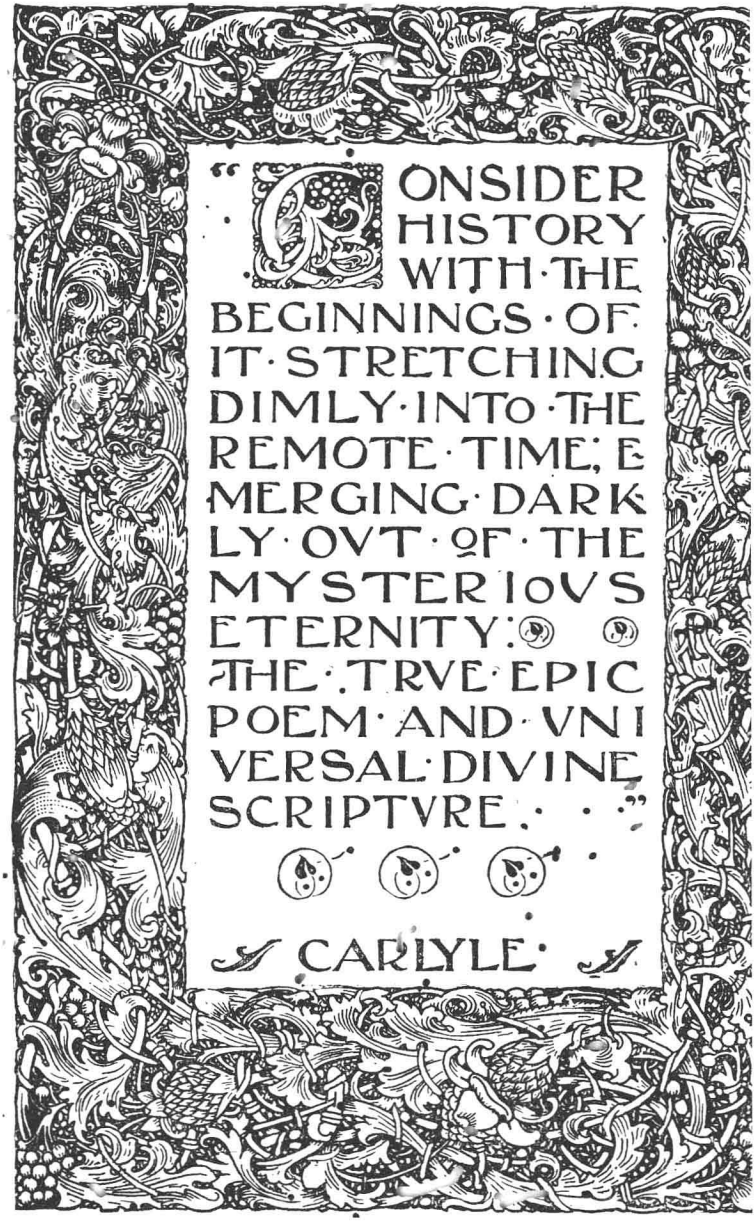
ANCIENT LAW

BY SIR HENRY JAMES SUMNER MAINE K.C.S.I.

EVERY MAN I WILL GO WITH THEE BE THY GVIDE

IN THY MOST NEED TO GO BY THY SIDE

LONDON & TORONTO
PUBLISHED BY J M DENT & SONS LTD & IN NEW YORK BY E P DUTTON & CO


"CONSIDER HISTORY WITH THE BEGINNINGS OF IT STRETCHING DIMLY INTO THE REMOTE TIME; EMERGING DARKLY OVT OF THE MYSTERIOVS ETERNITY: THE TRVE EPIC POEM AND VNIVERSAL DIVINE SCRIPTVRE. . . ."
CARLYLE

