CHAPTER IX

THE EARLY HISTORY OF CONTRACT

THERE are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract. Some of the phenomena on which this proposition rests are among those most frequently singled out for notice, for comment, and for eulogy. Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention; and indeed several of the few exceptions which remain to this rule are constantly denounced with passionate indignation. The point, for instance, which is really debated in the vigorous controversy still carried on upon the subject of negro servitude, is whether the status of the slave does not belong to bygone institutions, and whether the only relation between employer and labourer which commends itself to modern morality be not a relation determined exclusively by contract. The recognition of this difference between past ages and the present enters into the very essence of the most famous contemporary speculations. It is certain that the science of Political Economy, the only department of moral inquiry which has made any considerable progress in our day, would fail to correspond with the facts of life if it were not true that Imperative Law had abandoned the largest part of the field which it once occupied, and had left men to settle rules of conduct for themselves with a liberty never allowed to them till recently. The bias indeed of most persons trained in political economy is to consider the general truth on which their science reposes as entitled to become universal, and, when they apply it as an art, their efforts are ordinarily directed to enlarging the province of Contract and to curtailing that of Imperative Law, except so far as law

is necessary to enforce the performance of Contracts. The impulse given by thinkers who are under the influence of these ideas is beginning to be very strongly felt in the Western world. Legislation has nearly confessed its inability to keep pace with the activity of man in discovery, in invention, and in the manipulation of accumulated wealth; and the law even of the least advanced communities tends more and more to become a mere surface-stratum having under it an ever-changing assemblage of contractual rules with which it rarely interferes except to compel compliance with a few fundamental principles or unless it be called in to punish the violation of good faith.

Social inquiries, so far as they depend on the consideration of legal phenomena, are in so backward a condition that we need not be surprised at not finding these truths recognised in the commonplaces which pass current concerning the progress of society. These commonplaces answer much more to our prejudices than to our convictions. The strong disinclination of most men to regard morality as advancing seems to be especially powerful when the virtues on which Contract depends are in question, and many of us have almost instinctive reluctance to admitting that good faith and trust in our fellows are more widely diffused than of old, or that there is anything in contemporary manners which parallels the loyalty of the antique world. From time to time, these prepossessions are greatly strengthened by the spectacle of frauds, unheard of before the period at which they were observed, and astonishing from their complication as well as shocking from criminality. But the very character of these frauds shows clearly that, before they became possible, the moral obligations of which they are the breach must have been more than proportionately developed. It is the confidence reposed and deserved by the many which affords facilities for the bad faith of the few, so that, if colossal examples of dishonesty occur, there is no surer conclusion than that scrupulous honesty is displayed in the average of the transactions which, in the particular case, have supplied the delinquent with his opportunity. If we insist on reading the history of morality as reflected in jurisprudence, by turning our eyes not on the law of Contract but on the law of Crime, we must be careful that we read it aright. The only form of dishonesty treated of in the most ancient Roman law is

Theft. At the moment at which I write, the newest chapter in the English criminal law is one which attempts to prescribe punishment for the frauds of Trustees. The proper inference from this contrast is not that the primitive Romans practised a higher morality than ourselves. We should rather say that, in the interval between their days and ours, morality has advanced from a very rude to a highly refined conception—from viewing the rights of property as exclusively sacred, to looking upon the rights growing out of the mere unilateral reposal of confidence as entitled to the protection of the penal law.

The definite theories of jurists are scarcely nearer the truth in this point than the opinions of the multitude. To begin with the views of the Roman lawyers, we find them inconsistent with the true history of moral and legal progress. One class of contracts, in which the plighted faith of the contracting parties was the only material ingredient, they specifically denominated Contracts *juris gentium*, and though these contracts were undoubtedly the latest born into the Roman system, the expression employed implies, if a definite meaning be extracted from it, that they were more ancient than certain other forms of engagement treated of in Roman law, in which the neglect of a mere technical formality was as fatal to the obligation as misunderstanding or deceit. But then the antiquity to which they were referred was vague, shadowy, and only capable of being understood through the Present; nor was it until the language of the Roman lawyers became the language of an age which had lost the key to their mode of thought that a "Contract of the Law of Nations" came to be distinctly looked upon as a Contract known to man in a State of Nature. Rousseau adopted both the juridical and the popular error. In the Dissertation on the effects of Art and Science upon Morals, the first of his works which attracted attention and the one in which he states most unreservedly the opinions which made him the founder of a sect, the veracity and good faith attributed to the ancient Persians are repeatedly pointed out as traits of primitive innocence which have been gradually obliterated by civilisation; and at a later period he found a basis for all his speculations in the doctrine of an original Social Contract. The Social Contract or Compact is the most systematic form which has ever been assumed by the error we are discussing.

It is a theory which, though nursed into importance by political passions, derived all its sap from the speculations of lawyers. True it certainly is that the famous Englishmen, for whom it had first had attraction, valued it chiefly for its political serviceableness, but, as I shall presently attempt to explain, they would never have arrived at it, if politicians had not long conducted their controversies in legal phraseology. Nor were the English authors of the theory blind to that speculative amplitude which recommended it so strongly to the Frenchmen who inherited it from them. Their writings show they perceived that it could be made to account for all social, quite as well as for all political phenomena. They had observed the fact, already striking in their day, that of the positive rules obeyed by men, the greater part were created by Contract, the lesser by Imperative Law. But they were ignorant or careless of the historical relation of these two constituents of jurisprudence. It was for the purpose, therefore, of gratifying their speculative tastes by attributing all jurisprudence to a uniform source, as much as with the view of eluding the doctrines which claimed a divine parentage for Imperative Law, that they devised the theory that all Law had its origin in Contract. In another stage of thought, they would have been satisfied to leave their theory in the condition of an ingenious hypothesis or a convenient verbal formula. But that age was under the dominion of legal superstitions. The State of Nature had been talked about till it had ceased to be regarded as paradoxical, and hence it seemed easy to give a fallacious reality and definiteness to the contractual origin of Law by insisting on the Social Compact as a historical fact.

Our own generation has got rid of these erroneous juridical theories, partly by outgrowing the intellectual state to which they belong, and partly by almost ceasing to theorise on such subjects altogether. The favourite occupation of active minds at the present moment, and the one which answers to the speculations of our forefathers on the origin of the social state, is the analysis of society as it exists and moves before our eyes; but, through omitting to call in the assistance of history, this analysis too often degenerates into an idle exercise of curiosity, and is especially apt to incapacitate the inquirer for comprehending states of society which differ considerably from that to which he is accustomed. The mistake of judging

the men of other periods by the morality of our own day has its parallel in the mistake of supposing that every wheel and bolt in the modern social machine had its counterpart in more rudimentary societies. Such impressions ramify very widely, and masque themselves very subtly, in historical works written in the modern fashion; but I find the trace of their presence in the domain of jurisprudence in the praise which is frequently bestowed on the little apologue of Montesquieu concerning the Troglodytes, inserted in the *Lettres Persanes*. The Troglodytes were a people who systematically violated their Contracts, and so perished utterly. If the story bears the moral which its author intended, and is employed to expose an anti-social heresy by which this century and the last have been threatened, it is most unexceptionable, but if the inference be obtained from it that society could not possibly hold together without attaching a sacredness to promises and agreements which should be on something like a par with the respect that is paid to them by a mature civilisation, it involves an error so grave as to be fatal to all sound understanding of legal history. The fact is that the Troglodytes have flourished and founded powerful states with very small attention to the obligations of Contract. The point which before all others has to be apprehended in the constitution of primitive societies is that the individual creates for himself few or no rights, and few or no duties The rules which he obeys are derived first from the station into which he is born, and next from the imperative commands addressed to him by the chief of the household of which he forms part. Such a system leaves the very smallest room for Contract. The members of the same family (for so we may interpret the evidence) are wholly incapable of contracting with each other, and the family is entitled to disregard the engagements by which any one of its subordinate members has attempted to bind it. Family, it is true, may contract with family, chieftain with chieftain, but the transaction is one of the same nature, and encumbered by as many formalities, as the alienation of property, and the disregard of one iota of the performance is fatal to the obligation. The positive duty resulting from one man's reliance on the word of another is among the slowest conquests of advancing civilisation.

Neither Ancient Law nor any other source of evidence discloses to us society entirely destitute of the conception of

Contract. But the conception, when it first shows itself, is obviously rudimentary. No trustworthy primitive record can be read without perceiving that the habit of mind which induces us to make good a promise is as yet imperfectly developed, and that acts of flagrant perfidy are often mentioned without blame and sometimes described with approbation. In the Homeric literature, for instance, the deceitful cunning of Ulysses appears as a virtue of the same rank with the prudence of Nestor, the constancy of Hector, and the gallantry of Achilles. Ancient law is still more suggestive of the distance which separates the crude form of Contract from its maturity. At first, nothing is seen like the interposition of law to compel the performance of a promise. That which the law arms with its sanctions is not a promise, but a promise accompanied with a solemn ceremonial. Not only are formalities of equal importance with the promise itself, but they are, if anything, of greater importance; for that delicate analysis which mature jurisprudence applies to the conditions of mind under which a particular verbal assent is given appears, in ancient law, to be transferred to the words and gestures of the accompanying performance. No pledge is enforced if a single form be omitted or misplaced, but, on the other hand, if the forms can be shown to have been accurately proceeded with, it is of no avail to plead that the promise was made under duress or deception. The transmutation of this ancient view into the familiar notion of a Contract is plainly seen in the history of jurisprudence. First one or two steps in the ceremonial are dispensed with; then the others are simplified or permitted to be neglected on certain conditions; lastly, a few specific contracts are separated from the rest and allowed to be entered into without form, the selected contracts being those on which the activity and energy of social intercourse depends. Slowly, but most distinctly, the mental engagement isolates itself amid the technicalities, and gradually becomes the sole ingredient on which the interest of the jurisconsult is concentrated. Such a mental engagement, signified through external acts, the Romans called a Pact or Convention; and when the Convention has once been conceived as the nucleus of a Contract, it soon becomes the tendency of advancing jurisprudence to break away the external shell of form and ceremony. Forms are thenceforward only retained so far

as they are guarantees of authenticity, and securities for caution and deliberation. The idea of a Contract is fully developed, or, to employ the Roman phrase, Contracts are absorbed in Pacts.

The history of this course of change in Roman law is exceedingly instructive. At the earliest dawn of the jurisprudence, the term in use for a Contract was one which is very familiar to the students of historical Latinity. It was *nexum*, and the parties to the contract were said to be *nexi*, expressions which must be carefully attended to on account of the singular durableness of the metaphor on which they are founded. The notion that persons under a contractual engagement are connected together by a strong *bond* or *chain*, continued till the last to influence the Roman jurisprudence of Contract; and flowing thence it has mixed itself with modern ideas. What then was involved in this nexum or bond? A definition which has descended to us from one of the Latin antiquarians describes *nexum* as *omne quod geritur per æs et libram*, "every transaction with the copper and the balance," and these words have occasioned a good deal of perplexity. The copper and the balance are the well-known accompaniments of the Mancipation, the ancient solemnity described in a former chapter, by which the right of ownership in the highest form of Roman Property was transferred from one person to another. Mancipation was a *conveyance*, and hence has arisen the difficulty, for the definition thus cited appears to confound Contracts and Conveyances, which in the philosophy of jurisprudence are not simply kept apart, but are actually opposed to each other. The *jus in re*, right *in rem*, right "availing against all the world," or Proprietary Right, is sharply distinguished by the analyst of mature jurisprudence from the *jus ad rem*, right *in personam*, right "availing a single individual or group," or obligation. Now Conveyances transfer Proprietary Rights, Contracts create Obligations—how then can the two be included under the same name or same general conception? This, like many similar embarrassments, has been occasioned by the error of ascribing to the mental condition of an unformed society a faculty which pre-eminently belongs to an advanced stage of intellectual development, the faculty of distinguishing in speculation ideas which are blended in practice. We have indications not to be mistaken of a state

of social affairs in which Conveyances and Contracts were practically confounded; nor did the discrepance of the conceptions become perceptible till men had begun to adopt a distinct practice in contracting and conveying.

