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OXFORD LECTURES

AND OTHER DISCOURSES

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BY

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To

SIR ALFRED LYALL, K.C.B.

PREFACE

A PUBLIC lecture, as the term is used at Oxford, is the setting forth of matters in some way belonging to the speaker's particular branch of learning for an audience not assumed to be specially versed in its methods or applications. A considerable part of this volume represents, in text or in substance, public lectures actually delivered in the University; the whole of it is in a general way of the same character. A few pieces are included which are slightly or not at all connected with the Faculty of Law. Those whom the subjects do not interest will easily forgive the inclusion of these pieces, since they are so few. To lawyers I might justify one of them by the authority of Mr. Justice Wills, from whose "Eagle's Nest" in the valley of Sixt I started, many years ago, on one of my first days of real mountaineering, and another by boldly perverting Bracton's words *propter jus gladii quod dividi non potest.*

To the minority of readers who may be more interested in these outlying essays than in the main part of the book, I need hardly make excuses for having taken the first occasion of preserving them.

Some lectures on the History of the Science of Politics, which might otherwise have formed part of this book, were separately republished a few months ago for a special reason which was then stated.

F. P.

Lincoln's Inn,
October 1890.

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I

THE METHODS OF JURISPRUDENCE[1]

JURISPRUDENCE, *juris prudentia* or *peritia*, *Rechtswissenschaft*—these are terms current among lawyers and scholars, and imply the existence of a systematic body of doctrine; of a special kind of knowledge which can be and is methodically treated, and possesses methods and ideas proper to itself. A body of such special knowledge is a science, unless it depends only on the application of other and more general sciences. Thus there are scientific treatises on gunnery, navigation, and railway engineering. But we should hardly say that seamanship, or gunnery, or the construction of locomotives, is a science of itself. The application of the seaman's, or gunner's, or locomotive engineer's knowledge is a distinct art in itself, having in each case its own distinct practical end, and needing to be separately studied by those who would be skilled in it. But the knowledge that guides the art is obtained by the application to a particular kind of cases of general physical truths, and the methods are applications of those discovered

[1] An introductory lecture delivered at University College, London, October 31, 1882.

and used in mathematics and mathematical physics. Therefore we may speak for some purposes of the science of seamanship for instance, but if we are speaking with attention to the exact use of words, we shall say that seamanship is an art depending on certain branches of mathematical and physical science. As regards our own case, there is no doubt that the practice of the law is a perfectly distinct art. It is constantly spoken of as such in our older books. The lawyer's technical words are called terms of art, and in our own day an ill-drawn instrument may still be described by the judge as inartificial. In this usage the word has probably the larger sense in which the "liberal arts" were understood in the mediæval university course, covering what we now understand by both art and science; but at all events it includes art in the modern sense. Indeed, the lawyer's is a manifold art. As counsel he is called on to form a practical judgment on the legal effect of the facts laid before him; as advocate, to present in the most forcible and persuasive manner that view of the case which is most favourable to his client's interest; as draftsman, to express in apt and sufficient words the intention of the parties who instruct him. Nor can a draftsman, in particular, produce really good work, whether the instrument to be framed is an ordinary lease or an Act of Parliament, unless he has a share of artistic feeling in the eminent sense, and takes a certain artistic pride in the quality of his workmanship, apart from the reward he will get for it.

Art, then, we certainly have. And we have a body

of doctrine which in most civilised countries is systematic, and in England is at least capable of being made so, which is the peculiar and technical study of lawyers—so much so that laymen complain of it for being too technical—and which cannot be regarded as the application of any other and more general science or sciences. Legal ideas have as clear a generic stamp of their own as mathematical or physical ideas; and in law, no less than in physics, the terms of commonest use have a widely different import for the trained and for the untrained mind. A man of what is called good general education will talk of Obligation or Possession as he will talk of Energy or Mass, thinking he knows what he means, but in truth having only a vague shadow of a meaning. The physicist will tell him in one case, the lawyer in the other, that he is using words which it has taken generations of strenuous thought and discussion to bring to their full and clear significance. In either case he may put us off, if he chooses, with ridicule—the last refuge of obstinate ignorance in its lighter moods, as the will of Providence is in its serious ones. We also find that competent lawyers are substantially at one in their methods and their terminology, though they might have some trouble in explaining either to lay people, and English lawyers, for a variety of reasons, for the most part anxiously shrink from verbal definition. Law, then, has all the marks of a distinct science; and, seeing that legislatures and courts of justice notoriously exist, it cannot be charged with being a science falsely so

called and versed in unreal matter, such as astrology or the Chinese doctrine of auspicious and inauspicious sites. It may be suggested, perhaps, that legal science is nothing but the application of logic (at all events if logic be taken to include the systematic use of induction and analogy) to a special aspect of human life. My answer to this would be that every science is equally an application of logic to some class of facts. Logic is not a special science or art at all, but the condition or instrument of all knowledge alike. With metaphysics, and perhaps pure mathematics, it stands apart, presupposed in every science, but specially attached to none. It may be said, again, that Jurisprudence is one of a group of special studies which all come under Politics in the wide sense, and that some parts of what is called legal knowledge are really quite as much political. To this I should not gravely object, or not at all. Political science as a whole, however, cannot be said to be much organised at present; and the special branches, jurisprudence, political economy, and whatever others there may be, must meanwhile exist on their own footing if they are to exist at all, and even encroach on the general theory of politics when they find it convenient.

If it is certain that jurisprudence or legal science is the name of a real and distinct scientific study, no less is it certain that learned men have found it by no means an easy task to define its contents and scope. At this day widely different accounts of these are given by different schools. A student who has received an English training is at first bewildered by

the Continental treatment of theoretical jurisprudence. It is not merely that the terminology differs from his own; there is a radical diversity of conception and handling. Perhaps it may help us to understand such a divergence if we go back to the earliest classical definition of Jurisprudence, and see to what questions it gives rise. I mean Ulpian's, which is not only preserved in the Digest, but conspicuously adopted at the beginning of the Institutes, and is therefore familiar to every student of Roman law.

The words of Ulpian are as follows: — *Iurisprudentia est rerum divinarum atque humanarum notitia, iusti atque iniusti scientia.* We need not now trouble ourselves, I think, to discuss the exact meaning attached to this expression by Ulpian or the Greek theorists whom he followed. It will be more for our present purpose to see if, without doing violence to the words, we can find a meaning acceptable enough to lead us to definite issues. "Jurisprudence is the discernment of things divine and human, the knowledge of what is just and unjust." At first sight this is but an unpromising rhetorical description, covering, as it seems to do, the whole field of human conduct without distinction between legal and moral duty. But if we look closer, we see that the *scientia* here in question is a discriminative, not a collective knowledge. To know what is just and unjust is to know the difference between just and unjust. What if the *notitia* spoken of in the first clause be likewise a discernment not so much of the things themselves as of the distinction between them? If so, we may read

it thus: "the discernment of that which concerns the gods and that which concerns human authority," the separation, in other words, of the province reserved for religion and morality from the province of law. That is not yet jurisprudence, but it is a preface to jurisprudence; it is the knowledge of what jurisprudence is not, and, to that extent, of what it may be. The *res divinae* are to be left aside for the theologian or the moralist. And this is a distinction which is not merely formal, but goes deep into the practical working of law. Thus the motive of any given action, as distinct from its intention, is for the most part a *res divina* in the sense we have put upon Ulpian's definition. For many purposes, the law regards intention but not motive. It makes a great moral difference (to take a stock example) whether a man breaks a baker's window and snatches a loaf as a mere piece of mischief, or because his children are starving; but the legal offence is the same. Intention is a necessary element in the facts constituting theft; but when all the elements are there, they no less amount to theft because the motive may be such as to extenuate or all but abolish the moral demerit. Practically the result may be tempered by judicial discretion, which (not being bound to give reasons in detail) supplies the more subtle adaptations required by moral feeling. This is just the kind of point on which even intelligent laymen are apt to stumble; law-makers seem to them unjust because they leave the refinements of administration to the administrator. I leave you to consider for yourselves, from this point

of view, the spirit of our English criminal justice; the wide range of possible sentences (in the case of manslaughter for instance anything from one day's imprisonment to penal servitude for life), the power of suspending sentence altogether by taking security to come up for judgment, the extreme rarity of minimum sentences, and the like.

To return to our general topic: we have set off the proper field of legal study, namely *res humanae* in the sense of institutions of human ordinance. Then the definition specifies further: *iusti atque iniusti scientia*, the knowledge of what is just and unjust. Here just and unjust must mean something within the sphere of *res humanae*, something allowed or disallowed by rules which are administered, or conceived so to be, by a definite human authority. Just is that which is, actually or potentially, upheld in a court of justice; unjust is its contrary. Justice, legal as well as moral justice, is no doubt conceived as antecedent to any particular tribunal. Nevertheless if we want to know in practice what legal justice means, we must look to the usage of existing lawgivers and judges. So far we have traced in the rough the distinction between law properly so called and opinion or morality. The remark is obvious that Ulpian seems to omit the peculiar relation of positive law to the State. But the Latin word *ius* really includes this, if we may forget the unhappy term *ius naturale*, which seems to be a mere external ornament borrowed from Greek philosophers in excess of zeal to make a show of philosophical culture, and inconsistent

with the proper Roman use of the word. Indeed the Roman vocabulary for these general notions was almost too good. A Roman, possessing such apt and clearly distinguished words as *fas*, *mos*, *ius*, *lex*, and *aequum* and *bonum* to fall back on when he came to the region of moral discretion, could not feel much occasion for further verbal analysis. He could scarcely have been made to understand our modern ambiguities and flounderings with Law, *Recht*, and so forth. We analyse to supply our want of clear terms and correct instinct. Our science, then, is a knowledge of human laws. But of what laws, or what species of them? Are the laws or legal conceptions we study to be actual or ideal, general or particular? There are many distinct systems of rules by which the tribunals of civilised countries actually profess to be guided. They have the family likeness which belongs to the corresponding institutions of all civilised States, but they have considerable specific differences. We find one body of legal doctrine and form of legal proceedings here, another at Edinburgh, another in the Isle of Man, and another in Jersey; this by merely looking round us at home. If we go beyond our own seas, we may count up a dozen or more distinct bodies of law without quitting the dominions of the British Crown. And then there are several distinct systems of speculation and argument by which philosophers have endeavoured to make out what the laws of civilised States, in their general features at any rate must be or ought to be. This kind of discussion may range from the most abstract

and general ideas to the pressing and practical needs of the day. Moreover we may consider the form of laws as well as their matter; this leads us to such topics as codification, draftsmanship, and even parliamentary procedure. Shall the province of jurisprudence be deemed to embrace all these lines of inquiry, or some and which of them? Let us see what number and variety of possible species of legal science we have obtained.

First consider laws as the actually existing and operative rules under which justice is administered. A man may study the system of his own land in order to know how things stand with his own property and business, or to qualify himself as a skilled adviser in the affairs of others. This is what we mean in common speech by being learned in the law. By a good lawyer we signify, speaking among Englishmen, a man well acquainted with the laws of England as they now are and concern our present affairs. We may call such knowledge practical or empirical jurisprudence. In England it has to be sought in a clumsy and laborious fashion, and has got a forbidding reputation. It may be not useless to say that, in spite of all repulsive appearances, the student can commit no greater mistake than despising it.

A bare account of existing laws may be sufficient for common practice; but at many points it must leave unsatisfied curiosity in a mind that is curious at all. Doubts and anomalies force us to inquire how the particular legal system and its various parts came to be what they are. And if we pursue the inquiry

far, we shall find that, as many things in existing law were explicable only through history, so the history of one system is not complete in itself. Sooner or later we break off in a region of tradition and conjecture where we can guide ourselves only by taking into account the kindred institutions of other nations and races. Thus we are led to historical and comparative jurisprudence, a line of study which forms a bond of alliance between the scientific lawyer on the one side and the historian, the archæologist, and the ethnologist on the other, and enables legal science to claim an assured place among the Humanities.

Again, comparative study discloses a certain amount of groundwork and typical conceptions which are common to all legal systems, or to all that have made any considerable way towards completeness. The Romans discovered, or thought they discovered, such a common groundwork of legal institutions in the various commonwealths that became subject to Rome. What remained, after deducting local and technical peculiarities, was called by them the common law of nations, *ius gentium*. Human society is so far alike in all tolerably advanced nations that the same kind of dealings have to be regulated and the same kind of interests protected. Marriage and the custody of children; sale, hiring, loan, and pledge; liability for voluntary or involuntary acts causing injury; the punishment of theft and homicide—these matters, under whatever names or forms, must be provided for in every community where a settled order is to be preserved. Thus we get a common stock of general

ideas, the study of which, so far as we can pursue it or imagine it to be pursued apart from the study of any actual system of law, may be called General Jurisprudence. But these general ideas of law may be approached from another direction. The endeavour may be made, not only or chiefly to recognise them as being in fact common to different systems, but to exhibit them as necessary; to deduce them from the general conditions of human society and action, and define their exact import without reference to their actual treatment by legislators or courts of justice. Thus we may attempt a general definition of such ideas as Duty, Intent, Negligence, Ownership, Possession, or (boldest ambition of all) of Law itself. Speculation of this kind (for it is essentially a speculative study) has of late years been conveniently named Analytical Jurisprudence. It is apt to run up into speculations on the theory of politics and government which really form a sort of political prolegomena to legal science, or borderland between jurisprudence and politics. To this region belongs the theory of Sovereignty which is so conspicuous in Bentham and Austin.

We have then already four branches or methods of jurisprudence, practical, historical, comparative, and analytical (for what I have called General Jurisprudence is hardly more than a name for the collective result of the two latter), and these are all concerned with laws, not as they might be or as we should like them to be, but as they are.

If now we take in the consideration of laws as they

ought to be, we pass into ground which belongs—according to English notions at any rate—to the statesman more than to the lawyer. Still it belongs to lawyers in some sort, as technical knowledge is needful to give definition to the statesman's ideas, and express them in an appropriate and sufficient form. This department of jurisprudence is marked off from the others in that it does not examine facts, but aims at an end or ideal. This may be expressed by calling it, as I have elsewhere called it, Final Jurisprudence, by analogy to the well-known term Final Cause. The consideration of it may be approached in two ways. In England Bentham has taught us to approach it with a view to practice. If we consider what laws ought to be, it is because we want to make them such as they ought to be. We conceive our ideal for the purpose of realising it by reforms. The instrument of reforming laws is legislation; and we must further study the powers and the handling of the instrument if we would use it with effect. We must learn how to apply it to the best advantage. Our good intentions must be executed by the best possible workmanship; and if we find that the technical methods in use themselves need reforming, they also must be reformed. Thus our Final Jurisprudence assumes the shape of a Theory of Legislation, with special branches treating of the formal structure of laws, codification, revision of codes, and legal procedure. If we want to see a good practical exposition of the theory of legislation as understood by enlightened Englishmen, we cannot

do better than study the principal chapters of the Indian Penal Code with the notes annexed by its authors to their original draft.[1] And if anybody were to challenge me to say what is the use of a theory of legislation, I should think it a sufficient reply to point to the Anglo-Indian codes. Bentham was in many ways an unpractical or impracticable reformer, but his work gave a fruitful impulse to practical minds such as Macaulay's and Macleod's in the following generation.

But there is another way of considering what laws ought to be. The perfect and ideal law may be regarded as a kind of pattern existing in the constitution of man's social nature, or in the minds of philosophers, and consisting of principles which, as being absolutely reasonable, ought of right to be followed by all reasonable men, though, because of man's weakness and the local diversities and historical accidents of existing governments, the laws which are in fact enforced by princes and rulers can be only more or less rude approximations to them. Similarly the law which in given historical circumstances a perfectly wise legislator would enact may be conceived as a pattern from which the law that is actually made unavoidably deviates to a greater or less extent; and the former may be deemed to be, in the ideal sphere of reason though not in fact, not only a law in some sense, but more truly the law for the given circumstances than the imperfect production we have to accept in practice. The general principles of legis-

[1] These notes are included in Lady Trevelyan's edition of Macaulay's works.

lation and government which are in this manner put forward as claiming assent from all men in so far as they are rational and social beings are said to be of natural obligation, and the sum of them is called the law of nature, *droit naturel*, *Naturrecht*. The law which would in itself be best for a given nation in given circumstances is sometimes called, by authors who take this point of view, *positive law*, the rules of actual civil obligation which we of the English school call positive law being by these authors named *enacted* laws, and relegated to a subordinate place in their exposition.

This view, such as I have endeavoured to characterise it, is still prevalent among Continental philosophers and jurists. The sort of doctrine which embodies it may be called Ethical Jurisprudence, for the law of nature, whatever it may be, is alleged to be binding on all men's reason, which is as much as to say that it is of like obligation and equally wide application with morality: and indeed its principles appear to be nothing else than those moral and social precepts which, by general consent, or in the opinion of the expounder for the time being, are convenient to be enforced by the power of the State, or would be so in a perfect State. By those who take up this doctrine it is considered the most important and dignified branch of legal science, and is often called the philosophy of law in an eminent or exclusive sense, and though it is not in itself incompatible with other branches of jurisprudence, it is apt in the hands of these authors to thrust them very much into

the background. So far as my acquaintance with it goes, it appears to me to lump together in a cumbrous and over-ambitious manner a good many topics in the theory of government, politics, and legislation, which are better treated separately. Nevertheless, we cannot dismiss it in the lump as absurd or illegitimate. The theory of legislation must take its most general data from the most general facts of civilised human society. It must equally take its first principles, avowedly or tacitly, from ethics. Ethical Jurisprudence, therefore, is to a certain extent not only legitimate, but necessary. The only strictly necessary difference between our "theory of legislation" and a German philosopher's *Naturrecht* is, that the Continental schools consider their ideal of legal institutions as a thing to be contemplated in and for itself, with a metaphysical interest which is as it were cut adrift from practice; while the Englishman's ideal is of something to be realised, or approached as near as may be, in an actual State, for actual citizens, and by the positive enactment of a legislature. But the difference is vastly exaggerated in outward show by the circumstance (not that it is an accidental one) that the English and the Continental schools found their theories on widely different ethical systems. In the sense in which I have distinguished the terms, there might be a Kantian theory of legislation and an utilitarian *Naturrecht*. Many chapters of Mr. Herbert Spencer's recent work would be most intelligibly described to a Continental jurist as

Naturrecht treated from the point of view of Mr. Spencer's philosophy of evolution.[1] Transcendent theories of moral obligation, however, naturally lead to a transcendent philosophy of law which constructs an ideal for its own sake; and the consideration of morality as a means to welfare or happiness leads to the consideration of the State and its institutions in the same manner, and to the framing of political conceptions for practical purposes and under practical tests. In other words, the political grounds and reasons of legal institutions will present themselves to the philosopher who holds a transcendental theory of ethics as texts or chapters of the law of nature; while to such as are content to follow the humbler but surer path of experience they will rather appear as topics to be used in the theory of legislation. The ethical habit of thought will impart its own form and colour to the political and legal philosophy founded on it. Thus the students of France and Germany, trained on the lines of Descartes or Kant, are prone to make much of the law of nature; Englishmen who study law with any theoretical interest, deriving their impulse mainly from Bentham, think of law reform and active legislation. And, for the reason just given, not only the English and the Continental student differ in their cast of thought, but each expresses his thought in a language unfamiliar to the

[1] Since these remarks were written, the term has been actually applied to the theories of Bentham and Austin by an eminent living Continental master of the historical school, Brunner of Berlin. Truly philosophy has many and subtle revenges.

other, and understood by him with difficulty. The most hopeful common ground for a better understanding is to be found, I think, in the historical school. In Bluntschli's or Holtzendorff's work, for example, German philosophical ideas are tempered by history and knowledge of practical politics into a shape which need not frighten any fairly open-minded English reader.

Before we leave this topic of Final or Ethical Jurisprudence, I will remark that, although a theory of the law of nature or of legislation must rest on some definite kind of ethical temper, I do not see why it should formally assume any particular theory of ethics. In either shape—*Naturrecht*, or theory of legislation—there must be some positive conception of the purpose for which the State exists; because that purpose, whatever we consider it to be, fixes the ultimate object of all laws and legislation. This is fundamental and unavoidable. And the conception chosen by the theorist can hardly fail to be associated with one or another side of the standing controversy between the various "Methods of Ethics." But that is no reason why he should take upon himself the burden of a whole ethical doctrine. If he feels moved to write on ethics as well as on jurisprudence, he may do it separately. For example, Austin's second, third, and fourth Lectures appear to me to have no business where they are. They are not jurisprudence at all, but ethics out of place. Still more does this apply to all the expositions of what is called the law of nature, Continental, Scottish and American.

There is another branch of legal science of which I have as yet said nothing, and which stands by itself; I mean that which deals with existing or possible relations not between citizens of the same State but between independent States. International Law is a true branch of jurisprudence, notwithstanding all that may be said about its want of sovereign power and a tribunal.[1] You may define it as "positive international morality" not having the nature of true law, but if you do, the facts are against you. For what are the facts?

1. The doctrines of international law are founded on legal, not simply on ethical ideas. They are not merely prevalent opinions as to what is morally right and proper, but something as closely analogous to civil laws as the nature of the case will admit. They purport to be rules of strict justice, not counsels of perfection.

2. Since they assumed a coherent shape they have been the special study of men of law, and have been discussed by the methods appropriate to jurisprudence, and not by those of moral philosophy.

3. There is also a practical test, and a conclusive one. If international law were only a kind of morality the framers of State papers concerning foreign policy would throw all their strength on moral argument. But as a matter of fact this is not what they do. They appeal not to the general feeling of moral rightness, but to precedents, to treaties, and to the opinions

[1] I am happy to be now supported in this view by Mr. Westlake (*International Law: an Introductory Lecture*, Cambridge, 1888).

of specialists. They assume the existence among statesmen and publicists of a sense of legal as distinguished from moral obligation in the affairs of nations.

4. Further, there is actually an international morality, distinct from and compatible with international law in the usual sense. As a citizen among citizens, so a nation among nations may do things which are discourteous, high-handed, savouring of sharp practice, or otherwise invidious and disliked, and yet within its admitted right and giving no formal ground of complaint. There is a margin of discretionary behaviour which is the province not of claims and despatches but of "friendly representations" and "good offices."

If therefore we find that our definition of law does not include the law of nations, the proper conclusion is, not that there is no such thing as a law of nations and that we are to talk pedantically of positive international morality, but that our definition is inadequate.

To resume: we have as our total of divisions the following:—

A—I. Positive Jurisprudence: which is

a. practical.

b. historical.

c. comparative.

d. analytical.

II. Final Jurisprudence, which has a practical side (theory of legislation) and a speculative one (ethical jurisprudence or *Naturrecht*).

B. International Jurisprudence, which again is diversely treated by different authors, and might be, like municipal jurisprudence, subdivided according to their several methods if we were examining it more closely.

Putting aside the law of nations, let us see how and for what reasons one or another of the methods of jurisprudence has in different times and nations had the supremacy. We shall see at the same time that none of them can really subsist alone.

Consider, in the first place, the Roman lawyer of the classical period, as his learning and office are described by Ulpian. He is before all things *iuris prudens*, that is, a lawyer in our special and usual sense of the word; he is skilled and competent to advise in the laws of Rome; not the laws of Plato's Republic on the one hand, nor the particular ordinances of Rhodes or Ephesus on the other. His knowledge is eminently practical. But his practice branches out into more than one direction of science and speculation. There are ancient and half obsolete portions of Roman law which are not yet so obsolete but that an accomplished lawyer must know them. He must therefore be (if he aims at excellence and above common competence) to some extent a historian and an antiquary. There is every reason to think that the best Roman lawyers were also considerable historical scholars according to their means. This taste is conspicuous in Cicero, who is for us the standing pattern of the Roman statesman of the later Republic, proud of his own institutions and of his knowledge of

them, and at the same time eager to adorn his knowledge with Greek culture and philosophy. Thus Roman antiquities bring in history; and if the historical study was not scientific it was not for want of interest or of acute minds, but because comparative study had not gone far enough to make the scientific treatment of history, and especially of archaic history, practicable. Philosophy comes in by another door, which is opened by the Prætor's Edict. A jurisdiction extending beyond the still narrow bounds of Roman citizenship abandons the strait and archaic forms of Roman custom and procedure. It seeks under the local and peculiar forms principles that may be admitted by the common reason of mankind. The same state of things which made Rome a cosmopolitan power had given a cosmopolitan stamp to the ethical and political speculations of Greek authors. Hence Greek philosophy was ready with speculative justification of the practical wisdom of Roman administrators; and the Romans, having no philosophy of their own, gladly took up the ideas thus offered to them. On the actual substance of Roman law Greek speculation probably left hardly any mark, not even on the Prætorian part of it; but on the general conceptions of the State, of law and of justice, it left a good deal. The Roman was taught to look beyond the traditions and statutes of the Quirites for the source and the majesty of the law which was his study. He sought a wider ethical foundation for legal institutions, and delighted to think, as Ulpian says, that his learning was a genuine branch of philosophy. Nothing is

easier than to ridicule Ulpian's exordium in detail. Latin is hardly a philosophical language, to begin with, notwithstanding Cicero's efforts to make it so. But it was better that Celsus should define law as *ars boni et aequi*, and Ulpian think the definition perfect, than that they should think all legal science was contained in the exact framing of an issue, or in discovering what had become of a *nudum ius Quiritium*. And perhaps the definition is not altogether absurd. Why, says our modern critic, it includes morality and all sorts of things that are not law. Let us pause a moment. I have an odd prejudice in favour of making sense of what has been said by men who (to judge from that which is on all hands admitted of their performances) were not likely to talk nonsense. I would rather suspect myself of having missed a shade of meaning than write down Celsus an ass for his definition, and Ulpian for approving it. An "art of what is right and fair" sounds vague enough. But let us expand the phrase a little (without really adding anything of our own): "a skilled application of the principles of right and fairness." Is that so hopelessly unlike the purpose aimed at, if not always accomplished, by lawgivers and courts of justice? Observe, it is *art*, a special and skilled application of knowledge. And that is just what common morality is not; for if it were an art practicable only by specially skilled persons, it evidently would not be morality. Law then, according to Celsus, is so much of the permanent principles of moral justice as is reduced or reducible to a technical system. His

definition is a concise, and (as I think) a sufficiently clear statement of the point of view taken in modern times by what I have called Ethical Jurisprudence. But he fails to distinguish, you may say, between what is and what ought to be. True, but his time was not ripe for the distinction. If it could then have been made with the trenchant clearness of Hobbes or Bentham, it is doubtful whether Roman or European jurisprudence would have been any the better. Roman law had to be made broad enough to be in due time the strength of European civilisation; and nothing but a large infusion of ethical and cosmopolitan feeling could have done this. Let us not be over-critical about the form. What more idle fiction is there, philosophically speaking, than the original contract between king and people? Yet without it the English Revolution might never have been accomplished and the Whig party never have taken shape.

Nor was the analytical element wanting in classical Roman jurisprudence, though it was not clearly or separately conceived. Technical ideas were furnished in abundance by the historical tradition of the ancient system, and by the newer and more extensive range of Prætorian jurisdiction. The classical jurists put forth their strength in fixing the bounds of these ideas and developing their consequences. Their method was not consciously analytical, but their work (evèn when we are not satisfied with its results) is a model of legal analysis. Their tact and sense of analogy go far beyond the region of bare empirical

readiness which is still thought by many English lawyers to be the only solid ground of their art. In the Roman treatment of a complex legal idea such as that of Possession we may find all the modern methods employed, and appropriately for the most part. Or instead of taking a subject, let us take the one treatise of the classical period that we have in a fairly complete state. We find in various parts of the Institutes of Gaius distinct and creditable attempts in the direction of historical inquiry (mostly suppressed in the colourless recension of Justinian); the rational and ethical element is marked in his account of modern reforms; there are passages of critical analysis (and the criticism is very good); and in the quotations from Homer, though we may smile at them, there is a germ of comparative jurisprudence. From Gaius vouching the Iliad to help the definition of sale and exchange, to Sir Henry Maine correcting British dogmatism by the phenomena of the Indian village community, seems a long way. Yet, if we read Gaius and his fellows in a spirit neither of letter-worship nor of picking holes, we can feel at home with them and know that we are working on the same lines.

In modern times the several methods of jurisprudence have been separately and diversely worked out; so diversely as to appear, what they need not and should not be, positively hostile to one another. Here in England peculiar conditions have impressed a peculiar form and character both on our laws themselves and on the study and exposition of them.

From an early time our judicial system has been independent of Continental culture, and singularly independent of the other departments of government. The judges have not been a special branch of the profession, but selected, under an efficient criticism of skilled opinion, from the profession at large. Ever since the King's Courts received their definite historical form, the judgments of the King's judges have been accepted as not only deciding the case in hand but declaring the law. From an early time, again, we have had a central and powerful legislature which, as it represents the estates of the whole realm, has made statutes binding on the whole, and knows no legal bounds to its competence. Thus our laws have been eminently national and positive, and our particular legal habit of mind is perhaps the most insular of our many insular traits. Our long standing apart from the general movement of European thought has had its drawbacks; but I think it the better opinion that both in jurisprudence and in the not wholly dissimilar case of philosophy the gain has outweighed them. And I mean this to be understood, in the present case, both of science and of practice. The effect was to make our jurisprudence above all things practical, and then historical. I say historical as distinguished from comparative. One may find in Coke's commentary on Littleton, or better in Sir Matthew Hale's writings, a great deal of historical research, though very little comparison. Doubtless the history and the fruit of its application suffer much for want of the comparative method. Long ago it was remarked upon as a

strange thing that English real property lawyers so much neglected the Continental learning of feudalism. Still our English authors from Coke downwards (or indeed from Fortescue) pay serious attention to the history of their own system. Much of their history is wrong, partly from prejudice, partly from credulity and partly from imperfect materials; nevertheless they deserve credit for historical purpose, and for a certain amount of really historical method.

Speculative or analytical treatment of legal ideas, on the other hand, can hardly be said to have existed at all in England before Bentham's day. Such approaches to it as might be discovered in the earlier literature would be confined, I think, to public and especially to constitutional law, and would belong rather to political theories than to jurisprudence proper. Blackstone's constitutional doctrine is not derived from legal sources at all, but is a modified version of Locke's *Essay on Civil Government.* Ethical topics more or less answering to the *Naturrecht* of the moderns are by no means wanting either in Blackstone or in writers of earlier date, but they occur (so far at least as the common law goes) in a casual and confused manner. We have in this kind the dicta running through several generations of text-writers and judges to the effect that the law of England is the perfection of reason, and the attempts made at various times, notably in the Elizabethan age, to support or adorn its technical doctrines by reasons drawn from general philosophy. The student who has a mind for curious reading may

find a notable example in the great case in Plowden on Uses and Consideration, where the law of nature and Aristotle are freely invoked. Efforts of perverse astuteness in the same direction are manifested in the Scriptural reasons and illustrations occasionally given by Coke.

From another side, however, there came to the English system a large and bold infusion of ethical jurisprudence. The decisions of the Chancellor, professing as they did in the earlier days of his Court to be special dispensations of the king's justice in cases for which no ordinary jurisdiction was adequate, were openly founded on ethical and social principles that were adopted on their intrinsic merits. Equity was at length exhausted with victories, and ceased to be creative. But during two centuries or thereabouts before Lord Eldon's time the principles and practice of the Court of Chancery were being settled into the lines which he, more than any one man, finally fixed; and something hardly distinguishable from "the law of nature" was openly put forward as the ground and the sufficient reason of the innovations. We may roughly say that the Chancellors deliberately administered an expansive and inventive justice down to the time of the Revolution, and practically did so for almost a century later. In the present century the doctrines of equity have been quite as fixed both as to substance and as to procedure as those of the common law; nor have they escaped from creating fresh examples of the mischief they were originally designed to avoid, the sacrifice of convenience and the common reason of

mankind to the consistency of technical deductions. These things are of common knowledge to students; but we should also note what is more easily overlooked, the reaction of the methods and spirit of Equity (and ultimately, to an extent perhaps greater than is commonly allowed, of the general movement of European thought) upon the development of the common law. So early as the fifteenth century we find a common-law judge declaring that, as in a case unprovided for by known rules the civilians and canonists devise a new rule according to "the law of nature which is the ground of all laws," the Courts at Westminster can and will do the like. And in the latter part of that century Westminster could show at least one jurist of real genius, Chief Justice Brian. For the most part, however, jealousy of rival jurisdictions only made the common lawyers more obstinate in their technicality down to a much later time. The rational and ethical tendency became a real power in the common law in the eighteenth century. Lord Mansfield, its most illustrious exponent, sometimes carried it further than a mature system would bear. But on the whole excellent work was done under this impulse; nor is it correct to regard the movement as confined to commercial law, though its most conspicuous effects were certainly in that department. He was a bold man, it has been said, who first invented the "common counts." The development of the so-called equitable actions on the common counts for money had and received, and the like, belongs to this period. It is difficult nowadays

to estimate the saving in costly and hazardous procedure which was effected by their introduction. The same spirit was also shown, and perhaps to a greater extent than we now have occasion to remember, in positive legislation; for many of the statutes of the first half of the eighteenth century, whose operation has been superseded by later enactments, or has become too familiar a part of our common stock to be matter of express reference, were at the time considerable measures of law reform.

The peculiar character of English legal institutions was strong enough to subdue these new elements to itself. The ideas of a man of genius like Lord Mansfield were worked piecemeal into practice, but no definite theory was constructed by himself or by any one else, though in the reports and treatises of the last century one is puzzled by language which appears to assume that a complete system exists. There was a serious endeavour for lucidity and form, as against the gratuitous technicality and the literary clumsiness of the only existing legal classics. Blackstone's Commentaries were the outcome of this endeavour, and, all things considered, an admirable one. Dr. Brunner has borne splendid witness to Blackstone's merit in his account of the sources of English law.[1] But, both in the work of Blackstone's forerunner Hale and in his own, the arrangement is of the roughest kind, and the analysis of ideas is

[1] In the introduction to Holtzendorff's *Encyklopädie der Rechtswissenschaft*, translated by Mr. Hastie, Edinburgh, 1888, but there is a still later edition of the original.

rudimentary. Their science is historical, but too self-contained and insular for the need of searching analysis to be felt. I need not tell you how Bentham's vehement and often unfair criticism broke the spell that had fortified English jurisprudence as in an enchanted castle, nor of the work of the analytical method, enriched by wider and more enlightened historical research, in the hands of recent and living English authors. The history of the modern scientific movement in our legal studies is written in books which all students who aim at real knowledge must have in their hands and ought to be familiar with.

On the Continent the order of things has been quite different. Ethical speculation, as we just now said, has almost overshadowed jurisprudence, and has only within the last few generations been sufficiently tempered by positive and historical studies. Probably many reasons of more or less weight might be offered for this. First among them, I think, would come the peculiar position of Roman law during the middle ages. In all the lands which had obeyed Rome, and were included in the nominal supremacy of the revived Western Empire, it acquired a prevalence and power not derived from the sanction of any distinct human authority. No such authority was for the time being strong enough to compete in men's esteem and reverence with the shadow of majesty that still clung to the relics of Roman dominion. Thus the Roman law was not merely taken as (what for many purposes and in many states it really was) a common

groundwork of institutions, ideas, and method, standing towards the actual rules of a given community somewhat in the same relation as in the Roman doctrine *ius gentium* to *ius civile*; but it was conceived as having, by its intrinsic reasonableness, a kind of supreme and eminent virtue, and as claiming the universal allegiance of civilised mankind. If I may use a German term for which I cannot find a good English equivalent, its principles were accepted not as ordained by Cæsar, but as in themselves binding on the *Rechtsbewusstsein* of Christendom. They were part of the dispensation of Roman authority to which the champions of the Empire in their secular controversy with the Papacy did not hesitate to attribute an origin no less divine than that of the Church itself. Even in England (though not in English practice, for anything I know) this feeling left its mark. In the middle of the thirteenth century, just when our legal and judicial system was settling into its typical form, Bracton copied whole pages of the Bolognese glossator Azo. On the Continent, where there was no centralised and countervailing local authority, the Roman law dwarfed everything else. Yet the law of the Corpus Juris and the glossators was not the existing positive law of this or that place: the Roman law was said to be the common law of the Empire, but its effect was always taken as modified by the custom of the country or city. "Stadtrecht bricht Landrecht, Landrecht bricht gemein Recht." Thus the main object of study was not a system of actually enforced rules, but a type

assumed by actual systems as their exemplar without corresponding in detail to any of them. Under such conditions it was inevitable that positive authority should be depreciated, and the method of reasoning, even for practical purposes, from an ideal fitness of things should be exalted, so that the distinction between laws actually administered and rules elaborated by the learned as in accordance with their assumed principles was almost lost sight of. This is not matter of conjecture, for elsewhere similar causes have had similar effects. In India the whole Hindu community acknowledges a kind of ideal Brahmanical law.[1] To the Hindu population, broadly speaking, this is what the Roman law was to the mediæval Empire, and in the same kind of way it is largely modified by local, or rather tribal and even family customs. And English administrators and judges, honestly striving to do justice to Hindus according to their own law, have found grave difficulties in discerning the usage actually observed within their jurisdiction from that which native experts in Hindu law declared, on the authority of texts and commentators, as being the rule. The opinions of the Brahman Pandits have constantly tended to ignore particular customs, and it was a considerable time before English magistrates found that they were in

[1] It is doubtful how far, if at all, the Hindu law books represent anything that ever really existed as positive law. The so-called code of Manu is not a code in either the Roman or the modern sense. Moreover the conflict between Brahmanical theories and local customs is aggravated by sacerdotal ambition. These matters, however, do not affect the limited comparison now made.

danger of imposing on great numbers of people rules which were in truth as foreign to them as English law itself. A still more interesting example is afforded by the United States. There the general foundation of English common law bears the same sort of relation to the positive laws of the several States of the Union that Roman law does to Continental jurisprudence. In every State it is less than the actual law of that State, but greater than the actual law of any other State. And along with this condition of things we find a marked tendency in American authors to take a Continental rather than an English view of the general theory of jurisprudence. Not only our positive and analytical method finds little favour with them, and their theoretical work is mostly akin to that of the German philosophical and historical schools, but they treat the common law itself as an ideal system to be worked out with great freedom of speculation and comparatively little regard to positive authority. Decided cases are treated by them not as settling questions but as offering new problems for criticism. There are even one or two American writers of great ability for whom, as for the German expounders of *Naturrecht*, legal science appears to consist in a perpetual flux of speculative ideas. It is also noticeable that the present generation of scientific American lawyers have shown a disposition for historical research and exposition which has already borne excellent fruit.

The prevalence of one or another method of jurisprudence depends in the first place, if the foregoing

considerations be sound, on the historical conditions of legal systems and institutions. But there is no reason why in England, Germany, or America, we should make ourselves the slaves of such conditions, or why one method should be cultivated to the exclusion of the others. The false pride and exclusiveness of a favourite method will always bring their own punishment. A merely practical attention to law brings us into the danger of degrading our science to what Plato calls inartistic routine. Historical interest unchecked by analysis may in another way overwhelm us with particulars, and leave us where we cannot see the wood for the trees: again, the historical scholar is apt to fall into unreflecting optimism, thinking everything must be for the best which is explained as the natural result of historical conditions. Unguarded analytical speculation tends to make jurisprudence a thing of abstract formulas—as it were a sham exact science—instead of a study of human life and action. Excess of zeal for that which ought to be, whether in the shape familiar to us here of agitation for reforms, or in its Continental guise of devotion to the law of nature, tends no less strongly to beget contempt and ignorance of that which is, and expose the would-be philosopher to the derision of the first attorney's clerk. Every method is in its place legitimate and necessary, but is bound to secure itself against mistakes by taking due account of its fellows. Practically we shall guide our course by looking for what seems most to want doing among the things that come in our way to do. Here in

England we have an immense wealth of particular doctrines and principles, which, however, for want of being brought into the light of general ideas, remains uninstructive to the student until he has made a pretty full acquaintance with it in miscellaneous reading and practice. We have likewise a scheme of general jurisprudence due to Bentham's ideas in the first instance, and of which the importance as a part of legal knowledge and education was explicitly laid down from this chair by Austin. Not having been developed from within our particular and historical jurisprudence, but set beside it by criticism from without, and having indeed arisen from a movement of repulsion, this is at present, I think, something too much in the air. English learners run an appreciable risk—which for the moment our attempts at improvement have perhaps rather increased than diminished—of regarding legal science as a thing apart from legal practice. Jurisprudence and Roman law may seem to them nothing but additional subjects of examination imposed by the perversity of fate. Little has yet been done to make it clear that the object of these studies is not to enable English lawyers to talk with an air of knowledge of foreign systems or abstract speculations, but to make them better English lawyers by the exercise of comparison and criticism. There is a want of effectual contact and influence between the general and the particular branches of Jurisprudence, which nevertheless are both needful if either is to do its best. Our most useful ambition at present, I think, will be to supply this want; and

it will be my endeavour, so far as my means avail, to work in this direction. I propose to illustrate from English institutions and doctrines the general form and constituents of Positive Law, and a certain number of its leading ideas. We shall have opportunities both of correcting and enlarging our general ideas by reference to practice, and of criticising particular solutions and consequences from a comparative and general point of view. We shall try to go like wary travellers, neither slavishly following every winding of a beaten road, nor rashly making short cuts over unknown ground to find ourselves confronted by impassable floods or precipices.

II

ENGLISH OPPORTUNITIES IN HISTORICAL AND COMPARATIVE JURISPRUDENCE[1]

If envy is ever allowable between colleagues, I think I might have been excused two or three months ago for regarding my friend the Vinerian Professor with some measure of that feeling. In the first place, Professor Dicey had delivered his inaugural lecture while I still had to provide for mine, and therefore he had outstripped me in the beatitude of accomplished possession. Another advantage I was more gravely disposed to envy him was that of entering on his new labours in a scene known to him of old, and among familiar friends; an advantage which perhaps is not a matter of mere sentiment. For, as our two ancient Universities, taken together, have a generic character which makes them unique in Europe and broadly marks them off from all other seats of learning, so each of them is marked off from the other by subtle but real differences of individual spirit and traditions. In such a case resemblance and analogy will carry one a long way; but there comes a point—

[1] An Inaugural Lecture delivered at Corpus Christi College, Oxford, October 20, 1883.

as in the learning of a language closely akin to another already known—where the warrant of analogy fails, and even where the unbiassed curiosity of a perfect stranger may be less liable to error. The privileges of starting from impartial ignorance, be they more or less, are too manifestly denied to me. Therefore I must seek to fortify myself in another direction. Having no interest to maintain the paradox that, next after an Oxford man, a complete stranger will make the best Oxford Professor, I must persuade you to think me, as I desire to think myself, as little of a stranger as possible. And this is not such a merely personal matter as it seems: for the relations of a Professor to the University and its members are (at least it is a Professor's business to make them so if he can) something wider and more human than the delivering and hearing of lectures, and therefore it concerns you to know that fortune has dealt favourably with me in preparing the way for these relations, and especially in regard to the Faculty to which my work belongs.

