Ancient Law, its connection with the early history society and its relation to modern ideas / Henry Sumner Maine; London: Oxford University Press, 1931 (92-141)

CHAPTER V.

PRIMITIVE SOCIETY AND ANCIENT LAW.

THE necessity of submitting the subject of jurisprudence to scientific treatment has never been entirely lost sight of in modern times, and the essays which the consciousness of this necessity has produced have proceeded from minds of very various calibre, but there is not much presumption, I think, in asserting that what has hitherto stood in the place of a science has for the most part been a set of guesses, those very guesses of the Roman lawyers which were examined in the two preceding chapters. A series of explicit statements, recognising and adopting these conjectural theories of a natural state, and of a system of principles congenial to it, has been continued with but brief interruption from the days of their inventors to our own. They appear in the annotations of the Glossators who founded modern jurisprudence, and in the writings of the scholastic jurists who succeeded them. They are visible in the dogmas of the canonists. They are thrust into prominence by those civilians of marvellous

erudition, who flourished at the revival of ancient letters. Grotius and his successors invested them not less with brilliancy and plausibility than with practical importance. They may be read in the introductory chapters of our own Blackstone, who has transcribed them textually from Burlamaqui, and wherever the manuals published in the present day for the guidance of the student or the practitioner begin with any discussion of the first principles of law, it always resolves itself into a restatement of the Roman hypothesis. It is however from the disguises with which these conjectures sometimes clothe themselves, quite as much as from their native form, that we gain an adequate idea of the subtlety with which they mix themselves in human thought. The Lockeian theory of the origin of Law in a Social Compact scarcely conceals its Roman derivation, and indeed is only the dress by which the ancient views were rendered more attractive to a particular generation of the moderns; but on the other hand the theory of Hobbes on the same subject was purposely devised to repudiate the reality of a law of nature as conceived by the Romans and their disciples. Yet these two theories, which long divided the reflecting politicians of England into hostile camps, resemble each other strictly in their fundamental assumption of a non-historic, unverifiable, condition of the race. Their authors differed as to the characteristics of the præ-social state, and as to the nature of the abnormal action by which men lifted themselves out of it into that social organisation with which alone we are acquainted, but they agreed in thinking that a great chasm separated man in his primitive condition from man in society, and this notion we

cannot doubt that they borrowed, consciously or unconsciously, from the Romans. If indeed the phenomena of law be regarded in the way in which these theorists regarded them—that is, as one vast complex whole—it is not surprising that the mind should often evade the task it has set to itself by falling back on some ingenious conjecture which (plausibly interpreted) will seem to reconcile everything, or else that it should sometimes abjure in despair the labour of systematization.

From the theories of jurisprudence which have the same speculative basis as the Roman doctrine two of much celebrity must be excepted. The first of them is that associated with the great name of Montesquieu. Though there are some ambiguous expressions in the early part of the *Esprit des Lois*, which seem to show its writer's unwillingness to break quite openly with the views hitherto popular, the general drift of the book is certainly to indicate a very different conception of its subject from any which had been entertained before. It has often been noticed that, amidst the vast variety of examples which, in its immense width of survey, it sweeps together from supposed systems of jurisprudence, there is an evident anxiety to thrust into especial prominence those manners and institutions which astonish the civilised reader by their uncouthness, strangeness, or indecency. The inference constantly suggested is, that laws are the creatures of climate, local situation, accident, or imposture—the fruit of any causes except those which appear to operate with tolerable constancy. Montesquieu seems, in fact, to have looked on the nature of man as entirely plastic, as passively

reproducing the impressions, and submitting implicitly to the impulses, which it receives from without. And here no doubt lies the error which vitiates his system as a system. He greatly underrates the stability of human nature. He pays little or no regard to the inherited qualities of the race, those qualities which each generation receives from its predecessors, and transmits but slightly altered to the generation which follows it. It is quite true, indeed, that no complete account can be given of social phenomena, and consequently of laws, till due allowance has been made for those modifying causes which are noticed in the *Esprit des Lois;* but their number and their force appear to have been overestimated by Montesquieu. Many of the anomalies which he parades have since been shown to rest on false report or erroneous construction, and of those which remain not a few prove the permanence rather than the variableness of man's nature, since they are relics of older stages of the race which have obstinately defied the influences that have elsewhere had effect. The truth is that the stable part of our mental, moral, and physical constitution is the largest part of it, and the resistance it opposes to change is such that, though the variations of human society in a portion of the world are plain enough, they are neither so rapid nor so extensive that their amount, character, and general direction cannot be ascertained. An approximation to truth may be all that is attainable with our present knowledge, but there is no reason for thinking that is so remote, or (what is the same thing) that it requires so much future correction, as to be entirely useless and uninstructive.

The other theory which has been adverted to is the historical theory of Bentham. This theory which is obscurely (and, it might even be said, timidly) propounded in several parts of Bentham's works is quite distinct from that analysis of the conception of law which he commenced in the "Fragment on Government," and which was more recently completed by Mr. John Austin. The resolution of a law into a command of a particular nature, imposed under special conditions, does not affect to do more than protect us against a difficulty—a most formidable one certainly—of language. The whole question remains open as to the motives of societies in imposing these commands on themselves, as to the connexion of these commands with each other, and the nature of their dependence on those which preceded them, and which they have superseded. Bentham suggests the answer that societies modify, and have always modified, their laws according to modifications of their views of general expediency. It is difficult to say that this proposition is false, but it certainly appears to be unfruitful. For that which seems expedient to a society, or rather to the governing part of it, when it alters a rule of law is surely the same thing as the object, whatever it may be, which it has in view when it makes the change. Expediency and the greatest good are nothing more than different names for the impulse which prompts the modification; and when we lay down expediency as the rule of change in law or opinion, all we get by the proposition is the substitution of an express term for a term which is necessarily implied when we say that a change takes place.

There is such wide-spread dissatisfaction with existing theories of jurisprudence, and so general a conviction that they do not really solve the questions they pretend to dispose of, as to justify the suspicion that some line of inquiry necessary to a perfect result has been incompletely followed or altogether omitted by their authors. And indeed there is one remarkable omission with which all these speculations are chargeable, except perhaps those of Montesquieu. They take no account of what law has actually been at epochs remote from the particular period at which they made their appearance. Their originators carefully observed the institutions of their own age and civilisation, and those of other ages and civilisations with which they had some degree of intellectual sympathy, but, when they turned their attention to archaic states of society which exhibited much superficial difference from their own, they uniformly ceased to observe and began guessing. The mistake which they committed is therefore analogous to the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a world, instead of beginning with the particles which are its simplest ingredients. One does not certainly see why such a scientific solecism should be more defensible in jurisprudence than in any other region of thought. It would seem antecedently that we ought to commence with the simplest social forms in a state as near as possible to their rudimentary condition. In other words, if we followed the course usual in such inquiries, we should penetrate as far up as we could in the history of primitive societies. The phenomena which early

societies present us with are not easy at first to understand, but the difficulty of grappling with them bears no proportion to the perplexities which beset us in considering the baffling entanglement of modern social organisation. It is a difficulty arising from their strangeness and uncouthness, not from their number and complexity. One does not readily get over the surprise which they occasion when looked at from a modern point of view; but when that is surmounted they are few enough and simple enough. But, even if they gave more trouble than they do, no pains would be wasted in ascertaining the germs out of which has assuredly been unfolded every form of moral restraint which controls our actions and shapes our conduct at the present moment.

