ANCIENT LAW

ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS

BY

SIR HENRY SUMNER MAINE

K.C.S.I., LL.D., F.R.S

Foreign Associate Member of the Institute of France

WITH INTRODUCTION AND NOTES BY

SIR FREDERICK POLLOCK, BART.

LL.D., D.C.L.

FOURTH AMERICAN FROM THE TENTH LONDON EDITION

NEW YORK

HENRY HOLT AND COMPANY

1906

CONTENTS

CHAPTER III.

LAW OF NATURE AND EQUITY.

THE theory of a set of legal principles entitled by their intrinsic superiority to supersede the older law, very early obtained currency both in the Roman State and in England. Such a body of principles, existing in any system, has in the foregoing chapters been denominated Equity, a term which, as will presently be seen, was one (though only one) of the designations by which this agent of legal change was known to the Roman jurisconsults. The jurisprudence of the Court of Chancery, which bears the name of Equity in England, could only be adequately discussed in a separate treatise. It is extremely complex in its texture, and derives its materials from several heterogeneous sources. The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman Law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later gene

ration of Chancery judges, amid whose recorded dicta we often find entire texts from the *Corpus Juris Civilis* imbedded, with their terms unaltered, though their origin is never acknowledged. Still more recently, and particularly at the middle and during the latter half of the eighteenth century, the mixed systems of jurisprudence and morals constructed by the publicists of the Low Countries appear to have been much studied by English lawyers, and from the chancellorship of Lord Talbot to the commencement of Lord Eldon's chancellorship these works had considerable effect on the rulings of the Court of Chancery. The system, which obtained its ingredients from these various quarters, was greatly controlled in its growth by the necessity imposed on it of conforming itself to the analogies of the common law, but it has always answered the description of a body of comparatively novel legal principles claiming to override the older jurisprudence of the country on the strength of an intrinsic ethical superiority.

The Equity of Rome was a much simpler structure, and its development from its first appearance can be much more easily traced. Both its character and its history deserve attentive examination. It is the root of several conceptions which have exercised profound influence on human thought, and through human thought have seriously affected the destinies of mankind.

The Romans described their legal system as con-

sisting of two ingredients. "All nations," says the Institutional Treatise published under the authority of the Emperor Justinian, "who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the Civil Law of that people, but that which natural reason appoints for all mankind is called the Law of Nations, because all nations use it." The part of the law "which natural reason appoints for all mankind" was the element which the Edict of the Prætor was supposed to have worked into Roman jurisprudence. Elsewhere it is styled more simply Jus Naturale, or the Law of Nature; and its ordinances are said to be dictated by Natural Equity (*naturalis æquitas*) as well as by natural reason. I shall attempt to discover the origin of these famous phrases, Law of Nations, Law of Nature, Equity, and to determine how the conceptions which they indicate are related to one another.

The most superficial student of Roman history must be struck by the extraordinary degree in which the fortunes of the republic were affected by the presence of foreigners, under different names, on her soil. The causes of this immigration are discernible enough at a later period, for we can readily understand why men of all races should flock to the mistress of the world; but the same phenomenon of a large population of foreigners and denizens meets us in the very earliest records of the Roman State. No

doubt, the instability of society in ancient Italy, composed as it was in great measure of robber tribes, gave men considerable inducement to locate themselves in the territory of any community strong enough to protect itself and them from external attack, even though protection should be purchased at the cost of heavy taxation, political disfranchisement, and much social humiliation. It is probable, however, that this explanation is imperfect, and that it could only be completed by taking into account those active commercial relations which, though they are little reflected in the military traditions of the republic, Rome appears certainly to have had with Carthage and with the interior of Italy in pre-historic times. Whatever were the circumstances to which it was attributable, the foreign element in the com monwealth determined the whole course of its his tory, which, at all its stages, is little more than a narrative of conflicts between a stubborn nationality and an alien population. Nothing like this has been seen in modern times; on the one hand, because modern European communities have seldom or never received any accession of foreign immigrants which was large enough to make itself felt by the bulk of the native citizens, and on the other, because mod ern states, being held together by allegiance to a king or political superior, absorb considerable bodies of immigrant settlers with a quickness unknown to the ancient world, where the original citizens of a commonwealth always believed themselves to be