To say that I find myself here among friends is nothing. I have seen enough of Oxford hospitality and of the universal brotherhood of scholarship to be assured that such would be my experience if I had come here without a single acquaintance in this College or in the University. But it is something to say that I find myself in the company of old friends, and moreover of those who have been my guides and fellow-workers in a pursuit still followed in this land by few, scorned or depreciated by many, the scientific

and systematic study of law. When a dozen years ago I emerged, wearied and bewildered, from that rough and fragmentary training of "reading for the bar," which Professor Dicey so excellently described to us last term, I was advised to turn to Roman law as the best means of impressing some order and proportion of clear ideas on the half-digested mass of facts and formulas which I had acquired. It was from Professor Bryce that I sought counsel as to my reading; his advice was such as it would be bold, if not foolhardy, to give to a man reading for examination purposes; but then I was not going to be examined: and from my following of that advice I date whatever pretensions I may have to competence for taking a philosophical as distinct from a merely empirical view of law and jurisprudence.

It is with no ordinary satisfaction, therefore, that I now embrace the honour of meeting Professor Bryce as a colleague. On the occasions of such meeting, again, another peculiar pleasure awaits me: for they are presided over by the Warden of All Souls as Chairman of the Legal Board of Faculty. I do not know whether it has often happened that two schoolfellows, as nearly as possible of equal standing, should part, one to Oxford and one to Cambridge, and almost lose sight of one another for years; that they should take up the same profession, and their bent should lead them independently to deal with its learning in the same spirit; that they should select for illustration, for different external reasons, the very same subject; that they should use and discuss one an-

other's work with perfect freedom, and without the shadow of constraint; and, lastly, that they should find themselves associated at the same University, in conditions the most agreeable and honourable for both, in the promotion and direction of their chosen study. These things, I conceive, would be esteemed an improbable combination in any well-constructed fiction dealing with modern society. They are however the things, plainly and truly stated, which have happened to Sir William Anson and myself. His presence and companionship ought to disperse—they do disperse—whatever cloud of unfamiliarity might yet hang over my introduction to this University.

So much it seemed not unfitting to say, on this peculiar occasion, of my personal privileges and opportunities. According to the common and reasonable usage, the duties and opportunities of my office, or rather of the branch of studies with which my office is concerned, appear most proper to be now the chief matter of our attention. The historical and comparative treatment of jurisprudence is the function particularly assigned to the Corpus Professor; and I do not think it needful to tell you either that historical and comparative jurisprudence exists (I speak of it in the singular, for the two branches converge to one study and one method), or what results it already has to show. The works of my predecessor in this Chair are a sufficient answer to any questions on that score. I understand that a certain sort of clever young men, anxious to say something new and

surprising, are already going about to disparage Sir Henry Maine's way of research as a thing out of date. I shall not be at the pains of discussing this opinion. Nothing worse can happen to such as are capable of entertaining it than to remain possessed by their own conceit, and they deserve nothing better. If such a fancy is taken up otherwise than as a conscious exercise in paradoxical argument, it must be through total misapprehension of the historical method, of its true scope and significance, and of its place in modern science.

The historical method is not the peculiar property of jurisprudence or any other branch of learning. It is the newest and most powerful instrument, not only of the moral and political sciences, but of a great part of the natural sciences, and its range is daily increasing. The doctrine of evolution is nothing else than the historical method applied to the facts of nature; the historical method is nothing else than the doctrine of evolution applied to human societies and institutions. When Charles Darwin created the philosophy of natural history (for no less title is due to the idea which transformed the knowledge of organic nature from a multitude of particulars into a continuous whole), he was working in the same spirit and towards the same ends as the great publicists who, heeding his field of labour as little as he heeded theirs, had laid in the patient study of historical fact the bases of a solid and rational philosophy of politics and law. Savigny, whom we do not yet know or honour enough, and our own Burke, whom we know

and honour, but cannot honour too much, were Darwinians before Darwin. In some measure the same may be said of the great Frenchman Montesquieu, whose unequal but illuminating genius was lost in a generation of formalists. By such hands was the instrument formed and polished that my predecessor in this Chair has wielded in your presence and before the world: and from his hands I take it in reverence and not without fear, as a common mortal essaying to lift the spear of Achilles. It is a key to unlock ancient riddles, a solvent of apparent contradictions, a touchstone of sophistries, and a potent spell to exorcise those phantoms of superstition, sheeted now in the garb of religion, now of humanity, now (such is their audacity) of the free spirit of science itself, that do yet squeak and gibber in our streets. It is like the magic sword in Mr. George Meredith's delightful tale, whose power was to sever thoughts. One thing, indeed, the historical method will not do; there should be no mistake about this, and none shall be readier than myself to make the admission. Neither the theory of evolution in physics and psychology, nor the historical method in ethics and politics, can solve the ultimate problems of philosophy. But it does not follow that either of them is useless to the student approaching those problems. He may be helped by them to see in more than one way where science ends, and philosophy in the strict sense begins; he may even be helped to perceive in what forms and within what limits philosophical questions may be reasonably and hopefully stated.

Thus we have to do not with a literary fashion, not with the style of work of this or that writer, but (it cannot be too often repeated) with a method which has transformed and is transforming the face of human knowledge. That such a method should not be fruitful when applied to the special subject-matter of jurisprudence, intimately connected as that is with the historical institutions of civilised mankind and with the history of human nature itself, would be a thing contrary to all rational expectation. It could be accounted for, did it so happen, only by singular incapacity or infelicity on the part of those who undertook the adventure. But it has not so happened: already we have ample fruit, and ample promise of more. Enough, however, of these things in general. If any man is wilfully blind, let us leave him to his blindness. It will now be convenient for us, I think, to consider, not what may be done by historical and comparative jurisprudence in the abstract, but what we as Englishmen, here and now, have special opportunities for making of it, and therefore what, to the best of our power, we ought to make of it.

Let us first notice what a tempting field is offered to the historical student by the laws and legal institutions of England; and for the moment I speak of England alone. We know that English law is the despair of systematic reformers; the very causes which have made it so make it an unrivalled treasure-house of historical illustration. In our existing polity the latest mechanism of elaborate legislation may be found side by side with relics of a period of legal

culture not less archaic than that of the Twelve Tables at Rome. If we retrace the growth of our institutions as far back as the Norman Conquest, we shall find in full strength usages of which Roman jurisprudence has preserved only the faintest traces. We need not go abroad or sift obscure tradition and doubtful reports for examples of old-world forms of legal ideas, or the transitions by which they are adapted to the modern world. Our own Common Law is full of them. We are only beginning to realise their interest; the total want of the historical and scientific element, until a few years ago, in the training of English lawyers, has led us to despise these things as mere dry bones of antiquaries. Here, then, is a plain duty laid upon us, to bring out the significance of our own legal antiquities in relation to the general history of legal development, and to make our confused and half-wrought wealth in this kind accessible to fellow-workers in other lands. As a brilliant specimen of what may be expected in this region (though not a work undertaken chiefly with that view) I may point to Mr. O. W. Holmes's lectures on "The Common Law." That name leads me on, by an irresistible temptation, to another branch of what I have to say; but first there is an objection to be removed.

Some one may deny that the study of legal antiquities is jurisprudence at all; some one else may say, as indeed one or two historians have at least hinted, that a modern lawyer is in certain ways at a positive disadvantage in it. Well, the analytical and

the historical purist may both have their say; there is no occasion for us to hinder them. Only we shall not in this place, I hope, trouble ourselves with being over nice to define the limits of sister faculties. Assuredly these things belong to History as well as to Law; for my own part I trust that Law and History may ever be too good allies and helpmates to wrangle over an imaginary boundary between their territories. Each of them has so much to do for the other and so much to learn from her that a dispute of this kind is wasteful folly. I would fain have every lawyer a historian; and, seeing we ought to desire for all our fellow-men the increase of all good knowledge, there can be no harm in wishing that some historians had a little more law. Not the least of the objects at which the work of this University in both Schools may be aimed with good hope of accomplishment is to make such wishes superfluous in the coming generations. Meanwhile, trespass in pursuit of knowledge is a thing rather to be encouraged. Professor Stubbs has shown how much we lawyers may have to learn from the historian: it is for us to do something towards repaying the debt. Lately Mr. Justice Stephen, in his *History of the Criminal Law*, has brought in one or two substantial instalments.

Just now I named the work of an American lawyer on the Common Law. The writings of Dr. Oliver Wendell Holmes are popular in the best sense on both sides of the Atlantic. His son, now a judge of the Supreme Court of Massachusetts, inheriting a share of the same subtle imagination and finely

discerning mind, has devoted his power to gaining the more limited but more concentrated interest of a technically critical audience. As the reader of English literature loses much to whom the works of the father are unknown, so the English lawyer to whom law is not a mere business, but a science and study, cannot afford to neglect the work of the son. It is tempting to praise one's friends: but I am not here to praise my friend Mr. Holmes, though the occasion might furnish excuse enough, and I pass on to that which his work suggests. Eminent as it is in its own kind, I take it but as a specimen and symbol. I need not tell you that in the United States there already exists a considerable legal literature, much of it excellent, some of it classical, produced by English-speaking men trained in English legal ideas, and living under laws which are based on, and in the main identical with, the Common Law of England. Across the Atlantic we exchange discussion of the earliest Year Book and criticism of the latest leading case in a dialect which to the French is barbarous, and to the Germans foolishness. What does such a fact signify to us English lawyers? Nothing less than this, that the system which we have inherited is unique alike in its history and in its destiny.

From the storm-floods that made wreck of the Roman Empire there emerged, defaced but not broken, the solid fabric of Roman law. Not by any command or ordinance of princes, but by the inherent power of its name and traditions, Roman law

rose again to supremacy among the ruins of Roman dominion, and seemed for a time supreme in the civilised world. In only one corner of Europe it finally failed of obedience. Rude and obscure in its beginnings, unobserved or despised by the doctors and glossators, there rose in this island a home-grown stock of laws and a home-grown type of legal institutions. They grew in rugged exclusiveness, disdaining fellowship with the more polished learning of the civilians, and it was well that they did so: for, had English law been in its infancy drawn, as at one time it seemed likely to be drawn, within the masterful attraction of Rome, the range of legal discussion and of the analysis of legal ideas would have been dangerously limited. Roman conceptions, Roman classification, the Roman understanding of legal reason and authority, would have dominated men's minds without a rival. It is hardly too much to say that the possibility of comparative jurisprudence would have been in extreme danger. I am not now considering whether English law, in its mediæval or its modern stage, be better or worse than Roman law. The point is that it is different and independent; that it provokes comparison and furnishes a holding-ground for criticism. In its absence nothing but some surpassing effort of genius could have enabled us to view the Corpus Juris from the outside. Broadly speaking, whatever is not of England in the forms of modern jurisprudence is of Rome or of Roman mould. In law, as in politics, the severance of Britain by a world's breadth from the world of Rome has fostered

a new birth which mankind could ill have spared. And the growth of English politics is more closely connected with the independent growth and strength of English law than has been commonly perceived, or can be gathered from the common accounts of English history.

We stand, then, in a special and marked relation to the comparative and historical study of laws by the mere fact that our own laws are insular. But they are more than insular; they have become the law of half a world; already they may compare for the extent of their influence on men's affairs with the law of the Roman Empire. They have travelled with the English language wherever English enterprise has made itself a new home. From the North Sea to the Pacific they are the rule of life, and the mould in which men's ideas of justice are formed: and, if we go round the world, we shall traverse the domain of many strange laws and customs to find the image of our English polity and jurisprudence at the very antipodes. It is still more important for the power and value of English law, in the aspect under which we now regard it, that it has become the heritage of an independent nation of our own stock, and not only of a nation, but of a federal union of States which for their own municipal purposes are sovereign and independent. Since the classical period of Roman law there has never been a constitution of affairs more apt to foster the free and intelligent criticism of legal authorities, the untrammelled play of legal speculation and analysis, than now exists in

the States of the American Union, where law is developed under many technically independent jurisdictions, but in deference and conformity to a common ideal. We are justified, therefore, in expecting that our American colleagues will not be behindhand in the work to which in this generation jurisprudence appears to be specially called. This is the just and natural rivalry for English and American men of law, not the interchange of litigious despatches or the argument of diplomatic claims before foreign arbitrators. Not only do we hope that no less agreeable emulation may again in our time arise between the two nations, but we may flatter ourselves—we of this Faculty at least—that our fellowship and intercourse in legal matters is not the least of the forces working against any such mischief. It is only one of the visible marks of our common origin, of our common foundation of institutions, character, and habits; but it is a strong and a deep one. I feel, for my own part, a much nearer sense of kinship in discussing points with an American colleague than in hearing or reading generalities, however admirably expressed, about the friendship that ought to prevail between the two great English-speaking nations: and I think I may say without rashness (I have in mind some small but not insignificant instances) that the feeling of American lawyers is the same. Personal experience or assertion seems however needless in the face of the splendid welcome our American brethren have even now given us in the person of the Chief Justice of England and his companions. On this side we

may have no opportunity of doing the like in any such conspicuous and collective manner: but we can each of us use the opportunities that come to him. Most of all here, in these ancient Universities which are sought almost as holy places by our kinsfolk of the Western Continent, should we be ready and eager to meet with more than a stranger's welcome those who serve with us one law and learning. Let no such pilgrim fail of ample greeting at our hands. *Benedictus qui venit in nomine legum Angliae.*

These are resources, this is a range of knowledge and inquiry which, taken alone, would be in no way despicable. But I must call on you to look further. Let us consider of what manner of realm and empire we are citizens, and see what boundless wealth is open to us. Within our own seas, what varied specimens of legal development may we not find! Cross the border into Scotland, and you are under a system of law so different from that of England that at first sight it seems to speak with an unknown tongue. It is a system instructive both in its analogies to ours and in its contrasts, both in the similarity of the results produced and in the diversity of the means by which they are effected. English lawyers, as a rule, are content to live in greater ignorance, if possible, of the law of Scotland than of the law of the Continent of Europe. Here are opportunities of fruitful comparison—and I mean fruitful for practical as well as philosophical purposes—going to waste at our own door. During the last few years there has been much discussion of the

principles and method of criminal procedure. This is a subject on which examination of Scottish usage would be particularly instructive; but for the most part it has been discussed as if Scotland did not exist, or were less accessible to Englishmen than France or Italy. Turning from north to south, we find living in the Channel Islands the ancient customs of Normandy which on the Norman mainland have been wiped out by the levelling sweep of the Napoleonic legislation. In the little Isle of Man we have yet another seat of independent laws and jurisdiction. The practising English lawyer is not concerned with these things, and is almost of necessity indifferent to them. All the more should the study of them be encouraged at the times and places where there is room for it, and chiefly in the legal Faculties of the Universities.

Thus far we are merely looking round, as it were, at home. We have yet to add to the wealth of these realms in the matter of our science the wealth of the British empire. Herein we are partakers of a marvellous heritage, of memories and hopes, of powers and responsibilities, such as are the lot of no other nation upon earth. More truly than Pericles we may say that the valour of our fathers compelled every land and every sea to open a way before it; more truly than Virgil's feigned prophecy spoke of Augustus we may fit his words to the dominion of which, under the auspicious name and reign of our sovereign lady Queen Victoria, and by wisdom and genius not less than those of Rome,

the principles have been ordained and the boundaries established :—

> Super et Garamantas et Indos
> proferet imperium : iacet extra sidera tellus,
> extra anni solisque vias, ubi caelifer Atlas
> axem umero torquet stellis ardentibus aptum.
>
> . . . . . .
>
> nec vero Alcides tantum telluris obivit,
> fixerit aeripedem cervam licet aut Erymanthi
> pacarit nemora et Lernam tremefecerit arcu,
> nec qui pampineis victor iuga flectit habenis
> Liber, agens celso Nysae de vertice tigres.

The record of this dominion abounds in wonders in every part, but the British rule in India is most wonderful. A history that no maker of romance would have dared to invent; a future that no prudent man will dare to forecast; a power so disproportioned to its apparent means of command that, if not vouched by positive enumeration, the facts would seem incredible; these are the salient and elementary features of our Indian empire.

On what support, now, does that unique empire rest? Some persons of no mean authority will tell us that it rests upon force. And in some sense doubtless they say well. But if we speak thus, it should be clearly understood what kind of force we have in mind. Evidently not the bare force of arms. Roughly speaking India contains about two hundred and forty millions of people, of whom about one hundred and twenty thousand are Europeans. Let us try to realise what these figures mean. The number of Europeans in India, British soldiers and others,

does not amount to more than the population of an English town of the second rank, such as Portsmouth or Leicester. It is distinctly less than the population of Delhi or Benares. This number is distributed among nearly five times as many people as inhabit the whole of the United States. Or, to put it another way, suppose the whole of the dwellers in India to be ranged in military order. Two thousand is, I believe, a fair working strength for a brigade of infantry. There would be hardly one white man to every brigade. I know what may be said to mitigate these contrasts: the native races of India are not united, they have not European discipline, and the like. But in a case of such immense odds, what mitigating circumstances can avail? No, we do not govern India by the force of arms only. By what then? The answer is inevitable. State our position in the very lowest terms in which it can plausibly be stated. Say that the people of India from north to south love us not, and would fain be rid of us. Say that they obey only from mutual fear and jealousy, because men dread the unknown evils they might suffer from some native conqueror of hostile race and religion more than they mislike the certain evils of English rule. What is the signification of this, the worst that can be said by any one who is not grossly impudent or ignorant? It signifies that our rule is better in the estimation of the majority of the dwellers in India than any other rule which they could probably look for in our absence. It signifies that under English rule the weak feel safer against

the strong than ever they did before. It signifies that our empire is not of brute force, but of judgment and righteousness; in one word—for I will not shrink from seeming bold in my office—that it is an empire of law. The secret of our strength in India is that we have endeavoured truly and indifferently to do justice, according to the best of our skill and understanding, to all sorts and conditions of men.

And great indeed is the diversity of men that the rulers of India have to do with, and of their laws and customs. The Brahman, whose ancestors were the poets of a splendid and refined language, and the pioneers of the everlasting problems of philosophy, while ours, without arts or letters, were rough-hewing the elements of political freedom in German forests; the Mussulman, himself a descendant of conquerors within historical memory, inheriting from them the aptitude for government and affairs, and still proud of traditions whose virtue may sleep but is not dead; the Sikh, most valiant of our foes in the day of strife, and most faithful of helpers in the day when men's faith was tried; the Rajput, who traces his unblemished line of descent from an antiquity that laughs European dynasties to scorn;—all these, alien from one another, and alien from our Western ways, are equally the care of English justice, their society and usages the study of English governors. Nor these only, but tribes and kindreds so much farther remote from us that the difference of Englishman and Hindu seems to vanish when we consider them; the dusky people of the far south, Hindus barely in

name, who preserve in strange customs the vestiges of barbarous polities extinct before the beginning of history; the wild folk of the hills on our marches, who have been known (so men say) to offer human sacrifice on their immemorial high places to propitiate the dread and secret gods deemed by them to sit in unknown England and rule the issues of their law-suits; the remnants of aboriginal populations whom English officers find surviving, forgotten for generations past by their neighbours, in remote nooks of mountain and woodland; these likewise are under the equal protection and receive the equal judgment and justice of the supreme power in India. This is a very weighty matter to be laid upon any government of human frame; we need not marvel if to some it appears more than can be borne. Yet the burden of this duty has been fully understood and fully undertaken, I will not say always with success (that were to call mortals infallible), but with constant good faith, good will, and diligence, and with such results as in the main Englishmen may well be proud of.

Perhaps I have gone too near to forgetting the lawyer in the citizen: but I think excuse will not be wanting, for which of us can be unmoved at the thought of being a partaker, as every English citizen assuredly is, in such a power, such a destiny, and such duties? Our matter now in hand is to see how these things concern us not as Englishmen simply, but as students. The British empire in India, we said, is an empire of law: we may add that it has become an empire of systematic legislation, and offers

a unique field of observation in historical and comparative jurisprudence. There we are face to face with living examples of institutions and ideas elsewhere dead or decayed. Two great Asiatic bodies of customary ordinance, Hindu and Mahometan, widely differing from our own laws in almost every possible respect, demand the closest attention not only from students but from men of practice. The texts and authorities of Hindu law raise historical questions of the utmost interest and of more than Indian scope. The constitution of the Hindu family gives us the complete picture of which only a few faint lineaments are preserved in European societies. Its feasts and its offerings illuminate our obscure records of the household rites of Greece and Rome. In the Indian village we have a living witness to the most ancient form of self-government. And at almost every point Indian customs and institutions throw new light on a subject whose very difficulty makes it fascinating to both jurists and philosophers—the relations of law to religion in its early stages. Such is the character of the opportunities presented by India to Englishmen, and especially to those who are in a position to study the facts at first hand. If you would see how they can be used I will refer you not to any professedly legal treatise, but to the work of an English administrator who now bears rule over one of the great Indian provinces: I mean the admirable *Asiatic Studies* of Sir Alfred Lyall,[1] another proof (if proof could reasonably be demanded) that the historical

[1] Now a member of the Indian Secretary of State's Council.

and comparative method is yet in the vigour of its youth.

But the surpassing interest of India must not lead us to forget the vast and varied field of legal studies offered us by other British colonies and possessions. I think it may be said with truth that there is not in the world any type of legal system which the Queen in Council, in her supreme judicial capacity, may not be called on to administer. The Judicial Committee of the Privy Council are the authoritative interpreters, not only for India of the sacred or semi-sacred books of Hindus and Mahometans (side by side with the latest Act of the Governor-General in Council), but for Lower Canada of the law of the old French Monarchy, now recast by native enterprise in a code of modern form; for Mauritius, of the Civil Code of Napoleon; for the Cape Colony and Ceylon, of Roman law as understood by the great Continental lawyers who preceded the modern epoch of historical research. Add to this the share which the position of England among nations has given to English tribunals in the administration and development of a maritime law which is nothing if not cosmopolitan. It is little to our credit that the dealing with such materials as these should, until of late years, have been left in the hands of a few specialists, and should have been almost ostentatiously slighted by the professors of our English Common Law. Recent consolidation of jurisdiction, of professional qualifications, and of professional training, has done something, and will do more, to break down this

unnatural estrangement. For us here, at all events, the title of "Foreign and Colonial Laws" represents something very different from a museum of legal oddities to be hastily turned over once in a couple of years in search of authorities for a particular case, and then with no small danger of misunderstanding the authorities when found for want of acquaintance with the general principles which they assume. Meanwhile, let it not be thought that our opportunities in this kind have been altogether wasted. We have had illustrious judges who were masters of general jurisprudence, and have used its resources to widen and enrich the municipal jurisprudence of England. So far as they have not attained European reputation, it is because their work is not collected in systematic form but scattered in the pages of our law reports, and practically inaccessible save to English lawyers. It is enough to name three men whose genius was different and shown in distinct departments, Lord Stowell, Lord Justice Knight-Bruce, and Mr. Justice Willes: may their example not fail of abundant and worthy followers!

A discourse of this kind must needs deal in great measure with generalities. But I should like to give you one example of the points in the history of legal ideas which remain to be worked out by the comparative method. I will take it from a subject which has occupied a good deal of my own attention for some years, the law of Contract. At this time of day we all think it a plain matter that the law should hold men to perform their promises. Not every

promise, it is true, will be enforced by modern courts of justice even in things lawful and honest; but the conditions which limit their action are explained and justified as intended only to exclude light or hasty words from creating the bond of civil duty. Now this, I am much disposed to think, is in truth a modern conception. I believe that the enforcement of promises as such did not enter into the earlier forms or notions of civil justice. Archaic methods of redress fall under one of two heads, retaliation and restitution. The complainant seeks either vengeance for personal injury, or the restoration of something that belongs to him and has been wrongfully taken or detained. A debt is repayable, not because the debtor has promised to pay (as we now imagine the relation), but because the creditor's money is in his hands. From the demand "Pay me that thou owest" to the more general and elastic claim, "Perform thy covenant with me," there is a far longer step in thought than it is easy for us now to realise. It may be asked how any tolerably civilised society was carried on if men had no means of compelling the fulfilment of promises? We have not said that they had no means. It was not that men lived in a golden age of trust and good faith, or were content to go without redress in the miscellaneous affairs of life. The sanction which temporal jurisdiction did not afford was afforded by religious fears, and sometimes by the coercive power of distinct religious tribunals.

We see this in a striking form in our own legal history. Down to the fifteenth century the greater

part of what we call "simple contracts" were of no effect in the king's temporal courts. But the man who complained of broken faith could betake himself to the bishop, and the bishop's court would take it up as a matter of conscience. If the case was made out to the satisfaction of the ecclesiastical judge, performance was compelled by the power of the Church. Penance and excommunication were then very real and effectual sanctions, probably more real and effectual in many places than any that were practically at the disposal of the civil authority. You may say, however, that English legal history is full of anomalies, and this may be a quaint local accident of no general significance. And, if I had nothing else to bring forward, you would say well. Here the value of comparative inquiry comes in. We find in the classical period of Roman law that there is one form, and one only, whereby the force of legal compulsion can be given at the will of the parties to any and every sort of promise. That form is the Stipulation, and there appear in and about it unmistakable traces of a religious origin and of an originally spiritual sanction. Already, then, we see that our own history is not a mere isolated curiosity. Going farther afield, we take Mr. Newton[1] for our guide among the inscriptions that reveal to us the affairs and administration of an ancient Greek religious house. A master seeking to enfranchise a favoured slave, and to secure his freedom against any possible attack in time to come, could not bind himself by

[1] Now Sir Charles Newton.

any form of direct promise to the slave, who, until the enfranchisement was perfected, was incapable of acquiring rights. What security could he then give? There might have been a method, as at Rome, of placing the freedman under the direct protection of public law; but the Greek method was different, and belongs to an older world. The master sold the slave in name to Apollo of Delphi, and pledged his faith with sureties to the God himself that no man should disturb the title; so that, if he or his heirs should thereafter attempt to go back from the gift of freedom, they would be wrongdoers not against men but against the Gods. Armed with these evidences, we are now justified in making use of the fact, in itself ambiguous, that the earliest transactions in the nature of contract of which we have any record are treaties, confirmed by oath, between heads of tribes or clans dealing with one another as independent powers. The shape they take might be accounted for by the absence of any human tribunal acknowledged by both parties; but with the analogies before us, it seems as likely that they were modelled on the commonest if not the only form in which private agreements then existed. It may be worth while to add that in Homer (no mean store of archaic law for those who will seek discreetly) the confirmation of a promise by oath is frequent, and, so far as I can remember, there is no trace of any other kind of obligation.

Much might be said on the general importance of spiritual sanctions in the archaic stages of law, and

of the lingering traces it has left even in modern times. Shakespeare's curse on the mover of his bones comes of an ancient stock: its ancestors are yet preserved in Greek inscriptions, the work probably of men who had a more serious belief than Shakespeare in the efficacy of their imprecations. Another set of examples is furnished by the elaborate and fantastic curses invoked by the draftsmen of early English charters, notably about the end of the tenth century, on any one who should presume to violate the gifts they recorded. The so-called curse of Ernulphus, an eleventh-century precedent faithfully transferred from the Textus Roffensis to the pages of *Tristram Shandy*, is by no means at the head of them for invention and variety. A vestige of this kind of formulas clung about the Great Charter itself. One suspects that a similar purport may lurk in the seemingly innocent form of pious words to this day employed in some documents of maritime law.

To pursue this subject, however, would take us I know not where, certainly as far as India. Therefore I shall be your suitor that these bare indications may suffice, and I will make an end by claiming as good company and alliance for the studies assigned to this Chair as at the beginning I did for my own person.

Something has been said of the natural alliance between Law and History. Just now I pronounced a name venerable to all students of classical literature and art. In citing Mr. Newton's work, I have already exemplified the relations of Jurisprudence to those studies for which the University still preserves, I will

not say wrongly, a name denoting them as the crown of human culture. And this relation is not a thing to be put aside as accidental, or trifled with as matter of mere ornament. Rightly considered, it is essential to our science and our work. For Jurisprudence, if it is to be truly and vitally distinct from the empirical collection of matters of fact, must partake of the nature of Philosophy. And we know that Philosophy without scholarship and artistic faculty—without the Muses, as a Greek would in one word have said—is uncouth and but half articulate. As in philosophy so in the higher regions of all science, a thread of poetry is interwoven with the strand of knowledge, and the pursuit of truth, as was seen and proclaimed by Plato, becomes a pursuit of the beautiful. The light of this beauty flashes on the mathematician when he discerns the same harmonies of position and magnitude manifested in infinitely diverse configurations of space, or with some new charm of analysis compels a world of new relations of quantity to arise and do his bidding. It rejoices the mountaineer when he traces the normal features of glacier structure on the surface that to the untrained eye is a mere wilderness of stone-heaps and crevasses. And we, too, may hope not to fail of that light and that joy, whether we trace in the individual singularities of men's laws and customs the constant working of the same human nature and the same unconscious bias of old-world thought, or endeavour to analyse and exhibit in their just relations the developed ideas of modern law. It is not for nothing that Sir Alfred Lyall, whose work I named a little

while ago, is a poet as well as a student and a ruler of men. And it was with deep and wide meaning that the greatest poet of modern Europe proclaimed under the figure of Helena the glory of the arts and sciences inherited from Greece by the modern world. His meaning was wide enough, I am assured, to include even the learning that seems harsh and crabbed to many who are not fools. We of the Faculty of Law may claim and maintain, no less than our colleagues in the Humanities, our part in the favour of the Muses and the splendour of the ideal beauty perceived by true poets and philosophers from Plato to Goethe; and the least of us may thereby feel, as in that vision of Goethe the warder seeing the face of Helena, that our service is a delight:—

> Schwach ist, was der Herr befiehlt,
> Thut's der Diener, es ist gespielt:
> Herrscht doch über Gut und Blut
> Dieser Schönheit Uebermuth.
> Schon das ganze Heer ist zahm,
> Alle Schwerter stumpf und lahm,
> Vor der herrlichen Gestalt
> Selbst die Sonne matt und kalt,
> Vor dem Reichthum des Gesichts
> Alles leer und Alles nichts.

III

THE KING'S PEACE[1]

"AGAINST the peace of Our Lady the Queen, her crown and dignity." This formula was once the necessary conclusion, as it is still the accustomed one, of every indictment for a criminal offence preferred before the Queen's justices. Even to those who have nothing to do with assizes or quarter sessions the Queen's Peace is a familiar term. By the widely spread office of justice of the peace it is brought home to the remotest corners of England. And it seems to us a natural thing that throughout the realm peace should be kept—in other words that unlawful force should be prevented and punished—in the Queen's name and by officers armed with her authority. This does not look, on the face of it, like a fact requiring any special explanation. Our conception of an executive power, under whatever names and in whatever forms it is exercised, is that its first business is to preserve order. And that this power should be one and uniform in every part of a land ruled by the same laws appears to us so far from

[1] A Public Lecture delivered in the University of Oxford, May 24, 1884.

remarkable that anything contrary to it has the air of a puzzle and an anomaly. Such is our modern point of view, too obvious (one would think) to be worth stating. Yet it is so modern that there was demonstrably a time when it was an innovation. It belongs to the political theory of sovereignty which has superseded the feudal theory of autonomous personal allegiance. It assumes that the rights of private feud and war, rights exercised without contradiction far into the Middle Ages, are for us intolerable and impossible. It assumes, moreover, that a central authority has become strong enough to subdue local competition and jealousy. These conditions have been brought about in Western Christendom only by long processes of growth, strife, and decay. Perhaps examples might be assigned of lands and institutions where even yet they are not wholly fulfilled. The establishment of the king's peace is a portion, and in England no small one, of the historical transformation which has given us the modern in the place of the medieval State. In the history of our law the steps are singularly well marked, and for that reason are worth our dwelling on. A clearly traced example in detail will assist our grasp of the general process.

Before we consider our English evidences, it is well to remember what is the state of things to which the king's peace is opposed. Modern as is the particular development to which I call your attention, both the need and the remedy were understood at a time ancient enough for the most exacting definition

of antiquity. "In those days," says the chronicler in the Book of Judges, "there was no king in Israel, but every man did that which was right in his own eyes." And he explains his meaning by the case of Micah of Mount Ephraim, who "had an house of gods, and made an ephod, and teraphim," and by good fortune retained a wandering Levite, and knew that the Lord would do him good, seeing he had a Levite to his priest. But the tribe of Dan, or some clan of them, were seeking a place to dwell in, and their spies lodged in Micah's house, and took note of the images and the Levite. They also saw the city of Laish, and the people that were therein, "how they dwelt careless, after the manner of the Zidonians, quiet and secure," and reported to their brethren that it was an easy and desirable conquest, "a place where there is no want of anything that is in the earth." Whereupon the men of Dan set forth, six hundred men appointed with weapons of war, and, coming on their way to Micah's house, carried off the graven image, and the ephod, and the teraphim, and the molten image. The priest was easily persuaded to follow. "Is it better for thee to be a priest unto the house of one man, or that thou be a priest unto a tribe and a family in Israel?" We hear nothing of Micah till the raiders were well on their way. But he then appears as doing exactly what, according to English law and usage of the twelfth or thirteenth century, he ought to have done. He raised the hue and cry, and pursued with as many of his neighbours as he could assemble.

"And when they were a good way from the house of Micah, the men that were in the houses near to Micah's house were gathered together, and overtook the children of Dan. And they cried unto the children of Dan. And they turned their faces, and said unto Micah, What aileth thee, that thou comest with such a company? And he said, Ye have taken away my gods which I made, and the priest, and ye are gone away: and what have I more? and what is this that ye say unto me, What aileth thee? And the children of Dan said unto him, Let not thy voice be heard among us, lest angry fellows run upon thee, and thou lose thy life, with the lives of thy household. And the children of Dan went their way: and when Micah saw that they were too strong for him, he turned and went back unto his house."

Fortified by the possession of the idols and a real priest of the sacred tribe, the expedition went on to accomplish its main purpose. "And they took the things which Micah had made, and the priest which he had, and came unto Laish, unto a people that were at quiet and secure: and they smote them with the edge of the sword, and burnt the city with fire." They then built a new city, whereof the graven image from Micah's house became the tutelar idol or Palladium. The story of its capture was preserved, one may suppose, as a tribal tradition, without any notion that the six hundred men appointed with weapons of war deserved anything but praise for their successful conduct of the enterprise. Such was right

in the eyes of the men of Dan in the days when there was no king in Israel.

No parallel to this state of things can be found in modern Europe. But we have only to go to Asia to find it within the living memory of civilised observers. As Sir Alfred Lyall has pointed out, the episode of Micah and his household gods is as natural and intelligible to an Indian frontier officer as it is puzzling to the ordinary Biblical commentator. And there are still living under the Queen's rule men who have borne their share in exploits much like that of the six hundred of Dan, and who doubtless look on the English peace as a mischievous innovation, and regret the good old times when for their frontiers and hills there was no Governor-General in Council, and every man did that which was right in his own eyes. The same hand which has analysed in prose the religion of an Indian province has expressed in strong and brilliant verse the feelings of a superannuated freebooter of this sort. The old Pindaree, so far from being thankful for the Queen's peace, would fain be forty years younger, to flee from this tyranny of law and order, where he is "lectured by Káfirs and bullied by fat Hindus," and get him to "some far-off country where Mussulmans still are men"—in other words, where free fighting and plunder are to be had, and there are no Penal Codes administered by the infidel and impartial Gallios of the Indian Civil Service. These Asiatic instances will serve as an *auxilium imaginationis* to aid us in clothing with life and circumstance the meagre terms of the records which

mark for us the first appearance of the king's peace in our own land.

The custumals and ordinances of Kentish and West-Saxon chiefs and English kings which are collectively known as "Anglo-Saxon laws" exhibit a state of society where private war is usual and lawful. It has, indeed, laws and regulations of its own. A man must not be attacked in his own homestead without being summoned to do his adversary right, and even then he is entitled to seven days' grace after the investment of his house before an assault is delivered.[1] In this sanctity of the homestead we have one of the earliest securities for order; and it is one of the foundations, if not the chief foundation, of the institution we have now especially to examine. Every man was entitled to peace in his own house. The brawler or trespasser in another's homestead broke the owner's peace, and owed him special amends. We find this in the very earliest collection of ordinances, dating in substance at any rate from the first quarter of the seventh century. "If in an earl's town [that is, enclosure or private holding; such is the primitive signification of the word, which survives in cognate languages and in many English place-names] one

[1] Alfred, c. 42. This may be a comparatively recent "temperament," as Grotius would say. It is safer, however, to assume that the law is an express definition of older customary observance. I note here that documents are cited according to the arrangement in Schmid's *Gesetze der Angelsachsen*. I likewise note that I have not attempted to collect parallel examples from the Continent, though I doubt not such might be found: *e.g.* the Alsatian formula proclaiming peace during certain times, ap. Beatus Rhenanus, *Rer. Germ.* lib. 2, *s. t.* Status Germaniae sub imperatoribus Saxonibus (p. 97 in ed. 1531).

slays a man, let him atone it with twelve shillings. . . . The first who breaks into a man's town, let him atone it with six shillings, the next with three, after him a shilling each."[1] For slaying in the king's town the fine is increased to fifty shillings,[2] which makes it clear that in other cases too the fine here mentioned is payable not to the party directly injured but to the householder. Similarly, misconduct in a man's house where the king is drinking must be paid for with a double fine.[3] The peace of a house is broken not only by slaying but by quarrelling. Whoever calls a guest in another's house mansworn, or uses other shameful words to him, incurs three distinct fines; one to the host, another to the injured party, and another to the king. The same law holds "of old right" if one uncivilly removes another's cup where men are drinking; and the same fines are payable to the king and the householder if a weapon is drawn, though no actual hurt be done.[4] We find a curious echo of this ancient custom after the Conquest, in the so-called laws of Henry I., where there is a longer but much less clear statement that wherever men meet for drinking, selling, or like occasions, the peace of God and of the lord of the house is to be declared between them.[5] The amount

[1] Æthelbirht, cc. 13, 17. [2] *Ib.* 5. [3] *Ib.* 3.

[4] Hlóthær and Eádríc (Kent, late seventh century), cc. 11-13. It is not quite clear what "steóp ásette" means. See Thorpe's and Schmid's notes.

[5] C. 81. The heading "de pace *regis* danda in potatione," if not a later addition, shows that the compiler did not fully understand the text, which says "pax Dei et domini inter eos qui convenerint . . . .

payable to the host is only one shilling, the king taking twelve, and the injured party, in case of insult, six. Thus the king is already concerned, and more concerned than any one else; but the private right of the householder is also distinctly though not largely acknowledged. We have the same feeling well marked in our modern law by the adage that every man's house is his castle, and the rule that forcible entry may not be made for the execution of ordinary civil process against the occupier: though for contempt of Court arising in a civil cause it may, as not long ago the Sheriff of Kent had to learn in a sufficiently curious form.[1] The theoretical stringency of our law of trespass goes back, probably, to the same origin. And in a quite recent American text-book we read, on the authority of several modern cases in various States of the Union, that "a man assaulted in his dwelling is not obliged to retreat, but may defend his possession to the last extremity."[2]

Under the West-Saxon rule, where the king's power was first consolidated, eventually to swallow up that of all the under-kings and princes of the English name, we find that breaking the peace of the king's house is a graver matter than anything yet

ponenda est." Here the "dominus" can be only the house-master (there would be no ground for reading *domini regis*, which is not the phrase of the time; in the preamble Henry is indeed called *gloriosus Cæsar*, but not *dominus*): see § 2. The friðes-bóte of Æthelr. vi. 32. (repeated in Cnut, ii. 8) seems also to refer to the peace of private householders.

[1] *Harvey* v. *Harvey*, 26 Ch. D. 644.

[2] Cooley on Torts (1880), p. 168.

mentioned. "Whoso fights in the king's house, be all his heritage forfeit, and be it in the king's doom whether he have his life or not."[1] There follow a series of graduated fines for fighting in a minster, in the house of an ealdorman or member of the Witan, or in that of a common man. Two centuries later the penalty for quarrelling in the king's hall is extended by Alfred to the drawing of a weapon. Fighting in the presence of bishops and ealdormen, in the folkmoot, and in a countryman's homestead, are forbidden under various pecuniary penalties.[2] Like provisions are repeated, with more or less variation, in later collections.[3] How far they were observed we do not know. Probably Sir Henry Taylor is no less true to history than to human nature in the exclamation he puts into the mouth of a partisan in the king's palace itself:—

> "Keep the king's peace! If longer than three minutes
> I keep it, may I die in my bed like a cow."

And it is said in one of the Irish legends of Ossian, with reference to a state of society perhaps not very different from that of Wessex in the seventh or eighth century, that he was never afraid but once, and that was when he saw a man die in his bed.

Thus far then every man has his own peace, of

[1] Ine, c. 6. In § 1 there is no mention of *wite*. Presumably the Church's peace was too much *sui generis* for the king to claim anything in this case. Cp. the so-called Laws of Edward the Confessor, c. 6: "Qui sanctae ecclesiae pacem fregerit, episcoporum tum est justitia."

[2] Cc. 15, 38, 39. Cp. too the graduated fines for trespass (burhbryce) in c. 40.

[3] As Cnut, ii. 59.

which the breach is a special offence. But the great man's peace is of more importance than the common man's, and the king's peace is above all, and is broken at the hazard of the offender's life and goods. In the spiritual order the peace of the Church commands yet greater reverence. But for practical purposes the Church by no means disdained the temporal sanction, and it seems well understood that where her peace is, there is the king's peace also, and the king's vengeance on breakers of it. "Be every church in the peace of God and of the king and of all Christian folk." "Every church is lawfully in Christ's own peace, and every Christian man hath great need to know the great worship of this peace, because God's peace is of all peaces most chiefly to be sought and most willingly to be held, and next thereto the king's."[1] Whoever broke the peace in a church, therefore, had to do with both the spiritual and the temporal power. And the graduation of ranks from the king's hall to the simple homestead does not fail of its analogy here. According to the rank of the church, so is the fine.[2] More than once the peace of a church within its walls is expressly declared to be as inviolable as the king's peace specially given, of which more anon. Land and life are equally forfeit by the breach of either.[3] The

[1] Æthelr. vi. 13 ; Cnut, i. 2. Alf. 5 is already to the like effect. Cf. the Laws of Howel, ap. Haddan and Stubbs, i. 237.

[2] Æthelr. viii. 1-5 ; Cnut, i. 3. The rights of the Church are personified in a manner somewhat startling to modern usage: "And þæt is þonne ærest, þæt he his ágenne wer gesylle þám cyninge and Criste," etc.

[3] Edw. and Guth. 1 ; Cnut, i. 2, § 3. Compare cc. 1-15 of "Be

special protection given to well-conducted widows appears to come under this head, as being procured at the instance of the Church; for they are said to be in God's and the king's peace, and the declaration occurs in a context of ordinances chiefly ecclesiastical.[1] In later times, when the peace of the king in his temporal capacity had been extended so as to bring all sorts of offences within the jurisdiction of his courts, the special point of these expressions was forgotten, and "the peace of God and of our lord the king" became a common form in criminal pleadings.

We have now to see how the king's peace was extended in respect of persons, occasions, and places. A general summary of the doctrine as understood about the time of the Conquest is given in a convenient form by the compilation known as Laws of Edward the Confessor (c. 12; cf. c. 27):—

"The king's peace is of many kinds. There is one given by his own hand, which the English call "kinges hand-sealde griþ." Another of the day when he is first crowned; this lasts a week. At Christmas a week, and a week at Easter, and a week at Whitsuntide. Another given by his writ. Another belongs to the four roads: namely Watling Street, Foss, Hikenild Street, Erming Street, whereof two traverse the kingdom in length, the others in breadth. Another belongs to the waters, whereon provisions are shipped from sundry parts to cities and boroughs."

griðe and be munde" (Appendix iv., Schmid, Eth. vii. of Ancient Laws), a document of evident ecclesiastical origin.