The rudiments of the social state, so far as they are known to us at all, are known through testimony of three sorts—accounts by contemporary observers of civilisations less advanced than their own, the records which particular races have preserved concerning their primitive history, and ancient law. The first kind of evidence is the best we could have expected. As societies do not advance concurrently, but at different rates of progress, there have been epochs at which men trained to habits of methodical observation have really been in a position to watch and describe the infancy of mankind. Tacitus made the most of such an opportunity; but the *Germany*, unlike most celebrated classical books, has not induced others to follow the excellent example set by its author, and the amount of this sort of testimony which we possess is exceedingly small. The lofty contempt which a civilised people entertains for barbarous neighbours has caused a remarkable

negligence in observing them, and this carelessness has been aggravated at times by fear, by religious prejudice, and even by the use of these very terms—civilisation and barbarism—which convey to most persons the impression of a difference not merely in degree but in kind. Even the *Germany* has been suspected by some critics of sacrificing fidelity to poignancy of contrast and picturesqueness of narrative. Other histories too, which have been handed down to us among the archives of the people to whose infancy they relate, have been thought distorted by the pride of race or by the religious sentiment of a newer age. It is important then to observe that these suspicions, whether groundless or rational, do not attach to a great deal of archaic law. Much of the old law which has descended to us was preserved merely because it was old. Those who practised and obeyed it did not pretend to understand it; and in some cases they even ridiculed and despised it. They offered no account of it except that it had come down to them from their ancestors. If we confine our attention, then, to those fragments of ancient institutions which cannot reasonably be supposed to have been tampered with, we are able to gain a clear conception of certain great characteristics of the society to which they originally belonged. Advancing a step further, we can apply our knowledge to systems of law which, like the Code of Menu, are as a whole of suspicious authenticity; and, using the key we have obtained, we are in a position to discriminate those portions of them which are truly archaic from those which have been affected by the prejudices, interests, or ignorance of the compiler. It will at least be acknowledged that, if

the materials for this process are sufficient, and if the comparisons be accurately executed, the methods followed are as little objectionable as those which have led to such surprising results in comparative philology.

The effect of the evidence derived from comparative jurisprudence is to establish that view of the primeval condition of the human race which is known as the Patriarchal Theory. There is no doubt, of course, that this theory was originally based on the Scriptural history of the Hebrew patriarchs in Lower Asia; but, as has been explained already, its connexion with Scripture rather militated than otherwise against its reception as a complete theory, since the majority of the inquirers who till recently addressed themselves with most earnestness to the colligation of social phenomena, were either influenced by the strongest prejudice against Hebrew antiquities or by the strongest desire to construct their system without the assistance of religious records. Even now there is perhaps a disposition to undervalue these accounts, or rather to decline generalising from them, as forming part of the traditions of a Semitic people. It is to be noted, however, that the legal testimony comes nearly exclusively from the institutions of societies belonging to the Indo-European stock, the Romans, Hindoos, and Sclavonians supplying the greater part of it; and indeed the difficulty, at the present stage of the inquiry, is to know where to stop, to say of what races of men it is *not* allowable to lay down that the society in which they are united was originally organised on the patriarchal model. The chief lineaments of such a society, as collected from the early chapters in Genesis, I need

not attempt to depict with any minuteness, both because they are familiar to most of us from our earliest childhood, and because, from the interest once attaching to the controversy which takes its name from the debate between Locke and Filmer, they fill a whole chapter, though not a very profitable one, in English literature. The points which lie on the surface of the history are these:—The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself. The flocks and herds of the children are the flocks and herds of the father, and the possessions of the parent, which he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birthright, but more generally endowed with no hereditary advantage beyond an honorary precedence. A less obvious inference from the Scriptural accounts is that they seem to plant us on the traces of the breach which is first effected in the empire of the parent. The families of Jacob and Esau separate and form two nations; but the families of Jacob's children hold together and become a people. This looks like the immature germ of a state or commonwealth, and of an order of rights superior to the claims of family relation.

If I were attempting for the more special purposes of the jurist to express compendiously the

characteristics of the situation in which mankind disclose themselves at the dawn of their history, I should be satisfied to quote a few verses from the *Odyssey* of Homer:

> τοῖσιν δ' οὔτ' ἀγοραὶ βουληφόροι οὔτε θέμιστες.
> . . . θεμιστεύει δὲ ἕκαστος
> παίδων ἠδ' ἀλόχων, οὐδ' ἀλλήλων ἀλέγουσιν.

'They have neither assemblies for consultation nor *themistes*, but every one exercises jurisdiction over his wives and his children, and they pay no regard to one another'. These lines are applied to the Cyclops, and it may not perhaps be an altogether fanciful idea when I suggest that the Cyclops is Homer's type of an alien and less advanced civilisation; for the almost physical loathing which a primitive community feels for men of widely different manners from its own usually expresses itself by describing them as monsters, such as giants, or even (which is almost always the case in Oriental mythology) as demons. However that may be, the verses condense in themselves the sum of the hints which are given us by legal antiquities. Men are first seen distributed in perfectly insulated groups, held together by obedience to the parent. Law is the parent's word, but it is not yet in the condition of those *themistes* which were analysed in the first chapter of this work. When we go forward to the state of society in which these early legal conceptions show themselves as formed, we find that they still partake of the mystery and spontaneity which must have seemed to characterise a despotic father's commands, but that at the same time, inasmuch as they proceed from a sovereign, they

presuppose a union of family groups in some wider organisation. The next question is, what is the nature of this union and the degree of intimacy which it involves. It is just here that archaic law renders us one of the greatest of its services and fills up a gap which otherwise could only have been bridged by conjecture. It is full, in all its provinces, of the clearest indications that society in primitive times was not what it is assumed to be at present, a collection of *individuals*. In fact, and in the view of the men who composed it, it was *an aggregation of families*. The contrast may be most forcibly expressed by saying that the *unit* of an ancient society was the Family, of a modern society the Individual. We must be prepared to find in ancient law all the consequences of this difference. It is so framed as to be adjusted to a system of small independent corporations. It is therefore scanty, because it is supplemented by the despotic commands of the heads of households. It is ceremonious, because the transactions to which it pays regard resemble international concerns much more than the quick play of intercourse between individuals. Above all it has a peculiarity of which the full importance cannot be shown at present. It takes a view of *life* wholly unlike any which appears in developed jurisprudence. Corporations *never die*, and accordingly primitive law considers the entities with which it deals, i.e., the patriarchal or family groups, as perpetual and inextinguishable. This view is closely allied to the peculiar aspect under which, in very ancient times, moral attributes present themselves. The moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and

offences of the group to which the individual belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members; the crime is a corporate act, and extends in its consequences to many more persons than have shared in its actual perpetration. If, on the other hand, the individual is conspicuously guilty, it is his children, his kinsfolk, his tribesmen, or his fellow-citizens, who suffer with him, and sometimes for him. It thus happens that the ideas of moral responsibility and retribution often seem to be more clearly realised at very ancient than at more advanced periods, for, as the family group is immortal, and its liability to punishment indefinite, the primitive mind is not perplexed by the questions which become troublesome as soon as the individual is conceived as altogether separate from the group. One step in the transition from the ancient and simple view of the matter to the theological or metaphysical explanations of later days is marked by the early Greek notion of an inherited curse. The bequest received by his posterity from the original criminal was not a liability to punishment, but a liability to the commission of fresh offences which drew with them a condign retribution; and thus the responsibility of the family was reconciled with the newer phase of thought which limited the consequences of crime to the person of the actual delinquent.

