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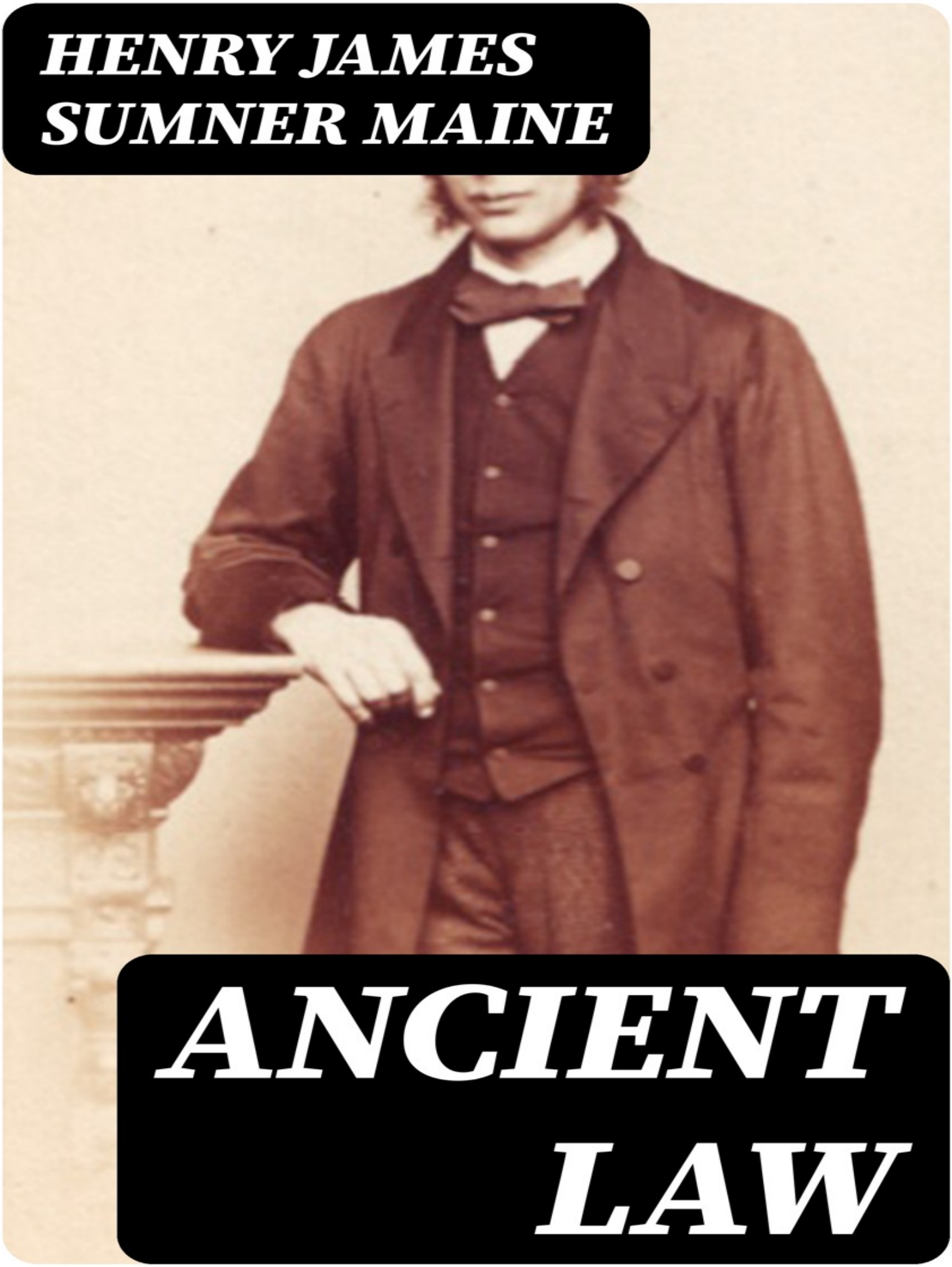