united by kinship in blood, and resented a claim to equality of privilege as a usurpation of their birth right. In the early Roman republic the principle of the absolute exclusion of foreigners pervaded the Civil Law no less than the constitution. The alien or denizen could have no share in any institution supposed to be coeval with the State. He could not have the benefit of Quiritarian law. He could not be a party to the *nexum* which was at once the conveyance and the contract of the primitive Romans. He could not sue by the Sacramental Action, a mode of litigation of which the origin mounts up to the very infancy of civilisation. Still, neither the interest nor the security of Rome permitted him to be quite outlawed. All ancient communities ran the risk of being overthrown by a very slight disturbance of equilibrium, and the mere instinct of self-preservation would force the Romans to devise some method of adjusting the rights and duties of foreigners, who might otherwise—and this was a danger of real importance in the ancient world—have decided their controversies by armed strife. Moreover, at no period of Roman history was foreign trade entirely neglected. It was therefore probably half as a measure of police and half in furtherance of commerce that jurisdiction was first assumed in disputes to which the parties were either foreigners or a native and a foreigner. The assumption of such a jurisdiction brought with it the immediate necessity of discovering some principles on

which the questions to be adjudicated upon could be settled, and the principles applied to this object by the Roman lawyers were eminently characteristic of the time. They refused, as I have said before, to decide the new cases by pure Roman Civil Law. They refused, no doubt because it seemed to involve some kind of degradation, to apply the law of the particular State from which the foreign litigant came. The expedient to which they resorted was that of selecting the rules of law common to Rome and to the different Italian communities in which the immigrants were born. In other words, they set themselves to form a system answering to the primitive and literal meaning of Jus Gentium, that is, Law common to all Nations. Jus Gentium was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil. Whenever a particular usage was seen to be practised by a large number of separate races in common it was set down as part of the Law common to all Nations, or Jus Gentium. Thus, although the conveyance of property was certainly accompanied by very different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed was a part of the ceremonial in all of them. It was, for instance, a part, though a subordinate part, in the

Mancipation or conveyance peculiar to Rome. Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the jurisconsults had the means of observing was set down as an institution Juris Gentium, or rule of the Law common to all Nations. A vast number of other observances were scrutinised with the same result. Some common characteristic was discovered in all of them, which had a common object, and this characteristic was classed in the Jus Gentium. The Jus Gentium was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes.

The circumstances of the origin of the Jus Gentium are probably a sufficient safeguard against the mistake of supposing that the Roman lawyers had any special respect for it. It was the fruit in part of their disdain for all foreign law, and in part of their disinclination to give the foreigner the advantage of their own indigenous Jus Civile. It is true that we, at the present day, should probably take a very different view of the Jus Gentium, if we were performing the operation which was effected by the Roman jurisconsults. We should attach some vague superiority or precedence to the element which we had thus discerned underlying and pervading so great a variety of usage. We should have a sort of respect for rules and principles so universal. Perhaps we should speak of the common ingredient as

being of the essence of the transaction into which it entered, and should stigmatise the remaining apparatus of ceremony, which varied in different communities, as adventitious and accidental. Or it may be, we should infer that the races which we were comparing at once obeyed a great system of common institutions of which the Jus Gentium was the reproduction, and that the complicated usages of separate commonwealths were only corruptions and depravations of the simpler ordinances which had once regulated their primitive state. But the results to which modern ideas conduct the observer are, as nearly as possible, the reverse of those which were instinctively brought home to the primitive Roman. What we respect or admire, he disliked or regarded with jealous dread. The parts of jurisprudence which he looked upon with affection were exactly those which a modern theorist leaves out of consideration as accidental and transitory; the solemn gestures of the mancipation; the nicely adjusted questions and answers of the verbal contract; the endless formalities of pleading and procedure. The Jus Gentium was merely a system forced on his attention by a political necessity. He loved it as little as he loved the foreigners from whose institutions it was derived and for whose benefit it was intended. A complete revolution in his ideas was required before it could challenge his respect, but so complete was it when it did occur, that the true reason why our modern estimate of the Jus Gentium differs from

that which has just been described, is that both modern jurisprudence and modern philosophy have inherited the matured views of the later jurisconsults on this subject. There did come a time when, from an ignoble appendage of the Jus Civile, the Jus Gentium came to be considered a great though as yet imperfectly developed model to which all law ought as far as possible to conform. This crisis arrived when the Greek theory of a Law of Nature was applied to the practical Roman administration of the Law common to all Nations.