It would be a very simple explanation of the origin of society if we could base a general conclusion on the hint furnished us by the Scriptural example already adverted to, and could suppose that communities began to exist wherever a family held together instead of separating at the death

of its patriarchal chieftain. In most of the Greek states and in Rome there long remained the vestiges of an ascending series of groups out of which the State was at first constituted. The Family, House, and Tribe of the Romans may be taken as the type of them, and they are so described to us that we can scarcely help conceiving them as a system of concentric circles which have gradually expanded from the same point. The elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregation of Families forms the Gens or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the Commonwealth. Are we at liberty to follow these indications, and to lay down that the commonwealth is a collection of persons united by common descent from the progenitor of an original family? Of this we may at least be certain, that all ancient societies regarded themselves as having proceeded from one original stock, and even laboured under an incapacity for comprehending any reason except this for their holding together in political union. The history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions; nor is there any of those subversions of feeling, which we term emphatically revolutions, so startling and so complete as the change which is accomplished when some other principle—such as that, for instance, of *local contiguity*—establishes itself for the first time as the basis of common political action. It may be affirmed then of early commonwealths that their citizens considered all the groups in which they claimed membership to be founded on common

lineage. What was obviously true of the Family was believed to be true first of the House, next of the Tribe, lastly of the State. And yet we find that along with this belief, or, if we may use the word, this theory, each community preserved records or traditions which distinctly showed that the fundamental assumption was false. Whether we look to the Greek states, or to Rome, or to the Teutonic aristocracies in Ditmarsh which furnished Niebuhr with so many valuable illustrations, or to the Celtic clan associations, or to that strange social organisation of the Sclavonic Russians and Poles which has only lately attracted notice, everywhere we discover traces of passages in their history when men of alien descent were admitted to, and amalgamated with, the original brotherhood. Adverting to Rome singly, we perceive that the primary group, the Family, was being constantly adulterated by the practice of adoption, while stories seem to have been always current respecting the exotic extraction of one of the original Tribes and concerning a large addition to the Houses made by one of the early kings. The composition of the state, uniformly assumed to be natural, was nevertheless known to be in great measure artificial. This conflict between belief or theory and notorious fact is at first sight extremely perplexing; but what it really illustrates is the efficiency with which Legal Fictions do their work in the infancy of society. The earliest and most extensively employed of legal fictions was that which permitted family relations to be created artificially, and there is none to which I conceive mankind to be more deeply indebted. If it had never existed, I do not see how any one of the primitive groups, what-

ever were their nature, could have absorbed another, or on what terms any two of them could have combined, except those of absolute superiority on one side and absolute subjection on the other. No doubt, when with our modern ideas we contemplate the union of independent communities, we can suggest a hundred modes of carrying it out, the simplest of all being that the individuals comprised in the coalescing groups shall vote or act together according to local propinquity; but the idea that a number of persons should exercise political rights in common simply because they happened to live within the same topographical limits was utterly strange and monstrous to primitive antiquity. The expedient which in those times commanded favour was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted; and it is precisely the good faith of this fiction, and the closeness with which it seemed to imitate reality, that we cannot now hope to understand. One circumstance, however, which it is important to recollect, is that the men who formed the various political groups were certainly in the habit of meeting together periodically, for the purpose of acknowledging and consecrating their association by common sacrifices. Strangers amalgamated with the brotherhood were doubtless admitted to these sacrifices; and when that was once done, we can believe that it seemed equally easy, or not more difficult, to conceive them as sharing in the common lineage. The conclusion then which is suggested by the evidence is, not that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence and solidity

either were so descended or assumed that they were. An indefinite number of causes may have shattered the primitive groups, but wherever their ingredients recombined, it was on the model or principle of an association of kindred. Whatever were the fact all thought, language, and law adjusted themselves to the assumption. But though all this seems to me to be established with reference to the communities with whose records we are acquainted, the remainder of their history sustains the position before laid down as to the essentially transient and terminable influence of the most powerful Legal Fictions. At some point of time—probably as soon as they felt themselves strong enough to resist extrinsic pressure—all these states ceased to recruit themselves by factitious extensions of consanguinity. They necessarily, therefore, became Aristocracies, in all cases where a fresh population from any cause collected around them which could put in no claim to community of origin. Their sternness in maintaining the central principle of a system under which political rights were attainable on no terms whatever except connexion in blood, real or artificial, taught their inferiors another principle, which proved to be endowed with a far higher measure of vitality. This was the principle of *local contiguity*, now recognised everywhere as the condition of community in political functions. A new set of political ideas came at once into existence, which, being those of ourselves, our contemporaries, and in great measure of our ancestors, rather obscure our perception of the older theory which they vanquished and dethroned.

The Family then is the type of an archaic society in all the modifications which it was

capable of assuming; but the family here spoken of is not exactly the family as understood by a modern. In order to reach the ancient conception we must give to our modern ideas an important extension and an important limitation. We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to regard the fiction of adoption as so closely simulating the reality of kinship that neither law nor opinion makes the slightest difference between a real and an adoptive connexion. On the other hand, the persons theoretically amalgamated into a family by their common descent are practically held together by common obedience to their highest living ascendant, the father, grandfather, or great-grandfather. The patriarchal authority of a chieftain is as necessary an ingredient in the notion of the family group as the fact (or assumed fact) of its having sprung from his loins; and hence we must understand that if there be any persons who, however truly included in the brotherhood by virtue of their blood-relationship, have nevertheless *de facto* withdrawn themselves from the empire of its ruler, they are always, in the beginnings of law, considered as lost to the family. It is this patriarchal aggregate—the modern family thus cut down on one side and extended on the other—which meets us on the threshold of primitive jurisprudence. Older probably than the State, the Tribe, and the House, it left traces of itself on private law long after the House and the Tribe had been forgotten, and long after consanguinity had ceased to be associated with the composition of States. It will be found to have stamped itself on all the great departments of jurisprudence,

and may be detected, I think, as the true source of many of their most important and most durable characteristics. At the outset, the peculiarities of law in its most ancient state lead us irresistibly to the conclusion that it took precisely the same view of the family group which is taken of individual men by the systems of rights and duties now prevalent throughout Europe. There are societies open to our observation at this very moment whose laws and usages can scarcely be explained unless they are supposed never to have emerged from this primitive condition; but in communities more fortunately circumstanced the fabric of jurisprudence fell gradually to pieces, and if we carefully observe the disintegration we shall perceive that it took place principally in those portions of each system which were most deeply affected by the primitive conception of the family. In one all-important instance, that of the Roman law, the change was effected so slowly, that from epoch to epoch we can observe the line and direction which it followed, and can even give some idea of the ultimate result to which it was tending. And, in pursuing this last inquiry, we need not suffer ourselves to be stopped by the imaginary barrier which separates the modern from the ancient world. For one effect of that mixture of refined Roman law with primitive barbaric usage, which is known to us by the deceptive name of feudalism, was to revive many features of archaic jurisprudence which had died out of the Roman world, so that the decomposition which had seemed to be over commenced again, and to some extent is still proceeding.

