# THE PHILOSOPHY OF LAW

An Exposition

OF THE

FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE

AS

THE SCIENCE OF RIGHT.

BY

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Translated from the German

BY

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*'But next to a new History of Law, what we most require is a new Philosophy of Law.'*—Sir HENRY SUMNER MAINE.

# TRANSLATOR'S PREFACE.

KANT'S *Science of Right*[1] is a complete exposition of the Philosophy of Law, viewed as a rational investigation of the fundamental Principles of Jurisprudence. It was published in 1796,[2] as the First Part of his *Metaphysic of Morals*,[3] the promised sequel and completion of the *Foundation for a Metaphysic of Morals*,[4] published in 1785. The importance and value of the great thinker's exposition of the Science of Right, both as regards the fundamental Principles of his own Practical Philosophy and the general interest of the Philosophy of Law, were at once recognised. A second Edition, enlarged by an

[1] Rechtslehre.

[2] It appeared soon after Michaelmas 1796, but with the year 1797 on the title-page. This has given rise to some confusion regarding the date of the first Edition, which is now usually quoted as 1796–7. (Schubert, *Kant's Werke*, Bd. ix. viii., and *Biographie*, p. 145.)

[3] Die Metaphysik der Sitten. Erster Theil. Metaphysische Anfangsgründe der Rechtslehre. Königsberg, 1797.

[4] Grundlegung zur Metaphysik der Sitten. Translated by Willich (1798), Semple (1836), and Abbott (1873).

Appendix, containing Supplementary Explanations of the Principles of Right, appeared in 1798.[1] The work has since then been several times reproduced by itself, as well as incorporated in all the complete editions of Kant's Works. It was immediately rendered into Latin by Born[2] in 1798, and again by König[3] in 1800. It was translated into French by Professor Tissot in 1837,[4] of which translation a second revised Edition has appeared. It was again translated into French by M. Barni, preceded by an elaborate analytical introduction, in 1853.[5] With the exception of the Preface and Introductions,[6] the work now appears translated into English for the first time.

Kant's *Science of Right* was his last great work of an independent kind in the department of pure Philosophy,

[1] These Supplementary Explanations were appended by Kant to the *First Part* of the work, to which most of their detail more directly apply; but they are more conveniently appended in this translation to the whole work, an arrangement which has also been adopted by the other Translators.

[2] Initia Metaphysica Doctrinæ Juris. Immanvelis Kantii Opera ad philosophiam criticam. Latine vertit Fredericus Gottlob Born. Volumen quartum. Lipsiæ, MDCCLXXXXVIII.

[3] Elementa Metaphysica Juris Doctrinæ. Latine vertit G. L. König. Amstel. 1800, 8. (Warnkönig and others erroneously refer it to Gotha.)

[4] Principes Métaphysiques du Droit, par Emm. Kant, etc. Paris, 1837.

[5] Eléments Métaphysiques de la Doctrine du Droit, etc. Paris, 1853.

[6] The Preface and the Introductions (*infra*, pp. 1–58, 259–265) have been translated by Mr. Semple. See *The Metaphysic of Ethics by*



and with it he virtually brought his activity as a master of thought to a close.[1] It fittingly crowned the rich practical period of his later philosophical teaching, and he shed into it the last effort of his energy of thought. Full of years and honours he was then deliberately engaged, in the calm of undisturbed and unwearied reflection, in gathering the finally matured fruit of all the meditation and learning of his life. His three immortal Critiques of *the Pure Reason*[2] (1781), *the Practical Reason*[3] (1788), and *the Judgment*[4] (1790), had unfolded all the theoretical Principles of his Critical Philosophy, and established his claim to be recognised as at once the most profound and the most original thinker of the modern world. And as the experience of life deepened around and within him, towards the sunset, his

*Immanuel Kant*, translated by J. W. Semple, Advocate. Fourth Ed. Edited with Introduction by Rev. Henry Calderwood, LL.D., Professor of Moral Philosophy, University of Edinburgh. Edin.: T. & T. Clark, 1886.—These are indispensable parts of the present work, but they have been translated entirely anew.