ANCIENT LAW

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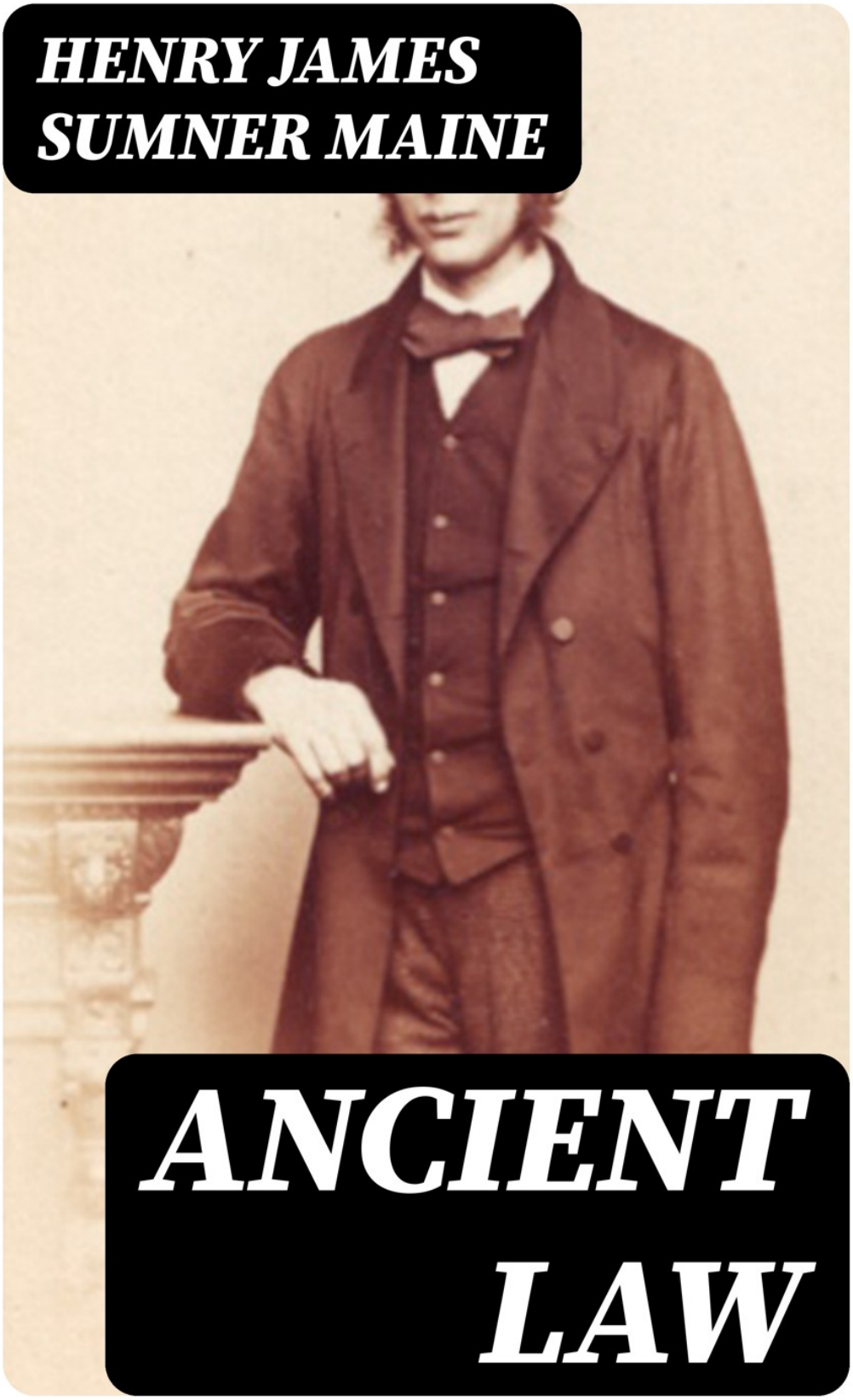

ANCIENT LAW

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Ancient Law

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CHAPTER I.

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ANCIENT CODES.

THE most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law. Except in one particular, no institutions anterior to the Twelve Tables were recognised at Rome. The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours. Neither theory corresponded exactly with the facts, but each produced consequences of the utmost importance.