INTRODUCTION

No one who is interested in the growth of human ideas or the origins of human society can afford to neglect Maine's *Ancient Law*. Published some fifty-six years ago it immediately took rank as a classic, and its epoch-making influence may not unfitly be compared to that exercised by Darwin's *Origin of Species*. The revolution effected by the latter in the study of biology was hardly more remarkable than that effected by Maine's brilliant treatise in the study of early institutions. Well does one of Maine's latest and most learned commentators say of his work that "he did nothing less than create the natural history of law." This is only another way of saying that he demonstrated that our legal conceptions—using that term in its largest sense to include social and political institutions—are as much the product of historical development as biological organisms are the outcome of evolution. This was a new departure, inasmuch as the school of jurists, represented by Bentham and Austin, and of political philosophers, headed by Hobbes, Locke, and their nineteenth-century disciples, had approached the study of law and political society almost entirely from an unhistoric point of view and had substituted dogmatism for historical investigation. They had read history, so far as they troubled to read it at all, "backwards," and had invested early man and early society with conceptions which, as a matter of fact, are themselves historical products. The jurists, for example, had in their analysis of legal sovereignty postulated the commands of a supreme lawgiver by simply ignoring the fact that, in point of time, custom precedes legislation and that early law is, to use Maine's own phrase, "a habit" and not a conscious exercise of the volition of a lawgiver or a legislature. The political philosophers, similarly, had sought the origin of political society in a "state of nature"—humane, according to Locke and Rousseau, barbarous, according to Hobbes—in which men freely subscribed to

an "original contract" whereby each submitted to the will of all. It was not difficult to show, as Maine has done, that contract—*i.e.* the recognition of a mutual agreement as binding upon the parties who make it—is a conception which comes very late to the human mind. But Maine's work covers much wider ground than this. It may be summed up by saying that he shows that early society, so far as we have any recognisable legal traces of it, begins with the group, not with the individual.

This group was, according to Maine's theory, the Family —that is to say the Family as resting upon the patriarchal power of the father to whom all its members, wife, sons, daughters, and slaves, were absolutely subject. This, the central feature of Maine's speculation, is worked out with infinite suggestiveness and great felicity of style in chapter V. ("Primitive Society and Ancient Law") of the present work, and his chief illustrations are sought in the history of Roman law. The topics of the other chapters are selected largely with a view to supplying confirmation of the theory in question and, as we shall see in a moment, Maine's later works do but serve to carry the train of reasoning a step further by the use of the Comparative Method in invoking evidence from other sources, notably from Irish and Hindu Law. Let us, however, confine ourselves for the moment to "Ancient Law." Maine works out the implications of his theory by showing that it, and it alone, can serve to explain such features of early Roman law as Agnation, *i.e.* the tracing of descent exclusively through males, and Adoption, *i.e.* the preservation of the family against the extinction of male heirs. The perpetual tutelage of women is the consequence of this position. Moreover, all the members of the family, except its head, are in a condition best described as *status*: they have no power to acquire property, or to bequeath it, or to enter into contracts in relation to it. The traces of this state of society are clearly visible in the pages of that classical text-book of Roman Law, the *Institutes* of Justinian,[1] compiled in the sixth century A.D., though equally visible is the disintegration wrought in it by the reforming activity

[1] The reader who desires to pursue the subject by reference to one of Maine's chief authorities is recommended to read the translation of the *Institutes* by Sandars.

of the praetor's edicts. That reformation followed the course of a gradual emancipation of the members of the family, except those under age, from the despotic authority of the father. This gradual substitution of the Individual for the Family was effected in a variety of ways, but in none more conspicuously than by the development of the idea of contract, *i.e.* of the capacity of the individual to enter into independent agreements with strangers to his family-group by which he was legally bound—an historical process which Maine sums up in his famous aphorism that the movement of progressive societies has hitherto been a movement from Status to Contract.

In the chapters on the early history of Wills, Property, and Contract, Maine supports his theory by showing that it is the key which unlocks many, if not all, of the problems which those topics present. The chapter on Wills—particularly the passage in which he explains what is meant by Universal Succession—is a brilliant example of Maine's analytic power. He shows that a Will—in the sense of a secret and revocable disposition of property only taking effect after the death of the testator—is a conception unknown to early law, and that it makes its first appearance as a means of transmitting the exercise of domestic sovereignty, the transfer of the property being only a subsidiary feature; wills only being permitted, in early times, in cases where there was likely to be a failure of proper heirs. The subsequent popularity of wills, and the indulgence with which the law came to regard them, were due to a desire to correct the rigidity of the Patria Potestas, as reflected in the law of intestate succession, by giving free scope to natural affection. In other words, the conception of relationship as reckoned only through males, and as resting on the continuance of the children within their father's power, gave way, through the instrumentality of the will, to the more modern and more natural conception of relationship.

