PROPERTY AND CONTRACT

IN THEIR RELATIONS TO THE

DISTRIBUTION OF WEALTH

BY

RICHARD T. ELY, PH. D., LL. D.

VOL. I

THIS BOOK IS DEDICATED TO THE
STUDENTS OF MY CLASSES IN
THE DISTRIBUTION OF WEALTH
UNIVERSITY OF WISCONSIN, 1892–1914
FRIENDS, WHOSE CHALLENGE AND CRITICISM
HAVE AIDED IN SHAPING IT

PROPERTY AND CONTRACT IN THEIR RELATIONS
TO THE DISTRIBUTION OF WEALTH

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PREFACE

It is the privilege of an author in his Preface to drop the third person and to speak directly in the first person to those who may be interested in the genesis of his book and in the circumstances surrounding its preparation as well as in any other matters which he cares to state in explanation of his undertaking. Generally he has in mind in his Preface that part of the general public who may be curious, scientifically or otherwise, about books in his particular field and also, and more especially, a narrower group of colleagues and friends to whom he desires to make clearer than would be appropriate in the text of his book his intentions, the obstacles that he may have encountered, and the relation of the work in question to other plans. I gladly avail myself of this privilege to speak to those who may care to hear what I have to say about my *Property and Contract in their Relations to the Distribution of Wealth;* and this circle includes before all others my own students, to whom I have been lecturing on these topics during the past twenty years. And I am moved at once to express my gratitude to them for the stimulus which I have received from my contact with them. We have truly worked together in the preparation of this work as it has grown from year to year, and the hours I have spent in the class room with them have been among the

happiest of my life. Now those who have left Wisconsin are widely scattered and many are occupying distinguished positions in our American universities and in our public life; and their loyal attachment is one of my dearest possessions. To them I dedicate my book because it belongs to them first of all.

The lectures on Property and Contract were written more than ten years ago and as early as 1899 many parts of the book were substantially in their present form. The work of revision has consisted to no inconsiderable extent in removing more recent additions. One great part of the lectures, namely, that on Landed Property, has been cut out and reserved for treatment in subsequent volumes, namely, those on *Landed Property and the Rent of Land.* In some places I am obliged to refer to this forthcoming work in order to explain a lack of treatment of topics which otherwise would be expected.

Some of my students have felt that it might have been better had I published this work as early as 1900, stating that had I done this the contributions which they are kind enough to think I have made would have stood out more clearly than now, when through them and others they have become widely diffused. Several have given courses covering this same field, using the lecture notes they have taken in my classes as a basis; and have done so with my cordial assent and approval. And then through these students and others the ideas and in some cases the very words in which they have been expressed have become widely diffused in class room work and publications growing out of class room

work. But this matter of credit is one that has comparatively little interest for the great world, and frequently we do not know ourselves the source of our own ideas. We go back to our teachers, I to Conrad, Wagner and above all Knies; and they to their teachers, and so we have a stream of thought, and each scholar hopes to contribute something to it; how much he does contribute it is hard for him and his contemporaries to say.

The delay has been in my case occasioned in large part by the multiplicity of demands made on my time by the rapidly growing Department of Political Economy in the University of Wisconsin. The connections of the Department have constantly increased and the close relations with the State in our effort to render public service have been the cause of many demands on time and strength. I have taken some personal satisfaction in finding myself not a worse sinner in this respect than all those upon whom the Tower of Siloam fell, for the prefaces to the books of Professor Wagner of Germany and Professor Marshall of England tell the same story of long-deferred hopes of publication.

During the years of growth of this work I have been struck by the orderly nature and continuity of progress and also by the internationalism of law and institutions, corresponding to economic internationalism. The growth from 1892 to 1914 has been rapid, but it shows no marked breaks. Citations and quotations in 1895, 1896, etc., are as appropriate as those of 1912 and 1913. They need continuation but usually not striking out. And very markedly does the evolution of this book or —to speak with greater accuracy—the evolution of my

ideas embodied in it illustrate the internationalism of our thought and life, showing the inadequacy of the idea that law is local and that we do not need to study foreign systems of law. My own serious study of economics began in Germany but was continued in this country; and built up on American experience and fed by it. My ideas are the outgrowth of American life; yet applicable again in many particulars to conditions in Germany, England and other European countries. The German economists are regarded as progressive and our American courts as conservative; but I have found no difficulty in passing from German economic literature to the decisions of American courts. Each land shows continuity of thought and the similarity of ideals is here striking for frequently the decisions are as progressive as modern economic thought.