It may here be observed that we know enough of ancient Roman law to give some idea of the mode of transformation followed by legal conceptions and by legal phraseology in the infancy of Jurisprudence. The change which they undergo appears to be a change from general to special; or, as we might otherwise express it, the ancient conceptions and the ancient terms are subjected to a process of gradual specialisation. An ancient legal conception corresponds not to one but to several modern conceptions. An ancient technical expression serves to indicate a variety of things which in modern law have separate names allotted to them. If however we take up the history of Jurisprudence at the next stage, we find that the subordinate conceptions have gradually disengaged themselves and that the old general names are giving way to special appellations. The old general conception is not obliterated, but it has ceased to cover more than one or a few of the notions which it first included. So too the old technical name remains, but it discharges only one of the functions which it once performed. We may exemplify this phenomenon in various ways. Patriarchal Power of all sorts appears, for instance, to have been once conceived as identical in character, and it was doubtless distinguished by one name. The Power exercised by the ancestor was the same whether it was exercised over the family or the material property—over flocks, herds, slaves, children, or wife. We cannot be absolutely certain of its old Roman name, but there is very strong reason for believing, from the number of expressions indicating shades of the notion of *power* into which the word *manus* enters, that the ancient general term was *manus*. But, when Roman law has advanced a little, both the name and the idea have become specialised. Power is discriminated, both in word and in conception, according to the object over which it is exerted. Exercised over material commodities or slaves, it has become *dominium*—over children, it is *Potestas*—over free persons whose services have been made away to another by their own ancestor, it is *mancipium*—over a wife, it is still *manus*. The old word, it will be perceived, has not altogether fallen

into desuetude, but is confined to one very special exercise of the authority it had formerly denoted. This example will enable us to comprehend the nature of the historical alliance between Contracts and Conveyances. There seems to have been one solemn ceremonial at first for all solemn transactions, and its name at Rome appears to have been *nexum*. Precisely the same forms which were in use when a conveyance of property was effected seem to have been employed in the making of a contract. But we have not very far to move onwards before we come to a period at which the notion of a Contract has disengaged itself from the notion of a Conveyance. A double change has thus taken place. The transaction "with the copper and the balance," when intended to have for its office the transfer of property, is known by the new and special name of Mancipation. The ancient Nexum still designates the same ceremony, but only when it is employed for the special purpose of solemnising a contract.

When two or three legal conceptions are spoken of as anciently blended in one, it is not intended to imply that some one of the included notions may not be older than the others, or, when those others have been formed, may not greatly predominate over and take precedence over them. The reason why one legal conception continues so long to cover several conceptions, and one technical phrase to do instead of several, is doubtless that practical changes are accomplished in the law of primitive societies long before men see occasion to notice or name them. Though I have said that Patriarchal Power was not at first distinguished according to the objects over which it was exercised, I feel sure that Power over Children was the root of the old conception of Power; and I cannot doubt that the earliest use of the Nexum, and the one primarily regarded by those who resorted to it, was to give proper solemnity to the alienation of property. It is likely that a very slight perversion of the Nexum from its original functions first gave rise to its employment in Contracts, and that the very slightness of the change long prevented its being appreciated or noticed. The old name remained because men had not become conscious that they wanted a new one; the old notion clung to the mind because nobody had seen reason to be at the pains of examining it. We have had the process clearly exemplified

in the history of Testaments. A Will was at first a simple conveyance of property. It was only the enormous practical difference that gradually showed itself between this particular conveyance and all others which caused it to be regarded separately, and even as it was, centuries elapsed before the ameliorators of law cleared away the useless encumbrance of the nominal mancipation, and consented to care for nothing in the Will but the expressed intentions of the Testator. It is unfortunate that we cannot track the early history of Contracts with the same absolute confidence as the early history of Wills, but we are not quite without hints that contracts first showed themselves through the *nexum* being put to a new use and afterwards obtained recognition as distinct transactions through the important practical consequences of the experiment. There is some, but not very violent, conjecture in the following delineation of the process. Let us conceive a sale for ready money as the normal type of the Nexum. The seller brought the property of which he intended to dispose—a slave, for example—the purchaser attended with the rough ingots of copper which served for money—and an indispensable assistant, the *libripens*, presented himself with a pair of scales. The slave with certain fixed formalities was handed over to the vendee—the copper was weighed by the *libripens* and passed to the vendor. So long as the business lasted it was a *nexum*, and the parties were *nexi*; but the moment it was completed, the *nexum* ended, and the vendor and purchaser ceased to bear the name derived from their momentary relation. But now, let us move a step onward in commercial history. Suppose the slave transferred, but the money not paid. In *that* case, the *nexum* is finished, so far as the seller is concerned, and when he has once handed over his property, he is no longer *nexus*; but, in regard to the purchaser, the *nexum* continues. The transaction, as to his part of it, is incomplete, and he is still considered to be *nexus*. It follows, therefore, that the same term described the Conveyance by which the right of property was transmitted, and the personal obligation of the debtor for the unpaid purchase-money. We may still go forward, and picture to ourselves a proceeding wholly formal, in which *nothing* is handed over and *nothing* paid; we are brought at once to a transaction indicative of much higher commercial activity, an *executory Contract of Sale*.

If it be true that, both in the popular and in the professional view, a *Contract* was long regarded as an *incomplete Conveyance*, the truth has importance for many reasons. The speculations of the last century concerning mankind in a state of nature, are not unfairly summed up in the doctrine that "in the primitive society property was nothing, and obligation everything;" and it will now be seen that, if the proposition were reversed, it would be nearer the reality. On the other hand, considered historically, the primitive association of Conveyances and Contracts explains something which often strikes the scholar and jurist as singularly enigmatical, I mean the extraordinary and uniform severity of very ancient systems of law to *debtors*, and the extravagant powers which they lodge with *creditors*. When once we understand that the *nexum* was artificially prolonged to give time to the debtor, we can better comprehend his position in the eye of the public and of the law. His indebtedness was doubtless regarded as an anomaly, and suspense of payment in general as an artifice and a distortion of strict rule. The person who had duly consummated his part in the transaction must, on the contrary, have stood in peculiar favour; and nothing would seem more natural than to arm him with stringent facilities for enforcing the completion of a proceeding which, of strict right, ought never to have been extended or deferred.

Nexum, therefore, which originally signified a Conveyance of property, came insensibly to denote a Contract also, and ultimately so constant became the association between this word and the notion of a Contract, that a special term, Mancipium or Mancipatio, had to be used for the purpose of designating the true nexum or transaction in which the property was really transferred. Contracts are therefore now severed from Conveyances, and the first stage in their history is accomplished, but still they are far enough from that epoch of their development when the promise of the contractor has a higher sacredness than the formalities with which it is coupled. In attempting to indicate the character of the changes passed through in this interval, it is necessary to trespass a little on a subject which lies properly beyond the range of these pages, the analysis of Agreement effected by the Roman jurisconsults. Of this analysis, the most beautiful monument of their sagacity, I need not say more than that it is

based on the theoretical separation of the Obligation from the Convention or Pact. Bentham and Mr. Austin have laid down that the "two main essentials of a contract are these: first, a signification by the promising party of his *intention* to do the acts or to observe the forbearances which he promises to do or to observe. Secondly, a signification by the promisee that he *expects* the promising party will fulfil the proffered promise." This is virtually identical with the doctrine of the Roman lawyers, but then, in their view, the result of these "significations" was not a Contract, but a Convention or Pact. A Pact was the utmost product of the engagements of individuals agreeing among themselves, and it distinctly fell short of a Contract. Whether it ultimately became a Contract depended on the question whether the law annexed an Obligation to it. A Contract was a Pact (or Convention) *plus* an Obligation. So long as the Pact remained unclothed with the Obligation, it was called *nude* or *naked*.

What was an Obligation? It is defined by the Roman lawyers as "Juris vinculum, quo necessitate adstringimur alicujus solvendæ rei." This definition connects the Obligation with the Nexum through the common metaphor on which they are founded, and shows us with much clearness the pedigree of a peculiar conception. The Obligation is the "bond" or "chain" with which the law joins together persons or groups of persons, in consequence of certain voluntary acts. The acts which have the effect of attracting an Obligation are chiefly those classed under the heads of Contract and Delict, of Agreement and Wrong; but a variety of other acts have a similar consequence which are not capable of being comprised in an exact classification. It is to be remarked, however, that the act does not draw to itself the Obligation in consequence of any moral necessity; it is the law which annexes it in the plenitude of its power, a point the more necessary to be noted, because a different doctrine has sometimes been propounded by modern interpreters of the Civil Law who had moral or metaphysical theories of their own to support. The image of a *vinculum juris* colours and pervades every part of the Roman law of Contract and Delict. The law bound the parties together, and the *chain* could only be undone by the process called *solutio*, an expression still figurative, to which our word "payment" is only occasionally

and incidentally equivalent. The consistency with which the figurative image was allowed to present itself, explains an otherwise puzzling peculiarity of Roman legal phraseology, the fact that "Obligation" signified rights as well as duties, the right, for example, to have a debt paid as well as the duty of paying it. The Romans kept in fact the entire picture of the "legal chain" before their eyes, and regarded one end of it no more and no less than the other.

In the developed Roman law, the Convention, as soon as it was completed, was, in almost all cases, at once crowned with the Obligation, and so became a Contract; and this was the result to which contract-law was surely tending. But for the purpose of this inquiry, we must attend particularly to the intermediate stage—that in which something more than a perfect agreement was required to attract the Obligation. This epoch is synchronous with the period at which the famous Roman classification of Contracts into four sorts —the Verbal, the Literal, the Real, and the Consensual— had come into use, and during which these four orders of Contracts constituted the only descriptions of engagement which the law would enforce. The meaning of the fourfold distribution is readily understood as soon as we apprehend the theory which severed the Obligation from the Convention. Each class of contracts was in fact named from certain formalities which were required over and above the mere agreement of the contracting parties. In the Verbal Contract, as soon as the Convention was effected, a form of words had to be gone through before the vinculum juris was attached to it. In the Literal Contract, an entry in a ledger or table-book had the effect of clothing the Convention with the Obligation, and the same result followed, in the case of the Real Contract, from the delivery of the Res or Thing which was the subject of the preliminary engagement. The contracting parties came, in short, to an understanding in each case; but, if they went no further, they were not *obliged* to one another, and could not compel performance or ask redress for a breach of faith. But let them comply with certain prescribed formalities, and the Contract was immediately complete, taking its name from the particular form which it had suited them to adopt. The exceptions to this practice will be noticed presently.

I have enumerated the four Contracts in their historical

order, which order, however, the Roman Institutional writers did not invariably follow. There can be no doubt that the Verbal Contract was the most ancient of the four, and that it is the eldest known descendant of the primitive Nexum. Several species of Verbal Contract were anciently in use, but the most important of all, and the only one treated of by our authorities, was effected by means of a *stipulation*, that is, a Question and Answer; a question addressed by the person who exacted the promise, and an answer given by the person who made it. This question and answer constituted the additional ingredient which, as I have just explained, was demanded by the primitive notion over and above the mere agreement of the persons interested. They formed the agency by which the Obligation was annexed. The old Nexum has now bequeathed to maturer jurisprudence first of all the conception of a chain uniting the contracting parties, and this has become the Obligation. It has further transmitted the notion of a ceremonial accompanying and consecrating the engagement, and this ceremonial has been transmuted into the Stipulation. The conversion of the solemn conveyance, which was the prominent feature of the original Nexum, into a mere question and answer, would be more of a mystery than it is if we had not the analogous history of Roman Testaments to enlighten us. Looking to that history, we can understand how the formal Conveyance was first separated from the part of the proceeding which had immediate reference to the business in hand, and how afterwards it was omitted altogether. As then the question and answer of the Stipulation were unquestionably the Nexum in a simplified shape, we are prepared to find that they long partook of the nature of a technical form. It would be a mistake to consider them as exclusively recommending themselves to the older Roman lawyers through their usefulness in furnishing persons meditating an agreement with an opportunity for consideration and reflection. It is not to be disputed that they had a value of this kind, which was gradually recognised; but there is proof that their function in respect to Contracts was at first formal and ceremonial in the statement of our authorities, that not every question and answer was of old sufficient to constitute a Stipulation, but only a question and answer couched in technical phraseology specially appropriated to the particular occasion.