[1] Æthelr. v. 21; vi. 26.

The peace given by the king's hand (cyninges hand-griðˇ: in the Latin of the Anglo-Norman time "pax regia per manum vel breve data")[1] appears to be in the first instance a special privilege of persons in attendance on him or employed about his business. It is mentioned like a well-known and accustomed thing, but we have little or nothing to show to whom or for what purpose it was commonly given. We may assume that the king's officers and messengers had it; perhaps others might have it by special favour. It would be quite in harmony with what we know of the king's court in the period immediately following the Conquest that his special "hand-peace," while it existed, should have been purchasable. And it might often be worth a man's while to pay richly for it if he could; a merchant carrying money or jewels, for example. This, however, is conjectural. In any case, breach of the king's "hand-griðˇ" was an offence of the highest order, not being redeemable by any payment: whereas breach of the peace individually given or generally proclaimed by other authorities was a matter for compensation by a fixed scale of fines.[2] The peace-breaker, if he fled, was reckoned an outlaw; it was a serious offence to harbour him,[3] so serious that it was itself reserved for the king's justice. Only the king's grace could restore him to his rights as a free man. He might be lawfully slain if he

[1] Ll. Henr. Primi, c. 10, § 1.

[2] Æthelr. iii. 1. It is not necessary to decide whether these other peaces were regarded as subordinate branches of the king's. The context rather suggests it by the association of the king's reeve with the alderman.

[3] *Ib.* 13.

resisted capture; this, at least, is expressly given as the tradition concerning breakers of the Church's peace, and we cannot suppose that the king's stood lower.[1] In much later times, it will be remembered, it was doubtful whether outlaws or persons attainted upon a *præmunire* (which last expressly includes being put out of the king's protection) might not be killed with impunity.

One particular application of the king's personal protection was to confirm the reconciliation of private enemies. When a manslayer's composition has been accepted by the kindred of the deceased, the king's peace was to be declared between the parties, and terms fixed for payment by instalments.[2] The effect of this would be that if the kindred on either part attempted to repudiate the settlement at any time before full payment, they would expose themselves, not only to a renewal of the feud, but to the penalties and dangers which fell on a peace-breaker. Another use of this royal power is curious as foreshadowing the policy of encouragement and security to foreign traders which runs through the whole history of our commercial law. In Æthelred's treaty with the Danes we read: "Let every man of those that are in peace with us have peace both by land and by water, both within harbour and without." The ordinance goes on to say that in an enemy's land the ships and goods of the king's friends which may be found there are to have

[1] Edw. Conf. 6. And see the customs of Chester, Lincoln, Oxfordshire, and Berkshire, ap. Stubbs, Sel. Ch. 87, 90, 91 (2d ed.)

[2] Edm. ii. 7; cp. App. vii. 1, § 3 (E. & G. 13, Thorpe).

peace, except as to property mixed with that of the enemy. Even merchant-ships from an enemy's land are protected to a considerable extent. They may be wrecked if they are driven in by stress of weather, but if they come of free-will into an English port they are to have peace.[1] Here the alien trader, if he was to be protected at all, must be under the king's peace, as he would have no standing before any of the popular courts. Doubtless he also had the benefit of the general peace of the four roads and navigable rivers.

Then we find that certain feasts of the church and other solemn assemblies are in the king's peace, more or less. As early as Alfred's time double fines are ordained for offences on Sundays and the greater feast days and in Lent. There are also exhortations to keep the peace and avoid all manner of sin and strife at holy times.[2] But these appear to be nothing more than general good advice, like the Queen's proclamation read until very lately at the opening of assizes, purporting to forbid various things which the Crown certainly has at this day no legal power to interfere with. And the express mention of the double fine in certain cases is enough to show that stealing or fighting in Easter-week, for example, was not converted by the sanctity of the time into the higher offence of peace-breaking in the special sense.

[1] Æthelr. ii. 2, 3. C. 3 may be principally meant to secure good treatment for friends of the English at the hands of the Danes. But c. 2 seems a quite general declaration for the benefit of commerce.

[2] Æthelr. v. 19; vi. 25; Cnut, i. 17, § 2 (all in nearly identical terms); cf. Cnut, ii. 38, 47; Henr. 62, § 1.

But the meetings of the Witan, the security of persons attending them, and the discipline of military expeditions, were by the eleventh century at any rate under the full sanction of the king's authority. "I will," says Cnut, "that every man be of peace worthy on his way to gemót and from gemót, unless he be a notorious thief." Again: "If a man on the service of the host commit breach of the peace, let him lose life or wergeld."[1] Thus the king's peace, in a sort of artless fashion, anticipated the office of our Mutiny Acts and Articles of War. If we may trust a rather doubtful authority, the king's coronation feast was protected to the same extent.[2] The king's peace at certain seasons likewise occurs as a local privilege; we find in Domesday that Dover had it from Michaelmas to St. Andrew's day.[3] The giving of a special peace at fairs and markets,[4] and very possibly on other public occasions,[5] was an ancient custom.

[1] Cnut, ii. 61, 82.

[2] Edw. Conf. 12, 27. But here observe that the offence is no longer bót-leás. Appointed fines, though very heavy ones are mentioned.

[3] Perhaps such a *privilegium* was a doubtful privilege in the modern sense, for in case of breach the town paid a fine to the king. "A festivitate S. Michaelis usque ad festum Sci. Andreae treuua regis erat in uilla. Si quis eam infregisset inde propositus regis accipiebat communem emendationem . . . Omnes hae consuetudines erant ibi quando Willelmus rex in Angliam uenit."

[4] *Report of the Royal Commission on Market Rights and Tolls*, 1889, pp. 7, 34, 99. There is a trace of this in the common form of proclaiming a fair still in use (*ib.* p. 5). When this peace became identified with the king's peace does not appear. In Scotland it is mentioned as a special privilege at a comparatively late date.

[5] An example of a proclamation of peace (in part intentionally burlesque) at a wrestling match occurs in the Grettis Saga, tr. Morris and Magnússon, p. 213.

As to places, we find that in the eleventh century the limits of the king's court, within which his peace must be kept, are extended by an artificial definition. They are to be ascertained by taking from his actual residence a radius of three miles, three furlongs, and a minutely expressed fraction.[1] The compiler of the so-called Laws of Henry I. makes a not insignificant addition. "Multus sane respectus esse debet, et multa diligentia, ne quis pacem regis infringat, maxime in ejus vicinia." This "maxime" shows that the establishment of peace in the precints of the king's house appears to him only as a special and emphatic instance of an universal law. The exceptional and local character of the king's peace is already obsolete for him, and hardly intelligible.

Of more importance, however, is the protection of the great roads, which was a settled rule by the time of the Conquest. In the laws of William the Conqueror we read: "Of the four roads, to wit Watling Street, Erming Street, Fosse, Hykenild; whoso on any of these roads kills or assaults a man travelling through the country, the same breaketh the king's peace."[2] These roads remained from the time of the Roman government of Britain. Watling Street is the best known of them. Starting from Dover, it passed through Canterbury, London, and Lichfield, to Wroxeter. Thence a later continuation of it turned northwards to the Mersey, and under the name of High Street was prolonged to the Roman

[1] App. xii. Schmid; cf. Henr. 16.
[2] Will. i. 26.

Wall, while another branch struck off into Yorkshire. The Foss Way made, roughly, an opposite diagonal, its chief points being Ilchester, Bath, Cirencester, Leicester, and Lincoln.

Erming or Irmin Street appears to have connected London with the stations north of York by way of Huntingdon and Lincoln, crossing the Humber by a ferry. Icenhild or Hykenild (later commonly written Icknield) Way[1] may be described as very roughly parallel to the more important Foss Way. Starting from Wallingford on the upper Thames in a north-easterly direction, it crossed Watling Street at Dunstable and Erming Street at Royston, and went on through Icklingham to or near Venta Icenorum (Caistor St. Edmund's near Norwich). There were other well-defined roads, but these four were the main ones, and these alone were first recognised and guarded as the king's highways.[2]

Even for some time after the Conquest it would appear that other roads, though public, were not in the king's protection but only in the sheriff's.[3] But

[1] This is quite distinct from Rikenild or Ryknield Way, with which it was identified by some of the earlier antiquaries. (Higden ap. Palgrave, *Eng. Comm.* 2, cxxxviii.)

[2] For the topography, see Guest, The Four Roman Ways (*Origines Celticae*, 1883, vol. ii. p. 218), and the map of Britain in Müller, Smith, and Grove's Atlas (1874). Dr. Guest's paper is, in the posthumous essays above cited, reprinted from the *Archæological Journal*, vol. xiv. He gives the original forms of the names as Fos, Wætlinga Stræt, Icenhilde Stræt, Earminga Stræt. See also Green's *Making of England*, *passim*. The statements in Schmid's Glossary, under the names of the several roads, stand in need of revision by the light of Dr. Guest's work.

[3] Edw. Conf. 12, § 9.

a tendency to enlarge the definition of the king's highway is already at work. "Via regia dicitur quae semper aperta est, quam nemo concludere potest vel avertere cum minis (?) suis, quae ducit in civitatem vel burgum vel castrum vel portum regium."[1] "Omnes herestrete omnino regis sunt."[2] Jurisdiction over the king's roads "de civitate in civitatem" was specially reserved out of the very large declaration of the privileges of the see of Canterbury in the great plea between Lanfranc and Odo on Penenden Heath.[3] First, only the four roads are the king's; then every common road which leads to the king's city, borough, castle, or haven; and as most roads of any importance must, sooner or later, answer this description if followed far enough, the king's highway came to be, as it now is, merely a formal or picturesque name for any public road whatever. As late as the fourteenth century, however, it was an opinion still held by some that not every common road was royal, insomuch that the soil and freehold of a common road could be vested in an individual owner only if it was not *via regia*.[4] The very survival of the term "the king's highway" shows that the idea of peculiar legal sanctity clung about highways in popular imagination

[1] Henr. 80, § 3. The final *regium* is omitted by one MS. *Minis* must be corrupt. The variant *ruinis*, "rubbish," is more plausible. One might suggest *muris*, if *murus* would bear the general sense of inclosure or purpresture.

[2] *Ib.* 10, § 2. Herestret = *Heerstrasse*, a main road fit for military purposes.

[3] Bigelow, *Placita Anglo-normannica*, 5, 8.

[4] Y. B. 6 Ed. III. 23, pl. 48.

long after they had ceased to be more under the king's peace than any other English ground. Echoes and revivals of the same feeling occur in the Statute-book. By the Statute of Marlbridge all men save the king and his officers are forbidden to take a distress on the king's highway or any common road (in regia via aut communi strata). And an Act of Henry VIII. (24 Hen. VIII. c. 5, entitled "An Act where a man killing a thief shall not forfeit his goods") made it justifiable homicide to kill any one attempting robbery or murder "in or nigh any common highway, cartway, horseway, or footways."

The same reign, it may be noted, presents a curious reminiscence of the sanctity of the king's peace within his own house; I mean the Act which imposed the penalty of losing the right hand on any one guilty of "malicious striking by reason whereof blood is or shall be shed against the king's peace" within the precincts of any palace or residence of the king.[1] The statute presents in the minuteness of its directions a curious compound of ferocity with a sort of rude humanity.

In all these ways the king's peace was enlarged in the age immediately preceding the Conquest, and tending to become the general peace of the kingdom. The interests of the king and of the subject conspired to the same end. It was for the king's manifest advantage to widen the bounds of his jurisdiction for the purpose of increasing the fines and forfeitures incident to its exercise. This kind of competition for

[1] 33 Hen. VIII. c. 12.

business and fees between independent or half-independent powers is the key, we need hardly remind the reader, to much of the legal history of the Middle Ages, and explains some of its oddest details. It was no less for the subject's advantage to be able to appeal for redress to the one authority which could not anywhere be lightly disobeyed. How the completion of the process should be carried out was more or less an affair of occasion and accident. As in other cases, the Conquest makes a gap in the continuity of the evidence, and obscures the exact sequence of things, while nevertheless it hastens and consolidates, on the whole, the result already impending. We do not know, for example, how a man proved that he had the king's special peace. We do know that in later times the averment of a trespass being committed against the king's peace, or that the person injured was in the king's peace, neither required nor was capable of proof, but still was necessary to give the Superior Court jurisdiction. We may imagine a transition period in which the judges were ready, on some very slight suggestion, to presume as between the king and the sheriff that the king's peace had been specially granted to the plaintiff, or to a man unlawfully slain. It is true that the Crown had assumed concurrent or exclusive jurisdiction (subject only to the possibility of a special grant of regalities to a subject) over various offences and trespasses, while breach of the king's peace was still nominally only one specific offence. From the point of view of amplifying jurisdiction,

therefore, the extension of the king's peace may not seem to have been so urgent. But these offences reserved to the Crown are really of the same class. The list as given for Wessex in Cnut's laws (ii. 12) is as follows :—

Þis syndon þá gerihta, þe se cyning áh ofer ealle men on Westsexan, þæt is mund-bryce and hám-sócne, forstal and flýmenafyrmðe and fyrd-wíte, buton he hwæne furðor gemǽdrian wylle, and he him þæs weorðscipes geunne.

Mund-bryce is the same as grið-bryce, breach of the king's special protection, of which we have already heard. Hám-sócne is an attack in force on a man in his homestead (saving, I presume, all rights to the regular prosecution of a feud). The offence is to this day known to the law of Scotland as hamesucken. It would according to the older notions be a breach of the householder's peace, not of the king's. But the very fact of the king assuming jurisdiction in such cases is evidence that the distinction could not be long maintained. Already in the laws of Edmund, before the middle of the tenth century, this offence is on the same footing as mund-bryce: the penalty being the same, and expressed in almost the same words, as that of the laws above mentioned which forbid fighting in the king's house.[1] The exact meaning of forstal (more commonly written forsteal) is not free from doubt. But it included attacking one's enemy by stealth while he was journeying: so

[1] Edm. ii. 6.

that, if committed on any of the great roads, the offence would be against the king's peace according to the authorities cited above. Flýmena-fyrmðe, the harbouring and comforting of outlaws, is closely connected with substantive offences against the king and his peace, for such offences were the gravest and probably the most frequent cause of outlawry.[1] Fyrd-wíte, the public fine for making default in military service, must have been in the king's hands, as captain of the host, from the time of its first institution. It disappears, however, with the change of military system after the Conquest. Thus, on the whole, an easy way is prepared for Pleas of the Crown, as we now say, and breaches of the king's peace to become co-extensive. It is curious to see how much the list is increased in the generations following the Conquest (Leges Henrici Primi, c. 10).

The exception of cases where the king might be pleased especially to honour any man (namely, by the grant of *jura regalia*) was preserved, in form, almost to our own time. Where such a grant had been made, the effect was to substitute the peace of the lord to whom the grant was made for that of the king. And in the Counties Palatine of Lancaster and Durham, while their separate jurisdictions were maintained, the style of pleading was not *contra pacem regis*, but *contra pacem ducis, comitis*, or *episcopi* as the case might be.[2]

[1] It is worth note that an outlaw's bookland is forfeit to the king, whether he be the king's man or not: Cnut, ii. 13.

[2] Blackstone, i. 117.

After the Conquest, then, the various forms in which the king's special protection had been given disappear, or rather merge in his general protection and authority: for the details that occur in the compilations bearing the names of Henry the First and Edward the Confessor, welcome as they are by way of supplement to earlier documents, are mere echoes of traditions no longer living. The king's peace is proclaimed in general terms at his accession.[1] But, though generalised in its application, it still was subject to a strange and inconvenient limit in time. The fiction that the king is everywhere present, though not formulated, was tacitly adopted; the protection once confined to his household was extended to the whole kingdom. The fiction that the king never dies was yet to come. It was not the peace of the Crown, an authority having continuous and perpetual succession, that was proclaimed, but the peace of William or Henry. When William or Henry died, all authorities derived from him were determined or suspended: and among other consequences, his peace died with him. What this abeyance of the king's peace practically meant is best told in the words of the Chronicle, which says upon the death of Henry I (*anno* 1135): "Then there was tribulation soon in the land, for every man that could forthwith robbed another." Order was taken in this matter (as our English fashion is) only when the inconvenience became flagrant in a particular case. At the time of Henry III.'s death his son Edward was in Palestine.

[1] Palgrave, i. 285.

It was intolerable that there should be no way of enforcing the king's peace till the king had come back to be crowned: and the great men of the realm, by a wise audacity, took upon them to issue a proclamation of the peace in the new king's name forthwith.[1] This good precedent being once made, the doctrine of the king's peace being in suspense was never afterwards heard of.

Thus by the end of the thirteenth century, a time when so much else of our institutions was newly and strongly fashioned for larger uses, the king's peace had fully grown from an occasional privilege into a common right. Much, however, remained to be done before the king's subjects had the full benefit of this. The local officers of justice were still no ministers of the king or of his courts; local interests and jealousies might still come in the way of the effectual and comparatively speedy redress which the king's power alone could give. A remedy was not difficult to devise; it lay in the appointment of other officers commissioned directly by the king, and charged to maintain his peace and his rights of jurisdiction. A beginning of this was made as early as 1195 by the assignment of knights to take an oath of all men in the kingdom that they would keep the king's peace to the best of their power.[2] Like functions were assigned first to the old conservators of the peace, now all but forgotten, then to the justices who superseded them, and to whose office a huge array of powers and duties of the most miscellaneous kind have been

[1] Stubbs, *Select Charters*, p. 448. [2] *Ib.* p. 264.

added by later statutes. The steps by which this was effected are part of the technical history of the modern law, and it does not concern us here to recall them. Then the writ *de securitate pacis* made it clear beyond cavil that the king's peace was now, by the common law, the right of every lawful man. The precept to the sheriff is that he cause the complainant to have of the person who threatens him "our strict peace according to the custom of England." Binding persons over to keep the peace is in our days one of the commonest forms of summary jurisdiction, and one cannot claim for it any peculiar dignity. Probably it is more familiar in rustic parts than almost any legal institution, and more cherished though less imposing and exciting than the pomp of assizes. If its precise operation is not understood belief in its efficacy loses nothing. We have heard of an application being made in good faith to a Devonshire magistrate to "swear the peace upon" a dying man, to the end of securing the complainant (his wife) from the threatened visitation of his ghost, in the event of her contracting a second marriage of which he disapproved. But if we can clear our imagination from anecdotes of petty sessions and go back to the old form of the writ in Fitzherbert, we shall find in it a gravity and weightiness not unworthy of a great legal reform. We must not think of it as being in its early days a mere preventive of common assaults, an economiser of the "little diachylon" made immortal by Holt in Ashby *v.* White. Rather it must have been a material instrument in the

suppression of wrong-doing on a more formidable scale, of tumultuous revenges and private warfare; a task for which all the power at the disposal of the Crown was none too much.

We said that the king's peace and protection had become the established right of every peaceable subject. Nevertheless a trace of the archaic ideas persisted as long as the art of common law pleading itself. The right was to be enjoyed only on condition of being formally demanded. In order to give the king's courts jurisdiction of a plea of trespass it was needful to insert in the writ the words *vi et armis*, which imported a breach of the peace; and it was usual, if not necessary, also to add expressly the words *contra pacem nostram*. Without the allegation of force and arms the writ was merely "vicountiel," that is, the sheriff did not return it to the Superior Court but had to determine the matter in the County Court.[1] By so many steps and transformations did it become possible for Lambarde, and Blackstone after him, to say,[2] with unconscious inversion of the historical order of development, and as if the matter were in itself too obvious to need explanation: "The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the King's Peace."

[1] F. N. B. 86.

[2] *Comm.* i. 349, 350.

IV

OXFORD LAW STUDIES[1]

THAT the profession of the law is necessary in a civilised commonwealth, and competence therein by no means to be attained without study, is matter of common knowledge. In speaking here of that study we have to consider more closely how it stands with us, not only as English citizens, but as scholars in this University. To what end is our study and teaching of law? Shall we say that we aim at producing successful lawyers? That would be a facile answer, if tenable. But it will not hold on any side. The University would justly refuse approval to it, as the world would justly refuse credit. Speaking as from the world to the University, I should feel constrained to say that such is not our competence; we could not achieve this if we would. Speaking as from the University to the world, I would say that such are not our aspirations; we would not undertake this if we could. Nay more, the undertaking is not within any resources of human teaching; it is in its own nature beyond them. Success in a profession depends,

[1] A Public Lecture delivered in the University of Oxford, May 22, 1886. Allusions to matters then recent are left untouched.

at the last, on a man's self and not on what he has received from without. All that his friends can do for him, or any teaching or training institution whatever, is to furnish him forth with such equipment that he may be ready for opportunities when they come, or for the one critical opportunity. And we cannot make even this our business to the full extent or for its own sake. We are no more called upon to make our graduates accomplished advocates or draftsmen than to make them accomplished engineers or railway directors. What really does concern us is that there is a science as well as a practice of law; a science inseparable from the practical art, or separable only at the cost of ceasing to be versed in real matter, but still a science of itself. And we shall find that in this there is nothing strange to our traditional habit, or alien from our dealing with other arts and sciences which have a practical side. If we consider the most obviously academical, and certainly not the least noble or strenuous of professions, we shall find the same distinction in force. The humanities are indispensable to a good schoolmaster, but we do not therefore warrant that our prizemen and classmen shall be good schoolmasters. If any one holds our Classical Schools cheap for not being, as of course and without more, an *officina* of successful teachers of the classics, the same greatly misconceives both the function of the University and the dignity and difficulty of the teacher's office. What, again, of our relation to those other arts, eminently so called, which more visibly adorn and elevate life? Why have we

saluted Mr. Herkomer as a colleague, and why do we receive Dr. Joachim and Dr. Richter not only as the welcome and familiar guests of England, but as partakers of the honourable degrees of our ancient English Universities? Surely it is not that we expect to send out into the world, from hence or from Cambridge, a certain number of painters and musicians. It is indifferent whether we send out any. The significance of our action is a different and independent one: that the humanities are not limited by any one form of expression. Because Michael Angelo and Turner not less than Homer, Bach and Beethoven not less that Plato, had the secret that bids the immeasurable heavens break open to their highest, therefore we do honour, in the name of the Muses whom we serve, to the masters and ministers of their art. The witness of our various activities here, of the new studies which some regard with suspicion from within, and some with contempt from without, is that the humanities have their part in all science whatever; that a profession, above all a learned profession, is not an affair of bargain and bread-winning, but the undertaking of a high duty to mankind. We do not say that in our schools we can make a man a skilled physician; but we can show him what is the tradition inherited by the science and art of medicine, and how intimate its connections with the whole of man's knowledge of nature, and of himself. Neither do we say, perhaps even less ought we to say, that we can make a man a skilled lawyer. But we can endeavour to impress on

him those larger and more generous notions which, if not planted betimes, are apt to wither in the dust of technical detail and the heat of forensic business. We can help him to regard law not merely as a regulated strife, or a complex machine for securing and administering property, but as the greatest, the most interesting, and in one word, the most humane of the political sciences. We can show him how legal ideas, legal habits of thought, oftentimes even legal controversies of the most distinct and technical kind, have entered into the very marrow of our political history, and may do so again. We can guide him to the distinction of that which is accidental and local from that which is permanent and universal; we can map out for him the analogies and contrasts between our own system and that of the Roman law, with whose descendants and successors our Germanic law, broadly speaking, divides the civilised world. Most chiefly, we can help him to fix in his mind that there are such things as general principles of law; that the multitude of particulars in which he must inevitably be versed as a practical student and worker are not really a chaos; and that, if he sets out with good will and good faith, he need have no fear that the search for a true art founded on science, τέχνη, will lead him into the wilderness where blind and erring tribes worship routine justified by rule of thumb, the ἄτεχνος τριβή denounced by Plato and by all sound philosophy.

So much we offer to the student, and it is not a little. If proof be needed that the offer is no vain

boast, it shall presently be forthcoming. But a University has regard to the mature worker as well as to the novice. We shall send forth our students warned and strengthened, as we trust, for the toil of their strictly professional training, and prepared to fill up and enrich with active experience the general notions they have already formed. For some years, perhaps for many, the larger world will claim them; many will belong to it irrevocably. Yet some will return to us, meaning to attach themselves to the science rather than the art of their profession, but with fresh interest, wider scope of knowledge, and a firmer grasp of intellect, derived from contact with the living affairs of mankind. These will not find their pursuits uncared for. We have here, in well devised order and easily accessible, all the needful appliances of legal work and research. In one way the apparatus of our science is simple; we share with moral as distinguished from natural philosophers the convenience of working mainly with books. But the amount of books a working lawyer must have within reach, whether his work be for the sake of practice or of science, is beyond the means of most private men. Our colleague Mr. Freeman can write a history without leaving his Somersetshire country-house. To write a law-book under such conditions, a man would need an exceedingly well filled purse or a singularly capacious and accurate memory, unless in other respects he were more than man or considerably less than a sound lawyer. To say, therefore, that serious workers in the law will find here an adequate and

well-ordered law library—in some respects a better one than those of the Inns of Court in London—is to say that of which every lawyer will perceive the importance. I need not add that the means to which I refer are those placed virtually at the disposal of the University by the care and liberality of All Souls College. Moreover, opportunities for oral discussion (a way of improving knowledge and clearing up doubts which is often and justly commended by our writers of authority) are in no wise wanting. In All Souls we have a centre of legal thought and work fitted to produce results that shall be academical in the best sense, and as far as possible from academical in the disparaging sense of having no relation to real facts in which the word is sometimes used. I will be so bold as to say that we have gone far to solve, as regards our own Faculty, the problem which some years ago was current, even to weariness of ears and vexation of spirit, under the name of the Endowment of Research.

It may be said to us, and fairly: These are your assertions on behalf of your own speciality; these are your professions of what the Oxford Law School can do; such intentions may be very good, but can you produce any visible fruit whereby men may judge your work? Now, considering the moderate number of years for which our Law School has been in existence in its present form, we think we can show fairly acceptable results. Fifteen or twenty years ago there was hardly to be found in the English language a good elementary introduction to any part of jurisprudence. I speak of elementary text-books, of works

fitted to the apprehension of an intelligent but as yet untrained beginner. Books were then in just repute, as they still are, which were and are invaluable repertories of learning for the trained lawyer; but such books presuppose familiarity with the very forms of speech and order of thought wherein the novice finds his difficulties. They are meat for men. And if elementary guidance was scanty even in the common lines of English law, there was almost a total lack of it in the region of public and constitutional law; and we shall scarcely find the law of nations to be an exception in this category, notwithstanding the bulk of its English and American literature. In Roman law we had simply nothing deserving of serious mention. What do we find now? I have no mind to exaggerate our merits, but neither will I use the language of false humility because I have to speak of the work of colleagues and friends. Mr. Poste, and more lately Mr. Moyle, have made accessible to English readers (for English students who can use German books without difficulty are still the minority) the results achieved in Roman law by the Continental scholarship of this century. We can now welcome the excellent contributions of Mr. Muirhead[1] from Edinburgh or Mr. Roby from Cambridge without feeling that our own hands are empty. Last of all, our colleague Dr. Grueber has for the first time, in his exhaustive monograph on the Lex Aquilia, exhibited to us in our own language the

[1] Professor Muirhead died in 1889, regretted by Continental as well as British students of Roman law.

very form and method of the leading modern school of Roman law: and this, be it remembered, with direct and definite relation to our University course. Not less are the benefactions of Professor Holland and Dr. Markby[1] to the beginner in search of an introduction to the general principles of law. It was Blackstone, teaching in this University, who, in the words of Bentham's frank admission, "first of all institutional writers taught Jurisprudence to speak the language of the scholar and the gentleman." The crabbed involution of Bentham's own later manner, and the still more repulsive formlessness of his successor Austin, who could never forgive Blackstone for writing good English, deprived a later generation of these advantages. In following the technical divisions of the law (with partial amendments, not always felicitous) Blackstone was at any rate intelligible to lawyers. The terminology of Bentham and Austin inflicted on us a mass of new technicalities, little better in themselves, if at all, than Blackstone's, and intelligible to nobody. Dr. Markby and Mr. Holland have delivered us from this state, and furnished us with lucid and readable expositions of the elementary (though not always easy) conceptions which underlie the detail of the law. Passing from these generalities to our particular system, we find ourselves indebted to the Warden of All Souls—and I am only repeating what I said some years ago, before I had any standing here—for a model introductory text-book on a special subject of English law.

[1] Now Sir William Markby.

These results, I conceive, are somewhat. But there is more yet; there is that which we may claim as not only service to professional students, but direct service to the Commonwealth. It is going, perhaps, to the verge of what is permissible in this place to refer to the constitutional argument lately[1] addressed to the House of Commons by my friend Professor Bryce, an argument which faced the highest and most difficult questions of modern politics. I refer to it only to say that, whether or not we agree with its aim and conclusions, no competent person can fail to admire in it the combination of learning and subtilty with sincerity and highmindedness; and that generous adversaries were to my own knowledge among the first to bear witness to its merit. The Warden of All Souls, however, and Mr. Dicey have been elucidating the principles of our public law within strictly academical bounds, and their labours belong to our Law School in the full and proper sense. Professor Dicey's book, designed for peaceful uses, has become an armoury for political combatants; whether the untried weapons snatched out of it by untrained hands are altogether safe for those who wield them, it is for the captain and not for the armourer to consider. Sir William Anson's exposition of the law of Parliament has been only these few days in our hands. It is at least an excusable ambition to hope that work of this kind, addressing itself to all capable citizens, and executed by persons of verified competence who are removed from the stress and

[1] In the debate on Mr. Gladstone's Home Rule Bill.

disturbing influences of active politics, may do something to enlarge the horizon of English political thought, and mitigate the crudeness and bitterness of English political controversy. In no generation of English history has the solid framework of law and custom on which the English Constitution is built up stood more in need of plain, definite, impartial exhibition than it does this day. At no time has it been fitter for us to be put in mind that the effective power of law is not only the work but the test of a civilised commonwealth, and that law, as a great English writer has said, is in its nature contrary to such forces and operations as are "violent or casual." It may be now and again inevitable that the casual fortunes of political strife determine resort to violent experiments for whose consequences we have no warrant. There may be such junctures brought about in the fates of nations, or by the improvidence of their rulers, that good citizens must acquiesce in desperate remedies rather than expose their country to yet worse evils. We who believe that law, like all other human sciences, and politics, like all other human arts and faculties, rest at bottom on the nature of things, and that the nature of things cannot be deceived and will not forgive, may submit to such things if the need for them is proved; but we will not praise them, nor the men who have made them needful. The learning which practical men affect to despise shall help us, at least, to know whither we are going, and what we risk.

It is time to come back from justifying ourselves

to the world to considering, here among ourselves, how we shall best further our work. There are some kinds of technical study (I have already hinted) which cannot well be undertaken here, or not so well here as elsewhere. In what lines, then, is it wise to guide our students, having regard both to the abundance and to the limitations of our resources? Let us consider for this end the general forms of an English lawyer's knowledge. They may be laid out in a threefold division of things necessary, things useful, and things of ornament. Some knowledge is necessary to a lawyer, in the sense that it should be always in his mind, and capable of being instantly called up into active apprehension, and that a good lawyer would be ashamed of not having it at command. Much is useful, but not in this way necessary. A good lawyer will be glad to have the full and actual command of as many departments as he can. But no man can thus occupy the whole field of such a science; and as a rule, both in practical and in speculative work, one must choose one or two departments for minute acquaintance, and in others be content with a sort of index-knowledge. Outside his own special branch, a sound lawyer will know where to look for full information, and have a fair notion of what he may expect to find. But it will be no shame to him not to be ready with an off-hand answer. Then we have the matters which are rather of delight and curiosity than of immediate profit, and are the ornaments of professional knowledge. Familiarity with them is the mark of the lawyer who is learned

in the eminent sense, as distinguished from him who is merely competent. Now and again they become of importance, even of capital importance, in practical application; witness, for example, the masterly historical investigation of the jurisdiction of Justices of Assize delivered as a judgment in Fernandez's case[1] by Willes J. But to be thus applied, they must have been acquired for their own sake: they cannot be "got up" like the facts of a brief. Bearing these distinctions in mind, it is in our power here in every one of these kinds to start a learner on the true path. We cannot usefully attempt to give him even so much of the details of law as will ultimately be indispensable to him; but we can give him a clear vision and a firm grasp of elementary principles which, being called to mind as occasion requires, will save him from being oppressed and confused by the multitude of particulars. Much less can we teach him all that is useful for a lawyer; but we can aid him to form the scholarly habit which makes the difference in practice between sure-handed and slovenly execution. We cannot make him a profound jurist or an accomplished legal historian; but we can aid him to form tastes which, after the inevitable stress of purely technical training has been endured and has done its work, will lead him to enjoy the fruits of the higher learning, it may be to add to them.

In particular, the course of our Law School—and I refer more especially to the course prescribed for

[1] 10 C. B., N. S. 1.

the Civil Law degree[1]—gives an opportunity, which may not recur for years after, for imbuing the mind, at the stage when it is just ripe for appreciation, with the classics of English legal and political science. A student will hardly lose sight of the larger bearings of jurisprudence who has been grounded betimes in Hobbes, in Blackstone, in Burke's great constitutional speeches and writings, in the best parts of Bentham's work, and in the lines of research opened by my predecessor in this Chair, Sir Henry Maine. Herein I assume a genuine pursuit of knowledge. There is no kind of sound doctrine which may not be—and I fear I must say, which is not—perverted by short-sighted learners and unscrupulous teachers, who substitute for the pursuit of knowledge the pursuit of examinations. For such as these their place is prepared, according as they have desired and deserve. The Muses will deal with their blasphemies in their own good time, showing perhaps some mercy to the dupes, but none to the sinners against light.

Again a man may learn here better than elsewhere,

[1] It may be proper to explain, for readers not familiar with the somewhat complex arrangements of the Oxford Schools, that the Honour School of Jurisprudence is one of the several optional ways of taking a degree with honours in Arts. The degree in Civil Law is open only to candidates who have already graduated in Arts (not necessarily in any particular School), and the examination for it is of a more advanced kind. There is not any corresponding examination at Cambridge, where attempts to make some similar use of the Chancellor's Medal for Legal Studies have failed: but the Law Tripos, which confers a degree in Arts or Laws at the successful candidate's option, covers a somewhat wider ground than the Oxford School of Jurisprudence.

and certainly better than by perfunctory reading snatched from the time which is none too much for his practical training, to appreciate the Roman law as a real and living system, different from our own but of kindred spirit, and presenting the most instructive analogies even in detail. It is neither possible nor desirable for an English lawyer to know the Corpus Juris in the way that a German professor does; and a compulsory smattering of undigested Roman law rules and terminology is worse than worthless. But the original authorities of the Roman system are, compared with our own, compendious; and a moderate amount of systematic application under proper guidance will give a man a range of legal ideas more complete in itself and more conducive to orderly thinking than he is likely to get from any other form of legal study at present practicable. In the Common Law we have outgrown Blackstone's work, and we are not yet ready to replace it.

And this brings me to a not unimportant consideration: that the invaluable habit of first-hand work and constant verification can be formed and exercised in a limited field no less than in an unlimited one, and, for the beginner, even better so. We no longer make and transcribe notes and extracts, with infinite manual labour, in a huge "commonplace book," as former generations were compelled to do by the dearth of printed works of reference.[1] But, since

[1] The old "Abridgments" are nothing else than the commonplace books of eminent lawyers. See the preface (attributed to Hale) to Rolle's Abridgment. Hale's own unpublished commonplace book, an

the law is a living science, no facilities of publishing and printing can ever perfectly keep pace with it. A student who intends to be a lawyer cannot realise this too soon. There is no need for him to make voluminous notes (indeed there is a great deal of vain superstition about lecture notes); but those he does take and use ought to be made by him for himself, and always verified with the actual authorities at the first opportunity. Another man's notes may be better in themselves, but they will be worse for the learner. As for attempts to dispense with first-hand reading and digesting by printed summaries and other like devices, they are absolutely to be rejected. No man ever became a lawyer by putting his trust in such things; and if men can pass examinations by them, so much the worse for the examinations. It is of course needless to say this to scholars; I now speak of purely professional experience. And in order to form the habit of first-hand work it is not necessary to possess many books, or even to have constant access to libraries. There is nothing to prevent any student of average means from having in his own copies of good modern editions the whole of the authentic texts of the Roman law. If, however, the Corpus Juris appears too formidable, the use of select parts of the Digest has been greatly facilitated by the publications of this University. English authorities are less manageable, but the selections of leading cases which have been

amazing monument of minute industry, is preserved among the MSS. of the Lincoln's Inn Library.

published on both sides of the Atlantic (I may specially mention as the latest and one of the best Mr. Finch's, on the Law of Contracts) will go some way towards enabling the student to practise real search and verification without so much as leaving his own rooms. At the same time it is good to learn, as early as may be, the use of public libraries, catalogues, and books of reference generally. Facility in such things may seem a small matter, but much toil may be wasted and much precious time lost for want of it. To the working lawyer these things are the very tools of his trade. He depends on them for that whole region of potential knowledge which, as I have said, must bear a large proportion to the actual. And where can one learn the mechanism of scholarship, general or special, better than at Oxford?

It is somewhat old-fashioned, though there is plenty of authority for it in our legal literature, to offer general good advice for the student's conduct of life. Such advice is apt to fall upon a dilemma. If you have had the experience on which it is founded, you do not need it; if not, you will not believe it. And after you have forgotten the advice and the adviser, and discovered the truth of things at your own charge, you will say to yourself quite innocently, Why did not some one tell me this before? Yet a few hints of warning and encouragement may fall on kindly soil and ripen. And therefore I would say to the student going forth into the heat of the day, Trust your own faculties and the genius of your University, and beware of the idols of the forum.

You will meet those who will endeavour to persuade you that it is "unbusinesslike" to be a complete man; that you should renounce exercises and accomplishments, abjure the liberal arts, and burn your books of poetry. Do this, and the tempters will shortly make you as one of themselves. You will steadfastly regard your profession as a trade; you will attain an intolerable mediocrity, the admiration of crass clients, and the mark of double-edged compliments from the Court; you will soberly carry out the rule laid down in bitter jest by a judge who was a true scholar, of attending to costs first, practice next, and principle last; you will stand for Parliament, not as being minded to serve the common weal, but as thinking it good for you in your business; and if you are fortunate or importunate enough, you may ultimately become some sort of an Assistant Commissioner, or a Queen's Counsel with sufficient leisure to take an active part in the affairs of your Inn, and prevent its library from being encumbered with new-fangled rubbish of foreign scientific books. But if you be true men, you will not do this; you will refuse to fall down and worship the shoddy-robed goddess Banausia, and you will play the greater game in which there is none that loses, and the winning is noble. Let go nothing that becomes a man of bodily or of mental excellence. The day is past, I trust, when these can seem strange words from a chair of jurisprudence. Professors are sometimes men of flesh and blood, and professors of special sciences are not always estranged from the humanities. For my part, I would in no

wise have the oar, or the helm, or the ice-axe, or the rifle, unfamiliar to your hands. I would have you learn to bear arms for the defence of the realm, a wholesome discipline and service of citizenship for which the Inns of Court offer every encouragement, and for learning to be a man of your hands with another weapon or two besides, if you be so minded.[1] Neither would I have you neglect the humanities. I could wish that every one of you were not only well versed in his English classics, but could enjoy in the originals Homer, and Virgil, and Dante, and Rabelais, and Goethe. He who is in these ways, all or some of them, a better man will be never the worse lawyer. Nay more, in the long run he will find that all good activities confirm one another, and that his particular vocation gathers light and strength from them all.

And what is to be the reward of your labour, when you have brought all your best faculties to bear upon your chosen study? Is it that you will have more visible success and prosperity than others who have worked with laxer attention or with lower aims? Is it that the world will speak better of you? Once more, that is not the reward which science promises to you, or to any man. These things may come to you, or they may not. If they come, it may be sooner or later; it may be through your own desert, or by the aid of quite extraneous causes. The reward

[1] The Inns of Court School of Arms is well approved by the authority of our old writers on Pleas of the Crown and the office of a Justice of the Peace, who all say that cudgel-playing and such like sports, as tending to activity and courage, are lawful and even laudable. Hawkins (P. C. I. 484) closes a whole *catena* of such authority.

which I do promise you is this, that your professional training, instead of impoverishing and narrowing your interests, will have widened and enriched them; that your professional ambition will be a noble and not a mean one; that you will have a vocation and not a drudgery; that your life will be not less but more human.

Instead of becoming more and more enslaved to routine, you will find in your profession an increasing and expanding circle of contact with scholarship, with history, with the natural sciences, with philosophy, and with the spirit if not with the matter even of the fine arts. Not that I wish you to foster illusions of any kind. It would be as idle to pretend that law is primarily or conspicuously a fine art as to pretend that any one of the fine arts can be mastered without an apprenticeship as long, as technical, as laborious, and at first sight as ungenial as that of the law itself. Still it is true that the highest kind of scientific excellence ever has a touch of artistic genius. At least I know not what other or better name to find for that informing light of imaginative intellect which sets a Davy or a Faraday in a different rank from many deserving and eminent physicists, or in our own science a Mansfield or a Willes from many deserving and eminent lawyers. Therefore I am bold to say that the lawyer has not reached the height of his vocation who does not find therein (as the mathematician in even less promising matter) scope for a peculiar but genuine artistic function. We are not called upon to decide whether the discovery of the

Aphrodite of Melos or of the unique codex of Gaius were more precious to mankind, or to choose whether Blackstone's *Commentaries* would be too great a ransom for one symphony of Beethoven. These and such like toys are for debating societies. But this we claim for the true and accomplished lawyer, that is, for you if you will truly follow the quest. As a painter rests on the deep and luminous air of Turner, or the perfect detail of a drawing of Lionardo; as ears attuned to music are rapt with the full pulse and motion of the orchestra that a Richter or a Lamoureux commands, or charmed with the modulation of the solitary instrument in the hands of a Joachim; as a swordsman watches the flashing sweep of the sabre, or the nimbler and subtler play of opposing foils; such joy may you find in the lucid exposition of broad legal principles, or in the conduct of a finely reasoned argument on their application to a disputed point. And so shall you enter into the fellowship of the masters and sages of our craft, and be free of that ideal world which our greatest living painter has conceived and realised in his master-work. I speak not of things invisible or in the fashion of a dream; for Mr. Watts, in his fresco that looks down on the Hall of Lincoln's Inn, has both seen them and made them visible to others. In that world Moses and Manu sit enthroned side by side, guiding the dawning sense of judgment and righteousness in the two master races of the earth; Solon and Scaevola and Ulpian walk as familiar friends with Blackstone and Kent, with Holt and Marshall; and the bigotry of a Justinian and the

crimes of a Bonaparte are forgotten, because at their bidding the rough places of the ways of justice were made plain. There you shall see in very truth how the spark fostered in our own land by Glanvill and Bracton waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt, and Mansfield, and the Scotts, and others whom living men remember. You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable, so majestic, is this living temple of justice, this immemorial and yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there.