One of the difficulties has been compression. Chapter after chapter of this book could be expanded into a good-sized volume—many of them will be so expanded by others. The Socialisation of Property and the Regulation of Inheritance of Property serve merely as illustration. A large part of economics is covered from our point of view, while in law we consider police power, eminent domain, constitutional law, and, of course, contract and property and general jurisprudence. One of the hardest and indeed most painful things I have had to do is to make omissions of things I wanted to say in order to bring the book within reasonable compass—cutting out passages and discussions dear to my heart; perhaps only authors will fully understand this.

A temptation has been found in the fascination of the

study of purely legal questions and especially of decisions to drift away from the economic point of view; but I have endeavoured to resist this temptation and "to stick to my last." I trust I have succeeded. Dr. Orth, to whom I am indebted for much valuable assistance, wrote me some time ago as follows: "Now you must avoid making your book a law book and must not make it appear that you are basing your opinions or your conclusions only on law cases. Your contribution is the philosophy that has been evolved in spite of the courts."

The division of the field has occasioned trouble; especially as the subjects are so interwoven. The treatment of property presupposes contract and contract, property; and vested rights, as they are developed, are based on both. These divisions do give us points of view, and are in reality distinct but not mutually exclusive economic and legal categories. The merging of them in the United States is largely due to the exigencies imposed on us by our constitutional system; for example, the courts, having the duty of protecting property, make contract a property right. Science, however, should emphasise fine and carefully drawn distinctions.

The order in which topics are taken is determined by the economic rather than the legal content of the work. In a law book, police power, for example, would be treated naturally in a systematic way by itself, but the economic order brings us back to the police power again and again. It is necessary to make a choice between the two orders of treatment and this explains the scattered discussion of legal topics which is puzzling, unless

it is borne in mind that this is first of all an economic work.

It has not been attempted to present anything like full bibliographies. It would be easy to fill a large volume with lists of books, for the fields covered are many and large. Even without an attempt at a full bibliography, titles could have been multiplied with ease. I do not believe that any useful purpose is accomplished by such multiplication. Books and articles are referred to for some special reason, as sources, as authority, and as affording information which some class of readers may care to have. The notes and cases have afforded a puzzling problem on account of the various classes of readers who, I venture to hope, will be interested in my work. I have finally decided to put the notes and cases by themselves at the close of the chapters where they can easily be consulted by students and others who care to go beyond the main text, with which many will be content. Those who use the book in class work will naturally wish to refer frequently to the notes and will often assign them as part of the required work.

I have tried to give credit where it is due. My master, the late Carl Knies of Heidelberg, is perhaps the one to whom I owe most, but my inspiration and instruction I have found largely in his lectures to which I have listened. Later I came under the influence of Professor Adolf Wagner, of the University of Berlin, and to him I refer more frequently than to Knies, one reason being that my indebtedness to Wagner is to his books more than to his lectures. It is difficult to place and apportion credit and when a book has grown as this has

done, one may have forgotten various sources of suggestions and ideas. Even classifications may in some cases linger in the memory after their authors have been forgotten. I have traced various ideas in the writings of others unmistakably to lectures to which I listened in Heidelberg, in cases where even the authors had so absorbed them and made them theirs as to forget the source. Of some things in the book, one or another may say, "Oh! this is mine," forgetting that they too go back to Knies. I can then only say I have conscientiously tried to give all credit to others to which they are entitled. From numberless sources and especially from American life, I have gathered the ideas and information which I have elaborated.

I must especially thank various authors and authorities to whom I am indebted—not with an idea of making them responsible for my opinions, but because to them much is due for any excellence my work may possess. First of all, I mention Mr. Justice Oliver Wendell Holmes, of the Supreme Court of the United States, who has read the work in manuscript and given many valuable suggestions. The greater part of the manuscript has also been read by Dr. Samuel P. Orth, professor of political science in Cornell University; Professor Allyn A. Young, of Cornell University; Professor Lewis H. Haney, of the University of Texas; Mr. Justice A. A. Bruce, of the Supreme Court of North Dakota; Dr. Max O. Lorenz and Mr. Fred H. Esch, both of the Interstate Commerce Commission; Honourable John H. Roemer, Chairman of the Wisconsin Railroad Commission; and Dr. W. I. King, instructor in

political economy, of the University of Wisconsin. I feel grateful to all for valuable assistance. To Dr. Orth, I am indebted for the appendix in which cases on Property and Contract are presented chronologically with brief comment to show the evolution of the law. Dr. Orth has also looked up many cases in the notes and in several places I use his notes unchanged over his initials. To Dr. W. I. King, I am indebted for the appendix printed over his name giving the limitations on distribution in production, which I believe to be a valuable contribution to our economic literature; also for data and suggestions elsewhere used.