I need hardly say that the publication of the Twelve Tables is not the earliest point at which we can take up the history of law. The ancient Roman code belongs to a class of which almost every civilised nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. They appeared under exceedingly similar circumstances, and were produced, to our knowledge, by very similar causes. Unquestionably, many jural phenomena lie behind these codes and preceded them in point of time. Not a few documentary records exist

which profess to give us information concerning the early phenomena of law; but, until philology has effected a complete analysis of the Sanskrit literature, our best sources of knowledge are undoubtedly the Greek Homeric poems, considered of course not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer. However the fancy of the poet may have exaggerated certain features of the heroic age, the prowess of warrior and the potency of gods, there is no reason to believe that it has tampered with moral or metaphysical conceptions which were not yet the subjects of conscious observation; and in this respect the Homeric literature is far more trustworthy than those relatively later documents which pretend to give an account of times similarly early, but which were compiled under philosophical or theological influences. If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence. The inquiries of the jurist are in truth prosecuted much as inquiry in physic and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober

research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.

The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words "Themis" and "Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that Themis is described in the Iliad as the assessor of Zeus. It is now clearly seen by all trustworthy observers of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person; the sun rising, culminating, and setting was a person and a divine person; the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was *Themis*. The peculiarity of the conception is brought out by the use of the plural. *Themistes*, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use; but it must be distinctly understood that they are not

laws, but judgments. "Zeus, or the human king on earth," says Mr. Grote, in his History of Greece, "is not a lawmaker, but a judge." He is provided with Themistes, but, consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments.

Even in the Homeric poems, we can see that these ideas are transient. Parities of circumstanced were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a Custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down *à priori* that the notion of a Custom must precede that of a judicial sentence, and that a judgment must affirm a Custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them. The Homeric word for a custom in the embryo is sometimes "Themis" in the singular—more often "Dike," the meaning of which visibly fluctuates between a "judgment" and a "custom" or "usage." Νόμος, a Law, so great and famous a term in the political vocabulary of the later Greek society, does not occur in Homer.

This notion of a divine agency, suggesting the Themistes, and itself impersonated in Themis, must be kept apart from other primitive beliefs with which a superficial inquirer might confound it. The conception of the Deity dictating an entire code or body of law, as in the case of the Hindoo laws of Menu, seems to belong to a range of ideas more recent

and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides. A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices; and every now and then the same duty is even more significantly recognised in the purifications and expiations which they perform, and which appear intended to deprecate punishment for involuntary or neglectful disrespect. Everybody acquainted with ordinary classical literature will remember the *sacra gentilicia*, which exercised so important an influence on the early Roman law of adoption and of wills. And to this hour the Hindoo Customary Law, in which some of the most curious features of primitive society are stereotyped, makes almost all the rights of persons and all the rules of succession hinge on the due solemnisation of fixed ceremonies at the dead man's funeral, that is, at every point where a breach occur in the continuity of the family.

Before we quit this stage of jurisprudence, a caution may be usefully given to the English student. Bentham, in his "Fragment on Government," and Austin, in his "Province of Jurisprudence Determined," resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on

the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection; and it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit. It is, to use a French phrase, "in the air." The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication. It is of course extremely difficult for us to realise a view so far removed from us in point both of time and of association, but it will become more credible when we dwell more at length on the constitution of ancient society, in which every man, living during the greater part of his life under the patriarchal despotism, was practically controlled in all his actions by a regimen not of law but of caprice. I may add that an

Englishman should be better able than a foreigner to appreciate the historical fact that the "Themistes" preceded any conception of law, because, amid the many inconsistent theories which prevail concerning the character of English jurisprudence, the most popular, or at all events the one which most affects practice, is certainly a theory which assumes that adjudged cases and precedents exist antecedently to rules, principles, and distinctions. The "Themistes" have too, it should be remarked, the characteristic which, in the view of Bentham and Austin, distinguishes single or mere commands from laws. A true law enjoins on all the citizens indifferently a number of acts similar in class or kind; and this is exactly the feature of a law which has most deeply impressed itself on the popular mind, causing the term "law" to be applied to mere uniformities, successions, and similitudes. A *command* prescribes only a single act, and it is to commands, therefore, that "Themistes" are more akin than to laws. They are simply adjudications on insulated states of fact, and do not necessarily follow each other in any orderly sequence.