In the chapter on Property Maine again shows that the theory of its origin in occupancy is too individualistic and that not separate ownership but joint ownership is the really archaic institution. The father was in some sense (we must avoid importing modern terms) the trustee of the joint property of the family. Here Maine makes an

excursion into the fields of the Early Village Community, and has, too, to look elsewhere than to Rome, where the village community had already been transformed by coalescence into the city-state. He therefore seeks his examples from India and points to the Indian village as an example of the expansion of the family into a larger group of co-proprietors, larger but still bearing traces of its origin to the patriarchal power. And, to quote his own words, "the most important passage in the history of Private Property is its gradual separation from the co-ownership of kinsmen." The chapter on Contract, although it contains some of Maine's most suggestive writing, and the chapter on Delict and Crime, have a less direct bearing on his main thesis except in so far as they go to show that the reason why there is so little in early law of what we call civil, as distinct from criminal, law, and in particular of the Law of Contract, is to be found in the fact that, in the infancy of society, the Law of Persons, and with it the law of civil rights, is merged in the common subjection to Paternal Power.

Such, putting it in the simplest possible language, is the main argument of *Ancient Law*. The exigencies of space and of simplicity compel me to pass by, to a large extent, most of the other topics with which Maine deals—the place of custom, code, and fiction in the development of early law, the affiliation of international Law to the *Jus Gentium* and the Law of Nature, the origins of feudalism and of primogeniture, the early history of delict and crime, and that most remarkable and profound passage in which Maine shows the heavy debt of the various sciences to Roman law and the influence which it has exerted on the vocabulary of political science, the concepts of moral philosophy, and the doctrines of theology. I must confine myself to two questions: how far did Maine develop or modify in his subsequent writings the main thesis of *Ancient Law?* to what extent has this thesis stood the test of the criticism and research of others? As regards the first point, it is to be remembered that *Ancient Law* is but the first, though doubtless the most important, of a whole series of works by its author on the subject of early law. It was followed at intervals by three volumes: *Village Communities in the East and West, Early Institutions,* and *Early Law and*

Custom. In the first of these he dealt with a subject which has excited an enormous degree of attention and not a little controversy among English, French, German, and Russian scholars,[1] amounting as it does to nothing less than an investigation into the origin of private property in land. The question has been put in various forms: did it commence with joint (or, as some would put it, less justifiably, communal or corporate) ownership or with individual ownership, and again was the village community free or servile? It is now pretty generally recognised that there was more than one type, though common cultivation was doubtless a feature of them all, and even in India there were at least two types, of which the one presenting several, as opposed to communal, ownership is not the less ancient. But it may well be that, as Maitland so often pointed out, much of the controversy has been literally an anachronism; that is to say, that nineteenth-century men have been asking the Early Ages questions which they could not answer and reading back into early history distinctions which are themselves historical products. Ownership is itself a late abstraction developed out of use. We may say with some certainty that family "ownership" preceded individual ownership, but in what sense there was communal ownership by a whole village it is not so easy to say.

Maine was on surer ground when, as in his studies of Irish and Hindu law, he confined himself to the more immediate circle of the family group. In his *Early Institutions* he subjects the Brehon Laws of early Ireland to a suggestive examination as presenting an example of Celtic law largely unaffected by Roman influences. He there shows, as he has shown in *Ancient Law*, that in early times the only social brotherhood recognised was that of kinship, and that almost every form of social organisation, tribe, guild, and religious fraternity, was conceived of under a similitude of it. Feudalism converted the village community, based on a real or assumed consanguinity of its members, into the fief in which the relations of tenant and lord were those of contract, while those of the unfree tenant

[1] English literature on the subject is best studied in Maitland's *Domesday Book and Beyond*, Vinogradoff's *The Growth of the Manor* and *Villeinage in England* (with an excellent historical introduction), and Seebohm's *English Village Community*.

rested on status. In his *Early Law and Custom* he pursues much the same theme by an examination of Hindu Law as presenting a peculiarly close implication of early law with religion. Here he devotes his attention chiefly to Ancestor-worship, a subject which about this time had engaged the attention, as regards its Greek and Roman forms, of that brilliant Frenchman, Fustel de Coulanges, whose monograph *La Cité Antique* is now a classic. As is well known, the right of inheriting a dead man's property and the duty of performing his obsequies are co-relative to this day in Hindu law, and his investigation of this subject brings Maine back to the subject of the Patriarchal Power. He points out that both worshipper and the object of worship were exclusively males, and concludes that it was the power of the father which generated the practice of worshipping him, while this practice in turn, by the gradual admission of women to participate in the ceremonies, gradually acted as a solvent upon the power itself. The necessity of finding some one to perform these rites, on failure of direct male heirs, marked the beginning of the recognition of a right in women to inherit. The conception of the family becomes less intense and more extensive. These discussions brought Maine, in chapter VII. of *Early Law and Custom*, to reconsider the main theory of *Ancient Law* in the light of the criticism to which it had been exposed, and every reader of *Ancient Law* who desires to understand Maine's exact position in regard to the scope of his generalisations should read for himself the chapter in the later work entitled "Theories of Primitive Society." His theory of the patriarchal power had been criticised by two able and industrious anthropologists, M'Lennan and Morgan, who, by their investigation of "survivals" among barbarous tribes in our own day, had arrived at the conclusion that, broadly speaking, the normal process through which society had passed was not patriarchal but "matriarchal," *i.e.* understanding by that term a system in which descent is traced through females. It would take up far too much space to enter into this controversy in detail. It is sufficient to say that the counter-theory rested on the assumption that society originated not in families, based on the authority of the father and relationship through him, but in promiscuous hordes among whom the only certain