On a few systems of law the family organisation of the earliest society has left a plain and broad

mark in the life-long authority of the Father or other ancestor over the person and property of his descendants, an authority which we may conveniently call by its later Roman name of Patria Potestas. No feature of the rudimentary associations of mankind is deposed to by a greater amount of evidence than this, and yet none seems to have disappeared so generally and so rapidly from the usages of advancing communities. Gaius, writing under the Antonines, describes the institution as distinctively Roman. It is true that, had he glanced across the Rhine or the Danube to those tribes of barbarians which were exciting the curiosity of some among his contemporaries, he would have seen examples of patriarchal power in its crudest form; and in the far East a branch of the same ethnical stock from which the Romans sprang was repeating their Patria Potestas in some of its most technical incidents. But among the races understood to be comprised within the Roman empire, Gaius could find none which exhibited an institution resembling the Roman "Power of the Father," except only the Asiatic Galatæ. There are reasons, indeed, as it seems to me, why the direct authority of the ancestor should, in the greater number of progressive societies, very shortly assume humbler proportions than belonged to it in their earliest state. The implicit obedience of rude men to their parent is doubtless a primary fact, which it would be absurd to explain away altogether by attributing to them any calculation of its advantages; but, at the same time, if it is natural in the sons to obey the father, it is equally natural that they should look to him for superior strength or superior wisdom. Hence, when

societies are placed under circumstances which cause an especial value to be attached to bodily and mental vigour, there is an influence at work which tends to confine the Patria Potestas to the cases where its possessor is actually skilful and strong. When we obtain our first glimpse of organised Hellenic society, it seems as if supereminent wisdom would keep alive the father's power in persons whose bodily strength had decayed; but the relations of Ulysses and Laertes in the *Odyssey* appear to show that, where extraordinary valour and sagacity were united in the son, the father in the decrepitude of age was deposed from the headship of the family. In the mature Greek jurisprudence, the rule advances a few steps on the practice hinted at in the Homeric literature; and though very many traces of stringent family obligation remain, the direct authority of the parent is limited, as in European codes, to the nonage or minority of the children, or, in other words, to the period during which their mental and physical inferiority may always be presumed. The Roman law, however, with its remarkable tendency to innovate on ancient usage only just so far as the exigency of the commonwealth may require, preserves both the primeval institution and the natural limitation to which I conceive it to have been subject. In every relation of life in which the collective community might have occasion to avail itself of his wisdom and strength, for all purposes of counsel or of war, the filius familias, or Son under Power, was as free as his father. It was a maxim of Roman jurisprudence that the Patria Potestas did not extend to the Jus Publicum. Father and son voted together in the city, and fought side by

side in the field; indeed, the son, as general, might happen to command the father, or, as magistrate, decide on his contracts and punish his delinquencies. But in all the relations created by Private Law, the son lived under a domestic despotism which, considering the severity it retained to the last, and the number of centuries through which it endured, constitutes one of the strangest problems in legal history.

The Patria Potestas of the Romans, which is necessarily our type of the primeval paternal authority, is equally difficult to understand as an institution of civilised life, whether we consider its incidence on the person or its effects on property. It is to be regretted that a chasm which exists in its history cannot be more completely filled. So far as regards the person, the parent, when our information commences, has over his children the *jus vitæ necisque*, the power of life and death, and *à fortiori* of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them. Late in the Imperial period we find vestiges of all these powers, but they are reduced within very narrow limits. The unqualified right of domestic chastisement has become a right of bringing domestic offences under the cognisance of the civil magistrate; the privilege of dictating marriage has declined into a conditional veto; the liberty of selling has been virtually abolished, and adoption itself, destined to lose almost all its ancient importance in the reformed system of Justinian, can no longer be effected without the

assent of the child transferred to the adoptive parentage. In short, we are brought very close to the verge of the ideas which have at length prevailed in the modern world. But between these widely distant epochs there is an interval of obscurity, and we can only guess at the causes which permitted the Patria Potestas to last as long as it did by rendering it more tolerable than it appears. The active discharge of the most important among the duties which the son owed to the state must have tempered the authority of his parent if they did not annul it. We can readily persuade ourselves that the paternal despotism could not be brought into play without great scandal against a man of full age occupying a high civil office. During the earlier history, however, such cases of practical emancipation would be rare compared with those which must have been created by the constant wars of the Roman republic. The military tribune and the private soldier who were in the field three quarters of a year during the earlier contests, at a later period the proconsul in charge of a province, and the legionaries who ocupied it, cannot have had practical reason to regard themselves as the slaves of a despotic master; and all these avenues of escape tended constantly to multiply themselves. Victories led to conquests, conquests to occupations; the mode of occupation by colonies was exchanged for the system of occupying provinces by standing armies. Each step in advance was a call for the expatriation of more Roman citizens and a fresh draft on the blood of the failing Latin race. We may infer, I think, that a strong sentiment in favour of the relaxation of the Patria Potestas had become fixed by the time that the pacifica-

tion of the world commenced on the establishment of the Empire. The first serious blows at the ancient institution are attributed to the earlier Cæsars, and some isolated interferences of Trajan and Hadrian seem to have prepared the ground for a series of express enactments which, though we cannot always determine their dates, we know to have limited the father's powers on the one hand, and on the other to have multiplied facilities for their voluntary surrender. The older mode of getting rid of the Potestas, by effecting a triple sale of the son's person, is evidence, I may remark, of a very early feeling against the unnecessary prolongation of the powers. The rule which declared that the son should be free after having been three times sold by his father seems to have been originally meant to entail penal consequences on a practice which revolted even the imperfect morality of the primitive Roman. But even before the publication of the Twelve Tables it had been turned, by the ingenuity of the jurisconsults, into an expedient for destroying the parental authority wherever the father desired that it should cease.