The Jus Naturale, or Law of Nature, is simply the Jus Gentium or Law of Nations seen in the light of a peculiar theory. An unfortunate attempt to discriminate them was made by the jurisconsult Ulpian, with the propensity to distinguish characteristic of a lawyer, but the language of Gaius, a much higher authority, and the passage quoted before from the Institutes, leave no room for doubt that the expressions were practically convertible The difference between them was entirely historical, and no distinction in essence could ever be established between them. It is almost unnecessary to add that the confusion between Jus Gentium, or Law common to all nations, and *international law* is entirely modern. The classical expression for international law is Jus Feciale, or the law of negotiation and diplomacy. It is, however, unquestionable that indistinct impressions as to the meaning of Jus Gentium had considerable share in producing the

modern theory that the relations of independent states are governed by the Law of Nature.

It becomes necessary to investigate the Greek conceptions of Nature and her law. The word φύσις, which was rendered in the Latin *natura* and our *nature*, denoted beyond all doubt originally the material universe contemplated under an aspect which—such is our intellectual distance from those times—it is not very easy to delineate in modern language. Nature signified the physical world regarded as the result of some primordial element or law. The oldest Greek philosophers have been accustomed to explain the fabric of creation as the manifestation of some single principle which they variously asserted to be movement, *force*, fire, moisture, or generation. In its simplest and most ancient sense, Nature is precisely the physical universe looked upon in this way as the manifestation of a principle. Afterwards, the later Greek sects, returning to a path from which the greatest intellects of Greece had meanwhile strayed, added the *moral* to the *physical* world in the conception of Nature. They extended the term till it embraced not merely the visible creation, but the thoughts, observances, and aspirations of mankind. Still, as before, it was not solely the moral phenomena of human society which they understood by *Nature*, but these phenomena considered as resolvable into some general and simple laws.

Now, just as the oldest Greek theorists sup

posed that the sports of chance had changed the material universe from its simple primitive form into its present heterogeneous condition, so their intellectual descendants imagined that but for untoward accident the human race would have conformed itself to simpler rules of conduct and a less tempestuous life. To live according to *nature* came to be considered as the end for which man was created, and which the best men were bound to compass. To live according to *nature* was to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe. It is notorious that this proposition—live according to nature—was the sum of the tenets of the famous Stoic philosophy. Now on the subjugation of Greece that philosophy made instantaneous progress in Roman society. It possessed natural fascinations for the powerful class who, in theory at least, adhered to the simple habits of the ancient Italian race, and disdained to surrender themselves to the innovations of foreign fashion. Such persons began immediately to affect the Stoic precepts of life according to nature—an affectation all the more grateful, and, I may add, all the more noble, from its contrast with the unbounded profligacy which was being diffused through the imperial city by the pillage of the world and by the example of its most luxurious races. In the front of the disciples of the new Greek school, we might

be sure, even if we did not know it historically that the Roman lawyers figured. We have abundant proof that, there being substantially but two professions in the Roman republic, the military men were generally identified with the party of movement, but the lawyers were universally at the head of the party of resistance.

The alliance of the lawyers with the Stoic philosophers lasted through many centuries. Some of the earliest names in the series of renowned jurisconsults are associated with Stoicism, and ultimately we have the golden age of Roman jurisprudence fixed by general consent at the era of the Antonine Cæsars, the most famous disciples to whom that philosophy has given a rule of life. The long diffusion of these doctrines among the members of a particular profession was sure to affect the art which they practised and influenced. Several positions which we find in the remains of the Roman jurisconsults are scarcely intelligible unless we use the Stoic tenets as our key; but at the same time it is a serious, though a very common, error to measure the influence of Stoicism on Roman law by counting up the number of legal rules which can be confidently affiliated on Stoical dogmas. It has often been observed that the strength of Stoicism resided not in its canons of conduct, which were often repulsive and ridiculous, but in the great though vague principle which it inculcated of resistance to passion. Just in the same way the influence on