V

THE ENGLISH MANOR[1]

In this exceedingly complex historical product there are two leading facts or groups of facts to be explained. We have the institution of the Manor, as known to lawyers, decrepit and in the way of being reduced to a shadowy name by the enfranchisement of copyholds, but still alive. A manor is an ancient *imperium in imperio*, as the family settlement of great estates may in some ways be deemed a modern one. It is a fortress island of Franco-Norman feudalism strangely blended with ancient local custom, holding out against that levelling flood of the Common Law which our forefathers, disguising a bold and far-sighted centralising policy under an innocent phrase, named "the custom of the realm." Like the scheme of a family settlement, the customs of a manor are privileged to exclude and modify the ordinary law within a pretty wide range of variation. In both cases the varieties that actually occur are found to be consistent with a well-marked generic resemblance. The private law of the estate (to use a happy phrase

[1] This essay contains the substance of several lectures given on different occasions.

of Sir H. Maine's) and the private law of the manor have each their own regular type. Aberrations are possible, but rare. Then we have or had, more or less associated with the manor, the system of common-field cultivation which prevailed in many parts of the country within living memory, and of which many traces yet remain. The measures of agricultural improvement which made an end of the system in practice have at the same time put its extent and its details more fully on record, in the shape of evidence and reports, than had ever been done before. As regards this head, we have to depend almost entirely on historical and economical sources of knowledge. Lawyers have confined themselves to a technical theory of tenure into which the facts of usage could at need be dovetailed without manifestly spoiling the work. This was done piecemeal and with grudging; the facts might be known to a whole country-side, and natural in the farmer's eyes; but it was reason enough for the lawyer to treat them as abnormal that they strained his accepted theory. When we turn from Kemble's or Nasse's marshalling of the facts to Coke's commentary on the law of tenures according to Littleton's semi-sacred text, we find that Coke's brief and apparently capricious suggestions of odd legal possibilities become suddenly luminous. As matter of law, the Manor and the Common Fields have not any necessary connection. The historical problem (which is also capable of becoming in particular cases a legal problem of practical importance, and has become so in cases within our knowledge) is to

determine what the connection really was. The opinion that there is not any relation but that of territorial coincidence may be recommended to the next inquirer in search of a new paradox. We have not yet heard of its being maintained, and hope for some amusement when its day comes. Meanwhile we turn to the closer examination of our manor.

The necessary elements of a perfect manor are a lord, free tenants, and a Court Baron. The free tenants hold lands of the lord according to the course of the common law, and by titles originally created, or presumed so to have been, by livery of seisin, commonly though not of necessity witnessed by deed, or its equivalent. At least two free tenants are required to make a Court. In this court the tenants who owe suit to it (that is, to whose tenure the duty of attending it is incident) are themselves the judges, the lord or his steward being only president. In default of free tenants to make a court, the manor in strictness of law ceases to exist. We read in a well-known passage of Domesday of one lord lending three tenants to another to keep up his court; so that the lord expected really to lose something if the court failed him. Nowadays it has been discovered that a "reputed manor" will serve as well as a real manor for most purposes, and in particular for the reception of fees and fines from the customary tenants. This class of tenants is not a necessary though it is a usual element. Customary tenants or copyholders hold their land not according to the common law but according to the custom of the manor, and their title

is evidenced not by deeds but by entry on the court rolls. The court which deals with their affairs is called the "Customary Court," or "Customary Court Baron," and is in practice held together with the Court Baron of the free tenants. In legal theory it is not the same court; the lord or his steward is judge, and the suitors are different. Mr. Maitland has shown, however, that the distinction of two courts is artificial and comparatively late.[1] A Court Baron is simply *curia baronis*, the lord's court. The reading of it as *curia baronum*, the court of the freeholders, is merely fanciful. The name does not commonly occur in early court rolls, and there is no evidence that freeholders as such were called *barones* at any time. The customary law of copyhold tenements must differ from the common law as regards modes of alienation; it may, and often does, differ as regards the course of inheritance. Dues are payable to the lord, of an amount formerly substantial, and constantly shown by ancient court rolls and surveys, where such have been preserved, to represent the commuted value of services once claimed in kind. Connected with the tenure and services are methods and rules of agriculture which to a modern farmer are simply barbarous; within the present century they have everywhere, or almost everywhere, been got rid of as intolerable. Thus in the manor itself

[1] Introduction to *Select Pleas in Manorial Courts* (Selden Society, 1889), pp. xvii., xxxix., *sqq.* *Curia baronum* does occur, Mr. Maitland now tells me, as the title of a thirteenth-century tract, but even there the MSS. are not uniform, and *curia baronum*, *c. baronis* are used indifferently in the same MS.

we have two distinct systems or groups—the free tenants, whose tenure falls quite naturally into the feudal theory of post-Norman lawyers, and the customary tenants, whose customs do not fall in with that theory at all, and have to be forced into apparent harmony with it by more or less barefaced fictions. As to the territorial extent of a manor, we have to bear in mind that its bounds need not, and often do not, coincide with those of any other civil or ecclesiastical division. There may be several manors, or parts thereof, in one vill or parish, and conversely; and for this there is definite legal as well as historical authority if required.

No historical explanation of the manor can be accepted which fails to account for all these elements. Even an hypothesis which does not profess to be complete must leave room for a rational account of those parts which for the time being it leaves untouched. Thus we may dismiss at once the story told by Blackstone, and followed until quite lately by all the ordinary legal text-books. Copyhold tenure was supposed by him to have arisen since the Norman Conquest out of the mere indulgence of lords to tenants who really and truly held at their will. And he suggests, though he does not say, that the customs themselves are of equally late origin. If we had no authorities earlier than the Conquest, we should still be warranted in saying that rational human beings could not have invented our manorial customs at any later time. Blackstone's legend could still not seem probable to a student in any degree trained in the

practice of historical and comparative observation. But we have earlier authorities; we know that the estate and duties of the Geneát before the Conquest, expressly stated to vary according to local usage ("that which is established on the land"),[1] were substantially like those of the *villanus* of the twelfth or thirteenth century. It is one of Kemble's merits to have brought out this continuity beyond the possibility of doubt, and not the least of Mr. Seebohm's to have emphasised it.

Again, we have to consider the facts of existing societies which are still in an archaic stage before we commit ourselves to any theory of origin. Throughout India we find communities with a system of agriculture regulated by custom, and with a kind of Customary Court, but without a lord. The interpretation of these facts may be doubtful, but the facts themselves are not; they are well known and abundantly verified. Take away the lord and the feudal theory from an English (or German) manor, and there is left something very like an Indian village community. Take an Indian village community, and impose on it a lord and a theory of tenure, and the result will be something very like an English manor. There is no vestige of evidence that there ever was a lord in the Indian community. And it seems a fair hypothesis, in the absence of proof to the contrary, that in the English manor the community is the oldest element, and the lordship a newer one; that the village community is an undeveloped manor, or

[1] Rectitudines singularum personarum, § 2.

the manor a developed and transformed village community. Moreover, German inquirers, with no knowledge at all of the Indian phenomena and no detailed acquaintance with the English, have derived from their own materials, as regards the origins of German land tenure, exactly this result. There is likewise a body of Slavonic usage (in great part, like the Indian, living and verifiable at this day) which points in the same direction. Again, there is considerable evidence, abundant in Asia, slighter in bulk but specific enough in kind in Europe, that the conception of private and absolute property, the *dominium* of the Roman lawyers, as we now hold and act upon it (that is to say, as the common rule of law and society, not a privilege in respect of persons or modes of acquisition), belongs not to the earliest stages of society, whether as regards things movable or immovable, but is of comparatively later origin. In the state of things yet visible in India, we have to do, in the first instance, not with property owned by individuals, but with family possessions administered by a chief. Separate property exists, but as an exception or privilege.[1]

It is obvious that, so long as land is abundant, there is no need for rules of property in the modern sense. For all practical purposes it is enough to recognise rights of use and enjoyment in that part of the tribal territory which a man, in Locke's phrase, "hath mixed his labour with." And this is what we find. Mr. Victor Dingelstedt tells us of the Kirghiz,

[1] See Note A.

who are still in the nomad state, "Les Kirghiz ne reconnaissent pas le droit de propriété individuelle sur le sol, mais ils en concèdent l'usufruit à perpétuité ou à temps à tout individu qui a fait des frais ou employé du travail pour le faire valoir. . . Pourtant, sous l'influence de la loi russe, les Kirghiz commencent à garder dans la même famille et transmettre en succession les lopins du terrain qu'ils ont cultivés."[1] Contact with Roman law must have been a powerful agent in producing the like effects on Germanic custom.

Let it be observed that the corporate or quasi-corporate unit of archaic property law, the family, or house or village community, is not like a modern corporation, which is an owner among individual owners. The modern law first assumes individual *dominium*, and then by a fiction treats the corporation as a single person and invests it with capacities of dominion, obligation, and so forth. Roman law as we know it, we need hardly explain, is for this purpose and for the whole of the present inquiry substantially modern; very little has been left for recent European law to add in that direction. But the archaic family or community is not a *dominus* or a person in the modern legal sense at all. It is not a subordinate or artificial unit created by the State, but an original unit upon which the State is built, and out of which individual rights are gradually developed. Does any one say this is mere speculation? The answer is ready. Let him consult any

[1] Le droit coutumier des Kirghiz, in *Revue Générale du droit*, 1890, xiv. 213.

standard work on Hindu law, or, still better, any Indian revenue officer.

Some people appear to think that any hypothesis, or at least the current hypothesis, of the growth of the manor from the village community, or rather the superposition upon it of the feudal structure of lordship and tenure, must involve the supposition of a time within historical memory, or only just beyond its bounds, when there was not any private property in land at all, or any difference between free men of the same community in respect of landholding. I have not been able to find any supposition of the kind in Kemble, or Von Maurer, or Sir Henry Maine. or the Bishop of Oxford, or (to cite a scholarly but perhaps more elementary book) Mr. Kenelm Digby. What the Bishop of Oxford does say is that, "although traces still remain of common land-tenure at the opening of Anglo-Saxon history, absolute ownership of land in severalty was established and becoming the rule"—a statement which is certainly very far from any theory of primitive communism. Again, all these authors are aware of the existence of lords having under them tillers of the soil from whom payments and services are due, and of whole communities being dependent on lords. Kemble is even emphatic on this head. If any one goes about to confute Kemble, or Von Maurer, or the Bishop of Oxford by proving that independent village communities were not common in England a century or even two centuries before the Norman Conquest, he will in no way diminish the value of their work,

and will add to the knowledge we have derived from it only this, that he has not himself studied it with fitting care. As to the earlier Germanic institutions, the existence of some private property in land, and a connection of landholding in some way with degrees of personal rank, are laid down for us by Tacitus. A theory of Teutonic communism within the period of historical observation would therefore have to begin with contradicting Tacitus. It is needless to explain that the modern authors we have cited are not so rash as to do anything of the kind. In one point their terminology is open to criticism; they use the word "mark" as a compendious equivalent for "village community." Now I feel sure that there is not any authority for the Old English "mearc"[1] having borne such a sense, and I think Fustel de Coulanges's work, especially his posthumous volume *L'alleu et le domaine rural*, has made it at least doubtful whether the High-German authorities warrant it, as regards the earlier documents, for Germany. But the question is at bottom one of things, not words.

Having pointed out the elements of which a lawful manor consists, we may now see what means we have of tracing them back beyond the conventional commencement of legal memory. Domesday Book tells us of manors in plenty, but of their internal constitution it tells very little. For the preceding centuries our direct evidence is imperfect. I do

[1] The normal meaning of "mearc" is "boundary," and I do not know of any passage in which this is not acceptable.

not think any considerable addition has been made to the materials used and published by Kemble a generation ago. The six volumes of the *Codex Diplomaticus* are full enough in one way, but the charters there collected are of one prevailing type—grants on a large scale by princes, mostly for religious purposes. I believe that they are, with few exceptions, grants of lordship, not of occupying possession. They hardly tell us more about the detailed economy of land-holding than a collection of modern family settlements of great estates would tell a French or German student of the position of a modern English tenant-farmer. We have also to remember that the charters were framed by clerks whose learning, such as it was, was Roman or Romanised, and who were thinking much more of their Continental models than of explaining actual English usage to posterity. Of the local customs and tenures we have no continuous or systematic records; there is no reason to believe that any such were kept in writing. Our notions of the Anglo-Saxon land system as a whole must be to a great extent hypothetical, and to some extent conjectural. Yet a few exceptional documents and incidental notices in various quarters have given us fixed points of importance. We know that the relation of chief and dependant, or lord and man, was part of the regular order of society long before the Norman Conquest, and that the dependant often held land of his lord on more or less burdensome terms. We know, too, that these terms were similar in kind to those on which customary tenants of manors are

found holding their land in post-Norman surveys and records. They consisted in doing or finding work for the benefit of the lord's demesne land, or paying its equivalent. Sometimes they were so burdensome as to appear barely compatible with personal freedom. It is quite certain, however, both from earlier and later authorities, that there was not any necessary correspondence between the terms of the tenure and the personal status of the tenant. We know from their express language that a tenant in a very small way might be, and commonly was, a free man. There was then, and long after, a personally enslaved class; a member of it (þeow, *servus* or *nativus*, bondman) had no civil rights as against his lord. But as against any one else, after the Conquest at any rate, he might act as a free man, and hold free land if he could. Somewhat in the same way a free man might be personally commended to one lord and owe suit of court to another. It is supposed, rather from post-Norman indications than from direct evidence, that there was at one time a considerable class of independent landholders on a moderate scale, such as we should now call squires or yeomen. But their proportion in number to the dependent freemen, and the proportion of either to bondmen (we purposely avoid the vague and unauthorised word "serf") are unknown. Kemble was of opinion that "the ruin of the free cultivators and the overgrowth of the lords" had gone very far before the Conquest; and his opinion is entitled to great weight. We may well think that in the tenth century dependent com-

munities tilled much, or even most, of the soil of England, and that at least the germs of lordship were as early as the English settlement. But we cannot affirm that dependence was universal, or that the English conquerors of Britain brought lordship with them full-grown (still less a manorial system), or that a thane even under Edward the Confessor was the lord of a manor in the Anglo-Norman sense. It would save trouble to follow Mr. Seebohm in pushing Kemble's view to that extreme length; but the evidence does not warrant it. The private jurisdiction which is essential to the developed manor has been shown, we think, to be essentially feudal, and to belong only to the latest pre-Norman period. In any case, only positive necessity would make us assume that the Germanic people who invaded Britain either had never been like the Germans described by Tacitus, or had become wholly different in the meantime. The alternative of merely discrediting Tacitus is not within the range of serious argument. One conclusion of a negative sort already mentioned may be repeated here. Whatever the English village community, dependent or independent, was called, there is no real authority for calling it a *mark*. Our proper English word, and the only one for which there is ancient authority, is "township," afterwards Latinised as "vill." And not only there is no authority for attributing to the township a popular court called a mark-moot, but it is very doubtful whether there was any regular township court at all. Certainly the word "mearcmót" is

found. But it may just as well refer to a court where the pleas of adjacent hundreds or shires were held on or near the common boundary, a thing known to have been sometimes done. There is every reason to think, as will be shown presently, that the manor court was of wholly different origin. It seems quite possible that it was welcomed as affording relief against the delays, inaccessibility, and other inconveniences of the hundred court. How far it may have supplanted the work of an informal township meeting, going back to a more ancient origin than the hundred court itself, and answering to the panchâyat of an Indian village, is at present an open question.

We have already hinted that manorial, or as it would better be called seignorial jurisdiction, is in truth purely feudal. Local—or more exactly personal—justice is as essential to feudal tenure as military service. The lord is bound to do justice to his tenants; the tenants on their part must attend the lord's court that he may have the means of justice; for the feudal tenant claimed "the judgment of his peers," not the judgment of the lord alone. Every lord ought to have his court. The king himself was lord of many domains, and held courts for his tenants which were quite distinct from the public courts of justice held for all the king's subjects, or for so many of them as had the time and the money, first to find their way to the place where the king happened to be, and then to pay the heavy fees which were required before they could get their suits heard. These

private feudal jurisdictions were valuable to the lords, pretty much as the king's justice was valuable to the king, by reason of the profit accruing from fees and fines. In the case of the greater lordships—an earldom, a bishopric, the possessions of a rich monastery—this was an important source of revenue. We find that struggles for jurisdiction and the profits of jurisdiction account for many of the oddest features of the legal history of the Middle Ages. The king, the Church, and the great men, were all endeavouring to get and to keep as many courts and as many grounds of jurisdiction as they could. Nor was it an unknown practice, any more than in modern times, to take what one wanted, when one felt strong enough, and find reasons for it afterwards. It is not surprising, therefore, if we fail to discover a perfectly logical system of judicature in our medieval authorities. But there is no doubt at all that feudal tenure implies the duty and the right of jurisdiction of some kind. It would be rash perhaps to give any confident opinion as to the origin of this rule, which is at least as fundamental in Continental as in English feudalism. Perhaps it was simply that, in the general state of disorder from which feudal polity emerged, it provided the best if not the only chance of getting justice at all. In England the feudal system of jurisdiction never quite had its own way. It was imported as an exotic, and comparatively late. Private jurisdictions were coming in, after Continental example, before the Norman Conquest, but apparently not much before. Thus the tradition of

the old public courts was never quite effaced, and on the other hand the king's government and the king's justice, in the hands of such rulers as Henry the Second and Edward the First, gained strength apace and checked feudalism in time. The private lords' courts were not abolished, but they were made to know their place, and the creation of new feudal jurisdictions was cut short by the great statute known as *Quia Emptores*. It was attempted—but without permanent success—to make this the law of Scotland also. Many private jurisdictions must have perished by mere decay; the increased ease and certainty of getting the king's justice and peace "according to the custom of England" from the king's judges led suitors to prefer the royal jurisdiction, and the judges were always ready to extend it at the expense of the private lord. The trouble of collecting a lord's free tenants from remote places to make up a court must have worked the same way. Private courts, on the whole, survived only where there was a sort of compact nucleus of local business and interests by which they could be maintained. Such a nucleus was afforded by the social structure of the township, with its system of common agriculture and labour-dues, already existing. Accordingly we have the complex legal entity known as the manor—an institution to which we may find partial parallels in Asiatic customs of unknown antiquity, in the provinces of the later Roman empire, and in mediæval Germany, but which in its entirety is one of our insular puzzles. It is certain that down to the

fourteenth century the word "manerium" did not convey the same meaning that "manor" does to a modern lawyer. It was rather the principal house of the estate, the "capital messuage" of later conveyancers. The word describes a material building having a definite situation. A *manerium* had doors or gates; it might be in good or in bad repair; it might be burnt down. Feudal jurisdiction survives, in a degenerate and somewhat undignified form, in the Court Baron. The results I have just stated have been worked out independently, on different lines of evidence, and I think conclusively, by Professor Maitland[1] and Mr. G. H. Blakesley.[2]

To recapitulate: an English manor, as we find it from the Conquest downwards, included the lord, the free tenants who held of the lord by regular feudal tenures and owed suit to the court, and the villeins or customary tenants who held land according to the custom of the manor in villenage or base tenure, being generally bound not only to make stated payments in kind but to furnish work on the lord's own land at stated times. The lands held on these conditions were in the legal theory of post-Norman times part of the lord's domain, or counted, as we should now say, as in hand. There is ample proof that such labour-services were common before the

[1] Introduction to Select Pleas, etc. cited above.

[2] "Manorial Jurisdiction," *Law Quarterly Review*, v. 113. The best and most accurate account of the modern legal manor is still to be found in Serjeant Manning's article under that title in the *Penny Cyclopædia*, or its successor the *English Cyclopædia*, where the article was reprinted without change.

Conquest; there is also sufficient proof that commutation of them for money rents began soon after the Conquest if not before. Tenants of this class were commonly, though not always, unfree in person, "bondmen in blood," in technical Latin *nativi*. They are represented by the copyholders of modern times, though any general difference of condition or rank between freeholders and copyholders has long ceased to exist, and in fact freehold and copyhold land have in many cases been so long held together by the same owners that it is extremely difficult to distinguish them. Kemble's account makes much of an original community of Teutonic freemen which is really conjectural, and he has very little to say of villenage. Mr. Seebohm has an elaborate account of the incidents of villein tenure, and a most valuable elucidation of the mediæval system of English agriculture as connected with the administration of a manorial domain. But he has very little to say of the free tenants, and both he and Kemble have almost nothing to say of the jurisdiction. A process of historical reconstruction which ends in a manor with the jurisdiction left out is clearly not final. I will not say it is equivalent to leaving out Hamlet, but it is something like propounding a theory of Hamlet's character without any reference to the scene between Hamlet and Ophelia. The history of private jurisdiction seems to be the point on which research may now be most hopefully concentrated. By research I do not mean exclusively or chiefly the search for unpublished court rolls. That work is desirable and laudable; but we

have no right to expect any startling discoveries from it. The ground is very fairly covered by documents already published or in course of publication, and there is a great deal of material in print which no modern scholar has yet thoroughly examined.

One thing rather apt to be forgotten is that the manor as we know it cannot have developed out of the township by any uniform process. For the township was not merged in the manor; it continued to have a distinct though less conspicuous existence. And we know that it is not even the rule for the boundaries of manors to coincide with those of townships or parishes. Manors constantly include several townships or parts of townships; parts of the same township often belong to two or even more manors. It will not do, therefore, to assume that the manor court was made out of an older township court by putting the lord on the top of it and introducing the sharp legal distinction between free and customary tenures. We could not get over the want of any regular territorial coincidence even if we knew that a township court had existed; and we do not know that. The "mark-moot" of some modern writers is a phantom of unsupported conjecture which only recedes farther and farther into the land of shadows when one endeavours to track it to some solid ground of evidence. It is likely enough that there was from very ancient times some sort of township or village meeting. Such meetings are common enough in other Teutonic lands to this day. But they have not the powers or attributes of a regular court of justice,

and there is nothing to show that they ever had. It is not the feudal manor but the ecclesiastical parish that has overlaid, so to speak, the ancient English township; it is the vestry meeting, and not the Court Baron, that represents the old village meeting if anything does. It is true that our law-books say there are two courts, the Court Baron for the free tenants and the customary court for the copyholders, though in fact they are always held at the same time and place; and this naturally suggests that the customary court represents an ancient popular court of some kind. But examination shows that this distinction is nothing but a piece of comparatively modern formalism. There is no sign of it in early court rolls. As a rule the court is described merely by the name of the lord or of the place, and when there is any epithet it is called a "lawful court" without further specification. The place, when named, is seldom if ever described as a manor. We do not know exactly in what manner the customary tenants became attached to the lord's court. But it was evidently good for the lord to have his rights formally recorded by the witness of the tenants themselves, and better for the villeins to be dealt with judicially, though in their own lord's jurisdiction, than to be dealt with merely according to his power, which was the practical alternative. It may well be that the thing came about because it seemed obviously convenient, and without its occurring to any one that a theory was wanted. A somewhat similar problem is presented by the law of distress. The right to distrain for rent in arrear was

an incident of feudal tenure, but it came to be applied, apparently without question, to leases for a term of years or from year to year, although these, according to the strict feudal theory, were merely a matter of personal contract. Tenant-farming of the modern type is the very opposite of feudal tenure, and it may be said that the introduction of leases for years was the beginning of the end of the manorial system. And yet feudalism left its mark on this least feudal part of our land laws.

The history of the social and economic processes underlying the legal history of the manor is now much better understood than it was even ten or twelve years ago. With the Conquest we enter on the period of written and formal testimony, and in the succeeding centuries the wealth of materials is almost perplexing. Domesday itself, though it does not give much direct explanation, is capable of affording much guidance: as witness Mr. James F. Morgan's excellent little book, not so well known as it deserves, *England under the Norman Occupation* (1858). The lately published volume of *Domesday Studies* (1888) may be of great use to scholars if used with discretion.[1] We may here call attention to the good work of the Devonshire Association, who are republishing both the Exon and the Exchequer texts of the survey of their own county in a form convenient for reference and comparison, and promise indices and other helps, besides the translation which already accompanies the extended text. It is much to be wished that the

[1] See Note B.

like work were done for other counties. About a century after Domesday there is a group of local surveys which enables us to compare the terms and usages of northern, eastern, and south-western England. The Durham inquest known as the Boldon book, and published by the Record Commission and the Surtees Society, the Peterborough book published many years ago by the Camden Society, and the Glastonbury book lately printed by the Roxburghe Club, offer as good typical selections as could be wished, and better than archæologists often dare to expect; and the fragment of the St. Paul's inquest of the same period, little of it as there is, adds something. For the thirteenth century we have the Domesday of St. Paul's, whose utility is much increased by the late Archdeacon Hale's excellent introduction, the Register of Worcester, the Hundred Rolls, the minute instructions for the bailiff and officers of a manor which occur as an interpolation in Fleta,[1] and, in the earlier work of Bracton, the beginning of legal authority proceeding on a definite legal theory. It is not probable that any further discoveries of early court rolls of manors will give us more detail than we already possess in the surveys.

In the years after the Black Death, when for the time labour was so scarce that farmers and labourers could make their own terms, many lords made haste to put the old accustomed services on record, either by way of protest or on the chance of one day being able to enforce them again. Sometimes, however,

[1] Now attributed to Walter of Henley.

new terms were formally made with the tenants and recorded. It is written in a still unpublished inquest of sundry manors in the county of Oxford:—"Tempore mortalitatis hominum sive pestilencie que fuit anno domini millesimo ccc° xlix° vix remanserunt duo tenentes in dicto manerio, qui recedere voluissent nisi frater Nicholas de Upton tunc abbas dicti manerii cum eisdem et aliis supervenientibus tenentibus [so the prospect of better terms brought in new tenants] de novo composuisset, qui convenit cum eisdem forma qua sequitur." So in the History of the Manor of Castle Combe, by Mr. Poulett Scrope, we read, *anno* 1357, concerning the tenure of a house and yardland, " et dictum tenementum concessum est ei ad tam parvam finem eo quod dictum tenementum est ruinosum et decassum; et existebat in manu domini a tempore Pestilentiæ pro defectu emptorum;" it was left on hand because nobody would take it, an experience which in late years has been revived for divers landlords, both individual and corporate. This History of the Manor of Castle Combe, privately printed, but accessible in some of our public libraries, gives good examples of the varied and continuous materials which are available from the fourteenth century downwards.

The medieval documents show at first sight a bewildering variety of nomenclature. Doubtless the same tenure was differently named in different parts of the country; but, with all allowance for this, it is evident that the facts were more complex than the legal doctrine which the King's judges imposed upon them at a later time. A man's personal condition

must either be free or bond; but the sharp distinction of the classical law books between free and base or "servile" tenure is hardly settled in the twelfth century. Liability to uncertain services is said to be the test of base tenure; yet we find in the Peterborough book free sokemen who at certain seasons are bound to service defined only by the lord's will, "quicquid jusserit dominus." There are other indications that the relation of legal theories to customary facts was unsettled as late as the thirteenth century. But the point of substance is the effect of the Norman Conquest and the Anglo-Norman settlement on the practical condition of the cultivators. We have long ceased to think of the Conquest as a catastrophe breaking up the whole order of society; perhaps the danger is now the other way, and we are disposed to underrate the disturbance and hardships that must accompany a new administration, even in parts where there is no armed resistance and no intention of interfering with existing usage. New lords are apt to define their rights more closely than old ones, and to enforce their dues with less tact and moderation. It appears on the whole, Mr. Seebohm notwithstanding, that the immediate effect of the Conquest was to depress the smaller occupiers. It is not unlikely, but we do not think it proved, that in this process the state of the bondmen became relatively better. We see no reason to doubt that the actual intention of the Conqueror and his advisers was to deal fairly by all sorts of people, apart from measures of punishment or reprisal for active opposition to his claim. Down

to the thirteenth century there was a deliberate endeavour to make the doctrines of the law less favourable to the customary tenant, which has left its mark in curious ways on the text of Bracton. I do not think it had much practical success, judging by the contemporary and subsequent evidence of actual usage. The king's courts knew nothing of the *villanus* as such ;[1] they knew the *nativus* as the lord's property. When a man's personal freedom was in dispute, a not uncommon case, his villein tenure of land might come in as matter of evidence, but as evidence only. Yet we are compelled to believe that a tenant in villenage had, through the customary court or otherwise, a fair measure of security. Even in respect of the services due to the lord the position may have been better than it appears. The Glastonbury book tells us of commutations of work for fixed money payments which were already regarded as ancient ("ex antiquitate," "nunquam viderunt aliter esse"). One thing which seems certain is that the archaisms and variety of tenure in villenage were preserved mainly by the contemptuous indifference of the king's courts. Had the justices in eire or their successors the justices of assize taken any notice of the rules of alienation and succession in villein lands, they would probably have made as short work of local usage as they did in dealing with the inheritance of freehold lands. When copyhold tenure was definitely brought into the sphere of the superior courts in the

[1] *i.e.* in the sense of Domesday. Thirteenth-century lawyers doubtless used *villanus*, *nativus*, *servus*, as equivalent.

fifteenth century the common law was past its creative period. Unable to assimilate the elements of ancient custom which it had so long ignored, and equally unable wholly to neglect them, it admitted them to a sort of ambiguous toleration. The details which are now precious to antiquaries and comparative jurists were slurred over with perfunctory notice, if noticed at all. Meanwhile personal bondage was on the wane. In the latter part of the sixteenth century it hardly survived except on Church lands, as we know from Sir Thomas Smith's *Commonwealth of England*, and on some Crown lands; and after the early part of the seventeenth it is no more heard of. This, no doubt, has contributed to the confusion between *villanus* and *nativus*, customary tenant and bondman, for which, in its current form, Blackstone is mainly answerable. But much confusion is of early growth. From the fourteenth century onwards there is frequent haziness about the proper constitution and style of private courts. It is almost impossible to define with legal accuracy the courts in which the jurisdiction of the Earldom and Duchy of Cornwall has been exercised over Dartmoor for more than six centuries.

While text-writers and judges were framing the orthodox legal theory which still nominally prevails, usage went its own way little disturbed. A few words of allowance are given by Coke (in obedience to a then recent decision) to the anomaly of a shifting fee-simple in meadow land subject to allotment; but it is certain that holdings of acre or half-acre strips

dispersed or "lying abroad" in the common fields prevailed in many parts of England after Coke's time; though probably they had long ceased to be movable, and the great inclosing movement of the sixteenth century had told heavily on the old open-field or "champion" husbandry. We must not suppose that the inclosures consisted wholly of turning plough land into sheep farms. Tusser stoutly defended the new system as making better farming possible and increasing the total produce of the soil. "Good land that is severall crops may have three [in rotation without fallow], In champion country it may not so be." Popular feeling, however, was against the inclosures. "Our inclosiers woolde leaue no such commens," exclaims Richard Eden, A.D. 1555, in a marginal note to his *Decades of the New World or West India.* With or against their will, they left a notable residue of common fields which have disappeared only within living memory. Maps of the late eighteenth or early nineteenth century, such as Mr. Seebohm has used for illustration, show them in a state of decay. But there are well-preserved maps in existence, belonging to colleges at Oxford, which show not only common fields as they were laid out about the end of the sixteenth century, but the scattered strips held by every tenant, the tenant's name and the area in terms of the statute acre being written along each strip; and this in many different parts of the country. A tendency to enfranchise copyholds and consolidate adjacent strips is already apparent; and we may collect that the holdings were

often originally fixed with reference not to the statute acre, but to a smaller customary acre. There is nothing to suggest that the arable ground was subject to re-allotment; but there is not infrequent mention of lot meadows (now and then with shares alternating between lord and tenants), and these, indeed, survive in a few places to this day. The maps of this kind which I have seen belong to Corpus and All Souls; for aught I know there may be others equally good. A selection of them has been reproduced by subscription under the direction of Mr. Mowat of Pembroke College. Again, there is ample witness that in spite of the perversely narrow theory laid down in Coke's Reports, and thereafter in all the received law books, the men of a vill or the tenants of a manor are constantly found acting in the manner of a corporation and treated as such. Now as against their own lord, now as against a neighbouring township, they claim or dispute rights of common and the like on the footing of independent powers; they make treaties and conventions, and even in formal pleadings we sometimes find rights ascribed to inhabitants as a class which the current legal doctrine does not allow to exist. As late as 1632 a Chancery suit is recorded where such a claim was made in the name of the inhabitants of the parish of Holne on Dartmoor. The orthodox lawyer has to say that the claim must be understood to have been really in respect of tenure. But it is clear that the people concerned, and even the learned persons who put their rights or claims on record, did not at the time so understand.

Nowadays a juster historical method is the possession of students, and is making way even in our jurisprudence. Things have been adjudged and said in the House of Lords itself which should have made Coke turn in his grave. As it happens in the long run, the unpractical scholar has prevailed, and the men of practice and common sense are discomfited. Kemble and the *Codex Diplomaticus*, and the once despised "black-letter learning," have routed Coke and Blackstone. It may seem fantastic to say that we owe to Kemble the preservation of Epping Forest and the reversal of the policy of the Inclosure Acts; yet one might so speak with no small measure of truth. Kemble worked and wrote for the living, not for the dead, and he knew it. History is not a dumb recorder, but a living witness. She will impartially rebuke those who forget the good of the past and those who put its evil out of sight. Least of all will she tolerate those who from her vast storehouse snatch a few crude notions as weapons of political agitation.

Note A

One point of substance on which there is an approximate agreement among scholars is that the modern rights of property which we regard as personal and individual have been developed out of the rights of families. The homestead, held in severalty from the earliest historic times, was long held in the name of a family rather than of a man. Whether the "village community" is to be considered as an aggregation of families, or the family as an institution produced from within a larger and less organised community, may be left over as a question of prehistoric anthropology, though Mr. Kovalevsky has lately gone far towards establishing by the Slavonic evidence and analogies that the village community is a regular development of the "patriarchal" joint family. But one may

admit the existence of separate and exclusive enjoyment of houses and land among the early Teutons (which has never been denied, except perhaps by M. de Laveleye in some unguarded passages), and yet not see one's way to admitting the full-blown conception of Roman *dominium*. Von Maurer's opinion that the Germans had not this until they got it from the Romans appears to us, with all respect for M. Fustel de Coulanges, to have the general probabilities of the case in its favour. Mr. Elton has summed up the common sense of the matter:—"It is difficult to see how private ownership can ever have preceded the system of common possession."

In 1884 Dr. Dargun of Cracow analysed and reviewed a great mass of evidence from all quarters of the world (*Zeitschrift für vergleichende Rechtswissenschaft*, vol. v.) tending, apparently, to the contrary. According to his authorities private and individual enjoyment of not only goods but land is so common among savage tribes that anything else is exceptional. A common-field system must belong to a society relatively advanced in politics as well as in agriculture. It implies a complex organisation and the habit of submission to constituted authority. At the same time Dr. Dargun regards the common-field system as a normal stage of transition from barbarism to civilisation which we may expect to find somewhere in the history of any given people. For the practical purposes of history, therefore, he is not far from the Germanic school. With regard to the primitive separate enjoyment which precedes, or may have preceded, common regulation, I will only say that I am not disposed to treat it as equivalent to the ownership we find in a modern civilised State without much more cogent and specific evidence than any that I have yet seen. Polyphemus was, without doubt, the sole and exclusive lord of his cave, of his flocks, and of his wives, if he had any. In one sense he was a more absolute owner than any Roman citizen under the laws of Marcus Aurelius or Englishman under those of Victoria, for he paid no more regard to the opinion of the other Cyclopes than they to his—*οὐδ' ἀλλήλων ἀλέγουσιν*. To call Polyphemus a *dominus jure Quiritium* would, nevertheless, be a legal and political solecism. To call him a possessor is inevitable, but in any exact sense only tolerable. It is of the essence of modern ownership to be protected and regulated by the law of the modern State. Thus the order of development would be:—First, several occupation guaranteed only by the occupier's power, the occupier being however more probably a family group than an individual (no law, but habit growing into

custom); next, communal regulation (custom growing into law); lastly, legal ownership, whether of individuals or of subordinate communities within the State considered as "artificial persons." And this is quite analogous to the development of that political freedom of the individual citizen which in English-speaking countries goes along with a freedom of individual ownership and disposing power unknown both to ancient customary laws and to modern Roman law. These liberties were made possible only by a long previous discipline; and people who try to copy them without having had the discipline are apt to find themselves in danger of a reversion to primitive anarchy.

Note B—Domesday Studies[1]

Ever since there has been any systematic study of English antiquities Domesday Book has been a puzzle to antiquaries. For a long time before that it was not a puzzle only because no one thought of trying to understand it at all. There has not been, since the thirteenth century at latest, any continuous use of the book, though it has now and then been referred to for evidence of the ancient rights of the Crown, still less any traditional interpretation. Only within the present century has the full text been made public, and only within its latter half has something like an *apparatus criticus* been gradually formed. Now, indeed, not only is the text to be found in every good public and corporate library in England and many private ones, but the facsimile published by the Ordnance Survey is as easily accessible and more easily procurable. It is hardly less important that we have now in print a considerable number of mediæval surveys and extracts from records which deal with the same matters as Domesday, though not altogether for the same purposes. References to many of these authorities are conveniently collected at the head of the opening chapter of Mr. W. J. Ashley's *Economic History*; a chapter, I take this opportunity of saying, which, though not long, represents a great deal of careful work and selection, and will be found an excellent general introduction to the history of the English manor and "village community." Mr. Ashley will send students, in the

[1] *Domesday Studies; being the papers read at the Meetings of the Domesday Commemoration*, 1886. Edited by P. Edward Dove. Vol. I. London: Longmans, Green, & Co. 1888. A second volume is shortly forthcoming.

main, to the right authorities and in the right way. Those authorities, including many which were practically inaccessible forty, thirty, or even ten years ago, will not enable us to understand Domesday Book without further trouble; very far from it. They will enable us, however, to avoid certain kinds of obvious errors, and to concentrate work on the really promising lines.

A good opportunity for such concentration of work, and for forming a nucleus of permanent interest in it, was afforded by the Domesday Commemoration Meeting of 1886. The volume since published shows that the opportunity was well used. It is true that the scholar's first impression may be of something like despair. For the main part of the volume consists of detailed and laborious discussion contributed by those learned persons Canon Isaac Taylor, Mr. J. H. Round, and Mr. O. C. Pell; certainly there are no other three men in England who have read Domesday more diligently or with more searching comparison of the facts and documents capable of illustrating it; and on the first reading it is hard to see that these three learned persons, or any two of them, are completely agreed on any point save one, which is that there is still very much to be learnt. We may find, however, that things are better than they look; and meantime the reader may turn to Mr. Stuart Moore's introductory essay on the study of Domesday Book. It will be found as readable as the subject admits of, and there is nothing worse to complain of than a certain excess of zeal in defending the Conqueror's memory. It was needless to administer a solemn rebuke to the English chronicler for allowing himself his grumble about Domesday. Englishmen have always grumbled at taxation and official returns of every sort, and probably always will. And English learned persons, when not in office themselves, have always looked on official interference in the matters of their learning with a certain mixed affection of fear, suspicion, and contempt. Lord St. Leonards used language about the imposition of Succession Duty not less violent than that of the English Chronicle about William's survey, though, one would think, on less provocation. Moreover the grumble of a monastic writer—"growl of the unintelligent unthrifty Saxon monk," as Mr. Stuart Moore calls it—proceeds from the landlord's point of view, not the labouring tenant's.

With regard to the matters discussed by Canon Taylor, Mr Round, and Mr. Pell, every one who means really to work at the subject must check their details for himself and exercise his own

judgment; and those who are not prepared to do this would find little or no interest in a mere statement of evidences and inferences which would have to be interrupted at every turn by doubts, exceptions, and qualifications, if it were to represent our existing knowledge with tolerable accuracy.[1] I shall therefore give, on my own responsibility, a summary of those results which I believe to be now either accepted as certain, or at least rendered highly probable by the labours of the learned contributors to *Domesday Studies*.

The primary object of the Domesday inquest was to ascertain the contributions on which, according to existing law and custom, the king could count for maintaining the armed force of the country. Part of the king's revenue was in the nature of rent, derived from lands of which he was lord. But rent (*gafol*) due to the king as territorial lord must be carefully distinguished from the public tax (*geld*) due to him in his political capacity.

The taxpaying capacity or liability of land was assessed in terms of units of superficial measure, which were the *hide*, generally speaking, in the southern or properly English counties, the *carucate* or *ploughland* in the northern counties, where Danish influence had been strong. These measures of surface had a real and definite value—that is to say, a hide or a carucate meant, in a given district, a certain number of acres. We need not here and now consider whether they had always been definite. Perhaps we might find that the native English *hide* began as a term of vague description, and only by degrees acquired a numerical meaning; whereas the *carucate* is more likely to have come in, so to speak, ready measured.[2] It is certain that the number of acres in a hide or a carucate, and also the actual dimensions of the acre itself, might and did vary from district to district, and there might be different customary acres even in different fields within the same township. Further, the number of hides or carucates for which a given manor is assessed is not necessarily equal to the actual acreage, any more than the modern rateable value of land or a house is necessarily or usually equal to the full rental. In many cases the assessment is plainly small in proportion, not only to the total extent of land, but to the

[1] Mr. Pell's elaborate numerical theories have failed to command much assent. Cf. Mr. Round's papers in the *Archæological Review*, June 1888 and Sept. 1889, and Mr. Elton's in the *Law Quarterly Review*, iv. p. 276.

[2] Cf. Mr. M. Kovalevsky in the *Law Quarterly Review*, iv. 266, 272.

extent of cultivated land. This may be well seen by turning to any of the royal manors in Devonshire; a test which the excellent parallel edition of the Exchequer and Exeter texts of the survey now in course of publication by the Devonshire Association enables us to apply with peculiar convenience. Local and personal considerations of policy or favour procured here and elsewhere an assessment which might be greatly below the real value. No fixed relation between the assessed or "geldable" value and the actual area can be assigned. Further, it seems probable that even where the assessment was intended to correspond with the actual extent of cultivated land, only the land which was under cultivation at one time was counted—in other words, the fallow was not counted. Thus, under the two-field system of mediæval tillage which held its own long after the Conquest, only half the ploughland would be reckoned; under the three-field system, only two-thirds. We owe this suggestion to Canon Taylor, who has worked it out in detail for certain parts of the northern counties, and has made it explain many apparent anomalies. Among other things, it accounts at once for the hide being sometimes called 120 acres (the taxable quantity) and sometimes 240 (the full acreage of both the tilled and the fallow fields in a two-field course). In a three-field course the 180 acres assigned to a ploughland by Fleta give for the taxable area the same number of 120 acres. At the same time neither this nor any other explanation will hold universally.

Although the hide, carucate, and so forth had various customary values in different parts of the country, there is a good deal of evidence that at the time of the Conquest there was a tendency to a mean or normal value, and that for the hide this was 120 acres (or a long hundred, according to the method of counting then so popular as to be called "anglicus numerus"), divided into four virgates or yardlands. The carucate was normally of the same acreage as the hide, but divided into eight bovates or ox-gangs, implying that the carucate was fixed with reference to the quantity of land which a full team of eight oxen (*caruca*) could till in the year. How far and where this eight-ox team was an existing fact, and how far and where an ideal common denominator used by the surveyors for the comparison of different areas and qualities of land, is one of the questions which seem still to demand further and more minute examination. The phrase "aratra fortissima in dominio," which occurs several times in the Burton Cartulary, should be noted in connection with it.

The hide was commonly divided into four yardlands, but we meet with a division into six, pointing perhaps to a change from two-field to three-field tillage, and also (as Mr. Stuart Moore has pointed out) with an odd and puzzling division into five. When the number of acres in the virgate is not the normal number of thirty, it is generally a multiple of twelve, such as forty-eight or thirty-six. These cases may be evidence of a two-field system; in the Worcester Register virgates of thirty-six acres are expressly said to consist of "xviij in utroque campo." It appears from the Ramsay Cartulary that sometimes Danish influence displaced the measurement by hides and virgates, without putting measurement by carucates in its place. As to the dimensions of the local acre, it may always be conceived as formed by a strip of a furlong (= 40 rods or 10 chains) in length and four rods in breadth. The result varied according to the length taken for the rod, which might be less or more than the statutory rod of $15\frac{1}{2}$ feet. Thus the "forest acre," constructed with the rod of 18 feet, was in use for measuring woodlands in relatively modern times. Many of us have wondered from our youth up why such a seemingly irrational number as $5\frac{1}{2}$ yards should make one rod, pole, or perch. Mr. Pell suggests that the standard measure was fixed at this value as a kind of compromise among the many customary measures.

