OF INTERCOURSE.

1117. According to International Jus, nations are regarded as distinct moral agents, capable of acting for or against each other, of contracting with each other, and the like. Hence they must have certain National Modes of Intercourse with each other; not merely such as consist in the citizens of one State communicating with the citizens of another; but in the States themselves communicating with each other, by persons who speak and act on their part. Such Intercourse is naturally under the direction of the *Executive* branch of the Government, as being that branch which acts for the State. But, for the most part, the communications with foreign States are not made directly by the Sovereign, as a part of his general administrative office, but by Ambassadors or other Ministers of the State, deputed for that express purpose.

1118. Every State, considered as an Independent State, has the power of negotiating and contracting Public Treaties with other Independent States. For this purpose, every Independent State has a right to send Public Ministers, and to receive Ministers from any other Sovereign State. No State is, strictly speaking, obliged, by the positive Law of Nations, to send or receive public ministers. But universal usage, the result of the Comity of Nations, has established this as a reciprocal Duty. Such being the Duty of every nation on the ground of Comity, it is what has been called an Imperfect Obligation. It may not and cannot be enforced as a Right; but the State which refuses to conform to the usage has no longer any claim to receive the benefits of the Law of Nations. *The Right of Legation* is a part of existing International Law.

1119. When States are not absolutely sovereign and independent, but semi-sovereign, or dependent, or united by federations of various kinds, it must be de-

termined, by their relation to their superior, or their compact with each other, how far they possess this Right of Legation. Thus England, or Ireland, or Scotland, cannot send Ambassadors or Ministers to a foreign State, distinct from the Ministers of Great Britain. Nor can the Colonies, as Canada or Australia. The United States of North America, though each, for many internal purposes, sovereign, are restrained by their federal Union from treating separately with foreign powers. But the States of the German Federation send their separate ambassadors. When, in the course of historical events, several States coalesce into one, as by legislative union, or by conquest; or when one State is divided into several, as by revolt, revolution, or common consent; it is the business of other States to determine when each new State assumes a distinct and real existence; and they recognize this existence by receiving Ministers from it and sending Ministers to it. The same is the mode of recognizing the actual authority of a new Government, in a State which has undergone an internal Revolution.

1120. In deciding upon such recognitions of new States and new Governments, the Governors of a Nation, if they would act for the Nation in its highest character of a moral agent, capable of Justice, Humanity, Magnanimity, Love of Order, and Love of Liberty, will not make their recognition of the New Government depend upon mere caprice, or upon any low views of their national interest; but will regard it as a jural and moral question; as a point to be decided according to the best existing Rules of International Law, and without losing sight, in the decision, of the prospect of raising the standard of International Law; for this prospect, all States must have before them, as the highest aim of their actions.

1121. The modern usage of Europe has introduced into the customary Law of Nations certain distinctions of various kinds of Public Ministers: and at the Congresses of Vienna and of Aix-la-Chapelle an uniform Rule was adopted for this subject. By this Rule

public ministers are divided into the four following classes*:

1. Ambassadors and Papal Legates or Nuncios.
2. Envoys Extraordinary, Ministers Plenipotentiary, and Internuncios.
3. Ministers Resident accredited to Sovereigns.
4. Chargés d'affaires accredited to the Minister of Foreign Affairs.

1122. Ambassadors possess a *representative* character; they are considered as representing the Sovereign or State by whom they are delegated, and receive peculiar honours on this ground. Formerly a *Solemn Entry* of the Ambassador was customary, but they are now received at a private audience, in the same manner as other Ministers.

1123. The Powers, Credentials, Privileges, and Modes of acting for their nation which belong to its Public Ministers abroad, need not be here dwelt upon. The Right of directing their actions, of negotiating and concluding Treaties, belongs, as we have said, to the Executive at home. But though the Executive thus makes the Contracts of the State with other States, the assent and co-operation of the Legislature may often be requisite to give effect to such Contracts. Thus, in Treaties requiring the appropriation of monies for their execution, it is the usual practice of the British Government to stipulate that the King will recommend to Parliament to make the grant necessary for that purpose. Under the Constitution of the United States, by which treaties made and ratified by the President, with the advice and consent of the Senate, are declared to be "the Supreme Law of the land," it seems to be understood that Congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry the treaty into effect†.