jurisprudence of the Greek theories, which had their most distinct expression in Stoicism, consisted not in the number of specific positions which they contributed to Roman law, but in the single fundamental assumption which they lent to it. After Nature had become a household word in the mouths of the Romans, the belief gradually prevailed among the Roman lawyers that the old Jus Gentium was in fact the lost code of Nature, and that the Prætor in framing an Edictal jurisprudence on the principles of the Jus Gentium was gradually restoring a type from which law had only departed to deteriorate. The inference from this belief was immediate that it was the Prætor's duty to supersede the Civil Law as much as possible by the Edict, to revive as far as might be the institutions by which Nature had governed man in the primitive state. Of course there were many impediments to the amelioration of law by this agency. There may have been prejudices to overcome even in the legal profession itself, and Roman habits were far too tenacious to give way at once to mere philosophical theory. The indirect methods by which the Edict combated certain technical anomalies, show the caution which its authors were compelled to observe, and down to the very days of Justinian there was some part of the old law which had obstinately resisted its influence. But on the whole, the progress of the Romans in legal improvement was astonishingly rapid as soon as stimulus was applied to it by

the theory of Natural Law. The ideas of simplification and generalization had always been associated with the conception of Nature; simplicity, symmetry, and intelligibility came therefore to be regarded as the characteristics of a good legal system, and the taste for involved language, multiplied ceremonials, and useless difficulties disappeared altogether. The strong will and unusual opportunities of Justinian were needed to bring the Roman law to its existing shape, but the ground plan of the system had been sketched long before the imperial reforms were effected.

What was the exact point of contact between the old Jus Gentium and the Law of Nature? I think that they touch and blend through Æquitas, or Equity in its original sense; and here we seem to come to the first appearance in jurisprudence of this famous term, Equity. In examining an expression which has so remote an origin and so long a history as this, it is always safest to penetrate, if possible, to the simple metaphor or figure which at first shadowed forth the conception. It has generally been supposed that Æquitas is the equivalent of the Greek ἰσότης, *i. e.* the principle of equal or proportionate distribution. The equal division of numbers or physical magnitudes is doubtless closely entwined with our perceptions of justice; there are few associations which keep their ground in the mind so stubbornly or are dismissed from it with such difficulty by the deepest thinkers. Yet in

tracing the history of this association, it certainly does not seem to have suggested itself to very early thought, but is rather the offspring of a comparatively late philosophy. It is remarkable too that the "equality" of laws on which the Greek democracies prided themselves—that equality which, in the beautiful drinking song of Callistratus, Harmodius and Aristogiton are said to have given to Athens—had little in common with the "equity" of the Romans. The first was an equal administration of civil laws among the citizens, however limited the class of citizens might be; the last implied the applicability of a law, which was not civil law, to a class which did not necessarily consist of citizens. The first excluded a despot; the last included foreigners, and for some purposes slaves. On the whole, I should be disposed to look in another direction for the germ of the Roman "Equity." The Latin word "æquus" carries with it more distinctly than the Greek "ἴσος" the sense of *levelling*. Now its levelling tendency was exactly the characteristic of the Jus Gentium, which would be most striking to a primitive Roman. The pure Quiritarian law recognised a multitude of arbitrary distinctions between classes of men and kinds of property; the Jus Gentium, generalised from a comparison of various customs, neglected the Quiritarian divisions. The old Roman law established, for example, a fundamental difference between "Agnatic" and "Cognatic" relationship, that

is, between the Family considered as based upon common subjection to patriarchal authority and the Family considered (in conformity with modern ideas) as united through the mere fact of a common descent. This distinction disappears in the "law common to all nations," as also does the difference between the archaic forms of property, Things "Mancipi" and Things "nec Mancipi." The neglect of demarcations and boundaries seems to me, therefore, the feature of the Jus Gentium which was depicted in Æquitas. I imagine that the word was at first a mere description of that constant *levelling* or removal of irregularities which went on wherever the prætorian system was applied to the cases of foreign litigants. Probably no colour of ethical meaning belonged at first to the expression; nor is there any reason to believe that the process which it indicated was otherwise than extremely distasteful to the primitive Roman mind.