Many of the causes which helped to mitigate the stringency of the father's power over the persons of his children are doubtless among those which do not lie upon the face of history. We cannot tell how far public opinion may have paralysed an authority which the law conferred, or how far natural affection may have rendered it endurable. But though the powers over the *person* may have been latterly nominal, the whole tenour of the extant Roman jurisprudence suggests that the father's rights over the son's *property* were always exercised without scruple to

the full extent to which they were sanctioned by law. There is nothing to astonish us in the latitude of these rights when they first show themselves. The ancient law of Rome forbade the Children under Power to hold property apart from their parent, or (we should rather say) never contemplated the possibility of their claiming a separate ownership. The father was entitled to take the whole of the son's acquisitions, and to enjoy the benefit of his contracts without being entangled in any compensating liability. So much as this we should expect from the constitution of the earliest Roman society, for we can hardly form a notion of the primitive family group unless we suppose that its members brought their earnings of all kinds into the common stock while they were unable to bind it by improvident individual engagements. The true enigma of the Patria Potestas does not reside here, but in the slowness with which these proprietary privileges of the parent were curtailed, and in the circumstance that, before they were seriously diminished, the whole civilised world was brought within their sphere. No innovation of any kind was attempted till the first years of the Empire, when the acquisitions of soldiers on service were withdrawn from the operation of the Patria Potestas, doubtless as part of the reward of the armies which had overthrown the free commonwealth. Three centuries afterwards the same immunity was extended to the earnings of persons who were in the civil employment of the state. Both changes were obviously limited in their application, and they were so contrived in technical form as to interfere as little as possible with the principle of Patria Potestas. A certain qualified and dependent

ownership had always been recognised by the Roman law in the perquisites and savings which slaves and sons under power were not compelled to include in the household accounts, and the special name of this permissive property, Peculium, was applied to the acquisitions newly relieved from Patria Potestas, which were called in the case of soldiers Castrense Peculium, and Quasi-castrense Peculium in the case of civil servants. Other modifications of the parental privileges followed, which showed a less studious outward respect for the ancient principle. Shortly after the introduction of the Quasi-castrense Peculium, Contantine the Great took away the father's absolute control over property which his children had inherited from their mother, and reduced it to a *usufruct*, or life-interest. A few more changes of slight importance followed in the Western Empire, but the furthest point reached was in the East, under Justinian, who enacted that unless the acquisitions of the child were derived from the parent's own property, the parent's rights over them should not extend beyond enjoying their produce for the period of his life. Even this, the utmost relaxation of the Roman Patria Potestas, left it far ampler and severer than any analogous institution of the modern world. The earliest modern writers on jurisprudence remark that it was only the fiercer and ruder of the conquerors of the empire, and notably the nations of Sclavonic origin, which exhibited a Patria Potestas at all resembling that which was described in the Pandects and the Code. All the Germanic immigrants seem to have recognised a corporate union of the family under the *mund*, or authority of a patriarchal

chief; but his powers are obviously only the relics of a decayed Patria Potestas, and fell far short of those enjoyed by the Roman father. The Franks are particularly mentioned as not having the Roman Institution, and accordingly the old French lawyers, even when most busily engaged in filling the interstices of barbarous custom with rules of Roman law, were obliged to protect themselves against the intrusion of the Potestas by the express maxim, *Puyssance de père en France n'a lieu.* The tenacity of the Romans in maintaining this relic of their most ancient condition is in itself remarkable, but it is less remarkable than the diffusion of the Potestas over the whole of a civilisation from which it had once disappeared. While the Castrense Peculium constituted as yet the sole exception to the father's power over property, and while his power over his children's persons was still extensive, the Roman citizenship, and with it the Patria Potestas, were spreading into every corner of the empire. Every African or Spaniard, every Gaul, Briton, or Jew, who received this honour by gift, purchase, or inheritance, placed himself under the Roman Law of Persons, and, though our authorities intimate that children born before the acquisition of citizenship could not be brought under Power against their will, children born after it and all ulterior descendants were on the ordinary footing of a Roman *filius familias*. It does not fall within the province of this treatise to examine the mechanism of the later Roman society, but I may be permitted to remark that there is little foundation for the opinion which represents the constitution of Antoninus Caracalla conferring Roman citizenship on the whole of his subjects as a

measure of small importance. However we may interpret it, it must have enormously enlarged the sphere of the Patria Potestas, and it seems to me that the tightening of family relations which it effected is an agency which ought to be kept in view more than it has been, in accounting for the great moral revolution which was transforming the world.

Before this branch of our subject is dismissed, it should be observed that the Paterfamilias was answerable for the delicts (or *torts*) of his Sons under Power. He was similarly liable for the torts of his slaves; but in both cases he originally possessed the singular privilege of tendering the delinquent's person in full satisfaction of the damage. The responsibility thus incurred on behalf of sons, coupled with the mutual incapacity of Parent and Child under Power to sue one another, has seemed to some jurists to be best explained by the assumption of a 'unity of person' between the Pater-familias and the Filius-familias. In the Chapter on Successions I shall attempt to show in what sense, and to what extent, this 'unity' can be accepted as a reality. I can only say at present that these responsibilities of the Paterfamilias, and other legal phenomena which will be discussed hereafter, appear to me to point at certain *duties* of the primitive Patriarchal chieftain which balanced his *rights*. I conceive that, if he disposed absolutely of the persons and fortune of his clansmen, this representative ownership was coextensive with a liability to provide for all members of the brotherhood out of the common fund. The difficulty is to throw ourselves out of our habitual associations sufficiently for conceiving the nature of his

obligation. It was not a legal duty, for law had not yet penetrated into the precinct of the Family. To call it *moral* is perhaps to anticipate the ideas belonging to a later stage of mental development; but the expression "moral obligation" is significant enough for our purpose, if we understand by it a duty semi-consciously followed and enforced rather by instinct and habit than by definite sanctions.

The Patria Potestas, in its normal shape, has not been, and, as it seems to me, could not have been, a generally durable institution. The proof of its former universality is therefore incomplete so long as we consider it by itself; but the demonstration may be carried much further by examining other departments of ancient law which depend on it ultimately, but not by a thread of connexion visible in all its parts or to all eyes. Let us turn for example to Kinship, or in other words, to the scale on which the proximity of relatives to each other is calculated in archaic jurisprudence. Here again it will be convenient to employ the Roman terms, Agnatic and Cognatic relationship. *Cognatic* relationship is simply the conception of kinship familiar to modern ideas; it is the relationship arising through common descent from the same pair of married persons, whether the descent be traced through males or females. *Agnatic* relationship is something very different: it excludes a number of persons whom we in our day should certainly consider of kin to ourselves, and it includes many more whom we should never reckon among our kindred. It is in truth the connexion existing between the members of the Family, conceived as it was in the most ancient times. The limits

of this connexion are far from conterminous with those of modern relationship.

Cognates then are all those persons who can trace their blood to a single ancestor and ancestress; or, if we take the strict technical meaning of the word in Roman law, they are all who trace their blood to the legitimate marriage of a common pair. "Cognation" is therefore a relative term, and the degree of connexion in blood which it indicates depends on the particular marriage which is selected as the commencement of the calculation. If we begin with marriage of father and mother, Cognation will only express the relationship of brothers and sisters; if we take that of the grandfather and grandmother, then uncles, aunts, and their descendants will also be included in the notion of Cognation, and following the same process a larger number of Cognates may be continually obtained by choosing the starting point higher and higher up in the line of ascent. All this is easily understood by a modern; but who are the Agnates? In the first place, they are all the Cognates who trace their connexion exclusively through males. A table of Cognates is, of course, formed by taking each lineal ancestor in turn and including all his descendants of both sexes in the tabular view; if then, in tracing the various branches of such a genealogical table or tree, we stop whenever we come to the name of a female and pursue that particular branch or ramification no further, all who remain after the descendants of women have been excluded are Agnates, and their connexion together is Agnatic Relationship. I dwell a little on the process which is practically followed in separating them from the Cognates, because it explains a memorable

legal maxim, 'Mulier est finis familiæ'—a woman is the terminus of the family. A female name closes the branch or twig of the genealogy in which it occurs. None of the descendants of a female are included in the primitive notion of family relationship.