The literature of the heroic age discloses to us law in the germ under the "Themistes" and a little more developed in the conception of "Dike." The next stage which we reach in the history of jurisprudence is strongly marked and surrounded by the utmost interest. Mr. Grote, in the second part and second chapter of his History, has fully described the mode in which society gradually clothed itself with a different character from that delineated by Homer. Heroic kingship depended partly on divinely given prerogative, and partly on the possession of supereminent strength, courage,

and wisdom. Gradually, as the impression of the monarch's sacredness became weakened, and feeble members occurred in the series of hereditary kings, the royal power decayed, and at last gave way to the dominion of aristocracies. If language so precise can be used of the revolution, we might say that the office of the king was usurped by that council of chiefs which Homer repeatedly alludes to and depicts. At all events from an epoch of kingly rule we come everywhere in Europe to an era of oligarchies; and even where the name of the monarchical functions does not absolutely disappear, the authority of the king is reduced to a mere shadow. He becomes a mere hereditary general; as in Lacedæmon, a mere functionary, as the King Archon at Athens, or a mere formal hierophant, like the *Rex Sacrificulus* at Rome. In Greece, Italy, and Asia Minor, the dominant orders seem to have univerally consisted of a number of families united by an assumed relationship in blood, and, though they all appear at first to have laid claim to a quasi-sacred character, their strength does not seem to have resided in their pretended sanctity. Unless they were prematurely overthrown by the popular party, they all ultimately approached very closely to what we should now understand by a political aristocracy. The changes which society underwent in the communities of the further Asia occurred of course at periods long anterior in point of time to these revolutions of the Italian and Hellenic worlds; but their relative place in civilisation appear to have been the same, and they seem to have been exceedingly similar in general character. There is some evidence that the races which were subsequently united under the Persian

monarchy, and those which peopled the peninsula of India, had all their heroic age and their era of aristocracies; but a military and a religious oligarchy appear to have grown up separately, nor was the authority of the king generally superseded. Contrary, too, to the course of events in the West, the religious element in the East tended to get the better of the military and political. Military and civil aristocracies disappear, annihilated or crushed into insignificance between the kings and the sacerdotal order; and the ultimate result at which we arrive is, a monarch enjoying great power, but circumscribed by the privileges of a caste of priests. With these differences, however, that in the East aristocracies became religious, in the West civil or political, the proposition that a historical era of aristocracies succeeded a historical era of heroic kings may be considered as true, if not of all mankind, at all events of all branches of the Indo-European family of nations.

The important point for the jurist is that these aristocracies were universally the depositaries and administrators of law. They seem to have succeeded to the prerogatives of the king, with the important difference, however, that they do not appear to have pretended to direct inspiration for each sentence. The connection of ideas which caused the judgments of the patriarchal chieftain to be attributed to superhuman dictation still shows itself here and there in the claim of a divine origin for the entire body of rules, or for certain parts of it, but the progress of thought no longer permits the solution of particular disputes to be explained by supposing an extra-human interposition. What the juristical oligarchy now claims is to monopolise the

knowledge of the laws, to have the exclusive possession of the principles by which quarrels are decided. We have in fact arrived at the epoch of Customary Law. Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste. Our authorities leave us no doubt that the trust lodged with the oligarchy was sometimes abused, but it certainly ought not to be regarded as a mere usurpation or engine of tyranny. Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to. Their genuineness was, so far as possible, insured by confiding them to the recollection of a limited portion of the community.

The epoch of Customary Law, and of its custody by a privileged order, is a very remarkable one. The condition of the jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world. English case-law is sometimes spoken of as unwritten, and there are some English theorists who assure us that if a code of English jurisprudence were prepared we should be turning unwritten law into written—conversion, as they insist, if not of doubtful policy, at all events of the greatest seriousness. Now, it is quite true that there was once a period at which the English common law might reasonably have been termed unwritten.

The elder English judges did really pretend to knowledge of rules, principles, and distinctions which were not entirely revealed to the bar and to the lay-public. Whether all the law which they claimed to monopolise was really unwritten, is exceedingly questionable; but at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the Courts at Westminster Hall began to base their judgments on cases recorded, whether in the year books or elsewhere, the law which they administered became written law. At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case-law, and only different from code-law because it is written in a different way.

From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen. In Greece, in Italy, on the Hellenised sea-board of Western Asia, these codes all made their appearance at periods much the same everywhere, not, I mean, at periods identical in point of time, but similar in point of the relative progress of each community. Everywhere, in the countries I have named, laws engraven on tablets and published to the

people take the place of usages deposited with the recollection of a privileged oligarchy. It must not for a moment be supposed that the refined considerations now urged in favour of what is called codification had any part or place in the change I have described. The ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing. It is true that the aristocracies seem to have abused their monopoly of legal knowledge; and at all events their exclusive possession of the law was a formidable impediment to the success of those popular movements which began to be universal in the western world. But, though democratic sentiment may have added to their popularity, the codes were certainly in the main a direct result of the invention of writing. Inscribed tablets were seen to be a better depositary of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise.