1124. The General Contracts between nations are divided into two classes: *Transitory Conventions*, such as treaties of cession, boundary, exchange of territory,

* Wheaton, P. III. c. i. § 6. † Ibid. c. ii. § 7.

and the like; and *Treaties* properly so called, *Fœdera;* such as those of friendship and alliance, commerce and navigation. The first class are perpetual in their nature; and once carried into effect, subsist, notwithstanding revolutions within the State, and wars without. The second class are interrupted by war, and extinguished by the extinction of one of the contracting parties as an Independent State. Most international Compacts contain Articles of both kinds; such is the case especially with most Treaties of Peace. Treaties of Alliance are either Defensive, when each ally engages to assist the other in repelling aggression; or Offensive, when an ally engages to co-operate with the other in a specified kind of hostilities. When the Alliance is Defensive, one of the allies cannot claim the assistance of the other in an aggressive war; such a war is not the *casus fœderis**.

1125. The Convention of *Guarantee* is one of the most usual international Contracts. It is an engagement by which one State promises to aid another, when interrupted, or threatened to be disturbed, in the peaceable enjoyment of its Rights, by a third Power. Guarantee may be applied to every species of Right and Obligation which can exist between nations: to the possession and boundaries of Territories, the Sovereignty of the State, the right of Succession, &c.

1126. But if a State assumes the character of Guarantee for one of the Parties in another State; if, for instance, it engages to protect the Sovereign against the revolt of the Subjects, or the Subjects against the tyranny of the Sovereign, the transaction is then of another kind. It is an *Intervention* which necessarily interferes with the independence of the State thus dealt with. Such an Intervention may be necessary for the safety of neighbouring States; but is only justifiable in a Case of Necessity, and is not to be looked upon as one of the ordinary Cases of International Jus. A Sovereign may be wrongfully dethroned, and a foreign

* Wheaton, P. III. c. ii. § 13.

State may aid him as his ally against a hostile faction. He may be rightly dethroned, and a foreign Sovereign may properly aid those who, in a Case of Necessity, deprive him of his office. A nation may resist a usurper, and a foreign Sovereign may properly aid the nation in such a cause; or a nation may proclaim doctrines which make all exercise of international jus impossible, and other nations may hence refuse international intercourse with this, and may thus be driven into war. All these are Cases in which Intervention may possibly be justified by necessity, according to the circumstances of the Case. But for these, as for other Cases of Necessity, it is impossible to lay down Rules beforehand.

1127. States have hitherto been much impelled in their public transactions by their views of their own particular interest. Yet there have not been wanting, in the history of nations, many acts of justice, of magnanimity, and of humanity. The negotiations of States and the reasonings of jurists seem to show, that International Law rises gradually to a higher moral Standard. The declarations of all civilized States against the Slave-trade, although hitherto imperfectly carried into effect, are a recognition of the principle of Humanity in the public Law, to an extent which places modern far before ancient times, in this respect. The abolition of Slavery in the West Indies, carried into effect by Great Britain at a very great cost, is another strong evidence of the growing influence of such Principles in public acts. On several occasions in recent times, the Great Powers of Europe have acted and negotiated as if they deemed themselves bound, by a tacit Convention, to guarantee the Liberty and order of Nations, and the preservation of Peace.

1128. If States continue firmly and consistently to pursue this Course, applying to themselves the same Rules of Justice and Humanity which they require their weaker neighbours to observe; there appears to be no reason to despair of the realization of the most equitable

and moral codes of International Law which Jurists have ever promulgated; nor of the indefinite moral elevation and purification of such Codes, in proportion as the characters of nations are elevated and purified by the practice of the political virtues.

THE END.