Professor Henry Schofield, of the Northwestern University Law School, Professor H. W. Ballantine, and Professor E. A. Gilmore, both of the Law School of the University of Wisconsin, have been most kind in answering questions and in the discussion of numerous points. Professor Freund, of the University of Chicago, Dean Wigmore, of the Northwestern University Law School, and Professor Kirchwey, of the Law School of Columbia University, have placed me under obligation for letters answering specific questions. But no one of these or other friends must be held to any responsibility for the views I express. Professor Ludwig Sinzheimer, of the University of Munich, during 1913 acting professor in the University of Wisconsin, has also aided me with points in regard to German law and institutions.

Among the many others who have contributed information here and there I desire to mention Mr. Justice Henry D. Harlan, of the Supreme Bench of Baltimore City; Mr. Justice E. Ray Stevens, of Wisconsin;

Honourable B. Howard Haman, of Baltimore; Dr. Delos F. Wilcox, of the Public Service Commission, of New York City; Mr. John J. Hannan, Secretary to Senator La Follette; Mr. E. M. Griffith, State Forester, of Wisconsin; Honourable George W. Field, of Boston, Chairman, Commissioners on Fisheries and Game, Massachusetts; Honourable Charles C. Yates, Assistant, United States Coast and Geodetic Survey, Chief of Party, Baltimore, Md.; the Canadian officials Honourable A. Johnston, Deputy Minister Marine and Fisheries, of the Dominion of Canada, and Honourable Aubrey White, Deputy Minister of Lands and Forests, of the Province of Ontario; and Frau Helene Riechers, of Berlin, Secretary of the Woman's Committee of the Association of the German Theatrical Profession.

Mrs. Caro Bugbey MacArthur, of Urbana, Illinois, has assisted in a multitude of ways, first in Munich, then later in Madison and Chicago, supervising the first copying of the manuscript and looking up many points for me. I owe much to her and for similar intelligent assistance I am grateful to Miss H. Dora Stecker, to Miss Dorothea Cable, Miss Jean M. Douglas and Miss Alice B. Cronin. Mr. R. T. Zillmer, one of my graduate students, and also instructor in political science, deserves my thanks for help, especially with respect to the cases cited. To Miss Bettina Jackson, I am indebted for the chief part of the labour involved in the preparation of the List of Authors and Works Cited. Also I must mention the valuable assistance in the preparation of the Index given by Miss Louise Phelps Kellogg of the staff of the Wisconsin State Historical Society.

Finally I must not fail to thank the authorities of the University of London for the invitation to give a brief course of lectures on property and its relations to the distribution of wealth. This was a graduate course and was delivered during the Summer Term of the university year 1913–14. If some of the latest additions to the book have value, I owe it in no small degree to the new and stimulating environment which I found in London. It was there that I developed the theory of the police power which is presented in this book.

RICHARD T. ELY.

THE UNIVERSITY OF WISCONSIN, July, 1914.

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PROPERTY AND CONTRACT

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DISTRIBUTION OF WEALTH

CHAPTER I

DISTRIBUTION DEFINED AND DESCRIBED

The term distribution is not altogether a felicitous one, as in ordinary language it has a variety of meanings, which cannot be changed to suit the purposes of science, important as these purposes are. Particularly does the adjective distributive tend to confusion as it is often employed with the noun industries to refer to movements of goods. But in economics, when we discuss the distribution of wealth, we have reference not to the location of things but to their ownership. By the distribution of wealth as a phase of economic activity we mean the assignment of goods for ownership. We deal in distribution not with the exchange or transfer of goods but with the condition of things following exchange and transfer. In a scientific treatment of this activity we attempt to answer the question, In whose hands do they rest as property? Who has the right to consume them, to sell them, to give them away? The question of property is central and pivotal in modern

distribution, whether we have reference to the economic process, a phase of economic activity, or to a branch of economics, dealing with the economic distribution. But ownership is not all-inclusive. Possession and temporary use may constitute a part of income, although generally the use in modern times would come as a result of an expenditure of income. In earlier times, income is less regularly the result of an expenditure of owned money incomes.