But although it is essential for the proper appreciation of the history of contract-law that the Stipulation should be understood to have been looked upon as a solemn form before it was recognised as a useful security, it would be wrong on the other hand to shut our eyes to its real usefulness. The Verbal Contract, though it had lost much of its ancient importance, survived to the latest period of Roman jurisprudence; and we may take it for granted that no institution of Roman law had so extended a longevity unless it served some practical advantage. I observe in an English writer some expressions of surprise that the Romans even of the earliest times were content with so meagre a protection against haste and irreflection. But on examining the Stipulation closely, and remembering that we have to do with a state of society in which written evidence was not easily procurable, I think we must admit that this Question and Answer, had it been expressly devised to answer the purpose which it served, would have been justly designated a highly ingenious expedient. It was the *promisee* who, in the character of stipulator, put all the terms of the contract into the form of a question, and the answer was given by the *promisor*. "Do you promise that you will deliver me such and such a slave, at such and such a place, on such and such a day?" "I do promise." Now, if we reflect for a moment, we shall see that this obligation to put the promise interrogatively inverts the natural position of the parties, and, by effectually breaking the tenor of the conversation, prevents the attention from gliding over a dangerous pledge. With us, a verbal promise is, generally speaking, to be gathered exclusively from the words of the promisor. In old Roman law, another step was absolutely required; it was necessary for the promisee, after the agreement had been made, to sum up all its terms in a solemn interrogation, and it was of this interrogation, of course, and of the assent to it, that proof had to be given at the trial – *not* of the promise, which was not in itself binding. How great a difference this seemingly insignificant peculiarity may make in the phraseology of contract-law is speedily realised by the beginner in Roman jurisprudence, one of whose first stumbling-blocks is almost universally created by it. When we in English have occasion, in mentioning a contract, to connect it for convenience' sake with one of the parties—for example, if we wished to

speak generally of a contractor—it is always the promisor at whom our words are pointing. But the general language of Roman law takes a different turn; it always regards the contract, if we may so speak, from the point of view of the promisee; in speaking of a party to a contract, it is always the Stipulator, the person who asks the question, who is primarily alluded to. But the serviceableness of the stipulation is most vividly illustrated by referring to the actual examples in the pages of the Latin comic dramatists. If the entire scenes are read down in which these passages occur (ex. gra. Plautus, *Pseudolus*, Act I. sc. 1; Act IV. sc. 6; *Trinummus*, Act V. sc. 2), it will be perceived how effectually the attention of the person meditating the promise must have been arrested by the question, and how ample was the opportunity for withdrawal from an improvident undertaking.

In the Literal or Written Contract, the formal act, by which an Obligation was superinduced on the Convention, was an entry of the sum due, where it could be specifically ascertained, on the debit side of a ledger. The explanation of this Contract turns on a point of Roman domestic manners, the systematic character and exceeding regularity of book-keeping in ancient times. There are several minor difficulties of old Roman law, as, for example, the nature of the Slave's Peculium, which are only cleared up when we recollect that a Roman household consisted of a number of persons strictly accountable to its head, and that every single item of domestic receipt and expenditure, after being entered in waste books, was transferred at stated periods to a general household ledger. There are some obscurities, however, in the descriptions we have received of the Literal Contract, the fact being that the habit of keeping books ceased to be universal in later times, and the expression "Literal Contract" came to signify a form of engagement entirely different from that originally understood. We are not, therefore, in a position to say, with respect to the primitive Literal Contract, whether the obligation was created by a simple entry on the part of the creditor, or whether the consent of the debtor or a corresponding entry in his own books was necessary to give it legal effect. The essential point is however established that, in the case of this Contract, all formalities were dispensed with on a condition being complied with. This is another step downwards in the history of contract-law.

The Contract which stands next in historical succession, the Real Contract, shows a great advance in ethical conceptions. Whenever any agreement had for its object the delivery of a specific thing—and this is the case with the large majority of simple engagements—the Obligation was drawn down as soon as the delivery had actually taken place. Such a result must have involved a serious innovation on the oldest ideas of Contract; for doubtless, in the primitive times, when a contracting party had neglected to clothe his agreement in a stipulation, nothing done in pursuance of the agreement would be recognised by the law. A person who had paid over money on loan would be unable to sue for its repayment unless he had formally *stipulated* for it. But, in the Real Contract, performance on one side is allowed to impose a legal duty on the other—evidently on ethical grounds. For the first time then moral considerations appear as an ingredient in Contract-law, and the Real Contract differs from its two predecessors in being founded on these, rather than on respect for technical forms or on deference to Roman domestic habits.

We now reach the fourth class, or Consensual Contracts, the most interesting and important of all. Four specified Contracts were distinguished by this name: Mandatum, *i.e.* Commission or Agency; Societas or Partnership; Emtio Venditio or Sale; and Locatio Conductio or Letting and Hiring. A few pages ago, after stating that a Contract consisted of a Pact or Convention to which an Obligation had been superadded, I spoke of certain acts or formalities by which the law permitted the Obligation to be attracted to the Pact. I used this language on account of the advantage of a general expression, but it is not strictly correct unless it be understood to include the negative as well as the positive. For, in truth, the peculiarity of these Consensual Contracts is that *no* formalities are required to create them out of the Pact. Much that is indefensible, and much more that is obscure, has been written about the Consensual Contracts, and it has even been asserted that in them the *consent* of the Parties is more emphatically given than in any other species of agreement. But the term Consensual merely indicates that the Obligation is here annexed at once to the *Consensus*. The Consensus, or mutual assent of the parties, is the final and crowning ingredient in the Convention, and it is the special

characteristic of agreements falling under one of the four heads of Sale, Partnership, Agency, and Hiring, that, as soon as the assent of the parties has supplied this ingredient, there is *at once* a Contract. The Consensus draws with it the Obligation, performing, in transactions of the sort specified, the exact functions which are discharged, in the other contracts, by the *Res* or Thing, by the *Verba* stipulationis, and by the *Literæ* or written entry in a ledger. Consensual is therefore a term which does not involve the slightest anomaly, but is exactly analogous to Real, Verbal, and Literal.

In the intercourse of life the commonest and most important of all the contracts are unquestionably the four styled Consensual. The larger part of the collective existence of every community is consumed in transactions of buying and selling, of letting and hiring, of alliances between men for purposes of business, of delegation of business from one man to another; and this is no doubt the consideration which led the Romans, as it has led most societies, to relieve these transactions from technical incumbrance, to abstain as much as possible from clogging the most efficient springs of social movement. Such motives were not of course confined to Rome, and the commerce of the Romans with their neighbours must have given them abundant opportunities for observing that the contracts before us tended everywhere to become *Consensual*, obligatory on the mere signification of mutual assent. Hence, following their usual practice, they distinguished these contracts as contracts *Juris Gentium*. Yet I do not think that they were so named at a very early period. The first notions of a Jus Gentium may have been deposited in the minds of the Roman lawyers long before the appointment of a Prætor Peregrinus, but it would only be through extensive and regular trade that they would be familiarised with the contractual system of other Italian communities, and such a trade would scarcely attain considerable proportions before Italy had been thoroughly pacified, and the supremacy of Rome conclusively assured. Although, however, there is strong probability that the Consensual Contracts were the latest-born into the Roman system, and though it is likely that the qualification, *Juris Gentium*, stamps the recency of their origin, yet this very expression, which attributes them to the "Law of Nations," has in modern times produced the notion of their extreme

antiquity. For, when the "Law of Nations" had been converted into the "Law of Nature," it seemed to be implied that the Consensual Contracts were the type of the agreements most congenial to the natural state; and hence arose the singular belief that the younger the civilisation, the simpler must be its forms of contract.

The Consensual Contracts, it will be observed, were extremely limited in number. But it cannot be doubted that they constituted the stage in the history of Contract-law from which all modern conceptions of contract took their start. The motion of the will which constitutes agreement was now completely insulated, and became the subject of separate contemplation; forms were entirely eliminated from the notion of contract, and external acts were only regarded as symbols of the internal act of volition. The Consensual Contracts had, moreover, been classed in the Jus Gentium, and it was not long before this classification drew with it the inference that they were the species of agreement which represented the engagements approved of by Nature and included in her code. This point once reached, we are prepared for several celebrated doctrines and distinctions of the Roman lawyers. One of them is the distinction between Natural and Civil Obligations. When a person of full intellectual maturity had deliberately bound himself by an engagement, he was said to be under a *natural obligation*, even though he had omitted some necessary formality, and even though through some technical impediment he was devoid of the formal capacity for making a valid contract. The law (and this is what the distinction implies) would not enforce the obligation, but it did not absolutely refuse to recognise it; and *natural obligations* differed in many respects from obligations which were merely null and void, more particularly in the circumstance that they could be civilly confirmed, if the capacity for contract were subsequently acquired. Another very peculiar doctrine of the jurisconsults could not have had its origin earlier than the period at which the Convention was severed from the technical ingredients of Contract. They taught that though nothing but a Contract could be the foundation of an *action*, a mere Pact or Convention could be the basis of a *plea*. It followed from this, that though nobody could sue upon an agreement which he had not taken the precaution to mature into a Contract by

complying with the proper forms, nevertheless a claim arising out of a valid contract could be rebutted by proving a counter-agreement which had never got beyond the state of a simple convention. An action for the recovery of a debt could be met by showing a mere informal agreement to waive or postpone the payment.

The doctrine just stated indicates the hesitation of the Prætors in making their advances towards the greatest of their innovations. Their theory of Natural law must have led them to look with especial favour on the Consensual Contracts and on those Pacts or Conventions of which the Consensual Contracts were only particular instances; but they did not at once venture on extending to all Conventions the liberty of the Consensual Contracts. They took advantage of that special superintendence over procedure which had been confided to them since the first beginnings of Roman law, and, while they still declined to permit a suit to be launched which was not based on a formal contract, they gave full play to their new theory of agreement in directing the ulterior stages of the proceeding. But, when they had proceeded thus far, it was inevitable that they should proceed farther. The revolution of the ancient law of Contract was consummated when the Prætor of some one year announced in his Edict that he would grant equitable actions upon Pacts which had never been matured at all into Contracts, provided only that the Pacts in question had been founded on a consideration (*causa*). Pacts of this sort are always enforced under the advanced Roman jurisprudence. The principle is merely the principle of the Consensual Contract carried to its proper consequence; and, in fact, if the technical language of the Romans had been as plastic as their legal theories, these Pacts enforced by the Prætor would have been styled new Contracts, new Consensual Contracts. Legal phraseology is, however, the part of the law which is the last to alter, and the Pacts equitably enforced continued to be designated simply Prætorian Pacts. It will be remarked that unless there were consideration for the Pact, it would continue *nude* so far as the new jurisprudence was concerned; in order to give it effect, it would be necessary to convert it by a stipulation into a Verbal Contract.