The Roman code belongs to the class of codes I have been describing. Their value did not consist in any approach to symmetrical classifications, or to terseness and clearness of expression, but in their publicity, and in the knowledge which they furnished to everybody, as to what he was to do, and what not to do. It is, indeed, true that the Twelve Tables of Rome do exhibit some traces of systematic arrangement, but this is probably explained by the tradition that the framers of that body of law called in the assistance of Greeks who enjoyed the later Greek experience in the art of law-making. The fragments of the Attic Code of Solon show, however, that it had but little order, and probably the laws

of Draco had even less. Quite enough too remains of these collections, both in the East and in the West, to show that they mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character; and this is consistent with all we know of early thought from other sources, the severance of law from morality, and of religion from law, belonging very distinctly to the *later* stages of mental progress.

But, whatever to a modern eye are the singularities of these Codes, their importance to ancient societies was unspeakable. The question—and it was one which affected the whole future of each community—was not so much whether there should be a code at all, for the majority of ancient societies seem to have attained them sooner or later, and, but for the great interruption in the history of jurisprudence created by feudalism, it is likely that all modern law would be distinctly traceable to one or more of these fountainheads. But the point on which turned the history of the race was, at what period, at what stage of their social progress, they should have their laws put into writing. In the western world the plebeian or popular element in each State successfully assailed the oligarchical monopoly; and a code was nearly universally obtained *early* in the history of the Commonwealth. But, in the East, as I have before mentioned, the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; while in some instances the physical conformation of Asiatic countries had the effect of making individual communities larger and more numerous than in the West; and it is a known social law that

the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality. From whatever cause, the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and wore a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo code, called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be the law. It is consistent with human nature and with the special motives of their author, that codes like that of Menu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity. Menu, according to Hindoo mythology, is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindoo jurisprudence, a recent production.

Among the chief advantages which the Twelve Tables and similar codes conferred on the societies which obtained them, was the protection which they afforded against the frauds of the privileged oligarchy and also against the spontaneous depravation and debasement of the national institutions. The Roman Code was merely an enunciation in words of the existing customs of the Roman people. Relatively to the progress of the Romans in civilisation, it was a remarkably early code, and it was published at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded. Now a barbarous society practising a body of customs, is exposed to some especial dangers which may be absolutely fatal to its progress in civilisation. The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development which ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that usage which is reasonable generates usage which is unreasonable. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of

snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons, to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it. After one kind of food has interdicted for sanitary reasons, the prohibition is extended to all food resembling it, though the resemblance occasionally depends on analogies the most fanciful. So, again, a wise provision for insuring general cleanliness dictates in time long routines of ceremonial ablution; and that division into classes which at a particular crisis of social history is necessary for the maintenance of the national existence degenerates into the most disastrous and blighting of all human institutions—Caste. The fate of the Hindoo law is, in fact, the measure of the value of the Roman code. Ethnology shows us that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code. It was compiled while the usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. We are not of course entitled to

say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but thus much at least is certain, that *with* their code they were exempt from the very chance of so unhappy a destiny.

CHAP. II.

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LEGAL FICTIONS.

When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without. It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long—in some instances the immense—interval between their declaration by a patriarchal monarch and their publication in writing. It would be unsafe too to affirm that no part of the alteration was effected deliberately. But from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change. Such innovations on the earliest usages as disclose themselves appear to have been dictated by feelings and modes of thought which, under our present mental conditions, we are unable to comprehend. A new era begins, however, with the Codes. Wherever, after this epoch, we trace the course of legal modification we are able to attribute it to the conscious desire of improvement, or at all events of compassing objects other than those which were aimed at in the primitive times.