Let us now pass on to a formal definition. As conceived in the present work the distribution of wealth, or simply and more conveniently distribution may be defined as follows: *Distribution as a part of economics relates on the one hand to the ultimate shares of accumulated wealth and income-wealth owned and received by the various social units, and on the other hand to the shares of income-wealth assigned to the various factors engaged in production: as a preliminary to both orders of inquiry it examines historically and critically the fundamentals in the existing socio-economic order.*[1]

This definition brings before us three distinct branches of economic inquiry. The first of these branches of inquiry relates to the distribution of property [2] and income among individuals, or, to use a more general phrase, the various units of the social organism.[3] We here deal with the question of wealth *versus* poverty, of rich people and poor people, of people in moderate circumstances, etc. We ask, what are the respective incomes of A, of B, of C, and so on? But it should be observed that we deal with A, B, C, etc., as types or even groups. It would be an endless task to conduct

an investigation of the incomes and fortunes of all individuals. When histories of rich families like the Fuggers of Augsburg have been written by scientific men, they have looked upon these families as having significance on account of their great wealth and on account of the rôle they played in economic life. The histories of such families throw light on the sources of fortunes as do histories of individuals and families at the other end of the scale on the causes of poverty. We ask further, how is the accumulated wealth or property of the nation, or of a part of the nation, or eventually of the world, divided among individuals? We deal with units,[4] whatever these may be, and we ask, what is their income? What is their property? Why or how has A an income of one thousand dollars, B an income of a million dollars, and C one of two hundred and fifty dollars? How did D become a millionaire, while the total assets of E would not bring five hundred dollars at public auction? What are the sources of fortunes and incomes? How do they vary as we pass from one economic stage to another? Many questions more or less like these arise in connection with any serious investigation of the distribution of property and income. This is frequently designated personal distribution.[5] And it is the first of the three main lines of inquiry which fall under distribution.

But we have to deal with another line of inquiry. We must inquire into the distribution of income-wealth among the various factors or elements engaged in its production, often called product distribution. Here we do not consider the incomes of A, B, and C, but we

examine into that part of the total wealth produced which is to be attributed or imputed to land, to labour, to capital, to entrepreneurial ability, and to any other categories into which this total available wealth may be divided. We deal with something different in many respects from the incomes of individuals, and we are not concerned so directly with questions of ownership. We deal with imputation or assignment of income to a class, finally reaching its members and passing into their ownership. We do not ask, What is the income of wage-earner A or of capitalist B? But we ask the quite different question, What part goes to wages? what part to rent? what part is set aside as interest? and so on. Now it may well happen that some particular capitalist, say B, is receiving an increasing income, although the total share which goes to capital may be decreasing. So, on the other hand, the general share of labour as a whole may be increasing and yet some particular labourer, say F, may be receiving less and less because of an increase in the number of wage-earners, while all the time a larger share of the product may go to labour as a whole than ever before. And from this follows an important conclusion. We do not know how the individual wage-earner fares when we know how much of the total wealth production goes to wages. The two things are distinct, and an inquiry into the one does not of necessity afford information about the other. Simple and obvious as this seems, it is very important, and it is something that appears to have been overlooked frequently. We want to know not only how great has been the share of the "riches annually produced" which goes to labour, but we desire still more to know how the individual wage-earner fares in his income.

In this second line of inquiry we are concerned with income distribution. Labour as such cannot be said to have property, nor can we assign any proportion or amount of accumulated wealth to land or capital. Only shares of income-wealth are assignable to the factors in production as such. We can, on the other hand, ask what share of wealth belongs to wage-earners. But not all of this has come to them from savings out of labour earnings. Wage-earners have received more or less from gift and inheritance, and in many parts of the world they have, altogether apart from wages, participated with others in the gains of increasing prosperity.