[1] He ceased lecturing in 1797; and the only works of any importance published by himself subsequent to the *Rechtslehre*, were the *Metaphysische Anfangsgründe der Tugendlehre* in 1797, and *Der Streit der Facultäten* and the *Anthropologie* in 1798. The *Logik* was edited by Jäsche in 1800; the *Physische Geographie* by Rink in 1802, and the *Pädagogik*, also by Rink, in 1803, the year before Kant's death.

[2] Kritik der reinen Vernunft. Translated anew by Max Müller (1881).

[3] Kritik der praktischen Vernunft. Translated by Abbott.

[4] Kritik der Urtheilskraft. Translated into French by M. Barni.

interest had been more and more absorbed and concentrated in the Practical. For to him, as to all great and comprehensive thinkers, Philosophy has only its beginning in the theoretical explanation of things; its chief end is the rational organization and animation and guidance of the higher life in which all things culminate. Kant had carried with him through all his struggle and toil of thought, the cardinal faith in God, Freedom, and Immortality, as an inalienable possession of Reason, and he had beheld the human Personality transfigured and glorified in the Divine radiance of the primal Ideas. But he had further to contemplate the common life of Humanity in its varied ongoings and activities, rising with the innate right of mastery from the bosom of Nature and asserting its lordship in the arena of the mighty world that it incessantly struggles to appropriate and subdue to itself. In the natural chaos and conflict of the social life of man, as presented in the multitudinous and ever-changing mass of the historic organism, he had also to search out the Principles of order and form, to vindicate the rationality of the ineradicable belief in human Causation, and to quicken anew the lively hope of a higher issue of History. The age of the Revolution called and inspired him to his task. With keen vision he saw a new world suddenly born before him, as the blood-stained product of a motion long toiling in



the gloom, and all old things thus passing away; and he knew that it was only the pure and the practical Reason, in that inmost union which constitutes the birthright of Freedom, that could regulate and harmonize the future order of this strongest offspring of time. And if it was not given to him to work out the whole cycle of the new rational ideas, he at least touched upon them all, and he has embodied the cardinal Principle of the System in his *Science of Right* as the philosophical Magna Charta of the age of political Reason and the permanent foundation of all true Philosophy of Law.

Thus produced, Kant's *Science of Right* constituted an epoch in jural speculation, and it has commanded the homage of the greatest thinkers since. Fichte, with characteristic ardour and with eagle vision, threw his whole energy of soul into the rational problem of Right, and if not without a glance of scorn at the sober limitations of the 'old Lectures' of the aged professor, he yet acknowledges in his own more aerial flight the initial safety of this more practical guidance.[1] In those early days of eager search and high aspiration, Hegel, stirred to the depths by Kant, and Fichte, and Schelling, wrote his profound and powerful essay on the Philosophy of

[1] Fichte's Nachgelassene Werke, 2 Bd. System der Rechtslehre (1804), 498, etc. (Bonn, 1834.) Fichte's Grundlage des Naturrechts (1796), as he himself points out, was published before Kant's *Rechtslehre*, but its principles are all essentially Kantian. (Translated by Kroeger, Philadelphia, 1870.)

Right, laden with an Atlantean burden of thought and strained to intolerable rigidity and severity of form, but his own highest achievement only aimed at a completer integration of the Principles differentiated by Kant.[1] It was impossible that the rational evangel of universal freedom and the seer-like vision of a world, hitherto groaning and travailing in pain but now struggling into the perfection of Eternal Peace and Good-will, should find a sympathetic response in Schopenhauer, notwithstanding all his admiration of Kant; but the racy cynicism of the great Pessimist rather subsides before him into mild lamentation than seeks the usual refuge from its own vacancy and despair in the wilful caustic of scorching invective and reproach.[2] Schleiermacher, the greatest theologian and moralist of the Century, early discerned the limitations of the *à priori* formalism, and supplemented it by the comprehensive conceptions of the primal dominion and the new order of creation, but he owed his critical and dialectical ethicality mainly to Kant.[3] Krause, the leader of the latest and largest

[1] Hegel's Werke, Bd. i. Philosophische Abhandlungen, iv. *Ueber die Wissenschaftlichen Behandlungsarten des Naturrechts* (1802–3); and the Grundlinien der Philosophie des Rechts, oder Naturrecht und Staatswissenschaft im Grundrisse (1821). Werke, Bd. viii. (*passim*). Dr. J. Hutchison Stirling's *Lectures on the Philosophy of Law* present a most incisive and suggestive introduction to Hegel's Philosophy of Right.