Finally, Domesday was a survey of estates and their taxpaying capacity, not of population for its own sake. Inferences as to the actual numbers and personal condition of the dwellers on the land must therefore be made with caution.

VI

SIR HENRY MAINE AND HIS WORK[1]

Sir Henry Maine preceded me in the office which it has pleased the University to confer upon me; he was its first holder; its conditions were framed for the purpose of giving scope to his peculiar genius in the lines of inquiry which he had himself opened. This imposes on me, and those who may come after me in this Chair, the duty, no facile one, but therefore the more honourable, of working, so far as our powers extend, in the spirit of the illustrious leader whom we have this year lost. It is a task that will not be soon exhausted. Through many years to come there will be new discoveries and new conquests to be made in the regions to which Maine pointed the way. For this reason alone it would be natural and fitting that some words should be said in this place and as at this time (though the time is not yet ripe for full judgment) of what we owe to Sir Henry Maine. But I have to speak of more than a predecessor, of more than a teacher; of one in whom, seeking the guidance of a master, I found not only

[1] A Public Lecture delivered in the University of Oxford, November 10, 1888.

a master but a friend. Now good advice is plentiful in the world; a young man who suffers for want of it must be singularly maladroit or unfortunate. But there is something much less common, the interest and sympathy which turn an older man's advice from a mere benevolent opinion, a more or less profitable direction, into a vital moving force. I know of no more sacred debts than these, and of nothing which goes so near to add to the relation of master and disciple, without abating anything of respect, a charm as of the friendship of equals.

Thus I am bound by many ties to the memory to which I devote this hour; and I do so, not for the sake of a remembrance and fame which are of themselves amply secure, but rather for the sake of the example left to us here, and that we may not be defaulters in a pious and honourable duty. For this purpose it is not needful, as it would hardly be possible, to speak at large of Sir Henry Maine's career and public services. Only those who knew his work intimately can measure its value, and it will be proper to limit our testimony to that which we know, and which directly concerns our studies here. Our studies, I say, not merely legal or historical study. For we have here an admirable example of the effective connection of the Universities with the general life of the nation, and the intimate connection of that efficiency with those branches of their studies which pass for unpractical. It is not too much to say that England and India, so far as human reason can assign causes in this kind, owed Sir Henry Maine to the

University of Cambridge. One cannot doubt that under any training, or without any systematic training, he would in some way, at some time, have produced work that would not have been forgotten. But it was Cambridge, and Cambridge alone, that in fact brought him into the light and placed him within reach of opportunities adequate to his power. He started without any advantage of birth, fortune, or interest. He entered the University an unknown young man; he left it marked as among the most brilliant scholars of his time; he returned to it for the last ten years of his life to fill a place of authority and dignity, the Mastership of Trinity Hall, where he had formerly taught—a place for which he was chosen, by a kind of acclamation, as being the one man whose acceptance of it would override all difficulties. Maine would have been singularly wanting in human affection if he had not loved Cambridge well; he would have been singularly above the usual partiality of our affections if he could have learnt to love Oxford so well. He could not pretend an attachment he did not feel; and a somewhat exclusive attachment to his University of origin was in his case, if in any, natural and all but inevitable. In and through Cambridge he won, along with his first crowns of fame, the gifts of life-long friendship without which fame is a light thing.

We may do well to remember that this was in an unreformed University, before even the first University Commission. Maine lived to see the activity, freedom, and healthy influences of the

Universities greatly enlarged; but in the earlier days they already did something to select and foster merit which otherwise only some happy accident could have brought forward. Let us also remember that Maine's academical distinctions were not of a narrowly specialised kind. He had taken his degree in Arts before he turned to the province which he afterwards made his own. Not only was he a humanist before he was a jurist, but he never ceased to be a humanist. In this, I venture to think, lay some part of the secret of his method. The value of our accustomed course of classical study, for men who do not profit by it to the extent of becoming finished scholars, is disputable and disputed. In the case of those who can profit by it as Maine did, I conceive that no dispute is possible. He never made any display of scholarship in after-life. He quoted Greek as easily and naturally as French, when the Greek happened to be exactly to his purpose; but he never went out of his way for it. Having at his command wide and rich domains of literature, he took toll of them for his service, but did not levy nominal tributes for ostentation. Very little really extraneous ornament is to be found in his writings. And yet nothing ever came from his hand that was not visibly the work of an accomplished scholar. *Village Communities* and *Early Law and Custom* seem remote enough from the excellent Greek verses contributed by Maine to *Arundines Cami;* but as these might be taken (perhaps they sometimes still are) as models of the artistic trans-

fusion of thought and style from one language into another, so his later and graver undertakings are models of the art—really a more difficult one—of clothing the higher generalisations of research, without apparent effort, in a form both accurate and lucid. In one word, they are themselves classics in their kind, and accordingly their standing and worth are little or not at all affected by the changes which the learning of posterity may bring to specific propositions contained or assumed in them. A book that is a work of art will survive many books of later and better informed authors which are mere storehouses of information. In the Faculties which demand a particular mechanism of learning, a particular intellectual habit, a particular set of terms not only strange but repugnant to the pure man of letters, we are too much tempted to forget the Humanities. There are even some who would counsel us to put them behind us. We may be thankful for Maine's witness that the Humanities are a living power, and the wisdom of the ancients is justified of her children even among the strange people. In this place, at all events, we shall not forget the words spoken by Maine to our sister University—words the more remarkable for their breadth and daring in a speaker usually so cautious: "Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin."[1]

An author in scientific matter who works as an

[1] Rede Lecture, 1875: in *Village Communities*, 4th ed. 1881, p. 238.

artist, and will not produce anything till he has made it complete as a work of art, is not likely to be voluminous. When he is also, like Maine, an active public servant during the best years of his life, we can still less expect a great show of literary production. One shelf, and not a long shelf, will easily hold everything to which Sir Henry Maine set his name.[1] But in these few volumes there is nothing ephemeral, nothing which is not in some way a pattern of style, of method, of exposition. It was inevitable that Maine's works should become text-books; but whoever takes them merely as text-books condemns himself to lose the better half of their value. Thus *Ancient Law* is of permanent importance as a leading type of the comparative method which has in the present generation become familiar. Its principal instances are taken, and for good reasons, from the history of Roman law. Maine followed the best authorities then in existence in his presentment of that history, and also with good reason; for, even if his taste and inclination had been to controvert accepted views in detail, he still could not have done so without making his book a critical monograph on the historical problems of Roman Law, which it was expressly not meant to be. Few of these historical inferences or assumptions appear, at this day, quite so probable as they did in 1861. Some of them now appear decidedly

[1] Six volumes, including the lectures on International Law delivered in the autumn of 1887, but not published in Sir Henry Maine's lifetime.

improbable. It might be safe to say that one or two are finally disproved. Yet a student who should think he had nothing to learn from Maine's discussion, for instance, of the early history of Contract would commit a more dangerous error than one who should read the discussion and omit to inquire whether its data could still be trusted. He would err more dangerously, because omissions or mistakes in matters of information may be corrected at any time, but the discipline which comes of tracing the methods of great masters must be acquired while the mind is plastic, and, if omitted then, can hardly be supplied in later life. To Maine, who began his work in the mighty and still present shadow of Savigny, and could as a grown man have seen Savigny alive, Savigny's historical deduction of the Roman Verbal Contract from an archaic Roman form of Conveyance appeared conclusive. At this day nearly a generation of active work and discussion has intervened, and the prevailing opinion is that the origin of the Stipulation must be sought in a wholly different quarter. But this in no wise affects the general interest of the phenomenon with which Maine was concerned, and for the sake of which the origin of the Roman Stipulation, whatever the true solution may be, is of more than technical importance: namely, the slowness with which the modern conception of Contract—the right and the duty of the civil magistrate to compel the fulfilment of promises made between citizens of the State—has everywhere been developed. And the final solution will be found,

whenever it is found, by working with the instruments which Maine has left us.

Neither do such things affect the interest or the importance of studying Maine's method of work, his apparently simple and really subtle establishment of analogies between facts widely remote in time and place, his faculty of seizing upon the salient points in a mass of details, and the firm and swift strokes, not the less sure for their freedom and seeming ease, with which he completes his structure, and revives for us the dawning of man's political life in the express image, not only of its habits and ordinances, but of its inner workings and struggles, its perplexities and superstitions, its evasions and its compromises. Maine can no more become obsolete through the industry and ingenuity of modern scholars than Montesquieu could be made obsolete by the legislation of Napoleon. Facts will be corrected, the order and proportion of ideas will vary, new difficulties will call for new ways of solution, useful knowledge will serve its turn and be forgotten; but in all true genius, perhaps, there is a touch of art; Maine's genius was not only touched with art, but eminently artistic; and art is immortal. Not only with sight but with spirit we watch the same stars that Jeb and Odysseus watched, the Pleiades and the bands of Orion, and the sleepless guardian of the Pole, "the Bear which men call the Wain for a byname, which turns on itself as it keeps watch on Orion, and alone goes free of dipping in Ocean." We no longer think that Orion dips in the world-river beyond which there is no world, nor do

we conceive the warrior God of Israel sitting above the vault of heaven and counting the treasures of his hail. But the Book of Job has outlived many systems of the universe and many departed gods, "les apparitions des dieux qui ne sont plus."[1] The song of the morning stars is as eternally new in the verse of Goethe and the vision of Blake as in the ancient words of that forerunner of Æschylus and Dante whose name and place remain a mystery. Homer has outlived many revolutions in warfare, and seems like to outlive gunpowder; but no change has abated the force or the truth of Homer's contrast between the silent march of the disciplined Achaian ranks and the clamorous onset of the Asiatic multitude. Yes, among things of human mould art is most surely divine and deathless:

οἵη δ' ἄμμορός ἐστι λοετρῶν ὠκεανοῖο.

Steadfast as the constellations themselves, the first poem of speculation and the first poem of adventure shine for us through the ages, and will shine for our children so long as the stars look down upon earth and men dwell on the earth to call the stars by their names.

And by this virtue, if it were by this virtue alone, I am bold to claim immortality for my master's work. Books with a greater show of learning, perhaps even more learned books, will be written; the Twelve Tables may be reconstructed over and over again; but *Ancient Law* does not depend on any particular

[1] Leconte de Lisle, *La Paix des Dieux.*

reconstruction of the Twelve Tables, and, unless I am sorely mistaken, will survive many such.

Certain peculiarities in Maine's manner of work are probably due to his constant and exquisite sense of artistic form. He was averse to recasting what he had once put forth, and *Ancient Law* stands at this day as it was first written, with only a general warning to the reader. When Maine specially wished to explain or qualify anything, he found some separate occasion for doing so. He was exceedingly averse to direct controversy, and seldom allowed himself to be engaged in any discussion leading that way. There is also conspicuous, especially in his earlier writing, an avoidance of specific references and other critical apparatus which can hardly be accidental. It must be allowed that at times this is carried to an inconvenient extent; but it must be no less allowed that a book ceases to be literature, and becomes a mere tool of science or scholarship, when it is loaded with notes, extracts, and auxiliary discussions. Maine was determined, if I may borrow Bentham's expression in praise of Blackstone, that his science should speak the language of a scholar and a gentleman. He would not risk the literary distinction of his work to save a moderate amount of trouble to the small minority of critical readers. In the same way, probably, his objection to serious revision of new editions may be explained. He must have well known that the choice was, in many things, between leaving his former work alone and rewriting it. He may well have felt that the rewriting of chapters and paragraphs

was more likely to spoil an original artistic whole than to leave it, as remodelled, an adequate expression of his later thoughts. To make such alterations, moreover, would have been to provoke a kind of minute criticism for which he had a constitutional dislike.

There is a known type of artistic temperament to which a piece of work once finally despatched into the world ceases almost to be interesting. It is no longer part of its maker's life; it is given to the world, and the world must take it as it will; for his part it is time for him to be about something else. I should not say that Maine looked on his works quite in this way; but I think his activity was of the kind that looks forward rather than backward, and seeks by preference new modes of expression along with new occasions.

So far I have spoken of Maine's work according to its form rather than its matter. The time has not come to sum up the full value of the gifts he has bequeathed not only to jurisprudence, but to history and politics. In his lifetime, however, evidence was already forthcoming that he exercised the kind of power which is perhaps the surest test of generalisation on a great scale—the power of directing further inquiries in lines which prove to be the right ones. Sir A. Lyall's words leave no room for doubt on this point:

> Sir Henry Maine's remarkable power of insight into the real meaning and connections of archaic customs so alien to modern ideas as to be ordinarily incomprehensible, and his luminous generalisations upon the materials found scattered over these obscure fields of research, have greatly influenced local

inquiries in India. He surveys and marks out the whole line of penetration into difficult and entangled subjects, and workers in the field are constantly verifying the extraordinary precision of their chief engineer's rapid alignments.[1]

I am not aware that the maintainers of newer theories of primitive society can yet point to any similar verification. However, I am not concerned here to discuss any of the theories which have been set up in more or less pronounced opposition to Maine's opinions and method; and I purposely do not mention any name. It was observed by Maine himself that there was no necessary antagonism, within sufficiently large limits, between his own work and any of the definite results obtained by certain other inquirers.

For the present we may at least say, looking to our own science of law, that the impulse given by Maine to its intelligent study in England and America can hardly be overrated. Within living memory the Common Law was treated merely as a dogmatic and technical system. Historical explanation, beyond the dates and facts which were manifestly necessary, was regarded as at best an idle ornament, and all singularities and anomalies had to be taken as they stood, either without any reason or (perhaps oftener) with a bad one. It was an unheard-of process to show that they were really natural products in the development of legal conceptions. A superior moral sense was supposed to have been combined in the founders of the law with a strictly logical intellect and

[1] *Asiatic Studies*, p. 213.

an almost infallible intuition of practical fitness, and on this more than doubtful assumption were built up phrases of amiable optimism which had not much difficulty in passing for philosophical reflection. A certain amount of awakening was no doubt effected by the analytical school, as Maine has taught us to call it. But the analysis of modern political and legal ideas in their latest form could not lead to any rational explanation of an actual historical system. Its immediate result was uncompromising and vehement criticism. This did, in its day, good service. It broke down prejudices and dissolved illusions which stood in the way of needful improvements. But the scientific study of legal phenomena, such as we really find them, had no place among us; at any rate there was no assured place for such study as distinct from the technical logic of a particular system on the one hand, and the classification of legal abstractions supposed common to all systems on the other. Maine not only showed that this was a possible study, but showed that it was not less interesting and fruitful than any in the whole range of the moral sciences. At one master-stroke he forged a new and lasting bond between law, history, and anthropology. Jurisprudence itself has become a study of the living growth of human society through all its stages, and it is no longer possible for law to be dealt with as a collection of rules imposed on societies as it were by accident, nor for the resemblances and differences of the laws of different societies to be regarded as casual.

Maine gave us an instalment, but only an instalment, of the application of his method to the problems of modern politics. I shall not endeavour on this occasion either to confirm or to mitigate the rather sombre view of the political tendencies of our age which is set forth in *Popular Government*. I have long thought that the general colour of a man's estimate of the greatest objects of human interest—the characters of his fellow-citizens, the affairs of his country, the nature of man and his relation to the universe—depends much more on temperament than on intellect. No very wide margin of debatable ground is required to enable two thinkers to draw from the same data, without manifest violence either to evidence or to logic, the one optimist and the other pessimist conclusions. Sir Henry Maine's temper was not a sanguine one, and he was not made sanguine by his own personal prosperity. No one, however, can read *Popular Government* without finding many familiar topics considered in ways that give fresh and striking matter for reflection. It is so far from being a partisan work that its detachment from the usual prepossessions and associations of English party government is positively startling. An author who not only points out that there is no necessary connection between popular government and moral or material progress, but sees in the unqualified rule of the majority the gravest danger of stagnation, will not fit into the usual divisions of parties. There is nothing new in telling a Liberal that he will be a Tory when he gets into office. But to tell Demos

himself that he has it in him, without knowing it, to be a worse Tory than any Tories does not suit practical politicians on any side. These things can be said only by some one who, like Maine, is in the world of politics, but not of it. And in order that the saying of them by some one should be beneficial, it is by no means needful that they should be strictly accurate or should contain the whole truth. It is enough if they contain elements of wholesome truth which are likely to be overlooked. For the rest, Maine did not write as a believer in any particular form of government, but as not believing that any form of government is infallible; and he pointed out to his countrymen the besetting weaknesses of that form which they seemed to him most likely to accept without criticism. If he had been writing for Frenchmen under the presidency of Marshal MacMahon, I believe he would have been quite as ready to point out to them the dangers of acquiescing in a monarchical restoration. I need hardly say that acquiescence in something one does not like may be uncritical though reluctant, and that for want of intelligent criticism reluctance may be impotent, or even worse than useless.

History, no doubt, had taught Maine, as it teaches most sober students, that many unknown quantities enter into the results of political experiments. Whoever has realised this must prefer to abide, so long as possible, by known results of experience, or at least to keep within their analogies. If it be conservative to have little faith in political machinery for its own

sake, and less than little in ready-made political systems on a grand scale, then was Maine a Conservative. But then he could on occasion give as emphatic warning against credulity based on unverified traditions of the past as against the credulity, now more common, which is based on unverified expectations of the future. I refer in particular to the addresses which he delivered as Vice-Chancellor of the University of Calcutta. Liberalism, in any case, has not yet been so defined by authority as to make the ignoring of obvious facts a necessary mark of it. We may or may not admire the decorative effect of trees of Liberty in public places. That is a matter of taste. It is matter of fact, nothing more and nothing less, that trees of Liberty, like other trees, have a way of not growing when they are planted at their full stature. Our old English oak is rugged and weather-beaten; its branches are not symmetrical; some limbs have spread abroad while others have been stunted; it savours of its own soil and knows of none other. But in that soil it is fast rooted, and from the deepest fibres that feed it in the secret places of the earth to the topmost leaves that leap to the air and glance in the sun, it still lives and grows. Our Constitution is popular in that the life of the English people, from the greatest to the least, has gone to make it what it is; and it has at almost all times combined the tenacity of tradition with a great power of assimilating fresh elements, and of adapting existing organs to new purposes. For some considerable time

our national institutions and our national character have been confirming one another in this habit. One may ask whether Maine did not underrate the moderating virtues of such a habit in the body politic, and the extent to which it can subdue to good uses, or at least render tolerable, innovations that might be dangerous elsewhere. Some observers have found in the pliability of our Constitution, and the quick sensitiveness of our sovereign Legislature to public opinion, rather a safeguard than a danger. It may be asked, on the other hand, whether Maine did not exaggerate both the practical rigidity of the Constitutions of the United States and the several States of the Union, and the benefits which have flowed from the difficulty of making formal alterations. We have proof, at all events, in a much nearer country, that the revision of a written Constitution may itself become a handle for the agitator's uses. But again I have to point out that all fruitful criticism or correction of Maine's work will have to proceed on his own methods; and even then we shall be apt to find, for some time to come, that our criticism has been anticipated, and that some significant reservation lies in a few words overlooked on a first reading. Few great writers are so easy as Maine to criticise superficially, for he constantly seems to be laying himself open by wide assertions. Few are so hard to criticise thoroughly, for the more carefully one studies his language, and with the greater knowledge of the subject-matter, the more real caution and the more subtle discrimination does

one find, both in what he says and in what he abstains from saying.

If I may add anything of my own as to the immediate future of comparative historical research, I should say that it is now entering on a less brilliant, though not a less useful or interesting stage. We have to explore point by point the features which our leaders and masters were the first to discern in their general bearings. We have to disentangle the manifold causes of change in human institutions, and to beware of being satisfied with our explanation of any one effect until we have traced it not merely to a possible cause, but to a cause of which we can prove the existence and watch the operation. Similarity of laws, customs, procedure, even in minute particulars, is only a guide to inquiry; it is not conclusive evidence of dependence or of a common origin. Like needs are apt to be met, in a general way, by like expedients, but those expedients may turn out to have been arrived at by the modification in widely different ways of widely different materials. A given result may be produced in one community by straightforward development; in another by some highly artificial adaptation; and in a third by direct importation or imitation of a foreign model. And a series of apparently continuous forms may have no real historical connection at all. In man's visible handiwork, in his tools, weapons, and ornaments, this is matter of constant observation. Any one who will spend half an hour in the Pitt-Rivers Museum may convince himself that in these things development

is far from always following that order which to us appears natural. Even in modern mechanics ideas are often discarded, after a short trial, as impracticable, only to reappear triumphant by the help of some small but vital improvement in the means of executing them. Such vicissitudes are not unknown in the mechanism of government and legislation; and the life or death of national customs may depend on conditions which only patient investigation can detect. If there be any safe general rule, it seems to be that, while the ways of change are seldom simple, and are often so complex as to be baffling, there is a strong presumption against anything being wholly new. *Homo non facit saltum.*

The latest work which Maine has left us is the one course of lectures delivered by him from the chair founded by Whewell. These lectures were not finally revised by the author, nor is it known how much further revision and recasting he might have given to them. It was thought better to print them as they stand than to withhold their substance from the public. They cannot, therefore, be fairly compared, in point of form, with the works issued under his own direction. And yet the comparison is profitable as showing how much compression and revision those works received before Maine judged them fit to be issued. The subject is not one which affords much room for historical discoveries or speculation, the history and literature of International Law being altogether modern. I think, however, that Maine's freshness and largeness of view, his wealth of illustra-

tion, his felicity in comparison, and his sureness of judgment, will be sufficiently recognised in this volume. And there is at least one point of substance of more than academical importance. The weight of Maine's authority is added to the opinion, propounded several years ago by Mr. Seebohm, that England's true interest is to extend the principles of the Declaration of Paris to the total abolition of the capture of private property at sea.

We are met to-day, not only to do honour to Sir Henry Maine's memory, but to bethink ourselves how we may best keep it in due honour by following his example as he would have wished it to be followed. We ought not, I think, to have much difficulty in knowing what to aim at. Certainly we shall be very dull scholars if we do not know what to avoid. Never shall we increase our master's worship, nor gain any for ourselves, by repeating propositions from his books, or taking his conclusions as if they dispensed us from any further trouble of thinking. Wisdom is not in propositions which can be repeated. And, in the golden words of another wise scholar whom we lost not long ago, Mark Pattison, "The learning of true propositions, dogmatically delivered, is not science." For science is organised knowledge living and acting, and without change there is no action and no life. Whatever has ceased to change is dead. It was said by a great Frenchman whose work Maine knew and prized, that the essence of stupidity is the demand for final opinions. As Maine himself said, the principle of progress, which is the

same thing as the law of healthy life, is a principle of "destruction tending to construction." The immortality of a man of genius is not only, nor chiefly, in the work which he leaves for posterity to contemplate, but in the activity which it inspires. There is only one way of paying our debts to the past; we must look to it that, when our time is done, we depart as creditors of the future. Maine's work has, as it already had in his lifetime, the assurance of long and fruitful survival. It is for us, his countrymen and his disciples, to claim and win the honour of being foremost in that continuance. And in the Universities, of all places, the name and example of Maine ought to be a constant encouragement. I know of no recent life which has more completely shown that learning is still a power in the civilised world. The steadfast veracity of Maine's intellect subdued to itself far more even of this world's goods than he could have attained by vulgar ambition; the reception and the spread of his ideas afford the strongest proof that studies which seem remote from the common interests of mankind may at any time be splendidly justified. He was fortunate, but most justly fortunate, both in his career and in his influence. He did not court success, honours, and esteem; they came to him unasked, and he enjoyed them without pride and without affectation. The simplicity of the true scholar never left him. We cannot all emulate his fortune; we cannot all hope to achieve fame; but the gifts of wisdom are open here to all who will truly seek them,

and in the true following of such a master as Maine we may all learn to make the dignity of knowledge our own.

*** It may be convenient to subjoin the chief dates of Sir Henry Maine's life :

Birth	1822
B.A. degree	1844
Regius Professor of Civil Law, Cambridge	1847
Call to the Bar	1850
Ancient Law published	1861
Legal Member of Governor-General's Council	1862
Corpus Professor of Jurisprudence, Oxford	1869
Member of Indian (Secretary of State's) Council	1871
Master of Trinity Hall	1877
Whewell Professor of International Law	1887
Death (February 3)	1888

VII

RELIGIOUS EQUALITY

A DIALOGUE BETWEEN A NONCONFORMING DOCTOR OF DIVINITY AND A STUDENT OF POLITICS

I

Doctor. What cheer this winter's morning, Sir Student? I have not seen you these many days.

Student. Well enough, Master Doctor, and none the worse that we are still free to discuss your favourite questions of ecclesiastical polity in a leisurely and academical manner.

D. In a sense I too can say it is well; for our cause, being just, will only gather more strength by delay. Time and the education of the mass of citizens will not cease to fight against an institution which violates the principle of religious equality and the fundamental doctrines of Liberalism; though I know that you, professing Liberal opinions on many things, are worse than lukewarm on this; I could say (if without offence I might) that you are no better than a Whig.

S. Let the name pass. I shall not wince even if you utter the horrible word Erastian, supposed by

Mr. Gladstone in some magazine article to denote a creature too depraved to exist.

D. Your indifference or inconsistency puzzles me. You have avowed yourself to me, once and again, as not afraid of democracy; you have approved in principle the assimilation of our land laws to those of our English-speaking colonies and the United States; I have heard you speak with levity of the wisdom of Bishops, with scant reverence of the House of Lords, and with less than reverence of the sanctity of parliamentary oaths.

S. All this may be true. Yet am I no Disestablishment-man. My reason has the merit of simplicity, and of being convincing to myself. I fail to see the connection between Disestablishment and any principle which I accept, or which I believe to be generally accepted by Liberals.

D. Do you make no account, then, of the principle of religious equality? Or will you go about, by some sophistry not yet disclosed, to reconcile it with the maintenance of a State-established Church?

S. Pardon me if I indulge a foible common among those of my profession. I am afflicted with a certain punctiliousness about the significance of terms, and when a large question is propounded in undefined terms I am fain to nibble it piecemeal. These ideas are so familiar to you that it will doubtless appear pedantic when I turn upon you in the counter-questioner's part, and crave to be fully satisfied what you understand by religious equality, what by a State Establishment, and in what points you conceive

the latter, as existing in England, to be incompatible with the former?

D. Religious equality, or the equality of all religions before the law, which is, in other words, the negation of a privileged form of religion, is surely a plain enough political conception. Establishment is nothing else than the conferring of privileges by the positive laws of the land on a particular form of religion, or the introduction of that which religious equality forbids.

S. Equality before the law may turn out easier to name than to define; and, at any rate, it does not involve of necessity that which I suppose you aim at —equality in the opinion of the world and in fact. Certainly we shall agree that it is false policy for the State to molest any subject for the exercise of any moral and decent form of religion in a decent manner and convenient time and place. Here are limitations already; but you will admit them needful; and, moreover, that morality and decency shall be judged by the standard of the law of the land, not that of the particular religion: otherwise we should make every sectary judge in his own cause, and might have some pious denizen of some Indian Exhibition claiming in the name of religious equality to sacrifice a goat on the Thames Embankment or swing himself on a hook on Wimbledon Common.

D. We claim not, and we have at no time claimed, any such licence; nor is it to be supposed that in a Christian and law-abiding country——

S. There should be a Salvation Army. Nay,

spare your protest; it is anticipated and allowed. And though I will assuredly not seek to make you or your friends answerable for the Salvation Army, I am not concerned to deny that it has respectable advocates. But the conflicting opinions and even judicial decisions to which its proceedings have given occasion are enough to show, whatever be the true estimate of General Booth's value as an ally of the powers that make for righteousness, that the case is on the border-line.

D. If the Salvation Army break the law, the law may look to its own. It has penalties and remedies that should provide sufficient restraint.

S. Very well said, and I could not better it. So far we are at one. Religious equality is not an absolute unconditional right, but a rule of lawful liberty within bounds of order, which bounds are determined, in case of doubt, by resort to the ordinary law.

D. Agreed.

S. In a well-ordered commonwealth I do not see how any person or sect can be suffered to demand more than this; and in these realms at present I do not see that any one enjoys less. We need not make an exception, save for form's sake, of sleeping and toothless penalties, fallen into the decay of a premature and ignominious old age, which are as certainly obsolete in fact as they deserve to be repealed in terms.

D. Within the Established Church the resort is not to ordinary law and jurisdiction. That is one of

the many proofs and signs of inequality. Methinks I am not to remind you that the privileged Church is under privileged jurisdiction, and exempt from the common law.

S. The law of the Church is ultimately controlled by the common law, as well as by Parliament; and the name of privilege may be literally applicable to the condition of being subject (in addition to those universal limits of public order already mentioned) to a body of regulation and restraint which, if difficult of complete enforcement and cumbrous in operation, is in the main effectual, and for immediate practical purposes must be considered as unalterable. The law will recognise, and more, if so required it will maintain with all its powers, the constitution and ordinances of a voluntary religious community (as of any other lawful association), so far forth as they are founded in agreement, and affect valuable rights. Agreement having made them, the like agreement can dissolve or refashion them. The Church of England belongs to public law; the covenants of her officers can be released by nothing less than the commandment of the estates of the realm, even if every one of her members consented. A clerk in orders is under disabilities as a citizen, while his immunities have disappeared into the limbo of ancient legal history, after serving their turn as the "first fault" of many lay malefactors. Excuse the old Eton phrase; such things will come to one's tongue now and again. Now, from the point of view of individual freedom and equality, the privileges I

have briefly rehearsed would seem to be of a negative sort.

D. Well, you are stating our case. We know that the Church is fettered; that is one of our grievances; we bring it forward in the interest of the Church itself. You dance in fetters that the State may pipe to you, and the State calls the tune. Or, to use a worthier and more fitting image, you barter the priceless birthright of spiritual freedom for the temporal mess of pottage prepared for you by Acts of Uniformity and Ecclesiastical Commissioners, with a garnish of pomps and vanities like public thanksgivings, coronations, assize sermons, and what else. While you stand upon your bargain, it hardly lies in your mouth to complain of the price. But on higher grounds we deem the compact essentially iniquitous, and therefore we do complain. Our settled purpose is to annul the compact, as the State lawfully may, and to deliver you from all these burdens. We would have the Episcopal Church of England free and honoured among free Churches, even as her sister in America, to dwell in peace with us that we may all be emulous in good works. Her legitimate spiritual traditions, her just renown, will be disengaged from the dross and ruinous heaps of legality. Believe me, we are not enemies battering your fortress, but friends crying to you to come out of your dungeon into the field and help us.

S. Excellent well, Master Doctor, for a discourse *ad clerum*. But pray remember that I am no clerk, only a plain citizen, and am apt to consider these

matters, as an honest statesman has said, as a layman and in the interest of the State. As concerning that trifle of the pottage, which your metaphor rode over somewhat apace, I am not wholly certified that the pottage is all one mess, or that it all belongs, as you seem to assume, to the State. Your demand is for temporal works, for legislation, for the transformation of estates and interests, for the redistribution of property. To this region you call, entreat—nay, summon us; and therein we must be subdued, with all due regard to your higher spiritual motions, to what we work in, even the filthy works of the law.

D. By your good leave, I shall not be drawn into a technical discussion. You and I are not to settle a Bill out of hand. When the nation has found a right will and a just power, the ways and means are the business of experts, and will doubtless also be found. For the will I stand upon that principle of religious equality which you have not denied; for the power, upon the eminent domain of the State which you will scarce deny. For the rest, I may have my opinions of the respective merits of plans. But the principle comes first.

S. Nay, by your leave, I cannot so lightly soar above details; I am of the common world, and hampered by matter of fact. Of the eminent domain of the State (which is indeed one with sovereign power) I seek no demonstration. It is an axiom of politics and law that all property and all individual rights whatever are in the control, so far as human

control can extend, of the supreme governors of the commonwealth. Whether it be wise and equitable to exercise that supreme power in a given case depends first on the cause alleged for its exercise, then on the proposed manner of it. This is a case, as I humbly think, wherein the principle may receive much light from its application in detail. Political action aims at some commensurate result by which it is to be justified; it is certain, at least, that no other justification will be accepted by the bulk of citizens. You invite us to a vast, complex, and untried action, and such that, once performed, it cannot possibly be reversed. Surely this action and its results will be in substance that which your plan makes them in details. The task is yours to make it probable beforehand (I do not say in every particular, but by reasonably sufficient particulars) that adequate results, good in themselves, can be attained by just and proportionable means. And I am confirmed in this view by observing that, so far as I am aware, few or none of your party have yet adverted to Disestablishment, apart from Disendowment, as an affair of practical moment.

D. Then on the practical ground I will meet you, and, as I hope, convince you of the soundness of our ideas by the justice of their application; but not now, for time presses.

S. With a good will, when the time serves again. I too must go my ways, which are yours, if I mistake not, this side the river. Shall we walk through the Abbey?

II

S. Well met again, Master Doctor. You are ready, I suppose, to convert me by detailed proofs to your project for restoring the equality and freedom of religion by destroying the Church of England as by law established.

D. Forgive me that I interrupt you so soon; but you force a protest on me. We are for destroying the parasite growths of legal establishment, and resuming the national property that has been perverted to the maintenance of an exclusive and artificial supremacy. But we say that this distinction will be the renovation of the true spiritual body.

S. I know it, and therefore was careful to add *by law established.* Now it may be granted that the Church of England would, as an ecclesiastical body, survive any practicable operation of Disestablishment; and this not on any ground of inherent and necessary divine authority (for as to reasons of that fashion, I shall not trouble you with any), but as matter of probability on our common grounds of judgment in human affairs. Indeed, I have my suspicions that its vitality might more than answer your expectations. But how far the idea and spirit of a disestablished Anglican Church would resemble those of the Church we know; how far traditions, of which the best side is nothing if not national, could or would preserve a substantial continuity; how the lay people in general would be affected by the letting loose of divers

controversies at present restrained, with other consequences of the like sort: these are problems of a certain gravity, whereof the solution appears to me, I confess, wholly indeterminate. On your part you seem to be assured that all things will work out for the best. For that comfortable assurance I have not seen any nearer or better verification than the double-faced maxim of average experience, that few plans turn out altogether so well as the promoters hoped, or so ill as opponents feared—a maxim apt, moreover, to break down in critical cases. But to come to a point. You conceive Disestablishment as the annulment of a compact between the State and the Church; or, more simply, if you choose, as the withdrawal by the State of benefits and sanctions which it gave. Such, at least, is the conception which passes current on your side, and does duty without contradiction on the platform and in the pamphlet. Thus you seem to point to a time when the State existed in England without the Church, or without any definite relation to the Church; whereas I find in history that there was one Church in England while there were yet many States; that there was never any compact between a Church and a State outside the Church, but a series of transactions and adjustments, which were in truth a thinly veiled contest for supremacy between the spiritual and the temporal powers within the State, a State of which both those powers were in common acceptation alike necessary elements; that this contest was further complicated by the claims of a foreign spiritual potentate to interfere to a large

extent in spiritual, and to a lesser but undefined extent in temporal matters within this realm; and that a relatively small incident brought the conflict to a crisis upon this last point, with the result of definitely repudiating foreign claims and fixing sovereignty in the hands of the temporal power. Likewise we find that through all changes the Church did not cease to be an integral constituent part of the commonwealth, and it remains so at this day. The Reformation neither established nor endowed the Church, but largely disendowed the Church (for it was a goodly share of his royal ancestors' gifts to religious uses, and other pious founders' besides, that Henry VIII. was pleased to resume), and established the supremacy of the Crown. I conclude that these glib five syllables of Disestablishment signify nothing less than an alteration in the State itself, which, in form if not in effect, would be more fundamental than any extension of the parliamentary franchise, reform of local administration, or other modifications in the machinery of government. It is the perpetual renunciation of a whole hemisphere of sovereignty—whence and for what? From the besetting modern fear and impatience of responsibility, and for—well, I do not wish to state it coarsely, but I cannot find a choicer term—for pounds, shillings, and pence.

D. It is not my fault that most people are ignorant about matters of history which at this day, after all, are irrelevant. We say that the Established Church of England, whatever it may have been, has ceased to be the Church of the nation; that it is not humanly

possible to restore it to that situation in fact, even if it were desirable, which on our general principles we deny; and that the time has come for the law to be adjusted to the facts. We have never denied that the undertaking is a great one; but at most we contemplate nothing so violent as the proceedings of Henry VIII. That portion of sovereignty or control of which we seek to relieve the State is in our judgment burdensome and useless. And the State would have its just compensation for the loss (if any) in resuming national property for national purposes—not as lucre, but for good works not much alien, perhaps, from the genuine original designs of the pious founders of churches.

S. A truce to ancient history, then; and let us forget Reformation, Commonwealth, and Restoration. If you will pass over the hardships of your predecessors under the Stuarts I will make no mention of the Quakers, nor otherwise remind you that the said worthy predecessors in particular, no less than Protestant Churches in general (but for a very few men of exceeding wisdom and charity) discovered the principle of toleration only when dominion was clearly beyond their reach. And yet this same history is a plaguy ghost that will not be laid. You speak of national property; some of my dry technical notions hinder me in following you. When a Mercian or West-Saxon prince endowed the see of Worcester or Winchester, was this nation of England (then only in the making) giving its own goods to itself? Or did the private benefactors of a minster or a

cathedral foundation deem that they were giving to the State? There is true national property created or maintained by deliberate acts of the State, "out of money provided by Parliament," as the official phrase goes: for example, a Queen's ship and her armament, the dockyards and arsenals, the British Museum, the National Gallery. Church property is not even the property of the Church of England, for the law knows no such body as capable of holding property: it is the property of many ecclesiastical corporations, administered under the ultimate control of Parliament, and (like all property held in trust for public and charitable uses) more obviously and practically subject to the eminent domain of the State than the private property held by individuals in their private right. I grant you that "national property" may be a fair term as against those who deal in such other terms as "sacrilege" and "spoliation;" but its fair use is only to bring back the discussion to the ground of political justice and expediency. There it leaves you, and you cannot force it to prejudge the merits.

D. Very well. Put the case, if you will, for the argument's sake, on the footing of an old charitable foundation. We say the institution is no longer of adequate benefit to its real objects (not that we approve the original method), and there must be a new scheme. It is needless to quibble about legal ownership when you are exercising sovereign rights; and even an owner is bound in conscience to deal justly. We do not shrink from responsibility in a work that is eminently one of conscience.

S. Taking property, then, in this larger sense, I conceive there is a somewhat important element of the property, though not a tangible one, which you have overlooked in your estimate. You know what merchants understand by the goodwill of a business?

D. I am little conversant with the market-place; but they mean, I believe, the credit and worth of the business in the hands of a successor, as depending on his right to use the old name, and so forth. One might say, perhaps, that goodwill is the continuity of an undertaking, regarded as adding to its capital value.

S. Right; and you have doubtless heard also that this addition may be no small part of the whole. Now if you had, as a trustee for others, the management of a great undertaking with a valuable goodwill, you would scarcely deem it a faithful discharge of the trust to make dispositions which would either destroy the goodwill or throw it into strange and perhaps hostile hands.

D. Assuredly not; but in what respect are these matters to our purpose?

S. In this, that we are trustees for posterity of our national institutions; not only of parcels of land and the visible works of men's hands, which are but instruments or symbols, but of the traditions and powers that belong to the continuity of the thing signified. In the case of the Church of England we have a tradition, a power, and an ideal which in their national character are unique. All this you propose, after defacing it as much as you can, to abandon

to the transformed and disestablished Church which (you appear to imagine) will become a harmless voluntary sect like any other, and lie down cheerfully with the Wesleyan and the Baptist. I tell you that this is not statesmanship, not the work of a physician of the common weal, but the rough surgery of despair, to be justified only by the imminence of things yet worse. No such imminent peril can be pretended with any plausible show of reason: and yet, rather than have patience for a generation more, you would commit us and our children to this incalculable experiment. How much of the exclusive character and pretensions of the Church could you destroy by statutes and regulations? How much of zeal and party spirit would be added to Churchmen, think you, by the very strife and stress of your Disestablishment campaign? You may judge by what the mere threat is already doing. How much of the endowments would be forthwith restored by private munificence? And would the new terms of communion be more expansive, the formulas less stringent, than under the dispensation of Establishment? At best it is guesswork, but I take leave to think my guess may be as good as yours; and methinks I see you face to face, not with a band of peaceful Christian people agreeing to differ from you in details, but with an orthodox Anglican Church (almost certainly High Anglican) disciplined and consolidated by combat, burning for revenge in the sphere left to it, powerful, rich, and militant. And I fail to perceive how that, or anything like it, would contribute to general peace and

charity. As for us poor lay folk, my vision is of a disestablished verger demanding the archdeacon's certificate of one's orthodoxy as a condition precedent to the sight of some historic monument. In return for these unknown risks, our consideration in hand is to be something large and dazzling, we know not what: at worst, a transitory squandering on local jobs: at best, let us say, a system of middle-class education. But I confess I should not expect much of rational design or permanent good, for many reasons, one of which is perhaps enough: namely, that the plan must needs be taking at first sight. It would serve the turn as a gilded bait for the constituencies, and vanish in a cloud of Blue Books.

D. Fantastic alarms, my good Student, and idols of the cloister; and if they were not, I should still bid you carry them to weaker brethren. We are minded to do right without fear of consequence. *Fiat justitia, ruat caelum.*

S. But once more, worthy Doctor, you assume the justice. You propose with a light heart to cut down a secular forest in order, as you say, to improve the climate. I humbly suggest that your improvements will give us a climate of alternating droughts and storm-floods, and you cry for answer, *Fiat justitia!* By the way, one point of your justice is to leave modern endowments alone, and that is well meant. I know not how you distinguish ancient from modern: for my part, I should call those gifts modern which were conferred on the Church since it was lawfully possible to give to other denominations; for

since that time it is a fair presumption that Anglicanism was consciously and freely preferred by the donor. For practical purposes it would not greatly matter whether we drew the line at the date of the Toleration Act or a century later. This discrimination, I say, is in itself equitable and laudable: without it, indeed, your plans would make little way. But it does not tend to diminish the risks of an *imperium in imperio*. Your so-called liberation would weaken the elements in the Church which want to be strengthened, and strengthen those which ought to be weakened.

D. We have thought of that, if your political caution must be satisfied. There are possible checks and safeguards.

S. O, master Doctor, I feared that your religious equality would prove but a rickety Hercules. Your destroyer of serpents cannot so much as walk alone, or encounter a dog unmuzzled. What! you would dismember the emancipated Anglican Church, debar it from retaining its unity and employing its freedom, lest it be too strong for you, and then talk of equality? Be these sour workings of the old anti-prelatical Adam the fruits of your new justice and charity? But to my mind 'tis all one, for it shall need much more than a neatly drawn schedule to persuade me that your safeguards will work.

D. But what then would you do with the Establishment?

S. That were a new topic, and too long to consider at present. I am not ready with any plan; it was for you to convert me to yours. The drawbacks and

anomalies of our ecclesiastical polity are obvious enough, and capable of being represented with painful or ludicrous effect. But the resulting evils are known, amendable, and, as I believe, tending to amendment, and in the meantime endurable. I will go as far as I can see to mend them, but will not exchange them for unknown ones till amendment is proved impossible.