On the other hand, the feature of the Jus Gentium which was presented to the apprehension of a Roman by the word Equity, was exactly the first and most vividly realised characteristic of the hypothetical state of nature. Nature implied symmetrical order, first in the physical world, and next in the moral, and the earliest notion of order doubtless involved straight lines, even surfaces, and measured distances. The same sort of picture or figure would be unconsciously before the mind's eye, whether it strove to form the outlines of the sup-

posed natural state, or whether it took in at a glance the actual administration of the "law common to all nations;" and all we know of primitive thought would lead us to conclude that this ideal similarity would do much to encourage the belief in an identity of the two conceptions. But then, while the Jus Gentium had little or no antecedent credit at Rome, the theory of a Law of Nature came in surrounded with all the prestige of philosophical authority, and invested with the charms of association with an elder and more blissful condition of the race. It is easy to understand how the difference in the point of view would affect the dignity of the term which at once described the operation of the old principles and the results of the new theory. Even to modern ears it is not at all the same thing to describe a process as one of "levelling" and to call it the "correction of anomalies," though the metaphor is precisely the same. Nor do I doubt that, when once Æquitas was understood to convey an allusion to the Greek theory, associations which grew out of the Greek notion of ἰσότης began to cluster round it. The language of Cicero renders it more than likely that this was so, and it was the first stage of a transmutation of the conception of Equity, which almost every ethical system which has appeared since those days has more or less helped to carry on.

Something must be said of the formal instrumentality by which the principles and distinctions

associated, first with the Law common to all Nations, and afterwards with the Law of Nature, were gradually incorporated with the Roman law. At the crisis of primitive Roman history which is marked by the expulsion of the Tarquins, a change occurred which has its parallel in the early annals of many ancient states, but which had little in common with those passages of political affairs which we now term revolutions. It may best be described by saying that the monarchy was put into commission. The powers heretofore accumulated in the hands of a single person were parcelled out among a number of elective functionaries, the very name of the kingly office being retained and imposed on a personage known subsequently as the Rex Sacrorum or Rex Sacrificulus. As part of the change, the settled duties of the supreme judicial office devolved on the Prætor, at the time the first functionary in the commonwealth, and together with these duties was transferred the undefined supremacy over law and legislation which always attached to ancient sovereigns, and which is not obscurely related to the patriarchal and heroic authority they had once enjoyed. The circumstances of Rome gave great importance to the more indefinite portion of the functions thus transferred, as with the establishment of the republic began that series of recurrent trials which overtook the state, in the difficulty of dealing with a multitude of persons who, not coming within the technical description of indigenous

Romans were nevertheless permanently located within Roman jurisdiction. Controversies between such persons, or between such persons and native born citizens, could have remained without the pale of the remedies provided by Roman law, if the Prætor had not undertaken to decide them, and he must soon have addressed himself to the more critical disputes which in the extension of commerce arose between Roman subjects and avowed foreigners. The great increase of such cases in the Roman Courts about the period of the first Punic War is marked by the appointment of a special Prætor, known subsequently as the Prætor Peregrinus, who gave them his undivided attention. Meantime, one precaution of the Roman people against the revival of oppression, had consisted in obliging every magistrate whose duties had any tendency to expand their sphere, to publish, on commencing his year of office, an Edict or proclamation, in which he declared the manner in which he intended to administer his department. The Prætor fell under the rule with other magistrates; but as it was necessarily impossible to construct each year a separate system of principles, he seems to have regularly republished his predecessor's Edict with such additions and changes as the exigency of the moment or his own views of the law compelled him to introduce. The Prætor's proclamation, thus lengthened by a new portion every year, obtained the name of the Edictum Perpetuum, that is, the *continuous* or *unbroken*

edict. The immense length to which it extended, together perhaps with some distaste for its necessarily disorderly texture, caused the practice of increasing it to be stopped in the year of Salvius Julianus, who occupied the magistracy in the reign of the Emperor Hadrian. The edict of that Prætor embraced therefore the whole body of equity jurisprudence, which it probably disposed in new and symmetrical order, and the perpetual edict is therefore often cited in Roman law merely as the Edict of Julianus.