[2] Die beiden Grundprobleme der Ethik (1841), pp. 118–9.

[3] Grundlinien einer Kritik der bisherigen Sittenlehre (1803). Entwurf



thought in this sphere—at once intuitive, radical, and productive in his faculty, analytic, synthetic, and organic in his method, and real, ideal, and historic in his product—caught again the archetypal perfectibility of the human reflection of the Divine, and the living conditions of the true progress of humanity. The dawn of the thought of the new age in Kant rises above the horizon to the clear day, full-orbed and vital, in Krause.[1] All the continental thinkers and schools of the century in this sphere of Jurisprudence, whatever be their distinctive characteristics or tendencies, have owned or manifested their obligations to the great master of the Critical Philosophy.

eines Systems der Sittenlehre, herausg. von A. Schweizer (1835). Grundriss der philosophischen Ethik, von A. Twesten (1841). Die Lehre vom Staat, herausg. von Ch. A. Brandes (1845).

[1] Grundlage des Naturrechts (1803). Abriss des Systems der Philosophie des Rechts oder des Naturrechts (1828). Krause is now universally recognised as the definite founder of the organic and positive school of Natural Right. His principles have been ably expounded by his two most faithful followers, Ahrens (*Cours de Droit Naturel*, 7th ed. 1875) and Röder (*Grundzüge des Naturrechts o. der Rechtsfilosofie*, 2 Auf. 1860). Professor J. S. del Rio of Madrid has vividly expounded and enthusiastically advocated Krause's system in Spanish. Professor Lorimer of the Edinburgh University, while maintaining an independent and critical attitude towards the various Schools of Jurisprudence, is in close sympathy with the Principles of Krause (*The Institutes of Law: a Treatise of the Principles of Jurisprudence as determined by Nature*, 2nd ed. 1880, and *The Institutes of the Law of Nations*). He has clearly indicated his agreement with the Kantian School, *so far as its principles go* (*Instit.* p. 336, n.).

The influence of the Kantian Doctrine of Right has thus been vitally operative in all the subsequent progress of jural and political science.[1] Kant, here as in every other department of Philosophy, summed up the fragmentary and critical movement of the Eighteenth Century, and not only spoke its last word, but inaugurated a method which was to guide and stimulate the highest thought of the future. With an unwonted blending of speculative insight and practical knowledge, an ideal universality of conception and a sure grasp of the reality of experience, his effort, in its inner depth, vitality, and concentration, contrasts almost strangely with the trivial formalities of the Leibnitzio-Wolffian Rationalists on the one hand,[2] and with the pedantic

[1] This applies to the latest German discussions and doctrines. The following works may be referred to as the most important recent contributions, in addition to those mentioned above (such as Ahrens and Röder, xi. n.):—Trendelenburg, Naturrecht auf dem Grunde der Ethik, 2 Auf. 1868. Post, Das Naturgesetz des Rechts, 1867. W. Arnold, Cultur und Rechtsleben, 1865. Ulrici, Naturrecht, 1873. Zoepfl, Grundriss zu Vorlesungen über Rechtsphilosophie, 1878. Rudolph von Ihering, Der Zweck im Recht, i. 1877, ii. 1883. Professor Frohschammer of Munich has discussed the problem of Right in a thoughtful and suggestive way from the standpoint of his original and interesting System of Philosophy, in his new volume, *Ueber die Organisation und Cultur der menschlichen Gesellschaft*, Philosophische Untersuchungen über Recht und Staat, sociales Leben und Erziehung, 1885.

[2] Leibnitz, Nova Methodus discendæ docendæque Jurisprudentiæ, 1767. Observationes de principio Juris. Codex Juris Gentium, 1693–1700.