If the system of archaic law at which we are looking be one which admits Adoption, we must add to the Agnates thus obtained all persons, male or female, who have been brought into the Family by the artificial extension of its boundaries. But the descendants of such persons will only be Agnates, if they satisfy the conditions which have just been described.

What then is the reason of this arbitrary inclusion and exclusion? Why should a conception of Kinship, so elastic as to include strangers brought into the family by adoption, be nevertheless so narrow as to shut out the descendants of a female member? To solve these questions, we must recur to the Patria Potestas. The foundation of Agnation is not the marriage of Father and Mother, but the authority of the Father. All persons are Agnatically connected together who are under the same Paternal Power, or who have been under it, or who might have been under it if their lineal ancestor had lived long enough to exercise his empire. In truth, in the primitive view, Relationship is exactly limited by Patria Potestas. Where the Potestas begins, Kinship begins; and therefore adoptive relatives are among the kindred. Where the Potestas ends, Kinship ends; so that a son emancipated by his father loses all rights of Agnation. And here we have the reason why the descendants of females are outside the limits of archaic kinship. If a

woman died unmarried, she could have no legitimate descendants. If she married, her children fell under the Patria Potestas, not of her Father, but of her Husband, and thus were lost to her own family. It is obvious that the organisation of primitive societies would have been confounded, if men had called themselves relatives of their mother's relatives. The inference would have been that a person might be subject to two distinct Patriæ Potestates; but distinct Patriæ Potestates implied distinct jurisdictions, so that anybody amenable to two of them at the same time would have lived under two different dispensations. As long as the Family was an imperium in imperio, a community within the commonwealth, governed by its own institutions of which the parent was the source, the limitation of relationship to the Agnates was a necessary security against a conflict of laws in the domestic forum.

The Parental Powers proper are extinguished by the death of the Parent, but Agnation is as it were a mould which retains their imprint after they have ceased to exist. Hence comes the interest of Agnation for the inquirer into the history of jurisprudence. The Powers themselves are discernible in comparatively few monuments of ancient law, but Agnatic Relationship, which implies their former existence, is discoverable almost everywhere. There are few indigenous bodies of law belonging to communities of the Indo-European stock, which do not exhibit peculiarities in the most ancient part of their structure which are clearly referable to Agnation. In Hindoo law, for example, which is saturated with the primitive notions of family dependency,

kinship is entirely Agnatic, and I am informed that in Hindoo genealogies the names of women are generally omitted altogether. The same view of relationship pervades so much of the laws of the races who overran the Roman Empire as appears to have really formed part of their primitive usage, and we may suspect that it would have perpetuated itself even more than it has in modern European jurisprudence, if it had not been for the vast influence of the later Roman law on modern thought. The Prætors early laid hold on Cognation as the *natural* form of kinship, and spared no pains in purifying their system from the older conception. Their ideas have descended to us, but still traces of Agnation are to be seen in many of the modern rules of succession after death. The exclusion of females and their children from governmental functions, commonly attributed to the usage of the Salian Franks, has certainly an agnatic origin, being descended from the ancient German rule of succession to allodial property. In Agnation too is to be sought the explanation of that extraordinary rule of English Law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the Customs of Normandy, the rule applies to *uterine* brothers only, that is, to brothers by the same mother but not by the same father; and, limited in this way, it is a strict deduction from the system of Agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clue to its principle, interpreted it as a general prohibition against the succession of the half-blood, and extended it to *consanguineous*

brothers, that is to sons of the same father by different wives. In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood.

It may be shown, I think, that the Family, as held together by the Patria Potestas, is the nidus out of which the entire Law of Persons has germinated. Of all the chapters of that Law the most important is that which is concerned with the status of Females. It has just been stated that Primitive Jurisprudence, though it does not allow a Woman to communicate any rights of Agnation to her descendants, includes herself nevertheless in the Agnatic bond. Indeed, the relation of a female to the family in which she was born is much stricter, closer, and more durable than that which unites her male kinsmen. We have several times laid down that early law takes notice of Families only; this is the same thing as saying that it only takes notice of persons exercising Patria Potestas, and accordingly the only principle on which it enfranchises a son or grandson at the death of his Parent, is a consideration of the capacity inherent in such son or grandson to become himself the head of a new family and the root of a new set of Parental Powers.. But a woman, of course, has no capacity of the kind, and no title accordingly to the liberation which it confers. There is therefore a peculiar contrivance of archaic jurisprudence for retaining her in the bondage of the Family for life. This is the institution known to the oldest Roman law as the Perpetual Tutelage of Women, under which a Female, though relieved from her

Parent's authority by his decease, continues subject through life to her nearest male relations as her Guardians. Perpetual Guardianship is obviously neither more nor less than an artificial prolongation of the Patria Potestas, when for other purposes it has been dissolved. In India, the system survives in absolute completeness, and its operation is so strict that a Hindoo Mother frequently becomes the ward of her own sons. Even in Europe, the laws of the Scandinavian nations respecting women preserved it until quite recently. The invaders of the Western Empire had it universally among their indigenous usages, and indeed their ideas on the subject of Guardianship, in all its forms, were among the most retrogressive of those which they introduced into the Western world. But from the mature Roman jurisprudence it had entirely disappeared. We should know almost nothing about it, if we had only the compilations of Justinian to consult; but the discovery of the manuscript of Gaius discloses it to us at a most interesting epoch, just when it had fallen into complete discredit and was verging on extinction. The great jurisconsult himself scouts the popular apology offered for it in the mental inferiority of the female sex, and a considerable part of his volume is taken up with descriptions of the numerous expedients, some of them displaying extraordinary ingenuity, which the Roman lawyers had devised for enabling Women to defeat the ancient rules. Led by their theory of Natural Law, the jurisconsults had evidently at this time assumed the equality of the sexes as a principle of their code of equity. The restrictions which they attacked were, it is to be observed, restrictions on the disposition of

property, for which the assent of the woman's guardians was still formally required. Control of her person was apparently quite obsolete.