Perhaps the first inquiry which occurs to an Englishman who considers the peculiar mechanism of the Edict is, what were the limitations by which these extensive powers of the Prætor were restrained? How was authority so little definite to be reconciled with a settled condition of society and law? The answer can only be supplied by careful observation of the conditions under which our own English law is administered. The Prætor, it should be recollected, was a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults, and it is probable that every Roman lawyer waited impatiently for the time when he should fill or control the great judicial magistracy. In the interval, his tastes, feelings, prejudices, and degree of enlightenment were inevitably those of his own order, and the qualifications which he ultimately brought to office were those which he had acquired in the practice and study of his profession.

An English Chancellor goes through precisely the same training, and carries to the woolsack the same qualifications. It is certain when he assumes office that he will have, to some extent, modified the law before he leaves it; but until he has quitted his seat, and the series of his decisions in the Law Reports has been completed, we cannot discover how far he has elucidated or added to the principles which his predecessors bequeathed to him. The influence of the Prætor on Roman jurisprudence differed only in respect of the period at which its amount was ascertained. As was before stated, he was in office but for a year, and his decisions rendered during his year, though of course irreversible as regarded the litigants, were of no ulterior value. The most natural moment for declaring the changes he proposed to effect, occurred therefore at his entrance on the prætorship; and hence, when commencing his duties, he did openly and avowedly that which in the end his English representative does insensibly and sometimes unconsciously. The checks on his apparent liberty are precisely those imposed on an English judge. Theoretically there seems to be hardly any limit to the powers of either of them, but practically the Roman Prætor, no less than the English Chancellor, was kept within the narrowest bounds by the prepossessions imbibed from early training, and by the strong restraints of professional opinion, restraints of which the stringency can only be appreciated by those who have

personally experienced them. It may be added that the lines within which movement is permitted, and beyond which there is to be no travelling, were chalked with as much distinctness in the one case as in the other. In England the judge follows the analogies of reported decisions on insulated groups of facts. At Rome, as the intervention of the Prætor was at first dictated by simple concern for the safety of the state, it is likely that in the earliest times it was proportioned to the difficulty which it attempted to get rid of. Afterwards, when the taste for principle had been diffused by the Responses, he no doubt used the Edict as the means of giving a wider application to those fundamental principles which he and the other practising jurisconsults, his contemporaries, believed themselves to have detected underlying the law. Latterly he acted wholly under the influence of Greek philosophical theories, which at once tempted him to advance and confined him to a particular course of progress.

The nature of the measures attributed to Salvius Julianus has been much disputed. Whatever they were, their effects on the Edict are sufficiently plain. It ceased to be extended by annual additions, and henceforward the equity jurisprudence of Rome was developed by the labours of a succession of great jurisconsults who fill with their writings the interval between the reign of Hadrian and the reign of Alexander Severus. A fragment of the wonderful

system which they built up survives in the Pandects of Justinian, and supplies evidence that their works took the form of treatises on all parts of Roman law, but chiefly that of commentaries on the Edict. Indeed, whatever be the immediate subject of a jurisconsult of this epoch, he may always be called an expositor of Equity. The principles of the Edict had, before the epoch of its cessation, made their way into every part of Roman jurisprudence. The Equity of Rome, it should be understood, even when most distinct from the Civil Law, was always administered by the same tribunals. The Prætor was the chief equity judge as well as the great common law magistrate, and as soon as the Edict had evolved an equitable rule the Prætor's court began to apply it in place of or by the side of the old rule of the Civil Law, which was thus directly or indirectly repealed without any express enactment of the legislature. The result, of course, fell considerably short of a complete fusion of law and equity, which was not carried out till the reforms of Justinian. The technical severance of the two elements of jurisprudence entailed some confusion and some inconvenience, and there were certain of the stubborner doctrines of the Civil Law with which neither the authors nor the expositors of the Edict had ventured to interfere. But at the same time there was no corner of the field of jurisprudence which was not more or less swept over by the influence of Equity It supplied the jurist with

all his materials for generalisation, with all his methods of interpretation, with his elucidations of first principles, and with that great mass of limiting rules which are rarely interfered with by the legislator, but which seriously control the application of every legislative act.