Wolff, Jus Naturæ Methodo Scientifica pertractatum, Lips. 8 Tomi. 1740–48. Institutiones Juris Naturæ et Gentium, Halæ, 1754. (In French by *Luzac*, Amsterdam, 1742, 4 vols.) Vernünftige Gedanken.

Vatel, Le Droit des Gens, Leyden, 1758. Edited by Royer-Collard, Paris, 1835. English translation by Chitty, 1834. [For the other works of this school, see Ahrens, i. 323–4, or Miller's *Lectures*, p. 411.]

[1] Grotius, De Jure Belli ac Pacis, lib. iii. 1625. Translated by Barbeyrae into French, 1724; and by Whewell into English, 1858.

Pufendorf, Elementa Juris Universalis, 1660. De Jure Naturæ et Gentium, 1672. [English translation by Kennett, 1729.]

Cumberland, De Legibus Naturæ Disquisitio Philosophica, London, 1672. Translated into English by Towers, Dublin, 1750.

Cocceji, Grotius illustratus, etc., 3 vols. 1744–7. [See Miller, 409.]

[2] Christian Thomasius (1655–1728) first clearly distinguished between the Doctrine of Right and Ethics, and laid the basis of the celebrated distinction of Perfect and Imperfect Obligations as differentiated by the element of Constraint. See Professor Lorimer's excellent account of Thomasius and of Kant's relation to his System, *Inst. of Law*, p. 288; and Röder, i. 240. The principal works of this School are: Thomasius, Fundamenta juris naturæ et gentium ex sensu communi deducta, 1705. Gerhard, Delineatio juris naturalis, 1712. Gundling, Jus Naturæ et gentium. Koehler, Exercitationes, 1728. Achenwall, Prolegomena Juris naturalis, and Jus Naturæ, 1781.



tediousness of the Empiricists of the School of Grotius on the other.[1] Thomasius and his School, the expounders of the Doctrine of Right as an independent Science, were the direct precursors of the formal method of Kant's System.[2] Its firm and clear outline implies the substance of many an operose and now almost unreadable tome; and it is alive throughout with the quick, keen spirit of the modern world. Kant's unrivalled genius for distinct division and systematic form, found full and appropriate scope in this sphere of thought. He

had now all his technical art as an expounder of Philosophy in perfect control, and after the hot rush through the first great Critique he had learned to take his time. His exposition thus became simplified, systematized, and clarified throughout to utmost intelligibility. Here, too, the cardinal aim of his Method was to wed speculative thought and empirical fact, to harmonize the abstract universality of Reason with the concrete particularities of Right, and to reconcile the free individuality of the citizen with the regulated organism of the State. And the least that can be said of his execution is, that he has rescued the essential principle of Right from the debasement of the antinomian naturalism and arbitrary politicality of Hobbes[1] as well as from the extravagance of the lawless and destructive individualism of Rousseau,[2] while conceding and even adopting what is substantially true in the antagonistic theories of these epochal thinkers; and he has thereby given the birthright of Freedom again, full-reasoned and certiorated, as 'a possession for ever' to modern scientific thought. With widest and

[1] Hobbes, De Cive, 1642. Leviathan seu de civitate ecclesiastica et civili, 1651. On Hobbes generally, see Professor Croom Robertson's Monograph in 'Blackwood's Philosophical Classics.'

[2] L'origine et les fondements de l'inégalité parmi les hommes, Dijon, 1751. Contrat social, 1762. Rousseau's writings were eagerly read by Kant, and greatly influenced him. On Rousseau generally, see John Morley's *Rousseau*, Lond. 1878.



furthest vision, and with a wisdom incomparably superior to the reactionary excitement of the great English Orator,[1] he looked calmly beyond 'the red fool-fury of the Seine' and all the storm and stress of the time, to the sure realization of the one increasing purpose that runs through the ages. The burden of years chilled none of his sympathies nor dimmed any of his hopes for humanity; nor did any pessimistic shadow or murmur becloud his strong poetic thought, or disturb 'the mystical lore' of his eventide. And thus at the close of all his thinking, he made the Science of Right the very corner-stone of the social building of the race, and the practical culmination of all Religion and all Philosophy.