D. Well, if you will not be with us, you must even abide with your paradoxical delight of being against the stars in their courses.

S. I have no skill to read the stars; but I am old enough to know that they are jealous of mortals, and ill to claim for allies before the event. Only one thing I will prophesy: that if the Church of England falls, it will be through the folly of her own champions.

VIII

HOME RULE AND IMPERIAL SOVEREIGNTY[1]

In the following remarks I shall endeavour to show how and why the question of Home Rule for Ireland is not an ordinary question of domestic policy, nor even a domestic question of constitutional policy, such as Parliamentary Reform, but one involving by its nature much wider issues and consequences. And in so doing I shall at the same time show the grounds on which I think that any serious and effective working out of the idea of Home Rule would import not only a new constitution for Ireland, but a new constitution for the British Empire, and a revolution in the existing relations between the British colonies and possessions and the Imperial Parliament. I do not profess to disclose new facts or urge new arguments. It appears to me that we are in far greater danger of neglecting plain facts and broad principles in this matter than of overlooking any facts not generally known, or reasons not of general validity which are likely to be material to a sound decision. Our business at this juncture is

[1] First published in *The Truth about Home Rule* (W. Blackwood and Sons, 1888). I do not think the argument is affected by anything that has happened since.

to insist on essentials, and to insist on them with repetition even to weariness rather than let them fall out of sight. My aim will be to make use of facts which are notorious, and inferences from them which are simple.

I

The territories collectively known as the British Empire are not only scattered over the world, but are subject to the ultimate dominion of the Imperial Parliament in many different ways. We have in the first place the United Kingdom of Great Britain and Ireland, whose people are directly represented in Parliament. We have a few possessions of the Crown which are geographically adjacent to Great Britain, but are extra-parliamentary (if one may use the word) for historical reasons. They enjoy their ancient local laws and privileges, which are practically guaranteed by the Imperial Parliament. Only the trifling area and population of the Channel Islands and the Isle of Man as compared with the United Kingdom have made the continuance of this state of things practicable. Then we have the colonies founded by English settlers who carried with them the law of England and the rights of British subjects. Lastly, there are the colonies and dependencies acquired at various times by conquest or by cession, or partly in one way and partly in the other, sometimes from native rulers, but more often from princes or rulers who, whether European or not, were themselves conquerors or represented some previous conqueror. Among this

class of dependencies there are many and important differences of laws, institutions, and government, but the details of these do not concern us here. What does concern us is that directly or indirectly the Queen, with the advice and consent of the estates of the realm—in other words, the Imperial Parliament[1]—has admitted and unlimited authority over all these dominions. The legal origin and theory of that authority are not the same in all cases, but that again does not now concern us. No one disputes its existence. It is exercised in various forms and degrees. In some cases it is manifested by direct and frequent interference. In many it has been exercised by framing or sanctioning a constitution, under which government is carried on by persons and bodies who may be said to be delegates of the Crown or of Parliament; the direct interference of Parliament remains possible, but is exceptional. In some cases not formally distinguishable from the rest—I mean, those of the self-governing English colonies—there is an effectual though undefined understanding by which such interference is limited to matters touching Imperial and not merely local interests.

Now the local institutions through which, outside

[1] Some British subjects may be in strictness under the government of the Crown merely by virtue of its general prerogative; I say *may be*, because it would be at least rash to assume that there is any part of the British dominions of which the government has not been affected at some time by some Act of the Imperial Parliament. But the Crown can of course do in Parliament whatever it could do without Parliament: and inasmuch as it can do nothing save through Ministers responsible to Parliament, the control and supremacy of Parliament are for practical purposes the same.

the United Kingdom, government and the administration of justice are regulated (subject always to the ultimate control of Parliament) may be classified as follows:

They may be institutions imported from England, and more or less modified to suit local circumstances.

They may be institutions imported from some other civilised country, and preserved for one or another reason under British supremacy. Thus we have held ourselves bound, ever since the period of military occupation immediately following the conquest, to maintain the laws and customs which the French population of Lower Canada had derived from their mother country.

Or they may be native institutions—that is, non-European; for we need not now attend to the distinction between such as are truly indigenous, and such as may have been imposed or imported by non-European conquerors before the commencement of English or European dominion. And these likewise may be maintained as a matter of express promise, of general good faith and equity, or of simple expediency.

These different elements do not always exist simply or separately. On the contrary, they are found in various and more or less complex combinations. In India the same courts administer for different purposes English law to Europeans, different systems of native law to different races and classes of Asiatics, and English law, modified by special legislation, to Asiatics and Europeans alike. Again, the maintenance of the

French institutions of Lower Canada, side by side with the English institutions imported by the English settlers of Upper Canada, led to very grave political troubles. After the failure of other methods, including that of a single autonomous government, Canada was endowed by the British North America Act of 1867 with an elaborate federal constitution, the invention of Canadian statesmen. Considered as a compromise this has worked well, but it must not be supposed that it works without friction.[1] In other colonies, such as Mauritius, the competition of English with non-English institutions and customs has been a source of difficulties which only the relatively small scale of the whole affair prevents from being seriously felt in England. The relations to the mother country are simplest in the case of the Australian colonies, where English population and institutions have taken an undisputed possession. Even there, however, they are less simple than they look, for there enter into them in fact, though not in law, the tacit understandings which have been already mentioned.

II

Ireland is at present a part of the United Kingdom. The advocates of Home Rule say it ought to be something else, but still a part of the British Empire, and they say that the principles of such an arrangement

[1] A conference of delegates from the Provinces of Canada has lately recommended material amendments in the Confederation Act.

are easily laid down, and the execution in detail not more difficult than that of any other considerable political reform. So much, I think, they have undertaken (and must undertake) to make good—unless, indeed, they will admit that Home Rule does carry with it known and unknown dangers of grave extent, but, admitting this, nevertheless will support Home Rule on the ground that even a desperate remedy cannot be worse than the present disease. This, the argument of despair, is not of the kind that rouses a cheerful courage in a man's constituents and political friends, nor can it be agreeable to the better sort of Irish Home Rulers. We therefore hear little of it in public, yet we may suspect that, with the more thoughtful English Home Rulers, it has weight—more, perhaps, than they acknowledge even to themselves. To return, however, to ideas and plans of an Irish constitution, whether proposed as a good thing in itself or as relatively tolerable. In one direction the choice is clearly limited. Ireland has not any native form of government or political institutions which can at this day be preserved or restored. There is no possible form of Irish constitution outside the variation and development of elements which are English in substance and in fact. Irish Nationalists complain that their lawful liberties are violated by the executive authority in Ireland. Those liberties—the rights of free speech, of public meeting, of political association, of trial by jury—are of English name and growth. They are the liberties of Irishmen, not because they are Irish, but because they are British

subjects. Even if we regard these liberties, or some of them, as deducible from universal principles of natural justice, England has come very much nearer to the supposed ideal of natural right than any other part of the civilised world, and Ireland has derived from British thinkers her share in the ideal, and from the laws of England her share of practical approximation to it. I say nothing here of the merits of any particular controversy, or of any method of controversy. I merely note an evident fact. Cæsar is denounced as a tyrant, but it is to Cæsar's laws and Cæsar's courts that Brutus and Cassius appeal against Cæsar. Still less do I wish to go back upon historical speculation. It is likely enough that the troubles of Ireland are due, in large measure, not to the introduction of English institutions in itself, but to that introduction having taken place without due regard to fit causes and occasions, and without any settled purpose or continuous policy. It is merely idle to discuss whether the English conquest of Ireland were more or less justified than the English conquest of Britain, or the prehistoric conquests of both Britain and Ireland from tribes of long-forgotten name and speech, themselves perhaps the supplanters of a still earlier race. Perhaps it would have been well if Edward I. had given his strength to a real conquest of Ireland, instead of an illusory conquest of Scotland. Perhaps it would have been better if some Elizabethan statesman could have had the genius and perseverance to deal with Ireland as the East India Company dealt with province after province, and kingdom after

kingdom. But it is too late now to regret that Ireland was not settled like Wales or like the Punjab. It is also too late to regret the extinction of whatever distinctively Irish civilisation existed at any time. So far as the desire for Home Rule includes a longing for the real or apparent restoration in Ireland of political institutions not of English mould, it is a desire which cannot be satisfied by any political or legislative measures whatever. Sentimental grievances, as they are called, can be dealt with only by remedies of the same kind. I use the term because it is convenient and understood, and not with any meaning of disparagement, for sentiment is the moving force of human action. Men are moved by things as they appear, and they act on their emotions. It is one of our national defects to underrate the value of the first impression of things, and to spoil even good deeds by an ill manner of doing them. That we have paid and are paying dearly for this fault in Ireland I have no doubt. It has been committed even in our recent dealings with the land question. I will give another example of what I mean, though at the risk of being thought to trifle. I verily believe that if there had been a regiment of Irish Guards at Waterloo and in the Crimea, there would be several regiments the fewer at this day in Ireland. It is not my province to inquire how far the mischief done in this kind can at this day be undone by public or private exertions. One thing is clear, that it will not be mended by the clauses and provisos of a Home Rule Bill, be they drafted never so skilfully. There

is a harder thing than to make and execute good laws; it is to revive and foster that spirit of trust and affection in the people which executes the law without an officer. The law must be a terror to evil-doers first, but we shall not be content with that. If I believed that the people of England would rest with no higher aim; that they were devoid of justice, of generosity, of patience (for the task will need firm and even justice, abundant generosity, and unfailing patience); that they would renounce the noblest and most arduous duties of government, declaring themselves, and thereby proving themselves, unfit for empire;—then I should accept the argument from despair, and acquiesce in Home Rule for Ireland if I could not support it. But I should acquiesce in it as a fatal symptom that English political supremacy had outlived the English genius for politics, and must ere long follow it to extinction, to be revived (if at all) in some younger and happier branch of our stock.

III

At present we cannot say in any definite terms what the relation of Irish Home Rule to the Imperial supremacy of Parliament is intended by its advocates to be, for there is not any authentic definition. Home Rulers, including Mr. Gladstone, profess themselves not bound by the proposals which Mr. Gladstone's Ministry introduced (we must presume, after the consideration befitting a measure of such import-

ance) in 1886. It is true that we are not thereby deprived of much guidance, for among the many omissions and ambiguities of the Government of Ireland Bill, not the least striking was its extreme obscurity as to the position of the new Irish Executive, as between the Irish "Legislative Body" on the one hand and the responsible Ministers of the Crown on the other.[1] If Lord Thring's lately published interpretation may be accepted, the general intention was to assimilate Ireland, with certain exceptions, to a self-governing colony of the Australian type. I shall not stop to consider whether the exceptions were not really such as to frustrate that intention. The time for minute criticism has been, and we Unionists hope it may not be again. It is enough for us now that any scheme of Home Rule must aim at satisfying the demands of Irish Home Rulers. Home Rule means at least the power of local legislation for Irish affairs, as distinguished from those which touch Imperial interests; and that, as I shall show, a practically uncontrolled power. The lines of distinction must be laid down in the Act of Parliament establishing the new Irish constitution, and worked out as occasion requires by some judicial authority of imperial character and dignity. Now all this machinery would be of no value if the Imperial Parliament were habitually, or on any common occasion, to interfere in anything outside the departments which had been expressly

[1] This statement is made from careful reading of the actual text of the Bill, notwithstanding Lord Thring's sweeping assertion that "Bills are never read by their accusers." — (*Handbook of Home Rule*, p. 71.)

reserved. As matter of law, Parliament could interfere when it thought fit, or could alter or revoke the constitution it had given—or, at any rate, it is a matter of skilled workmanship to prevent legal doubts from arising on this head; though even so, to leave no room for reasonable doubt is not the same thing as to prevent doubts from being raised, or from leading to grave trouble, when judgment is obscured by interest and passion. As matter of practice, Parliament would be expected not to interfere: such is the case with the self-governing colonies, and Ireland would expect no less. Habitual interference for the purpose of overriding the local legislature would not be acquiesced in. It would be resented on more plausible grounds than exceptional legislation for Ireland is resented now, with at least equal determination, and with much better hope of success. But the thing would never be attempted. Not only the Irish legislative body and the Irish executive would expect to be left alone within their competence, but the British House of Commons would expect Ministers not to trouble it with Irish affairs. We must take it that nothing short of overwhelming necessity would induce Ministers to do so. Not that Unionists are concerned to deny that such necessity might occur, and sooner rather than later. But I now try to conceive the case as it would stand if Home Rule were decided upon, and all English parties, being bound by that final decision, were content to give it a fair start.

Habitual non-intervention of the Imperial Parlia-

ment, and of the Crown as advised by its Ministers responsible to Parliament, must therefore be the rule. We are told that in the Australasian colonies and in Canada this is found to answer, and no prejudice ensues to the supremacy of the Crown and of Parliament. Why should it not be the same in Ireland? One must not be afraid of repeating simple things; and I shall repeat here what has been already well said, and may have to be said many times again. Why should not two and two make five? Because two is not three. Why should not colonial self-government flourish in Ireland as in New Zealand or Victoria? Because Ireland is not New Zealand or Victoria, and St. George's Channel is not two oceans and a continent.

Let us see what are the conditions that make the relation of colonial dependence permanently compatible with the habitual non-intervention of the supreme power. Two seem to me of the first importance.

First, the dependent community, and every considerable part of it, must frankly accept self-government with all its consequences. It must be plainly understood that a defeated party is not to appeal to the mother country for relief against anything done within the powers of the local constitution. Moreover, disputes as to what is within constitutional powers must be decided in the regular course of justice, either by the local tribunals, or, at need, by regular appeal to the Crown in its judicial capacity. All such communities are provinces of one empire, and may call upon Cæsar to protect them against

foreign enemies. But in their own matters they shall appeal to Cæsar according to the terms of their own covenant, and not otherwise. Their covenanted liberty of self-government implies an equally binding duty of settling internal disputes with their own resources, and not throwing them back on the mother country.

Secondly, the dependent community must be content to preserve its connection with the Empire of which it is part—nay, it must be more than content; there must be active willingness to suffer some particular inconvenience on some occasions for the sake of maintaining the connection. The occasional sacrifice of apparent local interest to the interest of the Empire as a whole is demanded as the price of Imperial citizenship. The demand is not great, nor is it often made, but when made it must be satisfied. A colony which did not set a positive value on the Imperial connection would soon go to work to convert its autonomy into formal independence, if not restrained by fears of revolution or foreign conquest. The value which our colonies in fact set on their connection with the mother country is happily a very high one; it is perhaps higher in the present generation than it has been at any former time,—it is certainly better understood and appreciated at home. In part it depends on considerations of material convenience and security, but in some part—I think in no small part—it is a matter of sentiment.

Are these conditions present in Ireland? It is fairly certain that the first of them is not, and the best we can say of the second is that it is doubtful.

As to the first, Ireland is divided by bitterly hostile parties, and each of them has vehement partisans in this country. Any Home Rule constitution settled by the Imperial Parliament would, by the nature of the case, aim at compromise between parties of whom neither has shown much of the spirit of compromise, and each of them would find matter of offence in some part of it. There is no reason to suppose that either Nationalists or Orangemen would abstain from working on public opinion in England to procure modifications of such parts of the new Irish Constitution as were offensive to them, or even interferences by special exercise of the ultimate supreme power of Parliament. As to the second point, it is at least unproved that the local governors of Ireland, under a scheme of colonial autonomy, would take any trouble to preserve the connection with England. So far as we can trust the evidence of public utterances—of nearly all public utterances at times and places where there is not an English audience to be conciliated—the prevailing sentiment of active Irish Nationalists is the other way. Either many prominent Nationalists have been using strong words without any meaning at all, or they have been obtaining the support, both moral and material, of their Irish and Irish-American hearers under something very like false pretences, or they would not stir a finger to prevent Home Rule from being made a stepping-stone to entire separation. They have declared themselves enemies not only of this or that principle, this or that individual concerned in English government of Ireland, but of the English

government and connection altogether. Such is not the language of political controversy among fellow-citizens; it is the language of men who put themselves outside the ties of common citizenship, who lack not the will but the power to be rebels, and who meanwhile use their rights as citizens only for a weapon against the commonwealth itself. If any one thinks I exaggerate, let him look to France, where the division of parties is far more deep and bitter than in England. Let him ask himself whether he can imagine a French Monarchist, of however extreme opinions, speaking of Republican France as a foreign and hostile nation, and rejoicing in her difficulties and misfortunes. It cannot be imagined. A Bonapartist who dared to express good wishes for insurgents against French authority in Algeria or Tonquin would be hooted down by any Bonapartist audience. But this thing which, to the credit of Frenchmen, is impossible in France, would be no more than Irish Nationalists have done. Notwithstanding that many valiant Irishmen share in whatever good or ill befalls British arms, men professing to speak in the name of Ireland have rejoiced in our real or imagined defeats. They have exulted in our real or imagined troubles in every part of the world. They have spoken of England as an enemy, and of the enemies of England as the friends and allies of their own cause. Not all Nationalists, I am aware, have done this. But some, and those not the least active and conspicuous, have done it; and I am not aware that those of their colleagues who pass for moderate have uttered any

word of protest. Moderation, or more than moderation, has been conspicuous in the attitude of the leaders toward these over-zealous followers.

All this may be, for anything that affects the present argument, legitimate and even laudable from the Nationalist point of view. I care not whether the persons who have uttered such sentiments in speech and writing were or were not members of Parliament bound by a voluntary oath of allegiance to the Sovereign of the British Empire, or, if they were, with what conscience or sense of honour they regarded the obligation of that oath. I simply point out that the temper of these utterances is not the temper by which either the express or the tacit conditions of Imperial union between Great Britain and an autonomous colony can be successfully observed. And I further point out that we must look not only to the temper of the speakers and writers of the Nationalist party, but to the temper likely to be begotten in their hearers and readers by a continued course of such matter. Say that this violence were but an imprudent ornament of Irish rhetoric, or the unskilled outpouring of a loyal desire for Home Rule, and nothing but Home Rule: the mischief wrought upon an ignorant multitude remains exactly the same. Besides, the maintenance of good relations under any scheme of Home Rule will need discretion as well as good faith on both sides. If this be the loyalty of Home Rule leaders, who shall answer to us for good faith? If it be their prudence, who shall answer to us for discretion? It is true that some of the Nationalist

orators have taken, late in the day and in a coarse fashion, to flattering the English democracy, or rather a minority of all conditions of the people of England which they choose to call the English democracy. There is no reason from their point of view why they should scruple to foment revolution, or fears of revolution, in England, if they may thereby further their ends in Ireland; and to that extent I can very well believe that these flatteries are sincere. They are perfectly consistent with that ill-will to the commonweal of England as a whole which is still abundantly expressed when it is thought to be agreeable to the audience.

But we are told that these things are of no account, for an autonomous Ireland would be too prudent to seek for independence; the superior power of England is too obvious. What then? Is the power of England to maintain the Union, if England be resolved to maintain it, less obvious now? And has it prevented an agitation for Home Rule from being planned, matured, established in the heart of English politics, and seeming for a time to be within sight of triumph? Twenty years ago Home Rule was as far from the practical consideration of English statesmen as separation is at this moment. Irish Nationalists may not suppose that England can be compelled by force of arms to grant independence, unless it were in some great conjuncture of foreign trouble such as none of them have openly deprecated and some of them have openly desired. But if England cannot be compelled, English constituencies may be cajoled and English Ministers worried. The means which

procured Home Rule would be effectual to procure separation also in good time. Home Rule could not have a more solemn appearance of finality than the Union had; why should it have more of the substance? So it might plausibly seem, at any rate, to a thorough-going Nationalist. And a movement towards separation in Ireland would be a wholly different thing from a movement towards separation in any of our English colonies. In the latter case an inevitable separation, however much to be regretted, might conceivably be accomplished with decency and dignity, and without bloodshed. In Ireland such a movement would be born in internal dissension; it would probably ripen in civil war, and the ultimate result would be a military reconquest. But let us suppose the resolution of England not to grant independence to be understood, and her power respected. Again, what then? Why, for the result of all our elaborate devices of Home Rule we should have Ireland still attached to the British Empire by coercion but one degree removed—still a source not of strength, but of weakness, in our troubles abroad—still not a credit, but a reproach, to English capacity for government. We should be in no better position than we now are, or may be, by a firm and just administration of the existing plan. Home Rule, not frankly accepted for its own sake, would make things worse for England and no better for Ireland. Prove to us that Home Rule will content the people of Ireland, and that is one material point made good. But if you tell us that, whether they are content or not,

we shall always have the strong hand, then we say that if it must come to the strong hand, we prefer using it to maintain the Union.

IV

The truth is, that the difficulties—the insuperable difficulties—of maintaining a just equilibrium between Irish Home Rule and the supremacy of the Imperial Parliament, arise from the peculiar conditions of Ireland. They are not disposed of by telling us that under other and different conditions other arrangements of a more or less similar kind have been found practicable. If Ireland were, like Hungary,[1] an ancient sovereign state, with ancient national institutions; or if it were, like Victoria or New Zealand, a colony settled by a uniform and like-minded population,—the problem of Irish government would be a much simpler one to deal with, or rather would not have arisen in its present form. But Ireland has neither a stock of ancient institutions nor such internal unity as will suffice for the peaceful development of new ones. It is useless to pretend that conditions exist which notoriously do not exist. Not

[1] The relations of Ireland to England have never been at all like those of Hungary to Austria. If Charles I. had first made himself absolute in Scotland, and then subdued English liberties by a combination of Scottish and Irish troops with aid from France (a plan of which all the elements existed, at one time or another, in the counsels of the Stuart dynasty), there would have been something like a parallel to the subjection of Hungary in 1849, but with Scotland in the place of Austria, England in the place of Hungary, not of Austria, and Ireland in that of Croatia.

one of the usual attributes of a commonwealth capable of single and uncontrolled self-government can be truly applied to Ireland. There is no substantial unity in religion, in breeding, in manners, or in allegiance to any one person or institution. The one thing certain about any scheme of Home Rule turning on the establishment of a single Irish Legislature at Dublin is that it would be strongly disliked and opposed by a minority of the people of Ireland considerable in numbers alone, and considerable beyond the proportion of their numbers in wealth, industry, and general ability.

It is time we should plainly understand that commonwealths are founded, and institutions established, not with pens and ink but with men. The Constitution of the United States has been often and justly praised. And I would abate no whit of the praise given to the men who framed that Constitution, and procured its adoption in the face of the utmost difficulties. But there is praise to be given elsewhere too. The work of the founders would long since have come to naught without the good will, good faith, and good sense applied by the people of the United States to the handling of it in practice. We have there seen a powerful and zealous party submit to a decision which they felt to be unjust, and believed to be illegal, rather than endanger the stability of the federal compact. There party contests run high, and decisions, however authoritative, are freely criticised; but all parties agree that the law declared and expounded by the proper authority must in every

case be obeyed. A much less skilfully framed constitution would become a good working instrument of government in the hands of such men as have made the Constitution of the United States a document of universal importance to students of politics. A much more skilful and elaborate one would fail in a community wanting the elements of political training, and the conditions of harmonious political action. South America is strewn with the wrecks of republican constitutions, which inquiry would probably show to look on paper full as well as the Constitution of the United States. Learning, reflection, and skilled expression must all go to the framing of a good constitution; but if it is to be born alive, the first things needful are good faith and good will. English supporters of Home Rule believe, no doubt, that a sufficient majority of good citizens would be found in Ireland to apply good faith and good will to the working out of a Home Rule constitution under the imperial sovereignty. But they believe it on evidence which appears to Unionists not only to be insufficient, but to point strongly the other way.

This, however, is not all. In a scheme of this kind minorities have to be thought of. Minorities also are composed of human beings capable of action and passion, and are not to be disposed of by a sum in subtraction.

One thing which we may learn from our own colonial history is the power of a compact party, working on sentiments of race[1] and religion, which go

[1] Sentiments of race may exist, and may even be artificially created,

deeper than ordinary party divisions, to paralyse the working of a scheme of autonomous government which fails to secure their rights, or what they consider to be such, against a disliked and distrusted rule. This was shown in Canada during the generation beginning approximately with the Queen's accession, which came between the insurrection of 1837 and the federal constitution of 1867. The French Canadians failed in armed resistance, but under the constitution of 1840 they succeeded in making it impossible for the English party, at first barely equal to them in numbers, but afterwards the majority, to work a centralised form of Home Rule. Ultimately, by the British North America Act of 1867, they obtained legislative autonomy for the Province of Quebec, and they have ever since exercised an influence in the affairs of the Dominion, and enjoyed a practical power of getting their own way, which many English Canadians regard as excessive. Now the position of Ulster in Ireland is by no means unlike that of the Province of Quebec in Canada. There is a Protestant and Teutonic minority face to face with a Catholic and Celtic majority, while in Canada the numbers are the other way. In other respects the scale and proportions of the two cases are fairly comparable. If the Unionist minority in Ireland be less numerous and compact than the French minority in Canada, we must bear in mind that it is they who lean on the

whether there is much real distinction or not. For politics the question is not one of actual ethnology. What people believe about themselves is often more important than what they are.

English connection, whereas in Canada that advantage was on the side of the English majority. The minority is in both cases a thriving and vigorous one.[1] I do not see why Ulster can be expected to sit down under Home Rule in the hands of a Catholic and anti-English majority, any more than Lower Canada was willing to sit down under the government of an English and Protestant party, or the English settlers, on the other hand, were willing to tolerate French Canadian ascendency. The chances of success would be at least as good for Ulster as for the Province of Quebec. I say nothing here of the claims which the men of Ulster, and others settled in Ireland on the faith of English laws, may urge, on grounds of morality and political justice, to be provided with safeguards for their religion and usages as effectual as those which the Imperial Parliament has provided for the people of Lower Canada. Right or wrong, the French Canadians have gotten their own way; right or wrong, Ulstermen would surely endeavour to get theirs. I believe they would succeed in the long run, but at a cost both to Ireland and to England which it is the duty of the Imperial Parliament not to suffer.

These last considerations may be thought to point

[1] Lower Canada is not a rich country, but French Canadians have the art of thriving on little. As to the numbers, Ulster has in round numbers 1,743,000, out of 5,174,000. If there are non-Unionists in Ulster, there are Unionists elsewhere in Ireland. The Province of Quebec has 1,460,000, out of a total of about 5,000,000, of which 1,925,000 belong to the Province of Ontario, formerly Upper Canada. The addition of the other English provinces to the Dominion seems not to have weakened the position of the French Canadians.

to the endowment of Ireland with some sort of a federal constitution analogous to that of the Dominion of Canada, by which the rights and usages of Ulster might be secured through provincial autonomy, somewhat like those of the Province of Quebec. And I am indeed apt to think that in such an arrangement might be found the least bad form of Home Rule. But we are now considering what is practicable, not what is imaginable: and we are met with the fact that no party in Ireland has expressed a desire for anything of the kind, or even a relative willingness to acquiesce in it. This makes it needless to show at length that such a plan would need far more delicate adjustment than anything yet proposed, or to dwell on the doubt, which seems grave, whether a majority not strongly attached to the English connection would evince the same patience and loyalty as the English population of Canada with regard to the guaranteed rights of the minority.

V

Thus are we confronted in every direction with difficulties fully as great as those of maintaining the Union. Home Rule might put off for a season the day of grappling with those difficulties. Like a spendthrift's note of hand, it might purchase a little present ease and accommodation upon usurious terms. On the other hand, it is more than possible that it would not procure us even that. Whatever scheme were adopted, there would be a new constitution for

Ireland, creating a new set of relations between Ireland and the Imperial Parliament. If Ireland, having an autonomous legislature at Dublin, continued to be represented at Westminster, these new relations would be quite unlike those now existing between Parliament and any British colony or possession. In any case there would be need of interpretation and development. We are expected to assume that this process would be quietly carried on in a civil and judicial manner, through the means appointed for that purpose by the new constitution, and that the subject would be excluded by common consent from English parliamentary debate and political controversy. We should have lightly cast off our imperial duties, and Ireland and Irish questions, in the cynical phrase of certain Home Rule advocates, would be out of the way. Having regard to the course of affairs in the past, from which alone we can reasonably foretell the future, I see no reason whatever why the expectation should be fulfilled. I have already indicated to some extent the reasons for which I think it would not. Instead of troublesome questions of executive government and special legislation in Ireland, we should have questions of constitutional competence and imperial discretion which might or might not be debated with greater decency, but which would hardly require less time and attention. Parliament could not refuse to entertain them, and politicians would certainly not abstain from making use of them.

There is one way, and it would seem only one, by which a fair chance of growing and taking firm root

could be secured for any plan of Home Rule. This would be to make the new Anglo-Irish constitution as difficult to alter as the federal constitution of the United States or of Switzerland. But to do this would be to introduce a wholly new element in our institutions. We know nothing of statutes which the Queen and the estates of the realm cannot repeal or amend in the ordinary form of an Act of Parliament. The succession to the Crown, the government of our Indian Empire, the constitutions of our self-governing colonies, all depend on Acts of Parliament indistinguishable in manner and form from the Margarine Act, or the last Act which may have been passed to remove doubts as to the validity of three or four marriages celebrated in some remote British consulate. To make a formal distinction between organic or constitutional and ordinary legislation is to destroy the supremacy of the Imperial Parliament, as it at present exists and is understood.[1] And therefore (which is more) it is to make a new constitution not only for Ireland and Great Britain in their mutual relations, but for the British Empire. Canada, Victoria, New Zealand, would not submit, and could not be expected to submit, to the supremacy of a Parliament that had made itself incompetent to legislate for Ireland. Some kind of new Imperial

[1] It is possible that the framers of one or both of the Acts of Union with Scotland and Ireland supposed themselves to be framing unchangeable organic laws. Whether they supposed this or not, no competent constitutional lawyer would now maintain that such was the legal effect in either case.

Parliament or Council would have to be formed for dealing with affairs of common concern. The Parliament at Westminster would become a local legislature for Great Britain, or perhaps for England alone. England herself would cease to be an imperial state, and would be one among many federated states —the first among equals, but nothing more.

It is not necessary to assume, nor do I assume, that this is in itself an impossible or absurd result. We cannot tell what the state of the British Empire may be a century hence, and the possibility of some kind of federal constitution being found practicable by our children is fair matter of speculation. It may be pointed out, for instance, that sooner or later the present constant apprehensions of European war must come to an end, either by a settlement following on a warlike trial of strength, or by some peaceable means as yet uncertain. Whenever this happens, one grave objection to a federal system for the British Empire—the executive weakness of such a system in foreign policy—will become of much less importance. But though it be rash to predict absolutely what a later generation may or may not find expedient, there is no rashness in holding that, if the British Empire does ever become a federal union, this will be a transformation greater and more arduous than has yet been accomplished in the history of political societies. An achievement of such scope must be the product of ripe occasion and experience. No good can come of attempting to force it on before its time. And it is certain that the problem of imperial federa-

tion, whenever it is taken up seriously, will for more than one or two years leave us but scant leisure for domestic reform. There are a few thinking persons, I believe, who accept Home Rule for Ireland because they find in it a stepping-stone to imperial federation. It seems to me that, on their own principles, they are beginning at the wrong end. They would embark on a vast enterprise under conditions not only unfavourable but perverse. The British Empire does not exist for the sake of Ireland, still less for the sake of one party in Ireland. Home Rule must be Irish and Nationalist, or it is nothing; federation must be imperial and impartial, or it is nothing. Given a federal system, it might be possible to admit Ireland as a constituent without danger; but to work out a federal system by starting with the single and exceptional case of Ireland is a notion exceedingly remote, for both external and internal causes, from any reasonable expectation of success.

It all comes round to the same issue. By whatever ideas known to politicians or lawyers we test the shadowy presentment of Home Rule which seems to beckon us to a land of peace and concord, we find nothing but a fool's paradise, with an infinite wilderness beyond it. The Parliament of the United Kingdom is called on to abdicate the sovereign power and responsibility in these realms, not in any clear and settled view of good to come, but in sheer weariness and despair. The British Empire was not so made, and it cannot be so maintained. If we do not know how to govern Ireland, we must learn. It is a

duty we cannot shuffle off. Remissness in this duty gives the demand for Home Rule its only real strength. The cry is, "You cannot, or you will not, perform the office of rulers in Ireland; you have only perplexed matters with legislation, and instead of being firm and gentle in administration, you are violent and feeble by turns. Let an Irish Parliament make what it can of the task you have failed in. If it does no better, it can do no worse." A just and high-minded nation, a nation that has achieved what England has achieved in the most various undertakings of government, will not be so abject as to give way to such a cry. We cannot in honour abandon our office if we would. Our worst faults, in their effects, have been those of indifference and ignorance. There has been indifference—perhaps culpable indifference—in the public, and ignorance—perhaps culpable ignorance—where knowledge was to be looked for. But these faults are not invincible. Englishmen have overcome them before, and can do so again; the first of them is overcome already. Our people have a mind to be just; and the will to be informed, that they may do judgment with knowledge, is not lacking. To delegate the whole burden would be a strange and, methinks, no worthy way of repairing what is amiss. I have tried to show that such a course would fail even of its own half-hearted purpose. The way of strenuous and patient justice, turned aside neither by evil nor by good report, will seem the more arduous, as it is the worthier. But the truth of things will not be escaped, and the nobler way is the only safe one at the last.

IX

EXAMINATIONS AND EDUCATION [1]

Before criticising a system which in its youth was hailed as a great reform, and to the development and perfection of which there has been devoted as much and as excellent ability as to any modern English institution whatever, it seems no more than fitting to show what opportunities one has had of forming a considered opinion of its merits and its dangers. I must therefore speak of myself so far as is needful for that purpose. For about ten years, namely, from my election as a King's Scholar at Eton to my election, now more than twenty years ago, as a Fellow of Trinity College, Cambridge, I was in the state of being habitually examined. I went through the Mathematical and the Classical Tripos, and competed with more or less success for such university and college prizes as then were and still are usually competed for by men who throw the main weight of their university reading on the Greek and Latin classics. For another ten years I had no direct concern with examining except on one or two occasions not worth special mention, though I took a good deal of interest in the reform of the Triposes at Cambridge. Having

[1] Reprinted by permission from the *Nineteenth Century*, Feb. 1889.

been called to the Bar before the establishment of the present compulsory examination of Inns of Court students, I have not been examined—save now and again in dreams—since I became a Fellow of Trinity. During the last ten years and more, again, I have been an examiner in the law schools of Cambridge, Oxford, and the Victoria University, and I do not think one of those years has passed without my being thus engaged in one or more of those schools, or in other occasional employment of the same kind. Thus I may claim a fair working experience of the university examination system in its methods and results, both as candidate and as examiner. It is true that as an examiner I can bear witness, of my own knowledge, only to its application in that branch of learning with which my own profession is concerned. Perhaps I may add without presumption that an interval of ten years spent in professional work and study apart from scholastic affairs is not likely, at any rate, to have spoilt my chances of forming a rational judgment.

Competitive examination, in the literal meaning of the words, would include any trial of strength or skill between several persons or associated bodies of persons of whom some or one are to be in some way preferred to the others in accordance with the result of the trial; and this whether the preference carry with it some kind of substantial gain or reward, or a purely honorific title or distinction; and again, whether the distinction in question be conferred by any formal act, or marked by any visible token, or consist only in the reputation of the published and verified result itself.

The Isthmian Games, the shooting for the Queen's Prize, the solution of chess problems propounded in a newspaper, come equally within this conception. But in common usage we limit the term to examinations conducted as a test of proficiency in some branch or branches of knowledge, and wholly or mainly by means of identical questions, problems, or exercises proposed to all the candidates in the same subject, to be dealt with in writing within the same limited time, and either without using books or other aids to memory, or with liberty to use only specified aids. Examination of this kind may be directed to "subjects" or to "books," or to both. One may be examined in Greek and Latin scholarship without any particular Greek and Latin authors being prescribed, as in the Cambridge Classical Tripos; or one may be required to show knowledge of a particular book chosen for its authority or importance in its subject, as the *Elements* of Euclid or the *Ethics* of Aristotle. Such particular requirements may be and often are combined with the requirement of general knowledge of the subject and of its literature. This is one of the distinctive traditions of the University of Oxford. Cambridge, in its higher examinations, has avoided prescribing fixed books. At both Universities, however, there has of late years grown up a system of officially recommending books as useful in the study of such special subjects as history, law, theology, but without requiring a specific knowledge of the contents of those books.

It is needful to bear in mind the limits to which

the method of examination is subject by its very nature; these being quite different from the dangers and abuses which may attend it when unskilfully or inopportunely employed. All that examiners can directly learn from the papers sent up to them is how much information and intelligence, and of what quality, the candidates have then and there given proof of in handling their allotted task. Whatever goes beyond this can at most be probable conjecture. It is a very probable inference that a Senior Wrangler is a man either of generally robust constitution or of exceptional nervous energy. Before drawing any further inferences, as, for example, whether he is likely to be a good man of business, or to succeed in any profession he takes up (even in a special application of mathematical knowledge, say practical astronomy or electrical engineering), one must know which of these types prevails in his person, and other things besides. I do not say that the style of his examination work would not, in many cases, give indications to a careful examiner. In practice, when people want to find out these things, they use more obvious and direct means. Now to denounce the Mathematical Tripos because it does not tell us that this one of the Wranglers will make discoveries in geometry, another will be a mechanical engineer, and a third will be a Queen's Counsel with a large practice, is like denouncing the barometer because it does not always enable us to predict the weather. The work of a barometer is to tell us the condition of atmospheric pressure, and if it tells that truly there is no

other virtue to be expected of it. We must not blame the barometer if we catch a wetting by trusting its rise unconditionally when the wind is in the north-east.

Again, the knowledge and intelligence displayed in an examination are necessarily relative to the prescribed scope of the test, not only in general but in details. And when the terms of competition are once fixed, examiners can and may concern themselves but little, if at all—candidates must and do concern themselves not at all—with any ulterior purpose. While the winner in an Isthmian pancratium went off to bespeak an ode from Pindar, the loser might have argued with the judges that the best man in that form of contest was not necessarily or probably the best man to make a forced march all night and fight the Persians in the morning; but the judges would clearly have been bound not to listen to him. Nowadays the volunteers who compete for the Queen's Prize regulate their practice according to the conditions laid down by the National Rifle Association. In their quality of competitors they are not free to consider whether those conditions do or do not give adequate weight, or the most that is practicable, to the powers which a marksman would most need in actual warfare, and by which his fire would be most effective. But it is certain that the Queen's Prize is won by the best marksman in the only applicable sense—that is to say, the shooter who makes the highest score by firing the appointed number of shots at the proper ranges, in his appointed turn, and with an arm of the

regulation pattern. In short, competitive examination, like any other instrument, has its inherent limits of operation. Within those limits it can be set to do whatever we think fit. If we set it to do something which does not answer our further purposes when it is done, that is not the fault of the instrument. We examine John Stiles in political economy, and find that he is competently acquainted with the theory of rent, and more competently so than Thomas Nokes. If on the strength of this we conclude that John Stiles is fitter than Thomas Nokes to keep the peace between Hindu and Mahometan fanatics in an Indian village, we may be right or not; but what we set the examiner to ascertain and report was not whether Nokes or Stiles could govern Asiatics better, but which of them knew the more political economy. For the present we leave aside the further reflections which arise; for it seems to be our first business to have an opinion how far our instrument, within the limits of its own nature, is to be trusted.

On this point I have no hesitation in saying that, if any one objects to examinations as being capricious or unfair in their immediate results, I must differ with him. Without entering on detailed reasons which would be uninteresting to most readers (and which moreover have been set forth once for all in Mr. Latham's book),[1] it may be said that the art of conducting examinations has been carried to great perfection by the experience of our universities, and

[1] *The Action of Examinations considered as a means of Selection.* By Henry Latham, M.A. Cambridge, 1877.

of other bodies which have adopted their methods, during the present century, and the element of mere accident is, in the ordinary university subjects, probably reduced to a quantity less than any assignable value. No doubt personal accidents may affect the candidates. A man may be below his proper condition or "form" in the Senate House as well as on the river or in the cricket field. But then it is his business to be in proper condition at the appointed time; and the power of being fit to do one's best at times not of one's own choosing is perhaps at least as much worth cultivating and encouraging as many kinds of specific knowledge and information. In fact, if candidates for a Tripos or a Fellowship do not train like the crew of a college eight, they know at all events that they also have, at their peril, to be capable of their best performance; and the cases in which they fail to do themselves justice are, to the best of my belief, by no means common. As for the "personal equation" of examiners, it counts, in my experience, for singularly little, certainly for less than is commonly supposed, or than I should myself, without actual experience, have guessed. The general coincidence and mutual confirmation of results independently obtained by a set of examiners testing the work of the same candidates in different portions of the same subject are far more striking than the occasional inequalities of performance and differences of impression.

Somehow the law of averages (I am not sure that the expression is here strictly correct, but it will be understood) neutralises many sources of error which

beforehand seem grave. I almost doubt whether it would be possible to devise a scheme of examination bad enough to prevent the best candidates from coming out at the head; and only those who have repeatedly examined can know how hopelessly below the most merciful standard of competence the worst class of candidates, even in honour examinations, are. The man who loses his class, or who is plucked, upon one unlucky paper is but a figment of the disappointed ones, or of their sisters and their cousins and their aunts; at times also, it is said, of their private tutors. What I am now saying, however, must be understood with a necessary caution. I am speaking of examinations competently conducted by examiners who really work together, who exercise real authority and discretion, and among whom an experienced majority is secured by introducing new members of the board in some form of rotation. Such is the settled usage of our ancient universities. Some of the examinations established by other bodies[1] in later times proceed on a different footing; the examiners are not the final judges, but report their separate results (arrived at, I believe, without opportunity of conference and comparison, or even with precautions against it) to an extraneous body. This appears to me a thoroughly perverse and mischievous plan. Maybe the law of averages is too much for it even so; but it shall

[1] I regret that when this essay first appeared in the *Nineteenth Century*, I erroneously included the University of London in this category, whereas, as I have since been authentically informed, its rules insist on the co-operation and collective responsibility of examiners.

have from me no word of defence or excuse. It is machinery-worship run mad; useful after a sort, nevertheless, as a patent *reductio ad absurdum* of the wrong side of examinations.