The period of jurists ends with Alexander Severus. From Hadrian to that emperor the improvement of law was carried on, as it is at the present moment in most continental countries, partly by approved commentaries and partly by direct legislation. But in the reign of Alexander Severus the power of growth in Roman Equity seems to be exhausted, and the succession of jurisconsults comes to a close. The remaining history of the Roman law is the history of the imperial constitutions, and, at the last, of attempts to codify what had now become the unwieldy body of Roman jurisprudence. We have the latest and most celebrated experiment of this kind in the *Corpus Juris* of Justinian.

It would be wearisome to enter on a detailed comparison or contrast of English and Roman Equity; but it may be worth while to mention two features which they have in common. The first may be stated as follows. Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when Equity first interfered with it. A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences.

and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal. Such an epoch was reached at Rome in the reign of Alexander Severus; after which, though the whole Roman world was undergoing a moral revolution, the Equity of Rome ceased to expand. The same point of legal history was attained in England under the chancellorship of Lord Eldon the first of our equity judges who, instead of enlarging the jurisprudence of his court by indirect legislation, devoted himself through life to explaining and harmonising it. If the philosophy of legal history were better understood in England, Lord Eldon's services would be less exaggerated on the one hand and better appreciated on the other than they appear to be among contemporary lawyers. Other misapprehensions too, which bear some practical fruit, would perhaps be avoided. It is easily seen by English lawyers that English Equity is a system founded on moral rules; but it is forgotten that these rules are the morality of past centuries—not of the present—that they have received nearly as much application as they are capable of, and that, though of course they do not differ largely from the ethical creed of our own day, they are not necessarily on a level with it. The imperfect theories of the subject which are commonly adopted have generated errors of opposite sorts. Many writers of treatises on Equity, struck with the com-

pleteness of the system in its present state, commit themselves expressly or implicitly to the paradoxical assertion that the founders of the chancery jurisprudence contemplated its present fixity of form when they were settling its first bases. Others, again, complain—and this is a grievance frequently observed upon in forensic arguments—that the moral rules enforced by the Court of Chancery fall short of the ethical standard of the present day. They would have each Lord Chancellor perform precisely the same office for the jurisprudence which he finds ready to his hand, which was performed for the old common law by the fathers of English equity. But this is to invert the order of the agencies by which the improvement of the law is carried on. Equity has its place and its time; but I have pointed out that another instrumentality is ready to succeed it when its energies are spent.

Another remarkable characteristic of both English and Roman Equity is the falsehood of the assumptions upon which the claim of the equitable to superiority over the legal rule is originally defended. Nothing is more distasteful to men, either as individuals or as masses, than the admission of their moral progress as a substantive reality. This unwillingness shows itself, as regards individuals, in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency. The movement of the collective opinion of a whole society is too palpable to be ignored, and is generally too visibly

for the better to be decried; but there is the greatest disinclination to accept it as a primary phenomenon, and it is commonly explained as the recovery of a lost perfection—the gradual return to a state from which the race had lapsed. This tendency to look backward instead of forward for the goal of moral progress produced anciently, as we have seen, on Roman jurisprudence effects the most serious and permanent. The Roman jurisconsults, in order to account for the improvement of their jurisprudence by the Prætor, borrowed from Greece the doctrine of a Natural state of man—a Natural society—anterior to the organization of commonwealths governed by positive laws. In England, on the other hand, a range of ideas especially congenial to Englishmen of that day, explained the claim of Equity to override the common law by supposing a general right to superintend the administration of justice which was assumed to be vested in the king as a natural result of his paternal authority. The same view appears in a different and quainter form in the old doctrine that Equity flowed from the king's conscience—the improvement which had in fact taken place in the moral standard of the community being thus referred to an inherent elevation in the moral sense of the sovereign. The growth of the English constitution rendered such a theory unpalatable after a time; but, as the jurisdiction of the Chancery was then firmly established it was not worth while to devise any formal sub-

stitute for it. The theories found in modern manuals of Equity are very various, but all alike in their untenability. Most of them are modifications of the Roman doctrine of a natural law, which is indeed adopted in terms by those writers who begin a discussion of the jurisdiction of the Court of Chancery by laying down a distinction between natural justice and civil.