It is not meant that everything presented here by Kant is perfect or final. On the contrary, there is probably nothing at all in his whole System of Philosophy—whose predominant characteristics are criticism, initiation, movement — that could be intelligently so regarded; and the admitted progress of subsequent theories of Right, as briefly indicated above, may be considered as conceding so much. It must be further admitted of Kant's *Science of Right* that it presents

[1] Burke is assigned to the Historical School of Jurisprudence by Ahrens, who not inaptly designates him 'the Mirabeau of the anti-revolution' (i. 53). See the *Reflections on the French Revolution* (1790). Stahl gives a high estimate of Burke as 'the purest representative of Conservatism.'

everywhere abundant opening and even provocation for 'Metacriticism' and historical anticriticism, which have certainly not been overlooked or neglected. But it *is* meant withal that the Philosophy of Jurisprudence has really flourished in the Nineteenth Century only where Kant's influence has been effective, and that the higher altitudes of jural science have only come into sight where he has been taken as a guide. The great critical thinker *set* the problem of Right anew to the pure Speculative Reason, and thus accomplished an intellectual transformation of juridical thought corresponding to the revolutionary enthusiasm of liberty in the practical sphere. It is only from this point of view that we can rightly appreciate or estimate his influence and significance. The all-embracing problem of the modern metamorphosis of the institutions of Society in the free State, lies implicitly in his apprehension. And in spite of his negative aspect, which has sometimes entirely misled superficial students, his solution, although betimes tentative and hesitating, is in the main faithful to the highest ideal of humanity, being foundationed on the eternity of Right and crowned by the universal security and peace of the gradually realized Freedom of mankind. As Kant saved the distracted and confused thought of his time from utter scepticism and despair, and set it again with renewed youth and enthusiasm on its way, so his spirit



seems to be rising again upon us in this our hour of need, with fresh healing in his wings. Our Jurists must therefore also join the ever increasing throng of contemporary thinkers in the now general *return to Kant.*[1] Their principles are even more conspicuously at hazard than any others, and the whole method of their science, long dying of intellectual inanition and asphyxia, must seek the conditions of a complete renovation. It is only thus, too, that the practical Politician will find the guidance of real principle in this agitated and troubled age in which the foundations of Government as well as of Right are so daringly scrutinised and so manifestly imperilled,[2] and in which he is driven by the inherent necessary

[1] 'The very cry of the hour is, Fichte and Schelling are dead, and Hegel, if not clotted nonsense, is unintelligible; let us go back to Kant. See, too, in other countries, what a difference the want of Kant has made.' Dr. J. H. Stirling, *Mind*, No. xxxvi. 'Within the last ten years many voices have been heard, both in this country and in Germany, bidding us *return to Kant*, as to that which is alone sound and hopeful in Philosophy; that which unites the prudence of science with the highest speculative enterprise that is possible without idealistic extravagances.' Professor E. Caird, *Journal of Speculative Philosophy*, vol. xiv. 1, 126. 'From Hegel, we must, I think, still return upon Kant, seeking fresh hope for Philosophy in a continued use of the critical method.' Professor Calderwood, *Introduction to Kant's Metaphysic of Ethics*, p. xix.

[2] The Socialistic and Communistic Doctrines of Owen (1771–1858), Fourier (1777–1837), Saint-Simon (1760–1825), Louis Blanc, Proudhon, and Cabet, 'considered as aberrations in the development of Right,' are sketched by Ahrens (i. § 12) with his characteristic discrimination and fairness. The principles of the contemporary English Socialism will be

of Right, to which we are now about to advance; and we may consider them now by way of supplement to these introductory Explanations, in order that their uncertain conditions may not exert a disturbing influence on the fixed Principles of the proper doctrine of Right.

F.

## Supplementary Remarks on Equivocal Right.

(Jus æquivocum.)