The extreme importance of this history of Contract, as a safeguard against almost innumerable delusions, must be

my justification for discussing it at so considerable a length. It gives a complete account of the march of ideas from one great landmark of jurisprudence to another. We begin with Nexum, in which a Contract and a Conveyance are blended, and in which the formalities which accompany the agreement are even more important than the agreement itself. From the Nexum we pass to the Stipulation, which is a simplified form of the older ceremonial. The Literal Contract comes next, and here all formalities are waived, if proof of the agreement can be supplied from the rigid observances of a Roman household. In the Real Contract a moral duty is for the first time recognised, and persons who have joined or acquiesced in the partial performance of an engagement are forbidden to repudiate it on account of defects in form. Lastly, the Consensual Contracts emerge, in which the mental attitude of the contractors is solely regarded, and external circumstances have no title to notice except as evidence of the inward undertaking. It is of course uncertain how far this progress of Roman ideas from a gross to a refined conception exemplifies the necessary progress of human thought on the subject of Contract. The Contract-law of all other ancient societies but the Roman is either too scanty to furnish information, or else is entirely lost; and modern jurisprudence is so thoroughly leavened with the Roman notions that it furnishes us with no contrasts or parallels from which instruction can be gleaned. From the absence, however, of everything violent, marvellous, or unintelligible in the changes I have described, it may be reasonably believed that the history of ancient Roman Contracts is, up to a certain point, typical of the history of this class of legal conceptions in other ancient societies. But it is only up to a certain point that the progress of Roman law can be taken to represent the progress of other systems of jurisprudence. The theory of Natural law is exclusively Roman. The notion of the *vinculum juris*, so far as my knowledge extends, is exclusively Roman. The many peculiarities of the mature Roman law of Contract and Delict which are traceable to these two ideas, whether singly or in combination, are therefore among the exclusive products of one particular society. These later legal conceptions are important, not because they typify the necessary results of advancing thought under all conditions, but because they have exercised perfectly enormous

influence on the intellectual diathesis of the modern world.

I know nothing more wonderful than the variety of sciences to which Roman law, Roman Contract-law more particularly, has contributed modes of thought, courses of reasoning, and a technical language. Of the subjects which have whetted the intellectual appetite of the moderns, there is scarcely one, except Physics, which has not been filtered through Roman jurisprudence. The science of pure Metaphysics had, indeed, rather a Greek than a Roman parentage, but Politics, Moral Philosophy, and even Theology, found in Roman law not only a vehicle of expression, but a nidus in which some of their profoundest inquiries were nourished into maturity. For the purpose of accounting for this phenomenon, it is not absolutely necessary to discuss the mysterious relation between words and ideas, or to explain how it is that the human mind has never grappled with any subject of thought, unless it has been provided beforehand with a proper store of language and with an apparatus of appropriate logical methods. It is enough to remark, that, when the philosophical interests of the Eastern and Western worlds were separated, the founders of Western thought belonged to a society which spoke Latin and reflected in Latin. But in the Western provinces the only language which retained sufficient precision for philosophical purposes was the language of Roman law, which by a singular fortune had preserved nearly all the purity of the Augustan age, while vernacular Latin was degenerating into a dialect of portentous barbarism. And if Roman jurisprudence supplied the only means of exactness in speech, still more emphatically did it furnish the only means of exactness, subtlety, or depth in thought. For at least three centuries, philosophy and science were without a home in the West; and though metaphysics and metaphysical theology were engrossing the mental energies of multitudes of Roman subjects, the phraseology employed in these ardent inquiries was exclusively Greek, and their theatre was the Eastern half of the Empire. Sometimes, indeed, the conclusions of the Eastern disputants became so important that every man's assent to them, or dissent from them, had to be recorded, and then the West was introduced to the results of Eastern controversy, which it generally acquiesced in without interest and without resistance.

Meanwhile, one department of inquiry, difficult enough for the most laborious, deep enough for the most subtle, delicate enough for the most refined, had never lost its attractions for the educated classes of the Western provinces. To the cultivated citizen of Africa, of Spain, of Gaul and of Northern Italy, it was jurisprudence, and jurisprudence only, which stood in the place of poetry and history, of philosophy and science. So far then from there being anything mysterious in the palpably legal complexion of the earliest efforts of Western thought it would rather be astonishing if it had assumed any other hue. I can only express my surprise at the scantiness of the attention which has been given to the difference between Western ideas and Eastern, between Western theology and Eastern, caused by the presence of a new ingredient. It is precisely because the influence of jurisprudence begins to be powerful that the foundation of Constantinople and the subsequent separation of the Western Empire from the Eastern, are epochs in philosophical history. But continental thinkers are doubtless less capable of appreciating the importance of this crisis by the very intimacy with which notions derived from Roman Law are mingled up with every-day ideas. Englishmen, on the other hand, are blind to it through the monstrous ignorance to which they condemn themselves of the most plentiful source of the stream of modern knowledge, of the one intellectual result of the Roman civilisation. At the same time, an Englishman, who will be at the pains to familiarise himself with the classical Roman law, is perhaps, from the very slightness of the interest which his countrymen have hitherto taken in the subject, a better judge than a Frenchman or a German of the value of the assertions I have ventured to make. Anybody who knows what Roman jurisprudence is, as actually practised by the Romans, and who will observe in what characteristics the earliest Western theology and philosophy differ from the phases of thought which preceded them, may be safely left to pronounce what was the new element which had begun to pervade and govern speculation.

The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of Obligation, or what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the copious and malleable terminology

belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. "Quasi," so used, is exclusively a term of classification. It has been usual with English critics to identify the Quasi-contracts with *implied* contracts, but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolised, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a Quasi-Contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, inasmuch as the Convention, the most essential ingredient of Contract, is wanting. This word "quasi," prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from one department of law may be transferred to the other and employed without violent straining in the statement of rules which would otherwise be imperfectly expressed.

It has been shrewdly remarked, that the confusion between Implied Contracts, which are true contracts, and Quasi Contracts, which are not contracts at all, has much in common with the famous error which attributed political rights and duties to an Original Compact between the governed and the governor. Long before this theory had clothed itself in definite shape, the phraseology of Roman contract-law had been largely drawn upon to describe that reciprocity of rights and duties which men had always conceived as existing between sovereigns and subjects. While the world was full of

maxims setting forth with the utmost positiveness the claims of kings to implicit obedience—maxims which pretended to have had their origin in the New Testament, but which were really derived from indelible recollections of the Cæsarian despotism—the consciousness of correlative rights possessed by the governed would have been entirely without the means of expression if the Roman law of Obligation had not supplied a language capable of shadowing forth an idea which was as yet imperfectly developed. The antagonism between the privileges of kings and their duties to their subjects was never, I believe, lost sight of since Western history began, but it had interest for few except speculative writers so long as feudalism continued in vigour, for feudalism effectually controlled by express customs the exorbitant theoretical pretensions of most European sovereigns. It is notorious, however, that as soon as the decay of the Feudal System had thrown the mediæval constitutions out of working order, and when the Reformation had discredited the authority of the Pope, the doctrine of the divine right of Kings rose immediately into an importance which had never before attended it. The vogue which it obtained entailed still more constant resort to the phraseology of Roman law, and a controversy which had originally worn a theological aspect assumed more and more the air of a legal disputation. A phenomenon then appeared which has repeatedly shown itself in the history of opinion. Just when the argument for monarchical authority rounded itself into the definite doctrine of Filmer, the phraseology, borrowed from the Law of Contract, which had been used in defence of the rights of subjects, crystallised into the theory of an actual original compact between king and people, a theory which, first in English and afterwards, and more particularly, in French hands, expanded into a comprehensive explanation of all the phenomena of society and law. But the only real connection between political and legal science had consisted in the last giving to the first the benefit of its peculiarly plastic terminology. The Roman jurisprudence of Contract had performed for the relation of sovereign and subject precisely the same service which, in a humbler sphere, it rendered to the relation of persons bound together by an obligation of "quasi-contract." It had furnished a body of words and phrases which approximated with sufficient accuracy to the ideas which then were from time

to time forming on the subject of political obligation. The doctrine of an Original Compact can never be put higher than it is placed by Dr. Whewell, when he suggests that, though unsound, "it may be a *convenient* form for the expression of moral truths."

The extensive employment of legal language on political subjects previously to the invention of the Original Compact, and the powerful influence which that assumption has exercised subsequently, amply account for the plentifulness in political science of words and conceptions, which were the exclusive creation of Roman jurisprudence. Of their plentifulness in Moral Philosophy a rather different explanation must be given, inasmuch as ethical writings have laid Roman law under contribution much more directly than political speculations, and their authors have been much more conscious of the extent of their obligation. In speaking of moral philosophy as extraordinarily indebted to Roman jurisprudence, I must be understood to intend moral philosophy as understood previously to the break in its history effected by Kant, that is, as the science of the rules governing human conduct, of their proper interpretation and of the limitations to which they are subject. Since the rise of the Critical Philosophy, moral science has almost wholly lost its older meaning, and, except where it is preserved under a debased form in the casuistry still cultivated by Roman Catholic theologians, it seems to be regarded nearly universally as a branch of ontological inquiry. I do not know that there is a single contemporary English writer, with the exception of Dr. Whewell, who understands moral philosophy as it was understood before it was absorbed by metaphysics and before the groundwork of its rules came to be a more important consideration than the rules themselves. So long, however, as ethical science had to do with the practical regimen of conduct, it was more or less saturated with Roman law. Like all the great subjects of modern thought, it was originally incorporated with theology. The science of Moral Theology, as it was at first called, and as it is still designated by the Roman Catholic divines, was undoubtedly constructed, to the full knowledge of its authors, by taking principles of conduct from the system of the Church, and by using the language and methods of jurisprudence for their expression and expansion. While this process went on, it was inevitable

that jurisprudence, though merely intended to be the vehicle of thought, should communicate its colour to the thought itself. The tinge received through contact with legal conceptions is perfectly perceptible in the earliest ethical literature of the modern world, and it is evident, I think, that the Law of Contract, based as it is on the complete reciprocity and indissoluble connection of rights and duties, has acted as a wholesome corrective to the predispositions of writers who, if left to themselves, might have exclusively viewed a moral obligation as the public duty of a citizen in the Civitas Dei. But the amount of Roman Law in moral theology becomes sensibly smaller at the time of its cultivation by the great Spanish moralists. Moral theology, developed by the juridical method of doctor commenting on doctor, provided itself with a phraseology of its own, and Aristotelian peculiarities of reasoning and expression, imbibed doubtless in great part from the Disputations on Morals in the academical schools, take the place of that special turn of thought and speech which can never be mistaken by any person conversant with the Roman law. If the credit of the Spanish school of moral theologians had continued, the juridical ingredient in ethical science would have been insignificant, but the use made of their conclusions by the next generation of Roman Catholic writers on these subjects almost entirely destroyed their influence. Moral Theology, degraded into Casuistry, lost all interest for the leaders of European speculation; and the new science of Moral Philosophy, which was entirely in the hands of the Protestants, swerved greatly aside from the path which the moral theologians had followed. The effect was vastly to increase the influence of Roman law on ethical inquiry.