For this is the main body of the grievance against the examination system, that a useful servant has been set up as a master, and makes (as was likely) a very bad master. In our eagerness to develop the resources of the instrument we have forgotten that it is only an instrument. This is a besetting fault of our national character as constructors and reformers, and has displayed itself in wider fields than those of the universities and the Civil Service. British public opinion is a weighty mass, and takes much pushing to get started in a given direction; but when it is once fairly going, the same inertia that was on the side of rest will be on the side of motion, and no less effort will be required to arrest the motion than was used to impart it. Thus in 1832 the first reform of the Parliamentary franchise was carried with a great struggle. Since that time our one method of constitutional reform has been more and more extension of the franchise, and proposals for improving the representation of the people by any further or other method than the mechanical lowering of the voter's qualification and equalising of constituencies, whether proceeding from political leaders, from disinterested students of politics, or from practical men of the world who were also politicians, have been received at best with respectful indifference. I say nothing of their intrinsic merits, but I say that the fixed idea of

extension of the franchise as a sole and sufficient method of reform has prevented them from ever being adequately considered. We are more superstitious than the men of Athens; we have no room for altars of unknown gods. After we have found an idol and worshipped it for one or two generations, it already seems "un-English" to dispute the complete efficacy of the ritual. In the case of examinations we have found a useful test of abilities of a certain kind, and a useful guide to selection of persons with regard to such abilities. But we have come to believe, or act as if we had come to believe, that this particular test is necessarily adequate for every and any kind of knowledge and ability, and that the systematic and impartial use of it enables us to dispense with all other methods of encouraging sound learning or discovering exceptional merit. We trust our machine as if it were little less than automatic, and nothing less than infallible. Things have gone so far that whenever it is proposed to recognise a fresh department of human knowledge at either university, the promoters have always to expect the objection that it is not a convenient subject for examination. A mediæval scholar not having the benefit of our modern lights would have supposed that the first question was whether, in the general interest of education and sound learning, young men ought to be encouraged to pursue such and such a branch of scholarship or science; that it was a secondary, though important question, by what means that study could, if judged deserving, be best

encouraged; and that, if the means already in common use were not sufficient or applicable in any particular case, it was the duty of those in authority to devise others. Again, examination is a test of producible knowledge, and to that extent it is also a measure, as between candidates on the same level of personal capacity and industry, of the instruction which the candidates have received. More than this, there are ways in which examinations may be and are of real service in setting and keeping up a standard of efficient instruction. But we find it supposed, on the strength of this, that the examiner's function is in some way a higher and more important one than the teacher's, which is a mischievous and dangerous delusion. It is like believing that literature exists for the sake of grammar; but perhaps there are some who do believe this also. Not that a teacher may not profit by his experience as an examiner; but it is far more important that examination should not be in the hands of persons ignorant of teaching.

The sufficiency of examination as the controlling method in education is maintained in some quarters on a sort of mechanical hypothesis. Create, by means of prizes and examinations, a demand for a certain kind of information; the information, and whatever teaching is needed to produce it, will come of themselves; and you will have an educated nation. The "useful knowledge" movement of fifty years ago, with which the spread of examinations has been closely connected, was largely based on assumptions of this kind. It is needless to refute them at large.

Education cannot be dealt with like an ordinary commodity purchasable on demand, as J. S. Mill, a witness against the school in which he was trained, showed many years ago; and moreover the demand created is not for knowledge as such, but for whatever plausible evidence of knowledge will satisfy examiners, or, more accurately, can get the reputation of being likely to satisfy them. The result is that much work is expended, and many respectable incomes are earned, in supplying this demand; I do not doubt that it is very well and faithfully supplied; but the process, whatever else it may be, is not a liberal education. An incidental result is that a considerable number of active-minded and vigorous persons have a strong interest in the maintenance of the system which furnishes them with pupils, and in the excellence of which they naturally believe. If any further results in the shape of work of permanent value can be shown as the direct product of the system, or connected with it by any reasonably probable consequence, I have not heard of them. For several years the Inns of Court have spent money with a free hand in awarding studentships and prizes upon examinations in Roman law. Two books on that subject have been produced in these kingdoms within the last six or seven years which may fairly take rank with the best German manuals. One of these came from Oxford, and the other from Edinburgh.

Having made competitive examinations a kind of end in themselves as being the sole recognised means of obtaining the reputation of competence at an early

age, we have indirectly, but most effectually, discouraged at our seats of learning every kind of intellectual activity which has not an obvious bearing on them. "Will this pay in the schools?" is the inevitable check on both learners and teachers. Freedom of learning and research can be secured, under such conditions, only by a constant struggle, and hardly so save by those who are in some specially favoured position. Worst of all is the general lowering of tone in matters of intellect, the enthronement of Banausia in the seat of Philosophy herself. At Oxford, even in the last retreat of the Humanities, in the school where the tradition of learning for its own sake ought to be strongest, it is matter of common fame that tutors adjust their lectures on philosophy to the philosophical predilections, real or imagined, of individual examiners. The fact of such reports being current is almost equally significant whether they are or are not exaggerated. And Oxford, for technical reasons too long to explain here, should offer, in the whole of this matter, by no means an extreme type of the mischief complained of. Even in so practical a study as that of the law we find men bent rather on "getting up" what will serve the immediate purpose of their impending examination than on acquiring knowledge which will be of abiding use to them in their profession. It is generally useless to tell them that real knowledge is the surest way to success even in examinations. They will not believe it — and the whole tribe of purveyors of second or third-hand substitutes for

knowledge, who by this time are many, are interested in their not believing it. I shall not attempt to consider the evils produced among younger learners, from the promising scholars of Eton or Rugby or the Charterhouse down to Board School children, by setting up an ideal of examination results instead of the ideal of knowledge. These are, I conceive, somewhat different in kind from what we see at the universities, and not less grave in degree. But I prefer to leave them to those who can bear witness of their own observation. I will only say that the routine of examination and competitions, assuming it to be, sooner or later, a necessity for the English public school boy, begins much too soon. Madvig, who knew Latin and had some experience of teaching, has recorded his opinion that boys would learn Latin all the better if it were put off to the age of twelve.

There is another aspect of the examination system which can hardly be realised unless by actual contact with university work, but which ought to be mentioned. I mean the frittering away of valuable time and energy on the mere machinery of examinations. This has been going on for twenty years or more, and recent reforms have only aggravated it. By means of examinations we have imposed a monotonous routine on university studies; and the only approach to a remedy, so far, has been to offer our students the choice of a bewildering number and variety of examinations. There is always a plan afoot for inventing some new examination or tinkering some old one. I do not deny that there

have been real improvements in principle, improvements which, so far as they go, are valuable checks and safeguards. But we are oppressed throughout by the burden of overmuch belief in machinery which the last generation of reformers has laid upon us, and I am disposed to think that ingenuity has often been wasted on making the machine too fine for the work it has to do.[1] Between those who are about to be examined, those who are being examined, those who are examining, and those who are reforming the examinations, a poor scholar of Cambridge or Oxford who has a mind to be a *vir doctus* just for learning's sake, and to leave his own chosen Faculty, according to his power, in some way richer than he found it, is like to have but scant opportunities as things now go.

The selection of public servants has to be considered on its own ground. It may be urged that the State is not bound to regard, in the first instance at any rate, the effect of its process of selection on the general standard of education; and yet, as Mr. Latham has well said, "unless it can be so carried out as to do more good than harm to education, we only get one kind of mischief instead of another." Probably the State is better served on the whole than it was in the old days of patronage. I leave it to those who know more of this matter than I do to judge whether the State might not be served better still, and whether the securing of a certain level of

[1] See on one aspect of this point Mr. F. Y. Edgeworth's remarks in the *Journal of Education* for October 1888.

ordinary competence could not be combined with a larger discretion in the discovery and encouragement of specially serviceable excellence. It is surely a significant fact that the Education Department itself is recruited, in its higher branches, not by examination, not even by any limited or modified form of it, but by unfettered personal selection. It is easy to see what kind of men are selected, and I have never heard of any complaint that the selection works ill. They are certainly, most or all of them, men of distinguished university standing, and thus in a manner may be said to owe their posts in the public service to success in the university examinations. But here the fellowship or the place in the first class is used as an indication, not as a compulsory direction. In other words, the Department profits by the selecting process of the universities and colleges, and profits by it with discretion, instead of repeating the process not so well and being tied beforehand to a mechanical following of the result. This is a peculiar example, and perhaps could not be largely followed; but it is a good one. To go back to an analogy I have already made use of, the Education Department reads its barometer like a meteorologist; other departments are too much in the case of the householder who knows nothing of the nature of the instrument, and reads only the conventional marks of "Set Fair" or "Change."

It will hardly be practicable in our time to abolish competitive examination, either as a scholastic or as an official instrument of selection. I do not know that

it would be desirable. Education is a difficult art; not the least of the difficulties is to make boys and young men do things which they would not do of themselves, and of which they cannot at the time understand the value. To throw away one of the strongest incentives to human action, an incentive running through the whole life of all living creatures, would be a heroic if not a desperate remedy for its abuses. We do not forbid the use of fire-arms because there are a certain number of gun accidents every year, nor banish powerful drugs from the pharmacopœia because there are a certain number of cases of poisoning by misadventure. This world is a world of competition, and we cannot make it otherwise. But powerful motives are to be used by legislators and governors with no less care and caution than powerful drugs or explosives are to be handled by the chemist.

This is not, in my opinion, the time or place for any detailed proposals; but some general principles of caution in the use of examinations may be shortly stated. In some cases the application of them would involve extensive change in existing arrangements, but I think the necessary change ought to be made.

In all organisation of studies, whether in the way of introducing new subjects or grouping those already recognised, examinations should not be multiplied without necessity.

More generally, examination by written papers should not be assumed to be the normal method of selection, but it should in every case be considered

whether some more appropriate and effectual method may not be found.

In the case of offices of trust, a qualifying examination admitting to service on probation, subject to discretionary powers of confirmation and promotion, should be preferred to a merely competitive scheme.

Examination ought to be a judicial and not a mechanical process, and any system of marking is only a guide for the judgment of the examiners: the number of marks obtained by candidates should therefore in no case be published. Examiners capable of acting unfairly without the supposed check of publishing the marks would be no less capable of falsifying the marks themselves. For like reasons a fixed numerical standard of marks is objectionable; an approximate standard based on continuous experience, and capable of adjustment to exigencies, is far better.

Classification in categories should be preferred, wherever possible, to a numerical order of merit.

Viva voce questioning and discussion, practical work and manipulation, and whatever may bring the order of examination into contact with real life, and make it less of a routine apart, should, so far as possible, be introduced and encouraged.

I make no claim to novelty for any of these suggestions, and nothing would please me better than that they should be regarded as commonplace.

X

THE USES AND ORDERING OF LAW LIBRARIES[1]

THE following notes are those not of a librarian but an outsider. Having found my way into this good company under colour of being the librarian of the Alpine Club, I am permitted to remember (what perhaps in strict regularity I should have forgotten at the door) that in another capacity I am a member of that class of readers who make use of Law Libraries, and that in fact I have constantly done so for a good many years. The place and circumstances of this meeting may be deemed to justify me in putting before you some of the reflections and desires begotten of that experience. Even where I use general language, I shall be understood to be speaking of the constitution and working of an English or Anglo-American law library; and, so far as these notes have any practical object, to be thinking especially of the libraries of the Inns of Court. One of those libraries (Lincoln's Inn) I know, as a reader, pretty well; of

[1] Read at the Annual Meeting of the Library Assocation in London, 1886. So far as I know, the Inns of Court libraries are now (1890) exactly where they were then.

the Inner Temple I know something; I have merely visited the libraries of the Middle Temple and Gray's Inn.

By a law library I do not mean merely a collection of law books, but a collection of books ordered and maintained for the special purpose of being useful to workers in the profession and science of the law. Such workers are either—

1. Novices in the law, "students" in the particular technical sense of the Inns of Court.
2. Practising lawyers in search of information and authorities, to be used for the purposes of their professional business.
3. Writers and teachers collecting materials for critical, dogmatic, or historical exposition.

To a considerable extent, but not altogether, the needs of these classes coincide. The requirements of the commencing student are limited within an easily defined range; those of the practitioner are wider, but in the general run of work they too are within ascertained limits; but the practitioner in extraordinary cases, and the critical inquirer in almost every branch of his undertaking, should have at command many and various kinds of information, often such kinds as at first sight would not be suspected of having anything to do with law. Thus a collection of all the law books ever published would not be an efficient law library. To make a good law library we must have a good collection of law books,

and a good selection of other books with a view to the special purposes in hand.

Again, the task is not like that of forming a library in the interest of any other special science. Chemistry, physics, and astronomy, for instance, are treated of in all the languages of the civilised world, with certain differences of terms and other diversities in detail; but the things signified and the fundamental ideas are the same throughout. The results obtained by a French geometer or a German chemist are equally valid for the whole world. The tongues and even the methods may be diverse (thus we stand alone in still resting geometrical instruction on the text of Euclid), but the science is one. In law we have another and less facile state of things: there is not one system but several systems, like one another in some respects and unlike in others, producing more or less analogous results, which may or may not have any definite connection with one another. There is not a French chemistry which an English chemist has to learn. Dr. Williamson needs no interpreter beyond knowledge of the French language to exchange ideas with M. Berthelot. But an English lawyer who has to consider a question of French law finds himself in the presence not only of new terms but of new ideas. He is on the whole less likely to misunderstand them than an Englishman who is not a lawyer, but that is all. Only under specially favourable conditions can a lawyer hope really to know any system besides his own. In a perfectly ordered law library there would be an adequate representation of all existing legal

systems, having due regard to their respective practical importance and to the general scale of the establishment. But it is evidently very difficult to bring together the special technical and literary knowledge needful to ensure that this should be first performed and afterwards maintained.

We have to add that the books of ordinary use must be freely accessible to readers (as is the case in the Inns of Court), or else there must be an abundant and well trained staff. No lawyer can tell, when he goes into a library, how many books he may want to refer to before he comes out. One reference leads to others, and a new line of search may be disclosed at any moment. Moreover, the number of volumes necessarily consulted, in proportion to the use made of each volume, is probably greater in an English lawyer's work than in any other kind of literary work whatever.

Thus law libraries have to provide a highly special kind of service; they have also to provide for somewhat exacting readers. Practising lawyers are apt to be in haste, and expect to be able to lay hands on what they want in the shortest possible time. They do not indeed care, as a rule, for the minuter matters of scholarship and bibliography; but the critical students of legal literature, though a minority, can give quite enough trouble in that kind to make up for the omissions of their brethren.

So much being premised, let us see what are the necessary departments of an English law library. They may be described roughly thus:

(*a*) Works of general reference.
(*b*) Cosmopolitan literature under such heads as—
  i. Roman law (with its offshoots in modern civil and canon law).
  ii. Philosophy of law.
  iii. Historical and comparative jurisprudence.
  iv. International law.
(*c*) English law literature, under such heads as—
  i. Text-books.
  ii. Reports and statutes.
  iii. Historical documents.
(*d*) American law literature.
(*e*) Foreign law literature.
(*f*) Legal bibliography.
(*g*) Catalogue.

To take the last point first, I hold a good classified catalogue or subject-index to be almost indispensable; and it should be revised if not made by a lawyer, so as not to omit the catchwords that a lawyer naturally looks for, nor insert headings unknown to the language of the law. Among the best examples in this kind is the catalogue of the library of the German Reichstag at Berlin (1882). I may also mention the subject-index of the Law Library of the State of New York (Albany, N.Y., 1883), which includes references to articles in periodicals. For Anglo-American purposes, however, I think it is better to have an alphabetical catalogue with a separate subject-index than to put one's trust in a class catalogue. One advantage of a pretty full

subject-index is that it removes all excuse for making the alphabetical catalogue depart, for any supposed reason of practical convenience, from generally accepted rules. Such variations are sure to cause more trouble to scholars than they save to the general reader or practitioner. Let us by all means be generous, nay lavish, in cross-references and other aids, but let there always be one certain place where the scholar accustomed to use catalogues will know where to find the thing he wants.

As to books of general reference, the scale on which they are provided must depend on the resources of the establishment. We only have to note that their rank among themselves in order of necessity and usefulness is by no means the same as in a general library. History and politics are of more importance than literature, mediæval than classical antiquity, Latin than Greek. Milton's *Areopagitica* may be desirable as a monument of English prose; it is necessary as a document in the history of copyright. We may dispense at need with the latest edition of Liddell and Scott, but we cannot do without Ducange. If, indeed, there is a point on which especial weight should be thrown, I should say it is that of mediæval philology, palæography, and whatever else is helpful to the study of mediæval authorities; a field in which the scholar who comes to legal studies with an ordinary classical education is apt to find some trouble in getting his bearings. *Et sic de similibus.*

As to the literature which I call cosmopolitan, the proper maintenance of that department requires a kind

of special knowledge for which the vast majority of English lawyers have no time. The average Inns of Court man, when his work happens to lead him in this direction, hardly knows where or how to start. For that very reason a sedulously competent provision ought to be made, and the advice of experts freely sought if necessary. Books in our own language in this kind are still meagre in quantity and uncertain in quality, though great advances have been made of late years. Continental literature is voluminous enough, but of all degrees of merit, and it can be made useful to most English workers only by careful selection. I need hardly say that the authentic texts of the Roman law should be accessible in the latest and best editions, both English and Continental, and in more than one copy if wanted.

English law-books ought to give little trouble. There is not much more choice than on the question whether a club shall take in the *Times*. A library professing to be complete must have a full set of reports and statutes at any cost, all text-books of established reputation in the current editions, and all new books of apparent merit or utility. The collection is bulky and expensive; it includes much that becomes obsolete; old editions, commentaries on short-lived statutes, and other superseded books accumulate at a monstrous rate. But it cannot be helped. Lawyers must have the tools of their trade ready for the day's use. Indeed, the books of less general and permanent value are those which the library is most bound to have, just because they are those which individual

workers are least likely to buy. Doubtless a full array of text-books and monographs may be distracting and oppressive to beginners, but for that evil I shall presently suggest a remedy. Practice is not quite uniform as to the arrangement of English law books on the shelves. Text-books, reports, and statutes, of course, have each their own place, and statutes go naturally in order of time. For text-books and reports (antecedent to the Law Reports), I strongly prefer a purely alphabetical arrangement, following the usual manner of citation.[1] There is no other way known to me of ensuring certainty in finding a book on the shelf from the reference in another book. A private owner may arrange his reports distributively under the several courts, and in order of time under each court. Such refinements are not, in my opinion as a reader, fit for public use. One word may be said about old editions. The "dumb dread people that sit" in the limbo of remote upper shelves are not all lumber. From time to time there must be a clearance; but I would carefully preserve, first, a copy of every book which has been of serious value in its day; next, the first edition of every book still current; and further, in the case of books many times re-edited, every edition which has involved so much revision as

[1] There are one or two minute exceptions which I should like to see abolished. We look for the "Queen's Bench" Reports on the shelf under Q, not under A, though they are also "Adolphus and Ellis, New Series." Why should we have to remember that "T. R." (Term Reports) in a foot-note means "Durnford and East" on the shelves? But this particular anomaly is perhaps too inveterate to be cured.

to give a new character to the work.[1] Law books, and the current opinions and habits of mind of lawyers from generation to generation, have a history of their own, and the evidences of that history should not be thrown away. Concerning the rarities and *incunabula* of our legal literature, the possession of them is a matter of good fortune, and their use (when cheaper modern editions are available for ordinary work) a matter of discretion. I do confess to a certain delight in handling the original folios of Blackstone and the other eighteenth-century reporters in the library of All Souls at Oxford, which, by the way, I take leave to commend as an almost perfect example of a compact and well-ordered law library for the work of both teachers and learners. In some ways (for one must not altogether shrink from specific plain speaking) it is not only relatively but absolutely better equipped than the much larger establishments of Lincoln's Inn and the Temple.

American law books belong to the same system as our own, with slight exceptions, and American authorities are (as Vice-Chancellor Bacon once said), a kind of Apocrypha for the English lawyer; not canonical, but good for example and illustration. An English lawyer has no difficulty in following them. To what extent they should be found in an English library is an affair of space, means, and intelligent selection. Some American reports and text-books

[1] In Woodfall's *Landlord and Tenant*, *e.g.*, there can now hardly be a plank of the old ship left; but publishers are loath to lose the good-will of the old name. It is as if Liddell and Scott still professed to be merely editors of Passow.

clearly ought to be there; some are to be expected only where the library is on a great scale; some are so unlikely to be useful that it may be enough if the student can be informed where to find them in England. Whatever there is, be it more or less, ought to be adapted to the accustomed form of citation in American books; that is, the reports of each State should be kept together, and those which are usually cited, not by the reporter's name but by consecutive numbers, should be arranged and lettered accordingly. To American lawyers this appears too obvious a rule to be worth mention; but I can bear witness to the inconvenience given to workers by disregard of it in England. It is pure waste of energy to seek for the continuous series of Supreme Court Reports (invariably now cited in America by the simple abbreviation U.S. with a consecutive number), in scattered patches of Wallace, Otto, and Davis—and this after a process of translating the American reference, unless one happens to remember the period indicated by the consecutive number and the name of the reporter covering that period, in which case one may hit off the right volume on the shelf at the second or third venture.

Foreign law literature properly so called—*i.e.* the literary apparatus of foreign systems of law—comes under much the same conditions as what I have called cosmopolitan. In some ways it is of greater practical importance. It must be remembered that in the regular day's work of our profession the law of foreign countries, especially commercial law, is often of direct and pressing interest; and besides, there is hardly any

historical system of law which is not administered in one or other of the Queen's possessions and presumed to be within the knowledge of the Judicial Committee of the Privy Council. In British India we have bodies of native law and custom which our courts profess not to alter, side by side with a modified and simplified system of English law and procedure. Indian law is already treated as a distinct department in our libraries, and rightly so. In Continental law France gets a conspicuous share, and also rightly; but I doubt whether we have duly kept pace with the rising activity and importance of Germany and Italy. As to our own colonies, I cannot honestly say that I think they are even decently treated. Any odd corner seems to be thought good enough for colonial law books, if they are to be found at all. It may be a question whether they ought to be in a special department all together, or associated with the systems from which they are derived, and in connection with whose authorities they have to be studied; the books of Lower Canada and Mauritius might be placed near the French Codes and commentaries, those of the Cape Colony and Ceylon near the older civilians, and those of the common law colonies, Australia, Upper Canada, etc., as near as possible to the English department. This latter arrangement would have some conveniences, but I do not know that it would ever come natural to the practising lawyer.

Legal bibliography is the department which, next the catalogue and the absolutely indispensable books that are constantly in use, is perhaps most necessary,

but is not always, I fear, most attended to. There may be many things which a library cannot afford, but at all events it can afford to let workers know not only what books it has, but what it has not, and by what libraries that which it lacks can be supplied. When I add that the number of law books in the world is very great, and their titles not always clear even to experts, I think I have said enough. The late Mr. W. H. Spilsbury, Librarian of Lincoln's Inn, aptly cited on this point the language of a Parliamentary Report: "A great library should in fact contain within it a library of catalogues": *Lincoln's Inn*, p. 243, 2d ed. Much more should a great law library contain all published law catalogues of importance.

By this time I may have gone near to convince you that the ideal law library and its ideal librarian cannot exist in this world. Nevertheless I have some suggestions which may or may not be immediately practicable, but which are, I venture to think, practical. There exist in the Inns of Court four distinct libraries of the same kind, doing the same work for sets of readers who are distributed among them, one may say, by mere accident. I am not aware that co-operation or division of special departments has ever been attempted. A good many years ago the Middle Temple committed itself to taking in all the American State reports, on the supposition, as I am informed, that the shelf-room was practically unlimited. In later times the burden became intolerable, and a wiser generation did what ought to have been done at first, took the advice of an

American lawyer (it was the best possible, the late Mr. Benjamin's) as to what was worth keeping. The rest was practically a dead loss to the Society. Now there is much to be said for having somewhere in England one complete set of all the American reports; but the undertaking is more than any one of the existing libraries, under existing conditions, can bear. In this case an endeavour laudable in purpose and capable, if prudently conducted, of leading to much good, ended in mere waste and trouble. The Honourable Society of the Middle Temple still seeks a purchaser, as I have understood, for a good many volumes of decisions of various American State Courts, which, to put it mildly, are not quite so much esteemed as those of New York or Massachusetts. All this would have been saved if the rulers of the Middle Temple in the last generation (they are past human praise or blame, nor do I speak as blaming them) had clearly perceived that, in the management of a technical library, no amount of good intentions will make up for the want of a policy and method. But so things have gone.

If at present the Inns of Court libraries supplement one another, it is by chance; yet they do so to some extent. The advantages of each Inn are open, as of right, only to its own members; one would expect, therefore, to find some understanding of reciprocal comity. But in fact each Inn does what is good in its own eyes. At the Inner Temple it is in practice quite easy for barristers of other Inns to use the library, while at Lincoln's Inn a special introduction is

required. At the Middle Temple I believe it is less easy than at the Inner Temple, but easier than at Lincoln's Inn. As to Gray's Inn I am not a competent witness, for the courtesy of our colleague Mr. Douthwaite has put it wholly beyond my power to report what facilities a simple extraneous member of the Bar would or would not find. Another piece of organisation which has not yet effectively occurred to any one (though I learn that it has occurred to persons of greater standing and experience than my own) is the separation of elementary students from advanced workers, by which I do not mean the bare reserving of certain tables for barristers. It would be much for the benefit of all concerned.

In fine, I should like to see all or some of the following things done, and I cannot see any grave inherent difficulty about any of them.

1. An elementary students' library to be formed, common to the four Inns, provided with a full set of the reports and other books in common use, and duplicates, or even a greater number of copies, of the books most in request. This might be connected with the establishment of a common lecture-room, which I hold to be much wanted. But I must not digress.

2. The library of each Inn to be open to all members of the Bar unconditionally, or on some such simple condition as writing one's name in a book;[1] to its own students, for

[1] Such is already the usage of the Inner Temple.

advanced work only, at the discretion of the librarian or some easily accessible Bencher, or on specified recommendations; and to students of other Inns only on special cause shown. I do not think it desirable to give any increased facilities for taking books out of the libraries, unless it were in the case of duplicates.

3. The authorities of the several Inns to confer and arrive at an understanding whereby the library of each Inn should pay particular attention to one or more special departments; so that each, without renouncing general efficiency, should, in at least one line besides English law, be as complete as reasonable diligence could make it. Thus (by way of mere rough illustration), the Inner Temple might undertake Indian and Colonial law, the Middle Temple American law, Lincoln's Inn modern Roman law and Continental systems, and Gray's Inn historical jurisprudence and antiquities.[1]

4. The working of this quasi-federal scheme would require some kind of joint committee of the

[1] Compare Mr. E. C. Thomas's Paper on English Legal Bibliography in the "London and Cambridge" volume of Proceedings of the Association, at pp. 25, 26. Very much the same proposal is made by a writer in the *Times* of the same day (September 28) on which the present Paper was read. Of course this does not mean that a member of Lincoln's Inn, *e.g.*, should not be able to find in his own library the United States Reports or the classical American text-books: but that he should be able to find in the Middle Temple such State reports and such monographs on specially American topics as an English law library may be without and yet be *generally* efficient.

Inns. Such a committee might be formed on the model of the Council of Legal Education, or perhaps more simply by empowering that body to deal with the matter, and for that special purpose to add to its number.

5. I purposely abstain from considering the administration of the several libraries, the position of the librarians, and the like. I will only venture to observe that technical work of other kinds is not commonly found to be in the long run improved by the constant interference of a fluctuating committee, however learned and eminent the individual members of such a committee may be; and that a librarian who has not some discretion in details and some real voice in general direction is in truth, whatever he may be called, and whatever he might in other conditions be capable of, not a librarian but at best a chief assistant.[1]

When I began to put on paper the remarks I have brought before you, I thought I should only set down a few stray notes. My excuse for troubling you thus far must be that the subject has been on my mind for a long time; and out of the abundance of the heart the mouth speaketh.

[1] It is proper to state that at Gray's Inn things are otherwise and better ordered.

XI

THE LIBRARY OF THE ALPINE CLUB[1]

A NOT uncommon belief about the Alpine Club is that it consists of a number of persons who regard mountains merely as objects of athletic ambition, and for whom the historical, scientific, and artistic interest of the Alps is non-existent or secondary. It is needless to refute this error here. Certainly we are a society primarily of mountaineers, not of antiquaries, or artists, or men of science. But to say that we ignore all interests but the gymnastic one, that in our collective capacity we treat the Alps as "greased poles," is not even a legitimate caricature. Differing in many respects from the most familiar types of literary and social clubs on the one hand, and athletic or sporting clubs on the other, the Alpine Club approaches the literary and social type in that it possesses a certain number of books. It has therefore seemed good to the Club to discover among its members one accustomed to reading and writing, and whose mountaineering youth is past, and to constitute him its harmless necessary bookworm, or in official

[1] Read before the Library Association at Plymouth in 1885, and afterwards before the Alpine Club.

terms its honorary librarian. That bookworm now proposes to render to the Club a short account of his stewardship.

It is unfortunate that no systematic attention was paid to the formation of a library when the Club was first established. So far as can now be guessed, it would have been easy to secure at comparatively little expense the nucleus of a collection of Alpine literature which by this time would be unsurpassed, if not unique. But opportunities of this kind once lost do not return. As things are we can only say that we have a sufficient working library of reference on mountain travelling and allied subjects, fair specimens of the older and more curious works, and a fair number of modern Continental publications (periodicals, pamphlets, and what not), of which not many copies can be accessible in England. There is to my certain knowledge one private collection—probably enough there are several—with which we cannot compete in books out of the common run. For about twenty years, in fact, the Club library existed rather by accident than on purpose. Books were presented by members and by the authors, English and foreign. As Alpine Clubs were formed on the Continent their periodicals were sent in exchange for the *Alpine Journal*. These objects occupied space and had to be put on shelves. This was done, and little or nothing more. Every member had access to the Club rooms and to all that was therein; at certain times the meetings of other social clubs were held there (I need not remind the Club that this

arrangement is no longer in force), and the shelves were equally open in fact, though not of right, to all persons present at those meetings. There was not much to prevent any one from obtaining access at other times who chose to represent himself as a member of the Alpine Club. The rules did not allow books to be taken away, but there was no explicit prohibition. Under such conditions it is more to be wondered at that any of the books were left than that some were missing.

Some half-dozen years ago the Committee resolved to take better order in the matter. My predecessor in office, Mr. C. C. Tucker, performed the first indispensable task of making a catalogue. It is dated 1880. Since that time the number and character of the additions is such that a new issue of the catalogue seems already called for.[1] Adding that, without the aid of Mr. Tucker's work, I could not even have begun mine, I proceed to my own experience.

The most pressing question was the safe keeping of the books. Permanent attendance was out of the question, as the rooms are not laid out for permanent occupation, and a special attendant would have nothing to do for days or weeks together. Attendance at stated days and hours was thought of, and possibly may be thought of again; but for the present a simpler plan has been adopted. The books are in locked cases; the working catalogue lies on the Secretary's table. A member wishing to use the library obtains

[1] A new catalogue was printed in 1888. It is accessible at the British Museum, the Bodleian, and the Cambridge University Library.

the key of the cases from the housekeeper on writing his name in a book kept for that purpose. The Committee can give leave to take out books on good cause shown. Perhaps these precautions do not come up to the mark of what judicial authorities have described as "consummate care," but so far they have been found in the main sufficient. No light has been thrown, however, on the mysterious character of the former losses. One could understand that a costly or rare Alpine book should disappear if there was nothing but the conscience of book-hunters to prevent it. But my chief troubles were not with works of this kind. The missing items were more apt to be little catchpenny books and, what is stranger, odd numbers of foreign journals. Who can the people be that want to convert to their own use a number here and a number there of those vexatious publications, long-winded of name, flapping of texture, and inconvenient of size, which appear in "zwanglos erscheinenden Heften?" I do not know—only they exist, for this kind of thing gave me, for a while, more to do than all the rest of the affairs of the library. [The mystery remains, in 1890, as much a mystery as ever.]

The next business was to provide for the continuance and gradual improvement of our collection. Even in proportion to our modest scale the administrative means were small. I could not devote any certain or considerable amount of time to keeping up the library. Practically, therefore, I had to devise a routine that should be, as near as might be, self-acting. New English books pretty well take care of themselves.

Even if the authors do not present them one is not likely to overlook them. Old books and current Continental books were the things to be looked after. I therefore established relations with a trustworthy and well-informed bookseller in either line, who undertook to report anything of a *prima facie* Alpine character that came in his way. Besides this, of course, I keep my eyes open for Alpine items in booksellers' catalogues generally. Not unfrequently my attention is called to valuable works by one or another of those members of the Club who take an interest in Alpine literature and bibliography. These methods are perhaps of an infantine obviousness and simplicity; but the result is that with a minimum of disposable time and attention, and with a very moderate expenditure, I have been able in five years to make additions to the library to an extent which, guessing roughly from the general appearance of the interleaved working catalogue, I estimate at from 20 to 25 per cent. The dates of the books I have picked up range from the sixteenth to the present century. First among them I reckon the charming account of the ascent of Pilatus, by Gesner of Zürich (1555), who was not only an eminent naturalist and humanist, but a true father of mountaineers. I think he is about the earliest Alpine traveller who takes a real pleasure in the mountains for their own sake. He waxes eloquent in scorn of the effeminate town-bred tourist who thinks the hardships and fatigue (much greater in Gesner's time than now, relatively to the results that could be attained) are not amply repaid. The

seventeenth and early eighteenth centuries are generally barren of Alpine works; but there are a certain number of books of the gazetteer sort, including some rather quaint English ones. In this kind we have acquired the *Mercurius Helveticus* (1701). In the latter part of the eighteenth century there sprang up a considerable literature of detailed description and exploration, the forerunners of our modern books of travel and Alpine journals. The French-speaking region of Switzerland and Savoy produced most of these works, though some are in German. Our library now has a good representative collection for this period, though, I fear, not a complete one. We have lately added two contemporary accounts of the great landslip at Goldau, on the lake of Luzern (1806-7). Then the first generation of the nineteenth century produced a crop of elaborately illustrated Alpine portfolios and albums. Napoleon's passage of the Alps and the engineering of the Simplon road had added a military interest to the picturesque one. We have a *Promenade pittoresque de Genève à Milan* in honour of the Simplon, in the original large form, and also in a smaller edition a few years later. I confess to a certain delight in these pictures; their texture and scheme of colour, which may be called tea-boardiness *in excelsis*, resemble nothing in nature and are almost unique in art. Of much the same spirit are the collections of Swiss costumes, in which the figures are all conventionally smart and picturesque.

Scientific papers and tracts on Alpine subjects

form a distinct category. Much matter of this kind naturally finds its place in the publications of the Alpine Club itself and kindred societies; but some is scattered in the transactions of other learned bodies, and must be picked up piecemeal as occasion serves. A bound volume of papers by Murchison, on various points of mountain physical geography, turned up in a country bookseller's catalogue not long ago. This is the sort of find over which the bookworm of a small collection may be permitted to rejoice in a small way.

There is also a religious or semi-religious literature of the Alps. During the reigns of their late Majesties George IV. and William IV. many worthy English Protestants went about Europe — as often as not taking Switzerland in their tour between France and Italy — and filled their note-books with remarks on the privileges of those who live under a reformed establishment, and the viciousness, dirtiness, and generally wretched condition of Popish countries. The Vaudois Protestants have also their sub-Alpine evangelical biographies and edifying narrations. Works of this kind add absolutely nothing to our knowledge of the Alps, and are contemptible as literature, being written in the mawkish jargon which seems, alike in English and French, to be the fitting expression of morbid Calvinistic excitement kept at simmering point. I have not thought it necessary or desirable to acquire more than a few typical specimens of this class.[1]

[1] It will be understood that this refers only to nineteenth century

What I have said of our additions within the last five years may pass as a sample of the general character of our collection. To define Alpine literature is a task I do not feel capable of undertaking; the more so as no systematic classification of our books has yet been attempted, and no rule has ever been formulated as to the classes of books which come within our scope. The librarian deals with each case on its own footing. In doubtful cases I should myself lean towards inclusion; if the book were an expensive one I might refer to the Committee. Practically we have aimed at completeness in mountaineering proper, at working utility in the way of general information about the Alps and other great mountains, and at a good choice of specimens in the way of curiosities and miscellanea. We possess a few standard works of reference, and a few more or less curious early works, on the political history, institutions, and general topography of Switzerland; but we should not go so far with regard to the Caucasus, the Himalayas, or the Andes. In like manner we deem the controversy on Hannibal's passage of the Alps to concern us, and have the tracts of divers learned persons on that subject. There is a grim pleasure in thinking that my friend Mr. Freshfield has lately gone near to show that the learned persons (partly because they had not visited the ground, and knew nothing about mountain passes)

books. The history of the troubles and final "glorieuse rentrée" of the Vaudois in the seventeenth-eighteenth centuries is quite another matter.

were all wrong.[1] Observations of the physical structure of glaciers and other masses of ice, in whatever part of the world, are fairly within our range: Arctic travel, as travel, I think is not, though our borders have been enlarged in this and other directions by presentation copies. I may mention that a good general account of early Alpine literature is to be found in a lately published book, Peyer's *Geschichte des Reisens in der Schweiz* (Basel, 1885). A pretty full Alpine bibliography is published by H. Georg, of Basel (*Bibliotheca Alpina Tertia*, 1878). A revised edition of the Alpine Club catalogue may one day supply the foundation of a similar work for English reading.[2]

Concerning the technical details of our library I have very little to tell, partly because in divers respects there are not any. The number of printed volumes may be taken as something under one thousand. We have a fair collection of maps, and a useful MS. catalogue of them; but we have not space for a proper arrangement even of the books, and any one wanting to consult maps with ease and convenience would probably do better at the Geographical Society. I regret that I have not much information about the libraries of Continental Alpine Clubs, or how far they have formed libraries at all beyond providing room for their own publications, journals taken in exchange, and presentation copies. [Since

[1] "The Pass of Hannibal," *Alpine Journal*, xi. 267.

[2] See now Mr. Coolidge's *Swiss Travel and Swiss Guide-books*, 1889.

writing this I have learned of some cases where it has been done.] The fact is that the library of the Alpine Club is very little used. Under the peculiar conditions of its existence it is difficult to see how it can be made more useful. Meanwhile there is no scope for refined devices of any kind. All we can do is to preserve the collection for posterity, keeping it up and improving it, as occasion offers, on the lines I have indicated. But, lest I should end in a tone of over much humility, I shall tell you that the Alpine Club has at least produced one rare book. The third volume of the *Alpine Journal* has long been out of print; it is not easy to meet with at all, and it is very difficult to get a perfect copy with the plates. My own is without them, which I lament mainly for the sake of the delightful cat-faced dragon reproduced from Scheuchzer's *Itinera Alpina* (1723). The original, which we also have in the library, is now, I believe, more easily procurable than the reproduction.

XII

THE FORMS AND HISTORY OF THE SWORD[1]

THERE seems to be a culminating point not only in all human arts, but in the fashion of particular instruments. And it so happens that the pre-eminent and typical instruments of war and of music attained their perfection at nearly the same time, in the first quarter of the eighteenth century. Within that period the violin, chief minister of the most captivating of the arts of peace, and the sword, the chosen weapon of skilled single combat and the symbol of military honour, assumed their final and absolute forms—forms on which no improvement has been found possible. Strangely enough, the parallel holds a step further. In each case, although nothing more could be added to the model or the workmanship, it was yet to be long before the full capacities of the instrument were developed. A quartet of Beethoven hardly differs more from the formal suites and gavottes of such composers as Rameau than does the sword-

[1] A Friday evening discourse at the Royal Institution of Great Britain, June 1, 1883. Cf. the article "Sword," also by the present writer, in the 9th ed. of the *Encyclopædia Britannica*, vol. xxii. p. 800.

play of the school of Prévost or Cordelois from the nicely balanced movements and counter-movements taught and figured in the works of Liancour or Girard. Nor has fencing been without its modern romantic school; we may even say that it has had its Berlioz in the brilliant and eccentric Bazancourt, a charming writer on the art, and—as he has been described to me by competent authority—*un tireur des plus fantaisistes*. And in both cases we may truly say that the period of academic formality was the indispensable predecessor of the more free and adventurous development of our own time. But before the modern small-sword could even exist—*the* sword, as it is called eminently and without addition in its land of adoption, *épée* as opposed to *sabre*—a long course of growth, variation, and experiment had to be run through. To give some general notion of the forms and history of the sword is what I shall now attempt; I say some notion, for the subject, narrow as it may seem at first sight, is one that marvellously grows upon consideration. And though there are perhaps not many of us nowadays who would, like Claudio before he fell in love, walk ten mile a-foot to see a good armour, I think we shall find the story not without interest.

The sword is essentially a metal weapon. Here at the outset we are on disputable ground; one cannot take a part either way without differing from good authorities. But some part must be taken, and on this point I hold with General Pitt-Rivers. The larger wooden or stone weapons, clubs and the like,

were not and could not be imitated in bronze in the early days of metal-work, for the one sufficient reason that metal was too scarce. We start then with spear-heads of hammered bronze, imitating the pointed flints which doubtless were still used for arrow-heads until bronze was cheap enough to be thrown or shot away without thought of recovering it. The general form of these spear-heads was a kind of pointed oval, a type which has continued with only minor variations in the greater part of the spears, pikes, and lances of historical times. It is difficult to say whether the spears thus headed were oftener used as missile or thrusting weapons, though the javelin has also forms peculiar to itself, of which the most famous example is the Roman *pilum*. In the semi-historical warfare of the Homeric poems the spear is almost always thrown; in the later historical period it is held fast as a pike; the Romans, carefully practical in all matters of military equipment, had different spears for different kinds of service. In mediæval Europe the missile use of spears had, I believe, disappeared altogether, except in the defence of walls and in naval combats. However these things may be, the need of a handier weapon than the spear for close quarters, and a readier and more certain one than the club, must have been felt at an early time. A spear broken off short would at once give a hand-weapon like the Zulu "stabbing assegai." When metal becomes more abundant, and skill in working it more common, such weapons are separately designed and made; the spear-head is enlarged into a blade,

with but little alteration of form, and we have a bronze[1] dagger of the type known to English archæologists as "leaf-shaped," the characteristic type of the bronze period everywhere. Some of the Greek bronze daggers, indeed, are rather smaller than the full-sized spear-heads. With increasing command of metal the length of blade is increased; and we have in course of time a true sword. It is impossible to define where the dagger ends and the sword begins, but perhaps the metal-bladed weapon may fairly be called a sword when it is two feet long or upwards, and has a metal grip, or nucleus of a grip (the "tang" of the modern armourer), wrought in the same piece with it, and finished off with a counter-guard or pommel. It may be observed that the prehistoric armourers, as far as one can guess, had no theories as to the most effective length of their weapons. I believe the dimensions were determined (within the limits of practical handling by a man of average stature) almost wholly by the costliness of the material. In the later bronze and earlier iron periods we find the blades attaining almost or quite the length of a modern sabre. And in like manner the bulging curvature towards the point appears not to have been adopted in order to give cutting power (which to some extent it does), but to be a mere imitation of the spear-head, which in turn owes its form to imitation of the earlier chipped flint points.

[1] It is not universally true that bronze was known and worked before other metals. Iron came first where, as in Africa, it was most accessible. But I speak here with a view to the European development only.

However produced, and for whatever reasons retained, this leaf-shape is the continuing type of the Greek sword throughout ancient Greek history; and it is not only thus persistent, but now and then recurs at much later times in unexpected ways. It is exactly reproduced in a pattern of short sword for the French dismounted artilleryman, dated 1816, which may be seen in the Musée d'Artillerie at the Invalides, and in some recent experimental sword-bayonets.[1] As the blade lengthened, the leaf-shape was less marked, and in the days of the Roman empire, and the barbarian dynasties which were built up on its ruins, the symmetrical curvature had disappeared, leaving a straight and broad blade which became the European sword of the Middle Ages. Meanwhile the leaf-shape had thrown out other offshoots elsewhere. From the mediæval type of sword, or in some cases from one of these other forms, are derived all the weapons of this class now employed by the European races of man.