With every Right, in the strict acceptation (*jus strictum*), there is conjoined a Right to compel. But it is possible to think of other Rights of a *wider* kind (*jus latum*) in which the Title to compel cannot be determined by any law. Now there are two real or supposed Rights of this kind — EQUITY and THE RIGHT OF NECESSITY. The first alleges a Right that is without compulsion; the second adopts a compulsion that is without Right. This equivocalness, however, can be easily shown to rest on the peculiar fact that there are cases of doubtful Right, for the decision of which no Judge can be appointed.

### I. EQUITY.

EQUITY (Æquitas), regarded objectively, does not properly constitute a claim upon the moral Duty of benevolence or beneficence on the part of others; but whoever insists upon anything on the ground of Equity, founds upon his *Right* to the same. In this case, however, the conditions are awanting that are requisite for the function of a Judge in order that he might determine what or what kind of satisfaction can be done to this claim. When one of the partners of a Mercantile Company,



formed under the condition of Equal profits, has, however, *done more* than the other members, and in consequence has also *lost more*, it is *in accordance with Equity* that he should demand from the Company more than merely an equal share of advantage with the rest. But, in relation to *strict Right*,—if we think of a Judge considering his case,—he can furnish no definite data to establish how much more belongs to him by the Contract; and in case of an action at law, such a demand would be rejected. A domestic servant, again, who might be paid his wages due to the end of his year of service in a coinage that became depreciated within that period, so that it would not be of the same value to him as it was when he entered on his engagement, cannot claim by Right to be kept from loss on account of the unequal value of the money if he receives the due amount of it. He can only make an appeal on the ground of Equity,—a dumb goddess who cannot claim a hearing of Right,—because there was nothing bearing on this point in the Contract of Service, and a Judge cannot give a decree on the basis of vague or indefinite conditions.

Hence it follows, that a COURT OF EQUITY for the decision of disputed questions of Right, would involve a contradiction. It is only where his own proper Rights are concerned, and in matters in which he can decide, that a Judge may or ought to give a hearing to Equity. Thus, if the Crown is supplicated to give an indemnity to certain persons for loss or injury sustained in its service, it may undertake the burden of doing so, although, according to strict Right, the claim might be rejected on the ground of the pretext that the parties in question undertook the performance of the service occasioning the loss, at their own risk.

juridical relation by a sensible image of this kind, and to express it in this way.

The Real Definition would run thus: 'RIGHT IN A THING is a Right to the Private Use of a Thing, of which I am in possession—original or derivative—in common with all others.' For this is the one condition under which it is alone possible that I can exclude every other possessor from the private use of the Thing (*jus contra quemlibet hujus rei possessorem*). For, except by presupposing such a common collective possession, it cannot be conceived how, when I am not in actual possession of a thing, I could be injured or wronged by others who are in possession of it and use it.—By an individual act of my own Will I cannot oblige any other person to abstain from the use of a thing in respect of which he would otherwise be under no obligation; and, accordingly, such an Obligation can only arise from the collective Will of all united in a relation of common possession. Otherwise, I would have to think of a Right in a Thing, as if the *Thing* had an Obligation towards me, and as if the Right as against every Possessor of it had to be derived from this Obligation in the Thing, which is an absurd way of representing the subject.

Further, by the term 'Real Right' (*jus reale*) is meant not only the 'Right in a Thing' (*jus in re*), but also the *constitutive principle* of all the Laws which relate to the real Mine and Thine.—It is, however, evident that a man entirely alone upon the earth could properly neither have nor acquire any external thing as his own; because between him as a Person and all external Things as material objects, there could be no relations of Obligation. There is therefore, literally,



no *direct* Right in a Thing, but only that Right is to be properly called 'real' which belongs to any one as constituted against a Person, who is in common possession of things with all others in the Civil state of Society.

## 12.

### The First Acquisition of a Thing can only be that of the Soil.

By the Soil is understood all habitable Land. In relation to everything that is moveable upon it, it is to be regarded as a *Substance*, and the mode of the existence of the Moveables is viewed as an *Inherence* in it. And just as, in the theoretical acceptation, Accidents cannot exist apart from their Substances, so, in the practical relation, Moveables upon the Soil cannot be regarded as belonging to any one unless he is supposed to have been previously in juridical possession of the Soil so that it is thus considered to be his.