fact, and, consequently, the only recognised basis of relationship, was maternity. Maine's answer to this was that his generalisations as to the prevalence of the patriarchal power were confined to Indo-European races, and that he did not pretend to dogmatise about other races, also that he was dealing not with all societies but all that had any permanence. He argues that the promiscuous horde, where and when it is found, is to be explained as an abnormal case of retrogression due to a fortuitous scarcity of females resulting in polyandry, and he opposes to the theory of its predominance the potency of sexual jealousy which might serve as only another name for the patriarchal power. On the whole the better opinion is certainly with Maine. His theory, at any rate, alone accords with a view of society so soon as it is seen to possess any degree of civilisation and social cohesion.

It will be seen that Maine's work, like that of most great thinkers, presents a singular coherence and intellectual elegance. It is distinguished also by an extraordinary wide range of vision. He lays under contribution with equal felicity and suggestiveness the Old Testament, the Homeric poems, the Latin dramatists, the laws of the Barbarians, the sacerdotal laws of the Hindus, the oracles of the Brehon caste, and the writings of the Roman jurists. In other words, he was a master of the Comparative Method. Few writers have thrown so much light on the development of the human mind in its social relations. We know now —a hundred disciples have followed in Maine's footsteps and applied his teaching—how slow is the growth of the human intellect in these matters, with what painful steps man learns to generalise, how convulsively he clings in the infancy of civilisation to the formal, the material, the realistic aspects of things, how late he develops such abstractions as "the State." In all this Maine first showed the way. As Sir Frederick Pollock has admirably put it—

> Nowadays it may be said that "all have got the seed," but this is no justification for forgetting who first cleared and sowed the ground. We may till fields that the master left untouched, and one man will bring a better ox to yoke to the plough, and another a worse; but it is the master's plough still.

We may conclude with some remarks on Maine's views

of the contemporary problems of political society. Maine was what, for want of a better term, may be called a Conservative, and, indeed, it may be doubted whether, with the single exception of Burke, any English writer has done more to provide English Conservatives with reasons for the faith that is in them. He has set forth his views in a collection of polemical essays under the title of *Popular Government*, which were given to the world in book form in 1885. He viewed the advent of Democracy with more distrust than alarm—he appears to have thought it a form of government which could not last—and he has an unerring eye for its weaknesses.[1] Indeed, his remarks on the facility with which Democracy yields itself to manipulation by wire-pullers, newspapers, and demagogues, have found not a little confirmation in such studies of the actual working of democratic government as M. Ostrogorski's *Democracy and the Organisation of Political Parties*. Maine emphasised the tyranny of majorities, the enslavement of untutored minds by political catchwords, their susceptibility to "suggestion," their readiness to adopt vicarious opinion in preference to an intellectual exercise of their own volition. It is not surprising that the writer who had subjected the theories of the Social Contract to such merciless criticism sighed for a scientific analysis of political terms as the first step to clear thinking about politics. Here he was on strong ground, but for such an analysis we have yet to wait.[2] He seems to have placed his hopes in the adoption of some kind of written constitution which, like the American prototype, would safeguard us from fundamental changes by the caprice of a single assembly. But this is not the place to pursue such highly debateable matters. Enough if we say that the man who wishes to serve an apprenticeship to an intelligent understanding of the political society

[1] Witness the characteristic sentence: "On the whole they [*i.e.* the studies of earlier society] suggest that the differences which, after ages of change, separate the civilised man from savage or barbarian, are not so great as the vulgar opinion would have them. . . . Like the savage, he is a man of party with a newspaper for a totem . . . and like a savage he is apt to make of his totem his God."