Even in the prehistoric period the leaf-shape underwent variations. There have lately been found at Mycenæ several sword (or rather dagger) blades of unknown antiquity, differing from the common pattern in being straight-edged; as likewise, it is worth while to note, are the swords figured on Assyrian

[1] The Londoner need not even trouble himself to walk into a museum, for the leaf-shaped Greek sword of classical times has been carefully copied from the best authorities in the weapon held by the statue at Hyde Park Corner taken from the group of the Dioscuri on Monte Cavallo, disfigured by a total perversion of the original motive, and absurdly re-named Achilles.

sculptures, narrow and slender weapons mounted not unlike the Roman army sword, and apparently tapering to a point. There are Etruscan ones of the same type. The Mycenæan examples are elaborately decorated, and of the utmost interest as specimens of early artistic metal work. Two of them are considerably shorter than the others, and these are the most finely wrought.[1] The blades are covered with hunting scenes and figures of animals, partly real and partly fabulous; the style of the work is archaic, and both the general style and certain details suggest an Egyptian origin for the school from which it came, if not for the artists themselves. The figures are not wrought in one piece with the blades, but made separately and let in. Some process of the nature of enamelling is used in parts, and gold, or alloys of gold and silver of different shades, are employed to give variety, and indicate to some extent the natural colouring of the objects. Whether imported or produced by a naturalised school of craftsmen, arms so richly adorned cannot have been at any time otherwise than a luxury confined to chiefs of the highest rank. These are of an antiquity far greater than that of the Homeric poems; and in Homer there is nothing that would lead us to expect such work, though decorated scabbards and mountings are mentioned. Swords occur now and then as presents, but there is no trace

[1] Kumanudes, *Ἀθήναιον*, vol. ix. p. 162, and x. p. 309; Köhler, *Mittheilungen des deutschen archäologischen Instituts in Athen*, vol. vii. p. 241. I am indebted to Mr. Sidney Colvin for the communication of these papers and their illustrations, as also the monograph on the Roman soldier's equipment cited below.

of their being peculiarly valuable possessions, and still less of any peculiar feeling of honour being associated with them. The spear is the favourite weapon of Homer's mighty men, as witness the spear of Achilles which none but himself can cast. The sword is used only when the spear has failed, and seems to do little execution then. In historical Greece, and to some extent among the Romans, the military point of honour was bound up with the shield, probably because the abandonment of it was naturally the first action of defeated troops anxious to lighten themselves in retreat.

So far as anything can be inferred from the allusions of the Greek tragedians, and from a few historical details like the improvements in equipment introduced by Iphicrates, the sword had a better relative position among the arms of Greek warriors in post-Homeric times. Probably this was due to the supplanting of bronze by iron—a process which was complete so long before Thucydides wrote that iron was in his language the natural and obvious material of weapons. To wear arms is for him to wear iron: in old times, he says, every man in Greece "wore iron" in everyday life, like the barbarians nowadays. But it is in the Roman armies that we find the first distinct evidence of the use of the sword being studied with anything like system. We learn from Vegetius —a writer of the late fourth century A.D., and of no great authority for his own sake, but likely enough to have preserved genuine traditions of the service — that the Roman soldier was assiduously practised in

sword exercise. What is more important, the Romans had discovered the advantage of using the point, and regarded enemies who could only strike with the edge as contemptible.[1] Vegetius assigns as reasons for this both the greater effectiveness of a thrust and the less exposure of the body and arm in delivering it; reasons which though not conclusive are plausible, and show that the matter had been thought out. Further, the Roman practice, notwithstanding the temptation to keep the shielded side foremost, was to advance the right side in attacking, as modern swordsmen do. The weapon was a thoroughly practical one: the straight and short blade was mounted in a hilt not unlike that of a Scottish dirk, scored with well-marked grooves for the fingers, and balanced with a substantial pommel: this last point, by the way, is too much neglected in our present military swords. A shorter and broader pattern was worn by superior officers, sometimes in a highly ornamented scabbard, of which there is a very fine specimen in the British Museum. Longer swords were used by the cavalry and by the foreign troops in the Roman service.[2] There is no evidence, however, that the Romans ever attained the point of cultivating swordsmanship in the proper sense, that is, making the sword a defensive as well as an offensive arm.

[1] In addition to Vegetius, cf. Tac. *Agric.* 36.

[2] Lindenschmit, *Tracht und Bewaffnung des römischen Heeres während der Kaiserzeit.* Braunschweig, 1882. Complete reconstructions of both Greek and Roman equipments of various periods (among others) may be seen in the excellent historical collection of *Costumes de guerre* in the Musée d'Artillerie of Paris.

After the fall of the Roman empire the sword in general use is a longer and larger weapon, but handled, we may suspect, with less skill and effect. It is straight, heavy, double-edged, and of varying length apparently determined by no rule beyond the strength or the fancy of the owner. A good historical specimen of this type is the sword of Charles the Great, exhibited in the Louvre. As often as not the earlier mediæval swords are rounded off at the end; and from this, as well as from the fact that some centuries later the "foining fence" of the Italian school was regarded as a wholly new thing, it appears that the Roman tradition of preferring the point to the edge had been lost or disregarded. There is every reason, indeed, to believe that the mediæval form is the continuance of a prehistoric one. Swords dug up in various parts of Europe from several feet of gravel show no essential difference of pattern from those which were common down to the sixteenth century. The hilts of the prehistoric swords do indeed affect (though not invariably) a shortness in the grip which seems to modern Europeans absurd, though a parallel to it may be found in modern Asiatic swords; and very short handles occur in European weapons as late as the thirteenth century. From three to three and a half inches, or sometimes even less, is all the room given to the hand. The modern European swordsman's grip is flexible; he requires free space and play for the fingers, and for the directing action of the thumb which is all but indispensable in using the point. The short grip is intended to give a tight-

fitting and rigid grasp, so that the whole motion of the cut comes from the arm and shoulder; and this is the manner in which Oriental swords are still handled. Apart from this difference in the size of the grip, a mediæval knight's sword, or one of the Scottish swords to which the name of claymore (commonly usurped by the much later basket-hilted pattern) properly belongs, has little to distinguish it from the arms of unknown date which, for want of a more certain attribution, are vaguely called British in our museums. But one thing of great curiosity happened to the sword in the Middle Ages; it became a symbol of honour, an object almost of worship, the chosen seat and image of the sentiment of chivalry. This may be accounted for in part by the accident of the cross-guard seeming to the newly converted barbarians to invest it with a sacred character; I say accident, for the cross-guard is certainly prehistoric and therefore pre-Christian. Still the religious associations of the cross must have given a quite new significance and importance to such customs as that of swearing by the sword—itself a widely spread one, and of extreme antiquity.[1] I think that other though not dissimilar influences also came into play. In the Old Testament the sword is

[1] It is common among the Rájpúts, and is met with, in conjunction with peculiar formalities, among certain hill tribes. Wilbraham Egerton, *Handbook of Indian Arms* (published by the India Office, 1880), pp. 77, 105-6. It is also a very old Teutonic custom. Grimm, *Deutsche Rechtsalterthümer*, pp. 165, 896, cf. Ducange, *s.v. Juramentum* (*super arma*). The implied imprecation was probably, "May the god of war abandon me in fight if I swear falsely," hardly "May

much oftener mentioned than the spear, and is a recognised symbol of war and warlike power. Thus, to take one of the best known passages, we read in the forty-fifth Psalm, "Gird thee with thy sword upon thy thigh, O thou most mighty:" in the Vulgate, *Accingere gladio tuo super femur tuum, potentissime.* Now it is no matter of conjecture that such a passage deeply affected the mediæval imagination. These words are quoted by a man of peace, our own Bracton, writing in the thirteenth century, when he speaks of the king's power, and of the counsellors and barons who are his companions, girt with swords, assisting him to do judgment and justice. It seems hardly too fanciful to think that the fascination and pre-eminence of the sword which were at their height in Bracton's time, and are not extinct yet, were in some measure derived from that one triumphant note of the Psalmist. Not that others were wanting; there is the two-edged sword in the hands of the saints: *Exaltationes Dei in gutture eorum, et gladii ancipites in manibus eorum,* a verse that was

I perish by the sword," for it was held disgraceful to a free man to die otherwise than in battle. In the sixteenth century Spanish fencing-masters, on their admission to the guild, took an oath "super signum sanctæ crucis factum de pluribus ensibus," *Revue archéologique*, vi. 589. Not unfrequently the sword itself was the object of worship; the feeling is more easily revived in fighting times, even now, than men of peace are apt to think, as Körner's well-known sword song shows. Compare General Pitt-Rivers's Catalogue of his collection (Stationery Office, 1887), p. 102. Some of the formulas in Ducange suggest the meaning, "What I assert or promise I am ready to make good with the sword;" but this I suspect is a later rationalising of the original ceremony.

in time to serve the Puritans as it had served the Crusaders.

But to follow out the associations of the sword with knighthood, semi-religious military vows and enterprises, and military honour in general, would be matter for a discourse of itself. Let us return to the fashion and development of the weapon. There was little variation from the eleventh to the sixteenth century, save that the decoration of the scabbard and mountings (of which I do not propose to speak) grew more elaborate with the growth of art and luxury, and that the average length tended to increase. After the twelfth century the sword is generally pointed as well as two-edged, and the point was sometimes used with effect. In a fourteenth-century MS. in the British Museum, engraved in Hewitt's *Ancient Armour and Weapons*, a mounted knight is delivering a thrust in quarte (as we now say), which completely pierces his adversary's shield. In the sixteenth century the blade is made narrower and lighter, and the sword-hand is for the first time adequately guarded. First, the plain cross-bar puts on various curved forms intended to arrest or entangle an enemy's blade with greater effect. Then rings project on either side of the root of the blade, and are worked, as time goes on, into a more or less complex system of convolutions according to the costliness of the weapon and the skill and fancy of the maker. These curved guards are known as *pas d'âne*, while the cross-pieces in the plane of the blade, now slender and elongated, and often curving towards the point,

are called *quillons*. Next the guard throws up one or more branches, covering or encircling the exposed outer part of the hand. These branches form a shell or basket pattern, their ends are solidly joined to the pommel (after an interval of hesitating osculation, well exemplified in a sword now in the museum of the United Service Institution, which was borne by Cromwell at Drogheda), and nothing but a process of selection and simplification is now needed to produce all the modern patterns of sword-hilts. It was at Venice that the basket-hilt came first into regular use in the swords named *Schiavone*, from being worn by the Doge's body-guard (*Schiavoni*, Slavs, *i.e.* Dalmatians). In these it is of a flattened elliptical shape. The Scots, renowned before the middle of the sixteenth century for their careful choice of weapons, took up the model, and in the course of another generation or two developed it into the well-known basket-guard still used by our Highland regiments, the most complete protection for the swordsman's hand ever devised without undue loss of freedom. Meanwhile the *pas d'âne* solidifies into a hollowed disc or even a deep bell-shaped cup, the characteristic feature of the guard of the Spanish rapier and the modern duelling sword. One cannot help speaking of the works of men's hands, when one traces them in historical order through their several forms, as if they were organic and grew like flowers, or like variations of a natural species; and in truth it is not an idle conceit, for the development of design and workmanship answers to a real organic development in the men from whose

brain and hand the work proceeds; every generation takes up from its fathers, if it is worthy of them, a new starting-point of imagination and aptitude, and the strange conservatism of the imitative faculty is a sure warrant of continuity.

The latter half of the sixteenth century was the time when the sword stood highest in artistic honour. Then it was that Holbein designed its ornaments for Henry VIII., and that Albert Dürer engraved a crucifixion on a plate of gold for the boss of a sword or dagger of the Emperor Maximilian's. Both the sword and its ornament disappeared at an early time, the prey of some greatly daring collector, and nothing is now known of their fate: the design survives, for impressions were taken as from an ordinary engraver's plate, and some are still in existence, though a good example is extremely rare. But in the true armourer's or swordsman's eyes the work even of a Holbein and a Dürer is only extraneous adornment, and must yield in interest to the qualities of the blade. And at this time the sword-smith became again, as he had been in the ruder ages when metal working was the secret of a few craftsmen, a man of renown. In Spain, in France, in Germany, and in Italy, there rose up masters and schools of sword-cutlery. There was a time when the blades of Bordeaux and Poitiers had the best price in the English market; but soon those of Toledo, combining beauty, strength, and elasticity, gained that eminence of which the tradition still clings to them. Othello's "sword of Spain, the ice-brook's temper," was such

an one as these now before us. And Shakespeare, be it noted, knew here, as always, exactly what he was speaking of; for it was long believed that the quality of the finest blades depended on their being tempered in mountain streams. Germany was not far behind in the race either; the Solingen blades, stouter and rougher than the Spanish ones, but for that reason fitter for common military service, made their trade-mark of a running wolf known throughout the north of Europe. The wolf, or hieroglyphic symbol that passed for one, was easily taken for a fox. Hence, it should seem, the cant name of fox for a sword, which is current in our Elizabethan literature. "O, Signieur Dew, thou diest on point of fox," cries Pistol to his captive on the field of Agincourt. A still greater reputation was gained by the strong and keen broad-swords bearing the name of Andrea Ferara, long a puzzle to antiquaries from the want of positive knowledge whether he was of Italian or Spanish origin. The story that he was invited to Scotland by James V. appears to be mere guess-work. There exists, however, contemporary evidence that some time after 1580 two brothers, Giovan Donato and Andrea dei Ferari, were well known sword-makers, working at Belluno in Friuli, the Illyrian territory of Venice; and this goes far to settle the question between Spain and Italy.[1] Probably the name of Ferara became a kind of trade-mark, and was used afterwards by many successors or imitators.

During this time the Spanish and Italian rapier

[1] *Cornhill Magazine*, vol. xii. p. 192 (August 1865).

was undergoing its peculiar development, and leading the way to the modern art of fencing. But this takes us out of the general line of history into a distinct branch. We have henceforth to consider the sword, not as the simple following out of a given primitive form, but as a weapon diverging from that form in two directions. It may be specialised as a cutting or as a thrusting arm. In the military sabre of our own time we find both qualities reconciled by a sufficiently effective compromise, but only after a long course of experiments.

For many centuries the armourers and swordsmen of the East have cultivated the edge at the expense of the point, and have attained a partly just and partly fabulous renown. The point, after being neglected since the days of the Romans, has made up its lost time in the West, and made it up triumphantly; for it is now admitted that the swordsman who would be a complete master of the edge must have learnt the ways of the point also. Let us take the earlier stage first, as shown in the cutting swords of the East. Broadly speaking, their characteristic feature is a decidedly curved blade as opposed to the straight or nearly straight European form. Not that all old European swords are straight, or all Eastern swords curved. There are curved blades of mediæval and even earlier times (one prehistoric example is in the Copenhagen Museum), and one remarkable type of Indian sword, the Mahratta gauntlet sword (Paṭá), is quite straight; but the contrast holds good in the main. The object of curvature is to gain cutting

power. When a straight sword strikes its object full, the direction of the stroke is at right angles to the length of the blade; and the amount of resistance, for a given velocity of stroke and substance to be cut, is measured by the acuteness of the angle shown by a transverse section of the cutting blade. The finer this angle, the less the resistance. In the case of an instrument not intended to bear rough usage or cut hard bodies, or much of any substance at one stroke (as a razor), it is only a question of workmanship how fine the angle can be made. But with a sword it is otherwise. Without a certain amount of thickness, the best steel blade would be too fragile or too flexible, so that in practice the limit up to which its cutting power can be increased by fining down the edge is soon reached. But now let the blow be delivered in a direction not at right angles, but oblique to the axis of the blade. The angle of resistance will then be given by an oblique section of the blade, and in proportion to the obliquity it will be finer than the angle of a straight cross section. It is on exactly the same principle that the steepness of a road or path on a mountain side is diminished by giving it a zigzag course. With a straight edge this effect can be produced by what is called a drawing cut. But it is far more simply and certainly produced by giving a permanent curvature to the edge in the part where the stroke falls. A weapon thus formed cannot help presenting an oblique section of the blade in the act of cutting, and therefore will cut better than a straight weapon of similar trans-

verse section. This is the principle of all curved swords, exemplified in the choice Persian blades, in the common Indian sabre (Talwár), and in the light cavalry sword of almost identical pattern which was used in our own service in the Peninsular and Waterloo campaigns. Near the hilt the blade is nearly straight, but towards the centre of percussion it bends rapidly away. This effect is enhanced by mounting the sword so that the initial direction of the blade, from which the curve falls back, makes a sensible angle with the line of direction of the hilt, and goes before it to meet the object struck at; in the sword-smith's terms, by making the edge "lead forward." Hence the elegant double curve made by the blade and hilt of the Persian sabre. The same rule is followed, though less obviously, by the most recent European patterns. In Japanese swords it is reversed, for some reason which I have never seen explained.

The use of a curved blade is of unknown antiquity in the East. Its most ancient form was probably short, and broader at the point than at the handle (the scimitar properly so called); an exaggerated representation of this type is the conventional weapon of Orientals and barbarians among the painters of the Renaissance or even later. Passing over earlier stages, however, let us come to the sabre which was made known to Western Europe by the crusades, and whose form and fashion have continued to our own day without notable change. These Indian and Persian arms exhibit the perfection of a specialised type. Great cutting power is gained by the curva-

ture, which ensures an oblique section of the blade, and therefore an acuter angle of resistance, being presented to the object struck. Everything else is sacrificed to the power of the edge, and sacrificed deliberately. The small grip and the partial or total neglect of protection for the sword-hand are part of the same plan. Defence is left to the shield and armour. The curious projecting pommel of the commonest pattern of Indian sabre may act, indeed, as a guard for the wrist, but it has other uses; it may become a weapon of offence at close quarters, it balances the weight of the blade, and it may be grasped with the left hand for a two-handed blow. Scottish broadswords not uncommonly have a kind of outside loop made in the hilt for the same purpose.

More time and labour have been given to the making and adornment of choice weapons in Syria, Persia, and India than in any other part of the world. The best steel always came, it appears, from India. Damascus has given its name to the characteristic processes of Oriental metal-work, but has long been supplanted by Khorassan as the chief seat of the art: nevertheless, Damascus blades, or what purport to be such are still freely sold to travellers in the East. One such purchaser, I am told, observed that a number of these swords had the same inscription in Arabic characters. He was unable to read it himself but afterwards consulted an Orientalist, who informed him that the writing signified—"I am *not* a Damascus blade." It may be believed that the interpre-

tation was faithful, for the jest is quite in the Persian manner. The damasked or "watered" appearance of the blades which are most highly esteemed in the East appears to have been originally due to an accidental crystallisation of the steel in the process of conversion. The production of it was long thought a secret, but Western experts have now both explained and imitated it.[1]

While we are among Indian weapons, we may learn from them that the development of the sword from the dagger by successive steps and modifications is not a matter of mere archæological conjecture Almost conclusive proof is given by the series of intermediate forms between the straight broad dagger (Kaṭár), with a handle formed by a pair of cross-bars set close together between two other bars parallel to the axis of the blade which serve as hand-guards, and the long sword with gauntlet hilt called Paṭá. The dagger, as far as the blade goes, is of a widespread type: the mediæval short swords, for example, called by modern antiquaries "anelace" or "langue-de-bœuf" (though there is some doubt as to what anelace or anlas, a name peculiar to England and of unknown origin, really means), are not unlike it. But the mounting is peculiar, and enables us to follow the transitions. First the blade is made about a third or a half longer. Then a kind of shell covering the back of the hand is added to the bars of the hand-guard. In this form the weapon is called "Bara jamdádú" (death-giver), and seems to be known only in a

[1] Wilkinson, *Engines of War* (1841), pp. 200 *et seq.*

limited part of Southern India. Finally the blade is lengthened into a double-edged sword, and the hand-guard is closed in so as to make a complete gauntlet-shaped hilt. The original cross-bar handle remains, making the grip entirely different from that of an ordinary sword.[1] One does not see how an arm thus mounted can be used except for a sweeping blow, no room being given for the slightest play of the wrist. It is not uncommon to find old Spanish or other European blades mounted in these gauntlet hilts—a fact worth noticing, to correct the popular impression that Eastern swords are better than European ones. This is far from being generally true. Not only may old Spanish, Italian, or German blades be found in collections of Oriental arms, but in quite modern times Indian horsemen have been known to use by preference English light cavalry swords, remounted in their own fashion, and to do terrible execution with them. European swords have been found ineffective in Indian warfare, not because they were bad in themselves, but because they were not kept sharp like the Indian ones. "A sharp sword will cut in any one's hand," said an old native trooper to Captain Nolan in answer to questions as to the secret of the Indian horsemen's blows. And if European sword-smiths do not produce habitually such elaborate work as those of Persia and Damascus, it is not

[1] Examples of all the stages may be seen in the Indian section of the South Kensington Museum, or still better in the Pitt-Rivers collection, now at Oxford, where a case is specially arranged to show the transition.

because they have not the secret of their Eastern fellow-craftsmen, but because the time and expense required for watered blades are such as would not be compensated by the price obtainable in the Western market. Only in the East, where men seem to take no count of time, and where centuries have passed without historians and without any means of fixing dates, could this branch of the armourer's art have arisen, or be regularly practised.

Similarly, we have all read in Walter Scott's *Talisman* the spirited (though, it must be confessed, inaccurate)[1] description of the sword-feats performed by Richard and Saladin; and most readers probably imagine the cutting of the cushion and the veil to require some temper to be found only in Oriental blades, or some refinement of address peculiar to Oriental hands. But these and other feats of Eastern swordsmen have been and are repeated with success by Europeans in our own time. It is true that a light and very sharp sword, not the service arm, is used for that special purpose.

Various peculiar types of curved swords and more or less similar weapons occur in different parts of the East. One which deserves special mention, from the distances to which it has travelled, is the yataghan type. The doubly-curved blade of the yataghan, still a constant part of the armed Albanian's equip-

[1] Richard I. is made to wield a two-handed sword, a weapon unknown in his time, and used only by foot-soldiers when it did come in some three centuries later; and Saladin's is described as having a *narrow* curved blade, whereas Indo-Persian sabres are, on the average, broader if anything than European swords.

ment, and a favourite Turkish weapon,[1] is identical in form with the short sword or falchion (Kopis) figured on sundry Greek monuments, and with the Kukri of Nepal. This last, indeed, is commonly broader and more curved; but there is an elongated variety of it which cannot be distinguished from the yataghan, and which occurs in Nepal itself, in the Deccan, and in Sind. A precisely similar arm, probably imported by Roman auxiliaries, has been found at Cordova and elsewhere in Spain, and may be seen in the Pitt-Rivers collection and the Musée d'Artillerie. It makes a very handy and formidable weapon, combining, if not too much curved, a strong cutting edge with considerable thrusting power. Of its birthplace, I believe, nothing is known; it is more or less used in all the Mahometan parts of Asia, and the geographical distribution would point to Persia or thereabouts for a common origin; but then Persia is just the country where the thing seems to be least common, and the word is purely Turkish. It is not impossible that, notwithstanding the strong temptation to make out a pedigree, we have here a case of independent invention in two or more distinct quarters; and in fact the Kukri of the Gurkhas is stated (on what authority I do not know) to be derived from a bill-hook used for woodcutter's work in the jungles. In modern times the yataghan has been the parent of the French sword-bayonet, and it

[1] I do not think it was adopted by the Greeks. In the Klephtic ballads it seems to be opposed, as the Turkish arm, to the Greek sword (σπαθί).

was even proposed by Colonel Marey, the author of a full and ingenious monograph on the forms and qualities of swords, to make the infantry officer's sword of this pattern.

There are many kinds of outlandish weapons, in Nepal and farther east, of which the edge has a concave instead of a convex curvature. I doubt whether these be properly swords; at all events, they have had no influence on European forms. The Japanese swords also stand by themselves, though they are historically nothing but a superior variety of the general type which is found in China and Burmah, and to some extent in the Malay archipelago. They are exceedingly sharp, but have no flexibility at all. It may be worth noting that the custom of wearing two swords, which has been the occasion of some curiosity and conjectural explanation, is not confined to Japan. Certain Arabs in the Mahratta service are stated to have done the same.[1] The two swords of the Japanese, however, are of such different sizes as to be rather comparable to the sword and dagger of Europeans, and perhaps there is really nothing to explain.

We pass now to the other special line of development, that of the rapier and small-sword. Whatever differences of opinion may be possible about the sabre, there can be no doubt that the straight sword which ultimately became a thrusting sword is an extension of the dagger. The East is rich in daggers of many forms, so rich that in India alone a score of distinct

[1] Egerton, *op. cit.* p. 114.

names for distinct varieties of the weapon appear to be current. There is a broad difference, however, between the straight and the curved daggers, and the modes of using them; the straight ones being held like a sword, the curved ones the reverse way, with the little finger next the blade. Among the curved species is one of which the shape would be puzzling if it were not known to be simply copied from a buffalo horn. The proof is that a dagger of this class is sometimes nothing but the split and sharpened buffalo horn itself. I am not sure that all the curved daggers may not be due to some imitation of this kind, and thus be quite unconnected with the course of development leading up to the modern sword. That the curved sabre is modified from a straight sword, not enlarged from a curved dagger, is, I think, too plain for discussion. The broad-bladed straight dagger which lengthened into the gauntlet-hilted sword has already been mentioned. But neither in this nor in any other case does the enlargement of the dagger appear to have suggested in the East the fabrication or use of a full-sized sword with thrusting for its chief or sole purpose. The rapier, the duelling sword, and the art of fencing, are purely Western inventions. Before going further, let us put a needful distinction of terms beyond mistake. A duelling sword and a rapier are not the same thing, though they are often confused. The rapier is a cut-and-thrust sword so far modified as to be used chiefly for pointing, but not to the complete exclusion of the edge. The duelling sword is a weapon made, and capable of being used,

for pointing only. Such a construction would be naturally first applied to the dagger, as its cutting edges could never be of much offensive service unless it were of a large and clumsy type. Cutting power being once regarded as secondary or superfluous, the two-edged blade is narrowed for convenience of carriage, perhaps also of concealment, until thickening becomes necessary to make it strong enough. This reinforcement may be effected by a ridge on either side of the blade, or by a ridge on one side only, which soon becomes as much or as little of an edge as the original and now degraded edges of the blade. From the narrow two-edged blade strengthened by a single "median ridge" we get a purely thrusting blade of triangular section, or an approximately bayonet-shaped blade as we should now call it. From the blade with a double "median ridge" we get a blade of quadrangular section, not corresponding to anything now in familiar use. Both the three-edged and the four-edged shape occur among mediæval daggers; they are also found, though exceptionally, in Indian specimens. It is difficult to say when they were introduced. We have a distinct record of three-edged swords or long daggers having been employed at the battle of Bovines (A.D. 1214); they are specially described by the chronicler as a novelty.[1] But no

[1] *Guillelmi Armorici liber* (Guillaume le Breton), anno 1214, § 192 (p. 283 of ed. 1882, published by the Société de l'histoire de France). —" . . . Ante oculos ipsius regis occiditur Stephanus de Longo Campo, miles probus et fidei integre, cultello recepto in capite per ocularium galee. Hostes enim quodam genere armorum utebantur admirabili et hactenus inaudito: habebant enim cultellos longos,

example of so early a date appears to be either preserved or figured anywhere; and it was as nearly as possible five centuries afterwards that the bayonet-shaped small-sword prevailed over the rapier. It is worth noticing that some of the Scottish broadswords of the late seventeenth and early eighteenth centuries have a "median ridge" so strongly marked as to make them almost three-edged.

As for the two-edged rapier, its parentage is obvious. It is the military sword of all work, in the form it had assumed in the first half of the sixteenth century, lengthened, narrowed, and more finely pointed.[1] The interesting question is, what led to the use of the point being studied and developed at that particular time. It may seem a paradox to say that the art of fencing is due to the invention of gunpowder; but I believe it to be true. So long as the body was protected by armour, there was no necessity and no scope for fine swordsmanship. Hard hitting was the only kind of attack worth cultivating. Fire-arms, however, made armour not only of less value, but at short ranges a source of positive danger, just as nowadays, when the side of an ironclad is once penetrated by shot, the splinters make matters worse than if there had been no resist-

graciles, triacumines, quolibet acumine indifferenter secantes a cuspide usque ad manubrium, quibus utebantur pro gladiis. Sed per Dei adjutorium prevaluerunt gladii Francorum," etc. The *estoc* of the Middle Ages was a staff-weapon.

[1] It has been said that the rapier and its distinctive manner of use were derived from an elongated dagger employed for piercing the joints of plate armour; but I have met with nothing to support this view.

ance at all. Armour being abandoned as worse than useless against fire-arms, it became needful to resort to skill instead of mechanical protection for defence against cold steel at close quarters. Various experiments were tried; the shield was reduced in dimensions to make it more manageable, and in England sword and buckler play, which had long been a favourite national pastime, still had, at the very end of the sixteenth century, its zealous advocates against the new-fangled rapier. But the point, of no avail against complete armour, soon manifested its superior power when this barrier was removed. There is some obscurity about the local origin of the rapier and of fencing. The finest old rapiers are Spanish, and there is mention of very early Spanish books on the subject, which, however, do not seem to be extant.[1] And it has been said that the rapier was imported into Italy by the Spanish armies early in the sixteenth century. So far as I have been able to learn, however, there is no real evidence of this.

From Italy the fashion came into France and England, and spread apace, not without grumbling

[1] See Nicolao Antonio, *Bibl. Hispana Vetus*, tom. 2, p. 305, and *Bibl. Hispana Nova*, tom. 1, p. 468, and tom. 2, p. 57, who names two Spanish authors, Jacobus or Jaume Pons (or Pona) of Perpignan, and Petrus de Turri, as having written in 1474. He does not profess to have seen their books, but gives as his authority a work of Luis Pacheco de Narvaez (*Engaño y desengaño de los errores, que se an querido introducir en la destreza de las armas*, Madrid, 1635), which I have not been able to consult. The same names are given by Morsicato Pallavicini, a Sicilian author of the late seventeenth century, but without any reference. It is possible that these books exist or existed in MS. only.

from the older sort of gentlemen and soldiers, of which the echoes are yet audible to us in sundry passages of Shakespeare. At some time between 1570 and 1580 the rapier became the favourite companion of the exquisites of London. "Shortly after (the twelfth or thirteenth year of Queen Elizabeth)," says Howes, the continuer of Stow's *Annals*, "began long tucks, and long rapiers, and he was held the greatest gallant, that had the deepest ruff and longest rapier; the offence to the eye of the one, and the hurt unto the life of the subject that came by the other, caused her Majesty to make proclamation against them both, and to place selected grave citizens at every gate to cut the ruffs and break the rapiers' points of all passengers that exceeded a yard in length of their rapiers, and a nail of a yard in depth of their ruffs." A later writer fixes the date of this proclamation to 1586, and adds that it forbad rapiers to be "carried, as they had been before, upwards in a hectoring manner," but says nothing of the ruffs.[1] In 1594-95 two English treatises appeared on the new art of fence, one translated from the Italian of Giacomo di Grassi, the other the work of Vincentio Saviolo,[2]

[1] Stow, *Annals*, continued by Edmond Howes, Lond. 1614, p. 869; *Survey of London*, ed. 1755, vol. ii. p. 543 (in Strype's additional matter). Such a proclamation was, according to modern ideas, quite illegal; but much else of the same kind was acquiesced in all through Elizabeth's reign.

[2] There is a second book of this treatise with a separate title-page, "Of honor and honorable quarrels," supposed by Warburton to be alluded to in Touchstone's exposition of the lie seven times removed. I cannot think this at all certain; the coincidence of matter is not very close, and it appears from Saviolo that other books of the kind

an Italian master established in England. The translator of Grassi tells us in his "Advertisement to the Reader," that "the sword and buckler fight was long while allowed in England (and yet practice in all sorts of weapons is praiseworthy), but now being laid down, the sword, but with serving-men, is not much regarded,[1] and the rapier fight generally allowed, as a weapon because most perilous, therefore most feared, and thereupon private quarrels and common frays most shunned." On the other hand, some partisans of the old sword and buckler play maintained its excellence on the express ground that men skilled in it might fight as long as they pleased without hurting one another; and others denounced the rapier as "that mischievous and imperfect weapon which serves to kill our friends in peace, but cannot much hurt our foes in war" (George Silver, *Paradoxes of Defence*, 1599). But they were soon discomfited. In 1617 we find one Joseph Swetnam, a garrulous and not original author, declaring that the short sword or back-sword (a stout sword so called from having only one edge) is against the rapier "little better than a tobacco pipe or a fox tail." We must not suppose that the rapier fight of the sixteenth century resembled modern fencing. It was the commoner practice to hold a dagger in the left hand for parrying; this, by the way, has an odd analogy in China,

were in existence. At least one other, Muzio's, had a European reputation.

[1] Cf. Florio, *First Fruits* (1573), cited by Malone on *King Henry IV.*, Part I. act i. sc. 3, where the buckler is called "a clownish, dastardly weapon, and not fit for a gentleman."

where instruments like blunt skewers are used for the same purpose. And not only did the use of the dagger, or in its absence of the gauntleted left hand, make the conditions different from those of the modern fencing-school, but the principles and methods were as yet crude and unformed. The fencing-match in *Hamlet* is commonly presented according to the modern fashion, though M. Mounet-Sully's treatment of it constitutes a distinguished exception, and Dumas and Gautier, both of whom knew the historic truth well enough, freely introduce the modern terms and rules into the single combats of their novels. In each case this course may be justified by artistic necessity. But if we look to the engravings in Saviolo or Grassi, we shall find that Hamlet and Laertes, when the play was a novelty at the Globe Theatre, stood at what would now be thought an absurdly short distance (for the lunge, or delivery of the thrust by a swift forward movement of the right foot and body, with the left foot as a fixed point, was not yet invented), with their sword-hands down at their knees, the points of their rapiers directed not to the breast but to the face of the adversary, and their left hands held up in front of the shoulder in a singularly awkward attitude. A great object was to seize the adversary's sword-hilt with the left hand; and this probably explains the "scuffling" in which Hamlet and Laertes change foils — a thing barely possible in a fencing-match of the present day.[1] An incidental illustration of the part of the left hand in defence

[1] See Mr. Egerton Castle's *Schools and Masters of Fence*, pp. 59, 60.

is given in *Romeo and Juliet*, where it is related that Mercutio

> with one hand beats
> Cold death aside, and with the other sends
> It back to Tybalt.

The duel with rapier and dagger had particular rules of its own; and the handling of a "case of rapiers" (that is, a rapier in either hand) was also taught, but, one would think, only for display.

During this period the use of the edge was combined with that of the point, but the point was preferred. "To tell the truth," says Saviolo, "I would not advise any friend of mine, if he were to fight for his credit and life, to strike neither mandrittas nor riversas" (the technical names of direct and back-handed cuts), "because he puts himself in danger of his life; for to use the point is more ready, and spends not the like time." In the books of the seventeenth century the instructions for mandrittas and riversas disappear accordingly, and at the beginning of the eighteenth we find the small-sword in existence and the rapier gradually giving place to it. Experiments had already been made with thrusting blades of triangular or quadrangular section; at least, specimens of such, ascribed to the early seventeenth or even the end of the sixteenth century, may be seen in museums. In some of these cases, however, one would like to ascertain that a more recent blade has not been mounted in a hilt of the period attributed to the weapon. Be that as it may, the small-sword completely prevailed over the two-edged rapier some

time about 1715. At the same time that the form of the blade was changed, its length, which had been excessive, was reduced to a handier and not less effective compass. A sword 36 inches long was reckoned short at the beginning of the seventeenth century, and some rapiers extend to four feet and more. The standard length of the modern small-sword and its representative for fencing purposes, the foil, is from 32 to 34 inches only. Sir William Hope, of Edinburgh, writing in 1692, considers three-quarters of an ell to be "an indifferent good length," that is, "neither too long, which would be unhandsome (*i.e.* unhandy or clumsy), nor too short, which would be very inconvenient": taking the ell at 45 inches, this comes very near the present measure. As regards the mounting and guard also, there was a marked return to simplicity. The elaborate work of the Spanish rapier-hilts disappears, to be replaced by a plain shell guard for the duelling sword, and a very light hilt, capable, however, of much decoration if desired, for the walking-sword which every gentleman habitually wore until near the end of the last century. Meanwhile the art of fencing made rapid progress, and may be said to have been fixed in substance upon its modern lines by 1750 or thereabouts. To give an account of its development before and since that time would require not a part of a discourse, nor a whole discourse, but a book. Such a book, strange to say, does not yet exist,[1] not even in France, the chief seat

[1] Mr. Egerton Castle has now given us the history down to the end

of the art ever since the first half of the seventeenth century, when the supremacy passed to her from Italy. The lunge had, indeed, been taught and figured by Italian masters; but the riposte, which is the very life of modern fencing as a system of combined defence and offence, is undoubtedly a French invention. All the modern authorities of much value are either French or openly founded on the French school. It must not be forgotten, however, that there exists a distinct Italian school, which has never adopted the three-edged sword. Its weapon is a two-edged rapier with cup guard and cross-bar, and its play, though less various than the French, is perhaps not less formidable.

One is tempted in the various forms and uses of the sword to see a reflection of the general temper, and even the tastes and style of the age. The sword of each period seems fitted by no mere accident to the gentlemen, both scholars and soldiers, like Bassanio, who wore and handled it. The long rapier, with its quillons and cunningly wrought metal-work, and the rigid hand-hold which the modern Italian swordsmen still use, is a kind of visible image of the stately and involved periods of Elizabethan prose. I can persuade myself that it was not in the nature of things for Sidney or Raleigh to be otherwise armed. When we come to the great forerunners of modern English, Hobbes (who has in nowise forgotten to put a sword in the right hand of the mystical figure representing

of the eighteenth century. A French version of his work appeared in 1888.

the might of the State in the frontispiece to his *Leviathan*) seems to wield an Andrea Ferara, such a blade and so mounted as Cromwell's, dealing nimbly and shrewdly with both edge and point. And in the exquisite dialectic of Berkeley and Hume, as clear and graceful as it is subtle, and without a superfluous word, we surely have the true counterpart of the finished play of the small-sword, the perfection of single combat. Warfare is on a grander scale now, the controversies of philosophers as well as the campaigns of generals. There are modern philosophical arguments which profess to be more weighty, as they are certainly more voluminous, than Hume's or Berkeley's, and which remind one not of an assault between two strong and supple fencers in which every movement can be followed, but of a modern field-day, where there is much hurrying to and fro, much din, dust, and smoke, and extreme difficulty in discovering what is really going on.

But our story is not fully done. At the same time, or almost the same time, with the small-sword there came in an offshoot of this class of weapons which has a curious little history of its own, namely the bayonet, a modified dagger in its immediate origin, but influenced in its settled ordinary form by the small-sword, and by the sabre and yataghan in various experimental forms which have ended in the sword-bayonet largely used in Continental services, and to some extent in our own. There is a recent French pattern of this weapon in which the yataghan curve is abandoned; though quite straight, it still

has only one edge. It seems a considerable improvement on the shape which we copied many years ago from an older French model, and have now discarded to return to a simple dagger form. There have been some rather pretentious writings in France and elsewhere about the reduction of bayonet practice to a system;[1] I am inclined to think that a man who knows how to use the point of a sword (the necessary foundation of all skill in hand-weapons) will very soon learn what the bayonet is and is not capable of.

A word is also due to the modern military sabre. This, broadly speaking, is a continuation of the straight European military sword of the sixteenth century, lengthened and lightened after the example of the rapier, but one-edged instead of two-edged (which, according to the French authorities, is the decisive mark of *sabre* as distinguished from *épée*), and in many cases more or less curved after the fashion of the Eastern swords. Meanwhile, the long straight sword has thrown out a most eccentric development, or even "sport," in the shape of the German Schläger with which students' duels are fought. This is too remotely connected with the main part of the subject to be dwelt upon here; the duels in question, for the rest, have been often and pretty recently described by English observers. The rapier and the small-sword are weapons of single combat, not of general military use; the small sword is too fragile, the rapier both too fragile and too long, for

[1] Capt. Hutton's concise and thoroughly practical works, *Cold Steel* and *Fixed Bayonets*, are by no means included in this category.

a soldier's convenience. It is true that it was proposed by no less an authority than Marshal Saxe to arm cavalry with long bayonet-shaped swords, and his opinion has been followed by at least one modern writer.[1] But it is founded on the erroneous notion that a good cutting sabre cannot have a good point, and therefore either the edge or the point must be wholly sacrificed; a notion which has so far prevailed that late in the eighteenth century an excessively curved light cavalry sabre (apparently copied with close fidelity from an Indian model) was introduced throughout the armies of Europe. It was the weapon of our light dragoons all through the Peninsular and Waterloo campaigns, and effective for cutting, but almost or quite useless for pointing. Even now there remains a certain difference in most services between the shape of the light and the heavy cavalry swords, the heavy cavalry sword being straighter, or sometimes perfectly straight. But it is pretty well understood by this time that one and the same sword can be made, though not so perfect for thrusting as the duelling sword, nor so powerful for cutting as an Indian talwár or the old dragoon sabre, yet a very sufficient weapon for both purposes. A blade of moderate length, not too broad, and lightened by one or more grooves running nearly from hilt to point, may be shaped with a curve too slight to interfere gravely with the use of the point, yet sensible enough to make a difference in favour of the edge. This plan is now generally followed. It may still be doubted

[1] Col. Luard, *History of the Dress of the British Soldier*, 1852.

whether for effective fighting purposes we have improved much or at all on the cavalry swords of the sixteenth and early seventeenth centuries.

The use of the edge, after being unduly neglected in consequence of the startling effectiveness of the rapier-point, has also been more carefully studied in modern times. Closely connected with the error just now mentioned, that the same blade cannot be good for both cutting or thrusting, is an equally erroneous belief that a cut cannot be delivered with sufficient force except by exposing one's whole body. The old masters of rapier-fence already knew better. What says Grassi in the contemporary English version? "By my counsel he that would deliver an edge-blow shall fetch no compass with his shoulder, because whilst he beareth his sword far off, he giveth time to the wary enemy to enter first; but he shall only use the compass of the elbow and the wrist: which, as they be most swift, so are they strong enough if they be orderly handled." This is exactly what the best modern teachers say. Though sabre-play cannot rival the refinements of the lighter and more subtle small-sword, there is much more science in it than would be supposed by any one not acquainted with the matter; and it may easily be seen that a pair of players who have learnt from a good master do, in fact, expose themselves wonderfully little. Nor is it easy to say on which side the advantage ought to be in a combat between duelling sword and sabre, the players being of fairly equal skill, and each acquainted with the use of both weapons.

My final word, albeit it savour of egotism, shall be one of practical testimony and counsel to a generation of students. I must add my voice to those of a long chain of authorities, medical and other, to bear witness that the exercise of arms, whether in the school of the small-sword, or in the practice, more congenial, perhaps, to the English nature, of the sturdier sabre, is the most admirable of regular correctives for the ill habits of a sedentary life. It is as true now as when George Silver wrote it under Queen Elizabeth that "the exercising of weapons putteth away aches, griefs, and diseases, it increaseth strength and sharpeneth the wits, it giveth a perfect judgment, it expelleth melancholy, choleric and evil conceits, it keepeth a man in breath, perfect health, and long life."

The Baron de Cosson has kindly made notes on some of the points mentioned in the foregoing essay, of which the communication has been accidentally delayed. I can now state on his authority that thrusting swords of triangular and quadrangular section certainly occur in genuine examples as early as the end of the fifteenth century. Most of these examples are German: they were called *Panzerstecher*, and were made for penetrating between the plates of sheet armour or breaking through chain-mail. Swords with short, rigid, four-sided blades, tapering to a very acute point, occur as early as the fourteenth century. These would seem to be descendants of the *cultelli triacumines* of Bovines.

Page 298, line 5 from bottom, *for* sheet armour, *read* steel armour.

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