It may seem at first sight that no general propositions worth trusting can be elicited from the history of legal systems subsequent to the codes. The field is too vast. We cannot be sure that we have included a sufficient number of

phenomena in our observations, or that we accurately understand those which we have observed. But the undertaking will be seen to be more feasible, if we consider that after the epoch of codes the distinction between stationary and progressive societies begins to make itself felt. It is only with the progressive that we are concerned, and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that the civilisation which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears, and speculations, would be materially affected, if we had vividly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. One set of usages has occasionally been violently overthrown and superseded by another; here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of sacerdotal commentators; but, except in a small section of the world, there has been nothing like the gradual amelioration of a legal system. There has been material civilisation, but, instead of the civilisation expanding the law, the law has limited the civilisation. The study of races in their primitive condition affords us some clue to the point at which the development of certain societies has stopped.

We can see that Brahminical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion. The members of such a society consider that the transgression of a religious ordinance should be punished by civil penalties, and that the violation of a civil duty exposes the delinquent to divine correction. In China this point has been passed, but progress seems to have been there arrested, because the civil laws are coextensive with all the ideas of which the race is capable. The difference between the stationary and progressive societies is, however, one of the great secrets which inquiry has yet to penetrate. Among partial explanations of it I venture to place the considerations urged at the end of the last chapter. It may further be remarked that no one is likely to succeed in the investigation who does not clearly realise that the stationary condition of the human race is the rule, the progressive the exception. And another indispensable condition of success is an accurate knowledge of Roman law in all its principal stages. The Roman jurisprudence has the longest known history of any set of human institutions. The character of all the changes which it underwent is tolerably well ascertained. From its commencement to its close, it was progressively modified for the better, or for what the author of the modification conceived to be the better, and the course of improvement was continued through periods at which all the rest of human thought and action materially slackened its pace, and repeatedly threatened to settle down into stagnation.

I confine myself in what follows to the progressive societies. With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

A general proposition of some value may be with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted. The early history of one of them, Equity, is universally obscure, and hence it may be thought by some that certain isolated statutes, reformatory of the civil law, are older than any equitable jurisdiction. My own belief is that remedial Equity is everywhere older than remedial Legislation; but, should this be not strictly true, it would only be necessary to limit the proposition respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in transforming the original law.

I employ the word "fiction" in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which

belonged to the Roman "fictiones." Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of these "fictiones" was, of course, to give jurisdiction, and they therefore strongly resembled the allegations in the writs of the English Queen's Bench and Exchequer, by which those Courts contrived to usurp the jurisdiction of the Common Pleas:—the allegation that the defendant was in custody of the king's marshal, or that the plaintiff was the king's debtor, and could not pay his debt by reason of the defendant's default. But I now employ the expression "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman Responsa Prudentum as resting on fictions. Both these examples will be examined presently. The *fact* is in both cases that the law has been wholly changed; the *fiction* is that it remains what it always was. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable

expedients for overcoming the rigidity of law, and, indeed, without one of them, the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps towards civilisation. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law. But at the same time it would be equally foolish to agree with those theorists, who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. They have had their day, but it has long since gone by. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. Hence there is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different casts will differ as to the branch of the alternative which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity whether of the Roman Prætors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from Legal Fictions just as Equity differs from them, and it is also distinguished from Equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public

opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature and not to that of the principles on which the legislature acted; and thus they differ from rules of Equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at once to the recognition of the courts even without the concurrence of prince or parliamentary assembly. It is the more necessary to note these differences, because a student of Bentham would be apt to confound Fictions, Equity, and Statute law under the single head of legislation. They all, he would say, involve *law-making;* they differ only in respect of the machinery by which the new law is produced. That is perfectly true, and we must never forget it; but it furnishes no reason why we should deprive ourselves of so convenient a term as Legislation in the special sense. Legislation and Equity are disjoined in the popular mind and in the minds of most lawyers; and it will never do to neglect the distinction between them, however conventional, when important practical consequences follow from it.

It would be easy to select from almost any regularly developed body of rules examples of *legal fictions*, which at once betray their true character to the modern observer. In the two instances which I proceed to consider, the nature of

the expedient employed is not so readily detected. The first authors of these fictions did not perhaps intend to innovate, certainly did not wish to be suspected of innovating. There are, moreover, and always have been, persons who refuse to see any fiction in the process, and conventional language bear out their refusal. No examples, therefore, can be better calculated to illustrate the wide diffusion of legal fictions, and the efficiency with which they perform their two-fold office of transforming a system of laws and of concealing the transformation.

We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has