[2] Something of the kind was done many years ago by Sir George Cornewall Lewis in his little book on the *Use and Abuse of Political Terms*. I have attempted to carry the task a step farther in an article which appeared in the form of a review of Lord Morley's "History and Politics" in the *Nineteenth Century* for March 1913.

of the present cannot do better than begin by a careful study of Maine's researches into the political society of the past.

J. H. MORGAN.

Note.—The reader who desires to study Maine in the light of modern criticism is recommended to read Sir F. Pollock's "Notes on Maine's *Ancient Law*" (published by John Murray at 2*s.* 6*d.*, or, with the text, at 5*s.*). The best short study of Maine with which I am acquainted is the article by Professor Vinogradoff in the *Law Quarterly Review* for April 1904. The field of research covered by Maine in his various writings is so vast that it is impossible to refer the reader, except at great length, to anything like an adequate list of later books on the subjects of his investigation. In addition to the works on the Village Community mentioned in a previous footnote, I may, however, refer the beginner to Mr. Edward Jenks' little book on *The History of Politics* in Dent's Primers, to Professor Ashley's translation of a fragment of Fustel de Coulanges under the title of *The Origin of Property in Land*, and to Sir Frederick Pollock's brilliant little book, *The Expansion of the Common Law*. The reader is also recommended to study Mr. H. A. L. Fisher's succinct survey of the contributions of Maitland to legal history under the title of *F. W. Maitland; an Appreciation* (Cambridge University Press). One of the most brilliant and ingenious studies of the origins of European civilisation is to be found in the work of the great German jurist, Ihering, *Die Vorgeschichte der Indo-Europäer*, translated into English under the title of *The Early History of the Indo-European Races* (Sonnenschein, 1897).

BIBLIOGRAPHY

Navis ornate atque armata in aquam deducitur (Prize Poem), 1842; The Birth of the Prince of Wales (Prize Poem), 1842; Cæsar ad Rubiconem constitit (Prize Poem), 1842; Memoir of H. F. Hallam, 1851; Roman Law and Legal Education (Essay), 1856; Ancient Law: its Connection with the Early History of Society and its Relation to Modern Ideas, 1861; Short Essays and Reviews on the Educational Policy of the Government of India, 1866; Village Communities in the East and West (Lectures), 1871; The Early History of the Property of Married Women as collected from Roman and Hindoo Law (Lecture), 1873; The Effects of Observation of India on Modern European Thought (Lecture), 1875; Lectures on the Early History of Institutions, 1875; Village Communities, etc.; third ed. with other Lectures and Addresses, 1876; Dissertations on Early Law and Custom (selected from Lectures), 1883; Popular Government (four Essays), 1885; India [1837–1887] (in "The Reign of Queen Victoria," ed. by Thos. Humphry Ward, vol. i.), 1887; The Whewell Lectures: International Law, 1887, 1888; Ancient Law (ed. with introduction and notes by Sir Frederick Pollock), 1906; Ancient Law (Allahabad ed., with introduction by K. C. Banerji), 1912.

Contributions to: "Morning Chronicle," 1851; "Cornhill Magazine," 1871; "Quarterly Review," 1886; "Saturday Review," and "St. James's Gazette."

A brief memoir of the life of Sir Henry Maine, by Sir M. E. Grant Duff; with some of his Indian speeches and minutes, selected by Whitley Stokes, 1892.

PREFACE

THE chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought. Much of the inquiry attempted could not have been prosecuted with the slightest hope of a useful result if there had not existed a body of law, like that of the Romans, bearing in its earliest portions the traces of the most remote antiquity and supplying from its later rules the staple of the civil institutions by which modern society is even now controlled. The necessity of taking the Roman law as a typical system has compelled the author to draw from it what may appear a disproportionate number of his illustrations; but it has not been his intention to write a treatise on Roman jurisprudence, and he has as much as possible avoided all discussions which might give that appearance to his work. The space allotted in the third and fourth chapters to certain philosophical theories of the Roman Jurisconsults has been appropriated to them for two reasons. In the first place, those theories appear to the author to have had a wider and more permanent influence on the thought and action of the world than is usually supposed. Secondly, they are believed to be the ultimate source of most of the views which have been prevalent, till quite recently, on the subjects treated of in this volume. It was impossible for the author to proceed far with his undertaking without stating his opinion on the origin, meaning, and value of those speculations.

H. S. M.

LONDON, *January* 1861.

CONTENTS

ANCIENT LAW

CHAPTER I

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 warriors 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 physics 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 pĕcŭlĭarity 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 law-maker, 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 circumstance 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