For, let it be supposed that the Soil belongs to no one. Then I would be entitled to remove every moveable thing found upon it from its place, even to total loss of it, in order to occupy that place, without infringing thereby on the freedom of any other; there being, by the hypothesis, no possessor of it at all. But everything that can be destroyed, such as a Tree, a House, and such like —as regards its matter at least—is moveable; and if we call a thing which cannot be moved without destruction of its form an *immoveable*, the Mine and Thine in it is not understood as applying to its substance, but to that which is adherent to it, and which does not essentially constitute the thing itself.

# RIGHTS OF THE FAMILY AS A DOMESTIC SOCIETY.

## TITLE THIRD.

### HOUSEHOLD RIGHT.

(Master and Servant.)

## 30.

**Relation and Right of the Master of a Household.**

The Children of the House, who, along with the Parents, constitute a Family, attain *majority*, and become MASTERS OF THEMSELVES (*majorennes, sui juris*), even without a Contract of release from their previous state of Dependence, by their actually attaining to the capability of self-maintenance. This attainment arises, on the one hand, as a state of natural Majority, with the advance of years in the general course of Nature; and, on the other hand, it takes form, as a state in accordance with their own natural condition. They thus acquire the Right of being their own Masters, without the interposition of any special juridical act, and therefore merely by Law (*lege*); and they owe their Parents nothing by way of legal debt for their Education, just as the parents, on their side, are now released from their Obligations to the Children in the same way. Parents and Children thus gain or regain their natural Freedom; and the domestic society, which was necessary according to the Law of Right, is thus naturally dissolved.

Both Parties, however, may resolve to continue the



Household, but under another mode of Obligation. It may assume the form of a relation between the Head of the House as its Master, and the other members as domestic Servants, male or female; and the connection between them in this new *regulated* domestic economy (*societas herilis*) may be determined by Contract. The Master of the House, actually or virtually, enters into Contract with the Children, now become major and masters of themselves; or, if there be no Children in the Family, with other free Persons constituting the membership of the Household; and thus there is established a domestic relationship not founded on social equality, but such that one *commands* as Master, and another *obeys* as Servant (*Imperantis et subjecti Domestici*).

The Domestics or Servants may then be regarded by the Master of the household, as thus far his. As regards the *form* or mode of his Possession of them, they belong to him as if by a Real Right; for if any of them run away, he is entitled to bring them again under his power by a unilateral act of his will. But as regards the *matter* of his Right, or the *use* he is entitled to make of such persons as his Domestics, he is not entitled to conduct himself towards them as if he was their proprietor or owner (*dominus servi*); because they are only subjected to his power by Contract, and by a Contract under certain definite restrictions. For a Contract by which the one party renounced his *whole* freedom for the advantage of the other, ceasing thereby to be a person and consequently having no duty even to observe a Contract, is self-contradictory, and is therefore of itself null and void. The question as to the Right of Property in relation to one who has lost his legal personality by a Crime, does not concern us here.

or whether it is to be regarded as merely a shooting and falling star![1]

## III.

### Examples of Real-Personal Right.

1. To have anything external as one's own, means to possess it rightfully; and Possession is the condition of the possibility of using a thing. If this condition is regarded merely as physical, the possession is called *detention* or holding. But legal detention alone does not suffice to make an object mine, or to entitle me so to regard it. If, however, I am entitled, on any ground whatever, to press for the possession of an object which has escaped from my power or been taken from me, this conception of right is a sign in effect that I hold myself entitled to conduct myself towards it as being mine and in my rational possession, and so to use it as my object.

The 'Mine' in this connection does not mean that it is constituted by ownership of the Person of another; for a man cannot even be the owner of himself, and much less of another person. It means only the right of Usufruct (*jus utendi fruendi*) in immediate reference to this person, as if he were a thing, but without infringing on the right of his personality, even while using him as a means for my own ends.

[1] According to the Definition, I do not use the expression 'to have another *Person* as *my Person*,' but as '*mine*' (*τὸ meum*), as if the Person were viewed in this relation as a Thing. For I can say 'this is *my father*' in indicating my natural relationship of connection with him, by which I merely state that I *have* a father. But I may not say 'I have him as *mine*' in this relation. However, if I say 'my Wife,' this indicates a special juridical relation of a possessor to an object viewed as a thing, although in this case it is a person. But physical possession is the condition of the use of a thing as such (*manipulatio*); although in another relation the object must at the same time be treated as a Person.