Ancient law subordinates the woman to her blood-relations, while a prime phenomenon of modern jurisprudence has been her subordination to her husband. The history of the change is remarkable. It begins far back in the annals of Rome. Anciently, there were three modes in which marriage might be contracted according to Roman usage, one involving a religious solemnity, the other two the observance of certain secular formalities. By the religious marriage or *Confarreation;* by the higher form of civil marriage, which was called *Coemption;* and by the lower form, which was termed *Usus*, the Husband acquired a number of rights over the person and property of his wife, which were on the whole in excess of such as are conferred on him in any system of modern jurisprudence. But in what capacity did he acquire them? Not as *Husband*, but as *Father*. By the Confarreation, Coemption, and Usus, the woman passed *in manum viri*, that is, in law she became the *Daughter* of her husband. She was included in his Patria Potestas. She incurred all the liabilities springing out of it while it subsisted, and surviving it when it had expired. All her property became absolutely his, and she was retained in tutelage after his death to the guardian whom he had appointed by will. These three ancient forms of marriage fell, however, gradually into disuse, so that, at the most splendid period of Roman greatness, they had almost entirely given place to a fashion of wedlock—old apparently, but not hitherto considered reputable—which was founded on a modification

of the lower form of civil marriage. Without explaining the technical mechanism of the institution now generally popular, I may describe it as amounting in law to little more than a temporary deposit of the woman by her family. The rights of the family remained unimpaired, and the lady continued in the tutelage of guardians whom her parents had appointed and whose privileges of control overrode, in many material respects, the inferior authority of her husband. The consequence was that the situation of the Roman female, whether married or unmarried, became one of great personal and proprietary independence, for the tendency of the later law, as I have already hinted, was to reduce the power of the guardian to a nullity, while the form of marriage in fashion conferred on the husband no compensating superiority. But Christianity tended somewhat from the very first to narrow this remarkable liberty. Led at first by justifiable disrelish for the loose practices of the decaying heathen world, but afterwards hurried on by a passion of asceticism, the professors of the new faith looked with disfavour on a marital tie which was in fact the laxest the Western world has seen. The latest Roman law, so far as it is touched by the Constitutions of the Christian Emperors, bears some marks of a reaction against the liberal doctrines of the great Antonine jurisconsults. And the prevalent state of religious sentiment may explain why it is that modern jurisprudence, forged in the furnace of barbarian conquest, and formed by the fusion of Roman jurisprudence with patriarchal usage, has absorbed, among its rudiments, much more than usual of those rules concerning the position of women which belong

peculiarly to an imperfect civilisation. During the troubled era which begins modern history, and while the laws of the Germanic and Sclavonic immigrants remained superposed like a separate layer above the Roman jurisprudence of their provincial subjects, the women of the dominant races are seen everywhere under various forms of archaic guardianship, and the husband who takes a wife from any family except his own pays a money-price to her relations for the tutelage which they surrender to him. When we move onwards, and the code of the middle ages has been formed by the amalgamation of the two systems, the law relating to women carries the stamp of its double origin. The principle of the Roman jurisprudence is so far triumphant that unmarried females are generally (though there are local exceptions to the rule) relieved from the bondage of the family; but the archaic principle of the barbarians has fixed the position of married women, and the husband has drawn to himself in his marital character the powers which had once belonged to his wife's male kindred, the only difference being that he no longer purchases his privileges. At this point therefore the modern law of Western and Southern Europe begins to be distinguished by one of its chief characteristics, the comparative freedom it allows to unmarried women and widows, the heavy disabilities it imposes on wives. It was very long before the subordination entailed on the other sex by marriage was sensibly diminished. The principal and most powerful solvent of the revived barbarism of Europe was always the codified jurisprudence of Justinian, wherever it was studied with that passionate enthusiasm which it seldom failed to

awaken. It covertly but most efficaciously undermined the customs which it pretended merely to interpret. But the Chapter of law relating to married women was for the most part read by the light, not of Roman, but of Canon Law, which in no one particular departs so widely from the spirit of the secular jurisprudence as in the view it takes of the relations created by marriage. This was in part inevitable, since no society which preserves any tincture of Christian institution is likely to restore to married women the personal liberty conferred on them by the middle Roman law, but the proprietary disabilities of married females stand on quite a different basis from their personal incapacities, and it is by keeping alive and consolidating the former that the expositors of the Canon Law have deeply injured civilisation. There are many vestiges of a struggle between the secular and ecclesiastical principles, but the Canon Law nearly everywhere prevailed. In some of the French provinces married women, of a rank below nobility, obtained all the powers of dealing with property which Roman jurisprudence had allowed, and this local law has been largely followed by the Code Napoleon; but the state of the Scottish law shows that scrupulous deference to the doctrines of the Roman jurisconsults did not always extend to mitigating the disabilities of wives. The systems however which are least indulgent to married women are invariably those which have followed the Canon Law exclusively, or those which, from the lateness of their contact with European civilisation, have never had their archaisms weeded out. The Scandinavian laws, harsh till lately to all females, are still remarkable for their severity to wives.

And scarcely less stringent in the proprietary incapacities it imposes is the English Common Law, which borrows far the greatest number of its fundamental principles from the jurisprudence of the Canonists. Indeed, the part of the Common Law which prescribes the legal situation of married women may serve to give an Englishman clear notions of the great institution which has been the principal subject of this chapter. I do not know how the operation and nature of the ancient Patria Potestas can be brought so vividly before the mind as by reflecting on the prerogatives attached to the husband by the pure English Common Law, and by recalling the rigorous consistency with which the view of a complete legal subjoction on the part of the wife is carried by it, where it is untouched by equity or statutes, through every department of rights, duties, and remedies. The distance between the eldest and latest Roman law on the subject of Children under Power may be considered as equivalent to the difference between the Common Law and the jurisprudence of the Court of Chancery in the rules which they respectively apply to wives.

If we were to lose sight of the true origin of Guardianship in both its forms and were to employ the common language on these topics, we should find ourselves remarking that, while the Tutelage of Women is an instance in which systems of archaic law push to an extravagant length the fiction of suspended rights, the rules which they lay down for the Guardianship of Male Orphans are an example of a fault in precisely the opposite direction. All such systems terminate the Tutelage of males at an extraordinarily early period. Under the ancient Roman

law, which may be taken as their type, the son who was delivered from Patria Potestas by the death of his Father or Grandfather remained under guardianship till an epoch which for general purposes may be described as arriving with his fifteenth year; but the arrival of that epoch placed him at once in the full enjoyment of personal and proprietary independence. The period of minority appears therefore to have been as unreasonably short as the duration of the disabilities of women was preposterously long. But, in point of fact, there was no element either of excess or of shortcoming in the circumstances which gave their original form to the two kinds of guardianship. Neither the one nor the other of them was based on the slightest consideration of public or private convenience. The guardianship of male orphans was no more designed originally to shield them till the arrival of years of discretion than the tutelage of women was intended to protect the other sex against its own feebleness. The reason why the death of the father delivered the son from the bondage of the family was the son's capacity for becoming himself the head of a new family and the founder of a new Patria Potestas; no such capacity was possessed by the woman and therefore she was *never* enfranchised. Accordingly the Guardianship of Male Orphans was a contrivance for keeping alive the semblance of subordination to the family of the Parent, up to the time when the child was supposed capable of becoming a parent himself. It was a prolongation of the Patria Potestas up to the period of bare physical manhood. It ended with puberty, for the rigour of the theory demanded that it should do so. Inas-

much, however, as it did not profess to conduct the orphan ward to the age of intellectual maturity or fitness for affairs, it was quite unequal to the purposes of general convenience; and this the Romans seem to have discovered at a very early stage of their social progress. One of the very oldest monuments of Roman legislation is the *Lex Lætoria* or *Plætoria* which placed all free males who were of full years and rights under the temporary control of a new class of guardians, called *Curatores*, whose sanction was required to validate their acts or contracts. The twenty-sixth year of the young man's age was the limit of this statutory supervision; and it is exclusively with reference to the age of twenty-five that the terms "majority" and "minority" are employed in Roman law. *Pupilage* or *wardship* in modern jurisprudence had adjusted itself with tolerable regularity to the simple principle of protection to the immaturity of youth both bodily and mental. It has its natural termination with years of discretion. But for protection against physical weakness and for protection against intellectual incapacity, the Romans looked to two different institutions, distinct both in theory and design. The ideas attendant on both are combined in the modern idea of guardianship.