"Shortly[1] after the Reformation, we find two great schools of thought dividing this class of subjects between them. The most influential of the two was at first the sect of school known to us as the Casuists, all of them in spiritual communion with the Roman Catholic Church, and nearly all of them affiliated to one or other of her religious orders. On the other side were a body of writers connected with each other by a common intellectual descent from the great author of the treatise *De Jure Belli et Pacis*, Hugo Grotius. Almost

[1] The passage quoted is transcribed with slight alterations from a paper contributed by the author to the *Cambridge Essays* for 1856.

all of the latter were adherents of the Reformation, and though it cannot be said that they were formally and avowedly at conflict with the Casuists, the origin and object of their system were nevertheless essentially different from those of Casuistry. It is necessary to call attention to this difference, because it involves the question of the influence of Roman law on that department of thought with which both systems are concerned. The book of Grotius, though it touches questions of pure Ethics in every page, and though it is the parent immediate or remote of innumerable volumes of formal morality, is not, as is well known, a professed treatise on Moral Philosophy, it is an attempt to determine the Law of Nature, or Natural Law. Now, without entering upon the question, whether the conception of a Law Natural be not exclusively a creation of the Roman jurisconsults, we may lay down that, even on the admission of Grotius himself, the dicta of the Roman jurisprudence as to what parts of known positive law must be taken to be parts of the Law of Nature, are, if not infallible, to be received at all events with the profoundest respect. Hence the system of Grotius is implicated with Roman law at its very foundation, and this connection rendered inevitable—what the legal training of the writer would perhaps have entailed without it—the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived. On the other hand, Casuistry borrows little from Roman law, and the views of morality contended for have nothing whatever in common with the undertaking of Grotius. All that philosophy of right and wrong which has become famous, or infamous, under the name of Casuistry, had its origin in the distinction between Mortal and Venial Sin. A natural anxiety to escape the awful consequences of determining a particular act to be mortally sinful, and a desire, equally intelligible, to assist the Roman Catholic Church in its conflict with Protestantism by disburthening it of an inconvenient theory, were the motives which impelled the authors of the Casuistical philosophy to the invention of an elaborate system of criteria, intended to remove immoral actions, in as many cases as possible, out of the category of mortal offences, and to

stamp them as venial sins. The fate of this experiment is matter of ordinary history. We know that the distinctions of Casuistry, by enabling the priesthood to adjust spiritual control to all the varieties of human character, did really confer on it an influence with princes, statesmen, and generals, unheard of in the ages before the Reformation, and did really contribute largely to that great reaction which checked and narrowed the first successes of Protestantism. But beginning in the attempt, not to establish, but to evade — not to discover a principle, but to escape a postulate — not to settle the nature of right and wrong, but to determine what was not wrong of a particular nature, — Casuistry went on with its dexterous refinements till it ended in so attenuating the moral features of actions, and so belying the moral instincts of our being, that at length the conscience of mankind rose suddenly in revolt against it, and consigned to one common ruin the system and its doctors. The blow, long pending, was finally struck in the *Provincial Letters* of Pascal, and since the appearance of those memorable Papers, no moralist of the smallest influence or credit has ever avowedly conducted his speculations in the footsteps of the Casuists. The whole field of ethical science was thus left at the exclusive command of the writers who followed Grotius, and it still exhibits in an extraordinary degree the traces of that entanglement with Roman law which is sometimes imputed as a fault, and sometimes the highest of its recommendations, to the Grotian theory. Many inquirers since Grotius's day have modified his principles, and many, of course, since the rise of the Critical Philosophy, have quite deserted them, but even those who have departed most widely from his fundamental assumptions have inherited much of his method of statement, of his train of thought, and of his mode of illustration, and these have little meaning and no point to the person ignorant of Roman jurisprudence."

I have already said that, with the exception of the physical sciences, there is no walk of knowledge which has been so slightly affected by Roman law as Metaphysics. The reason is that discussion on metaphysical subjects has always been conducted in Greek, first in pure Greek, and afterwards in a dialect of Latin expressly constructed to give expression to Greek conceptions. The modern languages have only been fitted to metaphysical inquiries by adopting this Latin dialect,

or by imitating the process which was originally followed in its formation. The source of the phraseology which has been always employed for metaphysical discussion in modern times was the Latin translations of Aristotle, in which, whether derived or not from Arabic versions, the plan of the translator was not to seek for analogous expressions in any part of Latin literature, but to construct anew from Latin roots a set of phrases equal to the expression of Greek philosophical ideas. Over such a process the terminology of Roman law can have exercised little influence, at most a few Latin law terms in a transmuted shape have made their way into metaphysical language. At the same time it is worthy of remark that wherever the problems of metaphysics are those which have been most strongly agitated in Western Europe, the thought, if not the language, betrays a legal parentage. How things in the history of speculation are more impressive than the fact that no Greek-speaking people has ever felt itself seriously perplexed by the great question of Free-will and Necessity. I do not pretend to offer any summary explanation of this, but it does not seem an irrelevant suggestion that neither the Greeks, nor any society speaking and thinking in their language, ever showed the smallest capacity for producing a philosophy of law. Legal science is a Roman creation, and the problem of Free-will arises when we contemplate a metaphysical conception under a legal aspect. How came it to be a question whether invariable sequence was identical with necessary connexion? I can only say that the tendency of Roman law which became stronger as it advanced, was to look upon legal consequences as united to legal causes by an inexorable necessity, a tendency most markedly exemplified in the definition of Obligation which I have repeatedly cited. "Juris vinculum quo necessitate adstringimur alicujus solvendæ rei."

But the problem of Free-will was theological before it became philosophical, and if its terms have been affected by jurisprudence, it will be because Jurisprudence had made itself felt in Theology. The great point of inquiry which is here suggested has never been satisfactorily elucidated. What has to be determined, is whether jurisprudence has ever served as the medium through which theological principles have been viewed: whether, by supplying a peculiar language, a peculiar mode of reasoning, and a peculiar solution of many

of the problems of life, it has ever opened new channels in which theological speculation could flow out and expand itself. For the purpose of giving an answer, it is necessary to recollect what is already agreed upon by the best writers as to the intellectual food which the Church first assimilated. It is conceded on all sides that the earliest language of the Christian Church was Greek, and that the problems to which it first addressed itself were those for which Greek philosophy in its later forms had prepared the way. Greek metaphysical literature contained the sole stock of words and ideas out of which the human mind could provide itself with the means of engaging in the profound controversies as to the Divine Persons, the Divine Substance, and the Divine Natures. The Latin language and the meagre Latin philosophy were quite unequal to the undertaking, and accordingly the Western or Latin-speaking provinces of the Empire adopted the conclusions of the East without disputing or reviewing them. "Latin Christianity," says Dean Milman, "accepted the creed which its narrow and barren vocabulary could hardly express in adequate terms. Yet, throughout, the adhesion of Rome and the West was a passive acquiescence in the dogmatic system which had been wrought out by the profounder theology of the Eastern divines, rather than a vigorous and original examination on her part of those mysteries. The Latin Church was the scholar as well as the loyal partizan of Athanasius." But when the separation of East and West became wider, and the Latin-speaking Western Empire began to live with an intellectual life of its own, its deference to the East was all at once exchanged for the agitation of a number of questions entirely foreign to Eastern speculation. "While Greek theology (Milman, *Latin Christianity*, Preface, 5) went on defining with still more exquisite subtlety the Godhead and the nature of Christ"—"while the interminable controversy still lengthened out and cast forth sect after sect from the enfeebled community"—the Western Church threw itself with passionate ardour into a new order of disputes, the same which from those days to this have never lost their interest for any family of mankind at any time included in the Latin communion. The nature of Sin and its transmission by inheritance—the debt owed by man and its vicarious satisfaction—the necessity and sufficiency of the Atonement—above all the apparent antagonism

between Free-will and the Divine Providence—these were the points which the West began to debate as ardently as ever the East had discussed the articles of its more special creed. Why is it then that on the two sides of the line which divides the Greek-speaking from the Latin-speaking provinces there lie two classes of theological problems so strikingly different from one another? The historians of the Church have come close upon the solution when they remark that the new problems were more "practical," less absolutely speculative, than those which had torn Eastern Christianity asunder, but none of them, so far as I am aware, has quite reached it. I affirm without hesitation that the difference between the two theological systems is accounted for by the fact that, in passing from the East to the West, theological speculation had passed from a climate of Greek metaphysics to a climate of Roman law. For some centuries before these controversies rose into overwhelming importance, all the intellectual activity of the Western Romans had been expended on jurisprudence exclusively. They had been occupied in applying a peculiar set of principles to all the combinations in which the circumstances of life are capable of being arranged. No foreign pursuit or taste called off their attention from this engrossing occupation, and for carrying it on they possessed a vocabulary as accurate as it was copious, a strict method of reasoning, a stock of general propositions on conduct more or less verified by experience, and a rigid moral philosophy. It was impossible that they should not select from the questions indicated by the Christian records those which had some affinity with the order of speculations to which they were accustomed, and that their manner of dealing with them should borrow something from their forensic habits. Almost everybody who has knowledge enough of Roman law to appreciate the Roman penal system, the Roman theory of the obligations established by Contract or Delict, the Roman view of Debts and of the modes of incurring, extinguishing, and transmitting them, the Roman notion of the continuance of individual existence by Universal Succession, may be trusted to say whence arose the frame of mind to which the problems of Western theology proved so congenial, whence came the phraseology in which these problems were stated, and whence the description of reasoning employed in their solution. It must only be recollected that

Roman law which had worked itself into Western thought was neither the archaic system of the ancient city, nor the pruned and curtailed jurisprudence of the Byzantine Emperors; still less, of course, was it the mass of rules, nearly buried in a parasitical overgrowth of modern speculative doctrine, which passes by the name of Modern Civil Law. I speak only of that philosophy of jurisprudence, wrought out by the great juridical thinkers of the Antonine age, which may still be partially reproduced from the Pandects of Justinian, a system to which few faults can be attributed except it perhaps aimed at a higher degree of elegance, certainty, and precision, than human affairs will permit to the limits within which human laws seek to confine them.

It is a singular result of that ignorance of Roman law which Englishmen readily confess, and of which they are sometimes not ashamed to boast, that many English writers of note and credit have been led by it to put forward the most untenable of paradoxes concerning the condition of human intellect during the Roman Empire. It has been constantly asserted, as unhesitatingly as if there were no temerity in advancing the proposition, that from the close of the Augustan era to the general awakening of interest on the points of the Christian faith, the mental energies of the civilised world were smitten with a paralysis. Now there are two subjects of thought—the only two perhaps with the exception of physical science—which are able to give employment to all the powers and capacities which the mind possesses. One of them is Metaphysical inquiry, which knows no limits so long as the mind is satisfied to work on itself; the other is Law, which is as extensive as the concerns of mankind. It happens that, during the very period indicated, the Greek-speaking provinces were devoted to one, the Latin-speaking provinces to the other, of these studies. I say nothing of the fruits of speculation in Alexandria and the East, but I confidently affirm that Rome and the West had an occupation in hand fully capable of compensating them for the absence of every other mental exercise, and I add that the results achieved, so far as we know them, were not unworthy of the continuous and exclusive labour bestowed on producing them. Nobody except a professional lawyer is perhaps in a position completely to understand how much of the intellectual strength of individuals Law is capable of absorbing, but a

layman has no difficulty in comprehending why it was that an unusual share of the collective intellect of Rome was engrossed by jurisprudence. "The proficiency[1] of a given community in jurisprudence depends in the long run on the same conditions as its progress in any other line of inquiry; and the chief of these are the proportion of the national intellect devoted to it, and the length of time during which it is so devoted. Now, a combination of all the causes, direct and indirect, which contribute to the advancing and perfecting of a science continued to operate on the jurisprudence of Rome through the entire space between the Twelve Tables and the severance of the two Empires,—and that not irregularly or at intervals, but in steadily increasing force and constantly augmenting number. We should reflect that the earliest intellectual exercise to which a young nation devotes itself is the study of its laws. As soon as the mind makes its first conscious efforts towards generalisation, the concerns of every-day life are the first to press for inclusion within general rules and comprehensive formulas. The popularity of the pursuit on which all the energies of the young commonwealth are bent is at the outset unbounded; but it ceases in time. The monopoly of mind by law is broken down. The crowd at the morning audience of the great Roman jurisconsult lessens. The students are counted by hundreds instead of thousands in the English Inns of Court. Art, Literature, Science, and Politics, claim their share of the national intellect; and the practice of jurisprudence is confined within the circle of a profession, never indeed limited or insignificant, but attracted as much by the rewards as by the intrinsic recommendations of their science. This succession of changes exhibited itself even more strikingly at Rome than in England. To the close of the Republic the law was the sole field for all ability except the special talent of a capacity for generalship. But a new stage of intellectual progress began with the Augustan age, as it did with our own Elizabethan era. We all know what were its achievements in poetry and prose; but there are some indications, it should be remarked, that, besides its efflorescence in ornamental literature, it was on the eve of throwing out new aptitudes for conquest in physical science. Here, however, is the point at which the history of mind in the Roman

[1] *Cambridge Essays*, 1856.

State ceases to be parallel to the routes which mental progress had since then pursued. The brief span of Roman literature, strictly so called, was suddenly closed under a variety of influences, which though they may partially be traced it would be improper in this place to analyse. Ancient intellect was forcibly thrust back into its old courses, and law again became no less exclusively the proper sphere for talent than it had been in the days when the Romans despised philosophy and poetry as the toys of a childish race. Of what nature were the external inducements which, during the Imperial period, tended to draw a man of inherent capacity to the pursuits of the jurisconsult may best be understood by considering the option which was practically before him in his choice of a profession. He might become a teacher of rhetoric, a commander of frontier-posts, or a professional writer of panegyrics. The only other walk of active life which was open to him was the practice of the law. Through *that* lay the approach to wealth, to fame, to office, to the council-chamber of the monarch—it may be to the very throne itself."