These ends, however, as conditioning the rightfulness of such use, must necessarily be moral. A man may neither desire a wife in order to enjoy her as if she were a thing by the immediate pleasure in mere physical intercourse, nor may the wife surrender herself for this purpose; for otherwise the rights of personality would be given up on both sides. In other words, it is only under the condition of a marriage having been previously concluded that there can be such a reciprocal surrender of the two persons into the possession of each other that they will not dehumanize themselves by making a corporeal use of each other.

When this condition is not respected, the carnal enjoyment referred to, is in principle, although not always in effect, on the level of cannibalism. There is merely a difference in the manner of the enjoyment between the exhaustion which may thus be produced and the consumption of bodies by the teeth and maw of the savage; and in such reciprocal use of the sexes the one is really made a *res fungibilis* to the other. Hence a contract that would bind any one for such mere use would be an illegal contract (*pactum turpe*).

2. In like manner, a husband and wife cannot produce a child as their mutual offspring (*res artificialis*) without both coming under the obligation towards it and towards each other to maintain it as their child. This relation accordingly involves the acquisition of a human being as if it were a thing, but it holds only in form according to the idea of a merely Personal Right of a real kind. The parents have a Right against any possessor of the child who may have taken it out of their power (*jus in*

established for all time, and that the Head of the State should not have the right entirely to abolish the privileges of such a class; nor, if this be done, can it be held that thereby what belonged to the Nobility as Subjects, by way of a hereditary possession, has been taken from them. The Nobility, in fact, constitute a temporary corporation or guild, authorized by the State; and it must adapt itself to the circumstances of the time, nor may it do violence to the universal right of man, however long that may have been suspended. For the rank of the nobleman in the State is not only dependent upon the Constitution itself, but is only an accident, with a merely contingent inherence in the Constitution. A nobleman can be regarded as having a place only in the Civil Constitution, but not as having his position grounded on the state of Nature. Hence, if the State alters its constitution, no one who thereby loses his title and rank would be justified in saying that what was his own had been taken from him; because he could only call it his own under the condition of the continued duration of the previous form of the State. But the State has the right to alter its form, and even to change it into a pure Republic. The Orders in the State, and the privilege of wearing certain insignia distinctive of them, do not therefore establish any right of *perpetual* possession.

### D. Primogeniture and Entail.

By the Foundation of *Primogeniture and Entail* is meant that arrangement by which a proprietor institutes a succession of inheritance, so that the next proprietor in the series shall always be the eldest born heir of the family, after the analogy of a hereditary monarchy in



the State. But such a Foundation must be regarded as always capable of being annulled with the consent of all the Agnates; and it may not be held to be instituted as for all time, like a hereditary Right attaching to the Soil. Nor, consequently, can it be said that the abrogation of it is a violation of the Foundation and Will of the first ancestral Founder. On the contrary, the State has here a Right and even a duty, in connection with gradually emerging necessity for its own Reform, if it has been once extinguished, not to allow the resuscitation of such a federative system of its subjects, as if they were viceroys or sub-kings, after the analogy of the ancient Satraps and Heads of Dynasties.

## IX.

### Concluding Remarks on Public Right and Absolute Submission to the Sovereign Authority.

With regard to the ideas presented under the Heading of PUBLIC RIGHT, the Reviewer says that 'the want of room does not permit him to express himself in detail.' But he makes the following remarks on one point: 'So far as we know, no other philosopher has recognised this most paradoxical of all paradoxes, that the mere *idea* of a Sovereign Power should compel me to obey as my master any one who gives himself out to be my master, without asking who has given him the Right to command me? That a Sovereign Power and a Sovereign are to be recognised, and that the one or the other whose existence is not given in any way *à priori* is also to be regarded *à priori* as a master, are represented so as to be one and the same thing.' Now, while this view is admitted to be *paradoxical*, I hope when it is more