The Law of Persons contains but one other chapter which can be usefully cited for our present purpose. The legal rules by which systems of mature jurisprudence regulate the connection of *Master and Slave*, present no very distinct traces of the original condition common to ancient societies. But there are reasons for this exception. There seems to be something in the institution of Slavery which has at all times either

shocked or perplexed mankind, however little habituated to reflection, and however slightly advanced in the cultivation of its moral instincts. The compunction which ancient communities almost unconsciously experienced appears to have always resulted in the adoption of some imaginary principle upon which a defence, or at least a rationale, of slavery could be plausibly founded. Very early in their history the Greeks explained the institution as grounded on the intellectual inferiority of certain races and their consequent natural aptitude for the servile condition. The Romans, in a spirit equally characteristic, derived it from a supposed agreement between the victor and the vanquished in which the first stipulated for the perpetual services of his foe; and the other gained in consideration the life which he had legitimately forfeited. Such theories were not only unsound but plainly unequal to the case for which they affected to account. Still they exercised powerful influence in many ways. They satisfied the conscience of the Master. They perpetuated and probably increased the debasement of the Slave. And they naturally tended to put out of sight the relation in which servitude had originally stood to the rest of the domestic system. The relation, though not clearly exhibited, is casually indicated in many parts of primitive law, and more particularly in the typical system—that of ancient Rome.

Much industry and some learning have been bestowed in the United States of America on the question whether the Slave was in the early stages of society a recognised member of the Family. There is a sense in which an affirmative answer must certainly be given. It is clear, from the

testimony both of ancient law and of many primeval histories, that the Slave might under certain conditions be made the Heir, or Universal Successor, of the Master, and this significant faculty, as I shall explain in the Chapter on Succession, implies that the government and representation of the Family might, in a particular state of circumstances, devolve on the bondman. It seems, however, to be assumed in the American arguments on the subject that, if we allow Slavery to have been a primitive Family institution, the acknowledgment is pregnant with an admission of the moral defensibility of Negro-servitude at the present moment. What then is meant by saying that the Slave was originally included in the Family? Not that his situation may not have been the fruit of the coarsest motives which can actuate man. The simple wish to use the bodily powers of another person as a means of ministering to one's own ease or pleasure is doubtless the foundation of Slavery, and as old as human nature. When we speak of the Slave as anciently included in the Family, we intend to assert nothing as to the motives of those who brought him into it or kept him there; we merely imply that the tie which bound him to his master was regarded as one of the same general character with that which united every other member of the group to its chieftain. This consequence is, in fact, carried in the general assertion already made that the primitive ideas of mankind were unequal to comprehending any basis of the connection *inter se* of individuals, apart from the relations of family. The Family consisted primarily of those who belonged to it by consanguinity and next of those who had been

engrafted on it by adoption; but there was still a third class of persons who were only joined to it by common subjection to its head, and these were the Slaves. The born and the adopted subjects of the chief were raised above the Slave by the certainty that in the ordinary course of events they would be relieved from bondage and entitled to exercise powers of their own; but that the inferiority of the Slave was not such as to place him outside the pale of the Family, or such as to degrade him to the footing of inanimate property, is clearly proved, I think, by the many traces which remain of his ancient capacity for inheritance in the last resort. It would, of course, be unsafe in the highest degree to hazard conjectures how far the lot of the Slave was mitigated, in the beginnings of society, by having a definite place reserved to him in the empire of the Father. It is, perhaps, more probable that the son was practically assimilated to the Slave, than that the Slave shared any of the tenderness which in later times was shown to the son. But it may be asserted with some confidence of advanced and matured codes that, wherever servitude is sanctioned, the Slave has uniformly greater advantages under systems which preserve some memento of his earlier condition than under those which have adopted some other theory of his civil degradation. The point of view from which jurisprudence regards the Slave is always of great importance to him. The Roman law was arrested in its growing tendency to look upon him more and more as an article of property by the theory of the Law of Nature; and hence it is that, wherever servitude is sanctioned by institutions which have been deeply affected by Roman juris-

prudence, the servile condition is never intolerably wretched. There is a great deal of evidence that in those American States which have taken the highly Romanised code of Louisiana as the basis of their jurisprudence, the lot and prospects of the negro-population are better in many material respects than under institutions founded on the English Common Law, which, as recently interpreted, has no true place for the Slave, and can only therefore regard him as a chattel.

We have now examined all parts of the ancient Law of Persons which fall within the scope of this treatise, and the result of the inquiry is, I trust, to give additional definiteness and precision to our view of the infancy of jurisprudence. The Civil laws of States first make their appearance as the Themistes of a patriarchal sovereign, and we can now see that these Themistes are probably only a developed form of the irresponsible commands which, in a still earlier condition of the race, the head of each isolated household may have addressed to his wives, his children, and his slaves. But, even after the State has been organised, the laws have still an extremely limited application. Whether they retain their primitive character as Themistes, or whether they advance to the condition of Customs or Codified Texts, they are binding not on individuals, but on Families. Ancient jurisprudence, if a perhaps deceptive comparison may be employed, may be likened to International Law, filling nothing, as it were, excepting the interstices between the great groups which are the atoms of society. In a community so situated, the legislation of assemblies and the jurisdiction of Courts reaches only to the heads of families, and to every other individual the rule of conduct

is the law of his home, of which his Parent is the legislator. But the sphere of civil law, small at first, tends steadily to enlarge itself. The agents of legal change, Fictions, Equity, and Legislation, are brought in turn to bear on the primeval institutions, and at every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals. The ordinances of the government obtain gradually the same efficacy in private concerns as in matters of state, and are no longer liable to be overridden by the behests of a despot enthroned by each hearthstone. We have in the annals of Roman law a nearly complete history of the crumbling away of an archaic system, and of the formation of new institutions from the recombined materials, institutions some of which descended unimpaired to the modern world, while others, destroyed or corrupted by contact with barbarism in the dark ages, had again to be recovered by mankind. When we leave this jurisprudence at the epoch of its final reconstruction by Justinian, few traces of archaism can be discovered in any part of it except in the single article of the extensive powers still reserved to the living Parent. Everywhere else principles of convenience, or of symmetry, or of simplification—new principles at any rate—have usurped the authority of the jejune considerations which satisfied the conscience of ancient times. Everywhere a new morality has displaced the canons of conduct and the reasons of acquiescence which were in unison with the ancient usages, because in fact they were born of them.

The movement of the progressive societies has

been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organisation can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no

true place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity. The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*