The premium on the study of jurisprudence was so enormous that there were schools of law in every part of the Empire, even in the very domain of Metaphysics. But, though the transfer of the seat of empire to Byzantium gave a perceptible impetus to its cultivation in the East, jurisprudence never dethroned the pursuits which there competed with it. Its language was Latin, an exotic dialect in the Eastern half of the Empire. It is only of the West that we can lay down that law was not only the mental food of the ambitious and aspiring, but the sole aliment of all intellectual activity. Greek philosophy had never been more than a transient fashionable taste with the educated class of Rome itself, and when the new Eastern capital had been created, and the Empire subsequently divided into two, the divorce of the Western provinces from Greek speculation, and their exclusive devotion to jurisprudence, became more decided than ever. As soon then as they ceased to sit at the feet of the Greeks and began to ponder out a theology of their own, the theology proved to be permeated with forensic ideas and couched in a forensic phraseology. It is certain that this substratum of law in Western theology lies exceedingly deep. A new set of Greek theories, the Aristotelian philo-

sophy, made their way afterwards into the West and almost entirely buried its indigenous doctrines. But when at the Reformation it partially shook itself free from their influence, it instantly supplied their place with Law. It is difficult to say whether the religious system of Calvin or the religious system of the Arminians has the more markedly legal character.

The vast influence of the specific jurisprudence of Contract produced by the Romans upon the corresponding department of modern Law belongs rather to the history of mature jurisprudence than to a treatise like the present. It did not make itself felt till the school of Bologna founded the legal science of modern Europe. But the fact that the Romans, before their Empire fell, had so fully developed the conception of Contract becomes of importance at a much earlier period than this. Feudalism, I have repeatedly asserted, was a compound of archaic barbarian usage with Roman law; no other explanation of it is tenable, or even intelligible. The earliest social forms of the feudal period differ in little from the ordinary associations in which the men of primitive civilisations are everywhere seen united. A Fief was an organically complete brotherhood of associates whose proprietary and personal rights were inextricably blended together. It had much in common with an Indian Village Community and much in common with a Highland clan. But still it presents some phenomena which we never find in the associations which are spontaneously formed by beginners in civilisation. True archaic communities are held together not by express rules, but by sentiment, or, we should perhaps say, by instinct; and new comers into the brotherhood are brought within the range of this instinct by falsely pretending to share in the blood-relationship from which it naturally springs. But the earliest feudal communities were neither bound together by mere sentiment nor recruited by a fiction. The tie which united them was Contract, and they obtained new associates by contracting with them. The relation of the lord to the vassals had originally been settled by express engagement, and a person wishing to engraft himself on the brotherhood by *commendation* or *infeudation* came to a distinct understanding as to the conditions on which he was to be admitted. It is therefore the sphere occupied in them by Contract which principally distinguishes the feudal institutions from the

unadulterated usages of primitive races. The lord had many of the characteristics of a patriarchal chieftain, but his prerogative was limited by a variety of settled customs traceable to the express conditions which had been agreed upon when the infeudation took place. Hence flow the chief differences which forbid us to class the feudal societies with true archaic communities. They were much more durable and much more various; more durable, because express rules are less destructible than instinctive habits, and more various, because the contracts on which they were founded were adjusted to the minutest circumstances and wishes of the persons who surrendered or granted away their lands. This last consideration may serve to indicate how greatly the vulgar opinions current among us as to the origin of modern society stand in need of revision. It is often said that the irregular and various contour of modern civilisation is due to the exuberant and erratic genius of the Germanic races, and it is often contrasted with the dull routine of the Roman Empire. The truth is that the Empire bequeathed to modern society the legal conception to which all this irregularity is attributable; if the customs and institutions of barbarians have one characteristic more striking than another, it is their extreme uniformity.

CHAPTER X

THE EARLY HISTORY OF DELICT AND CRIME

THE Teutonic Codes, including those of our Anglo-Saxon ancestors, are the only bodies of archaic secular law which have come down to us in such a state that we can form an exact notion of their original dimensions. Although the extant fragments of Roman and Hellenic codes suffice to prove to us their general character, there does not remain enough of them for us to be quite sure of their precise magnitude or of the proportion of their parts to each other. But still on the whole all the known collections of ancient law are characterised by a feature which broadly distinguishes them from systems of mature jurisprudence. The proportion of criminal to civil law is exceedingly different. In the German codes, the civil part of the law has trifling dimensions as compared with the criminal. The traditions which speak of the sanguinary penalties inflicted by the code of Draco seem to indicate that it had the same characteristic. In the Twelve Tables alone, produced by a society of greater legal genius and at first of gentler manners, the civil law has something like its modern precedence; but the relative amount of space given to the modes of redressing wrong, though not enormous, appears to have been large. It may be laid down, I think, that the more archaic the code, the fuller and the minuter is its penal legislation. The phenomenon has often been observed, and has been explained, no doubt to a great extent correctly, by the violence habitual to the communities which for the first time reduced their laws to writing. The legislator, it is said, proportioned the divisions of his work to the frequency of a certain class of incidents in barbarian life. I imagine, however, that this account is not quite complete. It should be recollected that the comparative barrenness of civil law in archaic collections is consistent with those other characteristics of ancient jurisprudence which have been discussed in this treatise. Nine-tenths of the civil part of the law practised by civilised societies

are made up of the Law of Persons, of the Law of Property and of Inheritance, and of the Law of Contract. But it is plain that all these provinces of jurisprudence must shrink within narrower boundaries, the nearer we make our approaches to the infancy of social brotherhood. The Law of Persons, which is nothing else than the Law of Status, will be restricted to the scantiest limits as long as all forms of status are merged in common subjection to Paternal Power, as long as the Wife has no rights against her Husband, the Son none against his Father, and the infant Ward none against the Agnates who are his Guardians. Similarly, the rules relating to Property and Succession can never be plentiful, so long as land and goods devolve within the family, and, if distributed at all, are distributed inside its circle. But the greatest gap in ancient civil law will always be caused by the absence of Contract, which some archaic codes do not mention at all, while others significantly attest the immaturity of the moral notions on which Contract depends by supplying its place with an elaborate jurisprudence of Oaths. There are no corresponding reasons for the poverty of penal law, and accordingly, even if it be hazardous to pronounce that the childhood of nations is always a period of ungoverned violence, we shall still be able to understand why the modern relation of criminal law to civil should be inverted in ancient codes.

I have spoken of primitive jurisprudence as giving to *criminal* law a priority unknown in a later age. The expression has been used for convenience' sake, but in fact the inspection of ancient codes shows that the law which they exhibit in unusual quantities is not true criminal law. All civilised systems agree in drawing a distinction between offences against the State or Community and offences against the Individual, and the two classes of injuries, thus kept apart, I may here, without pretending that the terms have always been employed consistently in jurisprudence, call Crimes and Wrongs, *crimina* and *delicta*. Now the penal law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. If the Commentaries of Gaius be opened at the place where the writer treats of the

penal jurisprudence founded on the Twelve Tables, it will be seen that at the head of the civil wrongs recognised by the Roman law stood *Furtum* or *Theft*. Offences which we are accustomed to regard exclusively as *crimes* are exclusively treated as *torts*, and not theft only, but assault and violent robbery, are associated by the jurisconsult with trespass, libel and slander. All alike gave rise to an Obligation or *vinculum juris*, and were all requited by a payment of money. This peculiarity, however, is most strongly brought out in the consolidated Laws of the Germanic tribes. Without an exception, they describe an immense system of money compensations for homicide, and with few exceptions, as large a scheme of compensations for minor injuries. "Under Anglo-Saxon law," writes Mr. Kemble (*Anglo-Saxons*, i. 177), "a sum was placed on the life of every free man, according to his rank, and a corresponding sum on every wound that could be inflicted on his person, for nearly every injury that could be done to his civil rights, honour or peace; the sum being aggravated according to adventitious circumstances." These compositions are evidently regarded as a valuable source of income; highly complex rules regulate the title to them and the responsibility for them; and, as I have already had occasion to state, they often follow a very peculiar line of devolution, if they have not been acquitted at the decease of the person to whom they belong. If therefore the criterion of a *delict*, *wrong*, or *tort* be that the person who suffers it, and not the State, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort.

Torts then are copiously enlarged upon in primitive jurisprudence. It must be added that Sins are known to it also Of the Teutonic codes it is almost unnecessary to make this assertion, because those codes, in the form in which we have received them, were compiled or recast by Christian legislators. But it is also true that non-Christian bodies of archaic law entail penal consequences on certain classes of acts and on certain classes of omissions, as being violations of divine prescriptions and commands. The law administered at Athens by the Senate of Areopagus was probably a special religious code, and at Rome, apparently from a very early period, the Pontifical jurisprudence punished adultery,

sacrilege and perhaps murder. There were therefore in the Athenian and in the Roman States laws punishing *sins*. There were also laws punishing *torts*. The conception of offence against God produced the first class of ordinances; the conception of offence against one's neighbour produced the second; but the idea of offence against the State or aggregate community did not at first produce a true criminal jurisprudence.

Yet it is not to be supposed that a conception so simple and elementary as that of wrong done to the State was wanting in any primitive society. It seems rather that the very distinctness with which this conception is realised is the true cause which at first prevents the growth of a criminal law. At all events, when the Roman community conceived itself to be injured, the analogy of a personal wrong received was carried out to its consequences with absolute literalness, and the State avenged itself by a single act on the individual wrong-doer. The result was that, in the infancy of the commonwealth, every offence vitally touching its security or its interests was punished by a separate enactment of the legislature. And this is the earliest conception of a *crimen* or Crime—an act involving such high issues that the State, instead of leaving its cognisance to the civil tribunal or the religious court, directed a special law or *privilegium* against the perpetrator. Every indictment therefore took the form of a bill of pains and penalties, and the trial of a *criminal* was a proceeding wholly extraordinary, wholly irregular, wholly independent of settled rules and fixed conditions. Consequently, both for the reason that the tribunal dispensing justice was the sovereign state itself and also for the reason that no classification of the acts prescribed or forbidden was possible, there was not at this epoch any *Law* of crimes, any criminal jurisprudence. The procedure was identical with the forms of passing an ordinary statute, it was set in motion by the same persons and conducted with precisely the same solemnities. And it is to be observed that, when a regular criminal law with an apparatus of Courts and officers for its administration had afterwards come into being, the old procedure, as might be supposed from its conformity with theory, still in strictness remained practicable, and, much as resort to such an expedient was discredited, the people of Rome always retained the power of punishing by a special

law offences against its majesty. The classical scholar does not require to be reminded that in exactly the same manner the Athenian Bill of Pains and Penalties, or εἰσαγγελία, survived the establishment of regular tribunals. It is known too that when the freemen of the Teutonic races assembled for legislation, they also claimed authority to punish offences of peculiar blackness or perpetrated by criminals of exalted station. Of this nature was the criminal jurisdiction of the Anglo-Saxon Witenagemot.

It may be thought that the difference which I have asserted to exist between the ancient and modern view of penal law has only a verbal existence. The community, it may be said, besides interposing to punish crimes legislatively, has from the earliest times interfered by its tribunals to compel the wrong-doer to compound for his wrong, and, if it does this, it must always have supposed that in some way it was injured through his offence. But, however rigorous this inference may seem to us now-a-days, it is very doubtful whether it was actually drawn by the men of primitive antiquity. How little the notion of injury to the community had to do with the earliest interferences of the State *through its tribunals*, is shown by the curious circumstances that in the original administration of justice, the proceedings were a close imitation of the series of acts which were likely to be gone through in private life by persons who were disputing, but who afterwards suffered their quarrel to be appeased. The magistrate carefully simulated the demeanour of a private arbitrator casually called in.

In order to show that this statement is not a mere fanciful conceit, I will produce the evidence on which it rests. Very far the most ancient judicial proceeding known to us is the Legis Actio Sacramenti of the Romans, out of which all the later Roman Law of Actions may be proved to have grown. Gaius carefully describes its ceremonial. Unmeaning and grotesque as it appears at first sight, a little attention enables us to decipher and interpret it.

The subject of litigation is supposed to be in Court. If it is moveable, it is actually there. If it be immoveable, a fragment or sample of it is brought in its place; land, for instance, is represented by a clod, a house by a single brick. In the example selected by Gaius, the suit is for a slave. The proceeding begins by the plaintiff's advancing with a rod,

which, as Gaius expressly tells, symbolised a spear. He lays hold of the slave and asserts a right to him with the words, "*Hunc ego hominem ex Jure Quiritium meum esse dico secundum suam causam sicut dixi;*" and then saying, "*Ecce tibi Vindictam imposui,*" he touches him with the spear. The defendant goes through the same series of acts and gestures. On this the Prætor intervenes, and bids the litigants relax their hold, "*Mittite ambo hominem.*" They obey, and the plaintiff demands from the defendant the reason of his interference, "*Postulo anne dicas quâ ex causâ vindicaveris,*" a question which is replied to by a fresh assertion of right, "*Jus peregi sicut vindictam imposui.*" On this, the first claimant offers to stake a sum of money, called a Sacramentum, on the justice of his own case, "*Quando tu injuriâ provocasti, D æris Sacramento te provoco,*" and the defendant, in the phrase "*Similiter ego te,*" accepts the wager. The subsequent proceedings were no longer of a formal kind, but it is to be observed that the Prætor took security for the Sacramentum, which always went into the coffers of the State.

Such was the necessary preface of every ancient Roman suit. It is impossible, I think, to refuse assent to the suggestion of those who see in it a dramatisation of the Origin of Justice. Two armed men are wrangling about some disputed property. The Prætor, *vir pietate gravis*, happens to be going by, and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as remuneration for his trouble and loss of time. This interpretation would be less plausible than it is, were it not that, by a surprising coincidence, the ceremony described by Gaius as the imperative course of proceeding in a Legis Actio is substantially the same with one of the two subjects which the God Hephæstus is described by Homer as moulding into the First Compartment of the Shield of Achilles. In the Homeric trial-scene, the dispute, as if expressly intended to bring out the characteristics of primitive society, is not about property but about the composition for a homicide. One person asserts that he has paid it, the other that he has never received it. The point of detail, however, which stamps the picture as the counterpart of the archaic Roman practice is the reward designed for the judges. Two

talents of gold lie in the middle, to be given to him who shall explain the grounds of the decision most to the satisfaction of the audience. The magnitude of this sum as compared with the trifling amount of the Sacramentum seems to me indicative of the indifference between fluctuating usage and usage consolidated into law. The scene introduced by the poet as a striking and characteristic, but still only occasional, feature of city-life in the heroic age has stiffened, at the opening of the history of civil process, into the regular, ordinary formalities of a lawsuit. It is natural therefore that in the Legis Actio the remuneration of the Judge should be reduced to a reasonable sum, and that, instead of being adjudged to one of a number of arbitrators by popular acclamation, it should be paid as a matter of course to the State which the Prætor represents. But that the incidents described so vividly by Homer, and by Gaius with even more than the usual crudity of technical language, have substantially the same meaning, I cannot doubt; and, in confirmation of this view, it may be added that many observers of the earliest judicial usages of modern Europe have remarked that the fines inflicted by Courts on offenders were originally *sacramenta*. The State did not take from the defendant a composition for any wrong supposed to be done to itself, but claimed a share in the compensation awarded to the plaintiff simply as the fair price of its time and trouble. Mr. Kemble expressly assigns this character to the Anglo-Saxon *bannum* or *fredum*.

Ancient law furnishes other proofs that the earliest administrators of justice simulated the probable acts of persons engaged in a private quarrel. In settling the damages to be awarded, they took as their guide the measure of vengeance likely to be exacted by an aggrieved person under the circumstances of the case. This is the true explanation of the very different penalties imposed by ancient law on offenders caught in the act or soon after it and on offenders detected after considerable delay. Some strange exemplifications of this peculiarity are supplied by the old Roman law of Theft. The Laws of the Twelve Tables seem to have divided Thefts into Manifest and Non-Manifest, and to have allotted extraordinarily different penalties to the offence according as it fell under one head or the other. The Manifest Thief was he who was caught within the house in which he

had been pilfering, or who was taken while making off to a place of safety with the stolen goods; the Twelve Tables condemned him to be put to death if he were already a slave, and, if he was a freeman, they made him the bondsman of the owner of the property. The Non-Manifest Thief was he who was detected under any other circumstances than those described; and the old code simply directed that an offender of this sort should refund double the value of what he had stolen. In Gaius's day the excessive severity of the Twelve Tables to the Manifest Thief had naturally been much mitigated, but the law still maintained the old principle by mulcting him in fourfold the value of the stolen goods, while the Non-Manifest Thief still continued to pay merely the double. The ancient lawgiver doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the Thief was detected after a considerable interval; and to this calculation the legal scale of penalties was adjusted. The principle is precisely the same as that followed in the Anglo-Saxon and other Germanic codes, when they suffer a thief chased down and caught with the booty to be hanged or decapitated on the spot, while they exact the full penalties of homicide from anybody who kills him after the pursuit has been intermitted. These archaic distinctions bring home to us very forcibly the distance of a refined from a rude jurisprudence. The modern administrator of justice has confessedly one of the hardest tasks before him when he undertakes to discriminate between the degrees of criminality which belong to offences falling within the same technical description. It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry, or in the analysis of motive, which we may not be called upon to confront, if we attempt to settle such a point with precision; and accordingly the law of our day shows an increasing tendency to abstain as much as possible from laying down positive rules on the subject. In France, the jury is left to decide whether the offence which it finds committed has been attended by extenuating circumstances; in England, a nearly unbounded latitude in the selection of punishments

is now allowed to the judge; while all States have in reserve an ultimate remedy for the miscarriages of law in the Prerogative of Pardon, universally lodged with the Chief Magistrate. It is curious to observe how little the men of primitive times were troubled with these scruples, how completely they were persuaded that the impulses of the injured person were the proper measure of the vengeance he was entitled to exact, and how literally they imitated the probable rise and fall of his passions in fixing their scale of punishment. I wish it could be said that their method of legislation is quite extinct. There are, however, several modern systems of law which, in cases of graver wrong, admit the fact of the wrong-doer having been taken in the act to be pleaded in justification of inordinate punishment inflicted on him by the sufferer—an indulgence which, though superficially regarded it may seem intelligible, is based, as it seems to me, on a very low morality.

Nothing, I have said, can be simpler than the considerations which ultimately led ancient societies to the formation of a true criminal jurisprudence. The State conceived itself to be wronged, and the Popular Assembly struck straight at the offender with the same movement which accompanied its legislative action. It is further true of the ancient world—though not precisely of the modern, as I shall have occasion to point out—that the earliest criminal tribunals were merely subdivisions, or committees, of the legislature. This, at all events, is the conclusion pointed at by the legal history of the two great states of antiquity, with tolerable clearness in one case, and with absolute distinctness in the other. The primitive penal law of Athens entrusted the castigation of offences partly to the Archons, who seem to have punished them as *torts*, and partly to the Senate of Areopagus, which punished them as *sins*. Both jurisdictions were substantially transferred in the end to the Heliæa, the High Court of Popular Justice, and the functions of the Archons and of the Areopagus became either merely ministerial or quite insignificant. But "Heliæa" is only an old word for Assembly; the Heliæa of classical times was simply the Popular Assembly convened for judicial purposes, and the famous Dikasteries of Athens were only its subdivisions or panels. The corresponding changes which occurred at Rome are still more easily interpreted, because the Romans confined their experiments

to the penal law, and did not, like the Athenians, construct popular courts with a civil as well as a criminal jurisdiction. The history of Roman criminal jurisprudence begins with the old Judicia Populi, at which the Kings are said to have presided. These were simply solemn trials of great offenders under legislative forms. It seems, however, that from an early period the Comitia had occasionally delegated its criminal jurisdiction to a Quæstio or Commission, which bore much the same relation to the Assembly as a Committee of the House of Commons bears to the House itself, except that the Roman Commissioners or Quæstores did not merely *report* to the Comitia, but exercised all powers which that body was itself in the habit of exercising, even to the passing sentence on the Accused. A Quæstio of this sort was only appointed to try a particular offender, but there was nothing to prevent two or three Quæstiones sitting at the same time; and it is probable that several of them were appointed simultaneously, when several grave cases of wrong to the community had occurred together. There are also indications that now and then these Quæstiones approached the character of our *Standing* Committees, in that they were appointed periodically, and without waiting for occasion to arise in the commission of some serious crime. The old Quæstores Parricidii, who are mentioned in connection with transactions of very ancient date, as being deputed to try (or, as some take it, to search out and try) all cases of parricide and murder, seem to have been appointed regularly every year; and the Duumviri Perduellionis, or Commission of Two for trial of violent injury to the Commonwealth, are also believed by most writers to have been named periodically. The delegations of power to these latter functionaries bring us some way forwards. Instead of being appointed *when and as* state-offences were committed, they had a general, though a temporary jurisdiction over such as *might* be perpetrated. Our proximity to a regular criminal jurisprudence is also indicated by the general terms "Parricidium" and "Perduellio" which mark the approach to something like a classification of crimes.

The true criminal law did not however come into existence till the year B.C. 149, when L. Calpurnius Piso carried the statute known as the Lex Calpurnia de Repetundis. The law applied to cases Repetundarum Pecuniarum, that is, claims by

Provincials to recover monies improperly received by a Governor-General, but the great and permanent importance of this statute arose from its establishing the first Quæstio Perpetua. A Quæstio Perpetua was a *Permanent* Commission as opposed to those which were occasional and to those which were temporary. It was a regular criminal tribunal whose existence dated from the passing of the statute creating it and continued till another statute should pass abolishing it. Its members were not specially nominated, as were the members of the older Quæstiones, but provision was made in the law constituting it for selecting from particular classes the judges who were to officiate, and for renewing them in conformity with definite rules. The offences of which it took cognisance were also expressly named and defined in this statute, and the new Quæstio had authority to try and sentence all persons in future whose acts should fall under the definitions of crime supplied by the law. It was therefore a regular criminal judicature, administering a true criminal jurisprudence.

The primitive history of criminal law divides itself therefore into four stages. Understanding that the conception of *Crime*, as distinguished from that of *Wrong* or *Tort* and from that of *Sin*, involves the idea of injury to the State or collective community, we first find that the commonwealth, in literal conformity with the conception, itself interposed directly, and by isolated acts, to avenge itself on the author of the evil which it had suffered. This is the point from which we start; each indictment is now a bill of pains and penalties, a special law naming the criminal and prescribing his punishment. A *second* step is accomplished, when the multiplicity of crimes compels the legislature to delegate its powers to particular Quæstiones or Commissions, each of which is deputed to investigate a particular accusation, and if it be proved, to punish the particular offender. Yet *another* movement is made when the legislature, instead of waiting for the alleged commission of a crime as the occasion of appointing a Quæstio, periodically nominates Commissioners like the Quæstores Parricidii and the Duumviri Perduellionis, on the chance of certain classes of crimes being committed, and in the expectation that they *will* be perpetrated. The *last* stage is reached when the Quæstiones from being periodical or occasional become permanent Benches or Chambers—when the

judges, instead of being named in the particular law nominating the Commission, are directed to be chosen through all future time in a particular way and from a particular class—and when certain acts are described in general language and declared to be crimes, to be visited, in the event of their perpetration, with specified penalties appropriated to each description.

If the Quæstiones Perpetuæ had had a longer history, they would doubtless have come to be regarded as a distinct institution, and their relation to the Comitia would have seemed no closer than the connection of our own Courts of Law with the Sovereign, who is theoretically the fountain of justice. But the Imperial despotism destroyed them before their origin had been completely forgotten, and, so long as they lasted, these Permanent Commissions were looked upon by the Romans as the mere depositaries of a delegated power. The cognisance of crimes was considered a natural attribute of the legislature, and the mind of the citizen never ceased to be carried back from the Quæstiones, to the Comitia which had deputed them to put into exercise some of its own inalienable functions. The view which regarded the Quæstiones, even when they became permanent, as mere Committees of the Popular Assembly—as bodies which only ministered to a higher authority—had some important legal consequences which left their mark on the criminal law to the very latest period. One immediate result was that the Comitia continued to exercise criminal jurisdiction by way of bill of pains and penalties, long after the Quæstiones had been established. Though the legislature had consented to delegate its powers for the sake of convenience to bodies external to itself, it did not follow that it surrendered them. The Comitia and the Quæstiones went on trying and punishing offenders side by side; and any unusual outburst of popular indignation was sure, until the extinction of the Republic, to call down upon its object an indictment before the Assembly of the Tribes.

One of the most remarkable peculiarities of the institutions of the Republic is also traceable to this dependance of the Quæstiones on the Comitia. The disappearance of the punishment of Death from the penal system of Republican Rome used to be a very favourite topic with the writers of the last century, who were perpetually using it to point some

theory of the Roman character or of modern social economy. The reason which can be confidently assigned for it stamps it as purely fortuitous. Of the three forms which the Roman legislature successively assumed, one, it is well known—the Comitia Centuriata—was exclusively taken to represent the State as embodied for military operations. The Assembly of the Centuries, therefore, had all powers which may be supposed to be properly lodged with a General commanding an army, and, among them, it had authority to subject all offenders to the same correction to which a soldier rendered himself liable by breaches of discipline. The Comitia Centuriata could therefore inflict capital punishment. Not so, however, the Comitia Curiata or Comitia Tributa. They were fettered on this point by the sacredness with which the person of a Roman citizen, inside the walls of the city, was invested by religion and law; and, with respect to the last of them, the Comitia Tributa, we know for certain that it became a fixed principle that the Assembly of the Tribes could at most impose a fine. So long as criminal jurisdiction was confined to the legislature, and so long as the assemblies of the centuries and of the Tribes continued to exercise co-ordinate powers, it was easy to prefer indictments for graver crimes before the legislative body which dispensed the heavier penalties, but then it happened that the more democratic assembly, that of the Tribes, almost entirely superseded the others, and became the ordinary legislature of the later Republic. Now the decline of the Republic was exactly the period during which the Quæstiones Perpetuæ were established, so that the statutes creating them were all passed by a legislative assembly which itself could not, at its ordinary sittings, punish a criminal with death. It followed that the Permanent Judicial Commissions, holding a delegated authority, were circumscribed in their attributes and capacities by the limits of the powers residing with the body which deputed them. They could do nothing which the Assembly of the Tribes could not have done; and, as the Assembly could not sentence to death, the Quæstiones were equally incompetent to award capital punishment. The anomaly thus resulting was not viewed in ancient times with anything like the favour which it has attracted among the moderns, and indeed, while it is questionable whether the Roman character was at all the better for it, it is certain that the Roman Constitution was a great deal

the worse. Like every other institution which has accompanied the human race down the current of its history, the punishment of death is a necessity of society in certain stages of the civilising process. There is a time when the attempt to dispense with it baulks both of the two great instincts which lie at the root of all penal law. Without it, the community neither feels that it is sufficiently revenged on the criminal, nor thinks that the example of his punishment is adequate to deter others from imitating him. The incompetence of the Roman Tribunals to pass sentence of death led distinctly and directly to those frightful Revolutionary intervals, known as the Proscriptions, during which all law was formally suspended simply because party violence could find no other avenue to the vengeance for which it was thirsting. No cause contributed so powerfully to the decay of political capacity in the Roman people as this periodical abeyance of the laws, and, when it had once been resorted to, we need not hesitate to assert that the ruin of Roman liberty became merely a question of time. If the practice of the Tribunals had afforded an adequate vent for popular passion, the forms of judicial procedure would no doubt have been as flagrantly perverted as with us in the reigns of the later Stuarts, but national character would not have suffered as deeply as it did, nor would the stability of Roman institutions have been as seriously enfeebled.

I will mention two more singularities of the Roman Criminal System which were produced by the same theory of judicial authority. They are, the extreme multiplicity of the Roman criminal tribunals, and the capricious and anomalous classification of crimes which characterised Roman penal jurisprudence throughout its entire history. Every *Quæstio*, it has been said, whether Perpetual or otherwise, had its origin in a distinct statute. From the law which created it, it derived its authority, it rigorously observed the limits which its charter prescribed to it, and touched no form of criminality which that charter did not expressly define. As then the statutes which constituted the various Quæstiones were all called forth by particular emergencies, each of them being in fact passed to punish a class of acts which the circumstances of the time rendered particularly odious or particularly dangerous, these enactments made not the slightest reference to each other, and were connected by no common principle.

Twenty or thirty different criminal laws were in existence together, with exactly the same number of Quæstiones to administer them; nor was any attempt made during the Republic to fuse these distinct judicial bodies into one, or to give symmetry to the provisions of the statutes which appointed them and defined their duties. The state of the Roman criminal jurisdiction at this period, exhibited some resemblances to the administration of civil remedies in England at the time when the English Courts of Common Law had not as yet introduced those fictitious averments into their writs which enabled them to trespass on each other's peculiar province. Like the Quæstiones, the Courts of Queen's Bench, Common Pleas, and Exchequer were all theoretical emanations from a higher authority, and each entertained a special class of cases supposed to be committed to it by the fountain of its jurisdiction; but then the Roman Quæstiones were many more than three in number, and it was infinitely less easy to discriminate the acts which fell under the cognisance of each Quæstio, than to distinguish between the provinces of the three Courts in Westminster Hall. The difficulty of drawing exact lines between the spheres of the different Quæstiones made the multiplicity of Roman tribunals something more than a mere inconvenience; for we read with astonishment that when it was not immediately clear under what general description a man's alleged offences ranged themselves, he might be indicted at once or successively before several different Commissions, on the chance of some one of them declaring itself competent to convict him; and, although conviction by one Quæstio ousted the jurisdiction of the rest, acquittal by one of them could not be pleaded to an accusation before another. This was directly contrary to the rule of the Roman civil law; and we may be sure that a people so sensitive as the Romans to anomalies (or, as their significant phrase was, to *inelegancies*) in jurisprudence, would not long have tolerated it, had not the melancholy history of the Quæstiones caused them to be regarded much more as temporary weapons in the hands of factions than as permanent institutions for the correction of crime. The Emperors soon abolished this multiplicity and conflict of jurisdiction; but it is remarkable that they did not remove another singularity of the criminal law which stands in close connection with the number of the Courts. The classifications of crimes which are

contained even in the Corpus Juris of Justinian are remarkably capricious. Each Quæstio had, in fact, confined itself to the crimes committed to its cognisance by its charter. These crimes, however, were only classed together in the original statute because they happened to call simultaneously for castigation at the moment of passing it. They had not therefore anything necessarily in common; but the fact of their constituting the particular subject-matter of trials before a particular Quæstio impressed itself naturally on the public attention, and so inveterate did the association become between the offences mentioned in the same statute that, even when formal attempts were made by Sylla and by the Emperor Augustus to consolidate the Roman criminal law, the legislator preserved the old grouping. The Statutes of Sylla and Augustus were the foundation of the penal jurisprudence of the Empire, and nothing can be more extraordinary than some of the classifications which they bequeathed to it. I need only give a single example in the fact that *perjury* was always classed with *cutting and wounding* and with *poisoning*, no doubt because a law of Sylla, the Lex Cornelia de Sicariis et Veneficis, had given jurisdiction over all these three forms of crime to the same Permanent Commission. It seems too that this capricious grouping of crimes affected the vernacular speech of the Romans. People naturally fell into the habit of designating all the offences enumerated in one law by the first name on the list, which doubtless gave its style to the Law Court deputed to try them all. All the offences tried by the Quæstio De Adulteriis would thus be called Adultery.

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Crimes; nor did they become criminally punishable till some late but uncertain date, at which the law began to take notice of a new description of offences called in the Digest *crimina extraordinaria*. These were doubtless a class of acts which the theory of Roman jurisprudence treated merely as wrongs; but the growing sense of the majesty of society revolted from their entailing nothing worse on their perpetrator than the payment of money damages, and accordingly the injured person seems to have been permitted, if he pleased, to pursue them as crimes *extra ordinem*, that is by a mode of redress departing in some respect or other from the ordinary procedure. From the period at which these *crimina extraordinaria* were first recognised, the list of crimes in the Roman State must have been as long as in any community of the modern world.

It is unnecessary to describe with any minuteness the mode of administering criminal justice under the Roman Empire, but it is to be noted that both its theory and practice have had powerful effect on modern society. The Emperors did not immediately abolish the Quæstiones, and at first they committed an extensive criminal jurisdiction to the Senate, in which, however servile it might show itself in fact, the Emperor was no more nominally than a Senator like the rest. But some sort of collateral criminal jurisdiction had been claimed by the Prince from the first; and this, as recollections of the free commonwealth decayed, tended steadily to gain at the expense of the old tribunals. Gradually the punishment of crimes was transferred to magistrates directly nominated by the Emperor and the privileges of the Senate passed to the Imperial Privy Council, which also became a Court of ultimate criminal appeal. Under these influences the doctrine, familiar to the moderns, insensibly shaped itself that the Sovereign is the fountain of all Justice and the depositary of all Grace. It was not so much the fruit of increasing adulation and servility as of the centralisation of the Empire which had by this time perfected itself. The theory of criminal justice had, in fact, worked round almost to the point from which it started. It had begun in the belief that it was the business of the collective community to avenge its own wrongs by its own hand, and it ended in the doctrine that the chastisement of crimes belonged in an especial manner to the Sovereign as representative and mandatary of

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ment in cases of extraordinary aggravation. At the same time, she taught that murder and robbery with their various modifications were under the jurisdiction of civil rulers, not as an accident of their position but by the express ordinance of God.

There is a passage in the writings of King Alfred (Kemble, ii. 209) which brings out into remarkable clearness the struggle of the various ideas that prevailed in his day as to the origin of criminal jurisdiction. It will be seen that Alfred attributes it partly to the authority of the Church and partly to that of the Witan, while he expressly claims for treason against the lord the same immunity from ordinary rules which the Roman Law of Majestas had assigned to treason against the Cæsar. "After this it happened," he writes, "that many nations received the faith of Christ, and there were many synods assembled throughout the earth, and among the English race also after they had received the faith of Christ, both of holy bishops and of their exalted Witan. They then ordained that, out of that mercy which Christ had taught, secular lords, with their leave, might without sin take for every misdeed the *bot* in money which they ordained; except in cases of treason against a lord, to which they dared not assign any mercy because Almighty God adjudged none to them that despised Him, nor did Christ adjudge any to them which sold Him to death; and He commanded that a lord should be loved like Himself."

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The new larger volumes are in keeping with the reader's own collection in his home, for which the Library is planned, and they are also in the suitable size for the shelves of all public, institutional, university, and school libraries. Many important works in *Everyman's Library* are unobtainable in any other edition, while over 250 are *unobtainable in any other reprint series*, and they are as essential to the comprehensiveness of the Library as are the masterpieces of fiction, some of which are in one *Everyman* volume of anything up to 800 or 900 pages. The new *Everyman's Library* in crown octavo is published at four prices (except in the U.S.A.), according to the length and nature of the work. Volumes at the lowest price are in red wrapper, marked * in catalogues; the second price in blue wrapper †; the third price in green wrapper §; the highest price in yellow wrapper ‡.

This development entails no break in the continuity of the Library; there are at this writing some two hundred and eighty volumes in the original format, and they will be obtainable in the old size and at the old price until they are reissued in the new. At intervals the Publishers issue a prospectus of the volumes to be issued in the larger format during the next few months: this will be sent free to all applicants. A descriptive catalogue of all volumes is also freely available, the annotations giving the year of birth and death of the author, the date of first publication of the work, and a brief description, or details of the contents, of the last revised *Everyman's Library* edition.

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