The third line of inquiry indicated by our definition of distribution is concerned with the underlying economic institutions upon which our whole economic structure rests. The fundamentals have been much neglected by English and American economists, who until recently were inclined to restrict distribution as a part of economics to our second line of inquiry alone.[6] While these writers are broadening the field of economics, the German economists have long included the fundamentals within the scope of economics and treated at least some of them with praiseworthy thoroughness, although even these scholars have given us comparatively little of a systematic nature about individual fortunes.[7] Private property has been treated more fully than any other fundamental. And in this connection all scholars will think of the distinguished

veteran German economist, Professor Adolf Wagner, and of his monumental but only partially finished work on the whole field of economics, of which the first part, called *Grundlegung* (Foundation-laying), deals especially with this fundamental.[8]

Notes and References to Chapter I

[1] P. 2. The term socio-economic order is frequently abbreviated into social order, because the fundamentals of the socio-economic order are such a large part of our entire social order. But this is a procedure more convenient than accurate, and the distinction between the entire social order and any part of it must always be kept clearly in mind.

[2] P. 2. Property is used as equivalent to accumulated economic goods of all kinds, such as the census of the United States takes note of in giving estimates of the wealth of the country. This is a popular and convenient use of the term and avoids long and tedious phrases and terms such as "accumulated economic goods." Strictly speaking, as is pointed out later on, property is a right in economic goods and we have property in income as well as in land and in capital. It will be endeavoured to use this term "property" so as not to lead to confusion, and it will doubtless be evident when this term is employed in a strict and narrow sense, as well as in a popular sense, for example, in the phrase "property and income." The word "wealth" without any prefix is a convenient term for accumulated wealth or property, as property is employed in the last sentence, and will be so employed at times when no confusion is likely to result therefrom.

[3] P. 2. The use of the term organism here does not mean the adoption of any particular theory of the origin and nature of human society, a subject much discussed by sociologists. We here and now simply accept the fact that men are united into society with a multiplicity of relations to each other and that it is convenient to use this term organism as pointing to this unity which has its resemblances to as well as its still more marked differences from an organism like a plant or a human body. See an able treatment of this subject by Professor L. H. Haney in his article "The Social Point of View in Economics," *Quarterly Journal of Economics* for November, 1913 (Vol. XXVIII, No. 1).

[4] P. 3. We have many different units, depending upon the nature and purpose of our particular inquiry. Sometimes we are concerned with families, sometimes with private corporations, more generally with the individual human being.

[5] P. 3. Personal is here used in the legal sense, meaning any legal entity, as employed in the decisions of the courts of the United States in interpreting the Fourteenth Amendment of the Constitution of the United States, which protects property and person against invasion by state action.

[6] P. 5. The author was frequently criticised a few years ago for an alleged undue enlargement of the scope of economics, because he included these lines of inquiry within economics. The more recent treatises, however, generally have at least a brief treatment of all three lines of inquiry, or, at any rate, enough about them to imply an admission that they fall within the scope of economics.

[7] P. 5. Professor Richard Ehrenberg, of the University of Rostock, has done something in this field. See his work, *Grosse Vermögen, ihre Entstehung und ihre Bedeutung*. 2 vols.

[8] P. 6. *Lehr und Handbuch der politischen Oekonomie*, 3d ed. Leipzig, 1892, 1894. The first two parts consist of the following divisions:

Grundlegung der politischen Oekonomie.
- Erster Teil. Die Grundlagen der Volkswirtschaft.
  - Erstes Buch. Die wirtschaftliche Natur des Menschen.
  - Object. Aufgaben. Methoden. System der politischen Oekonomie.
  - Zweites Buch. Elementare Grundbegriffe.
  - Drittes Buch. Wirtschaft und Volkswirtschaft.
  - Viertes Buch. Bevolkerung und Volkswirtschaft.
  - Fünftes Buch. Die Organisation der Volkswirtschaft.
  - Sechstes Buch. Der Staat, volkswirtschaftlich betrachtet.
- Zweiter Teil. Volkswirtschaft und Recht, besonders Vermögensrecht oder Freiheit und Eigentum in volkswirtschaftlicher Betrachtung.
  - Erstes Buch. Einleitung. Persönliche Freiheit in volkswirtschaftlicher Betrachtung. Unfreiheit und Freiheit.
  - Zweites Buch. Die Eigentumsordnung in volkswirtschaftlicher Betrachtung. Einleitung, Begründung und Begriff des Privateigentums.
  - Drittes Buch. Die Ausdehnung des Privateigentums.

CHAPTER II

THE FORCES IN DISTRIBUTION

The forces which are at work in distribution are manifold in character and it is well in this introduction to speak about some of these, as the differences among them must be held clearly in mind if we would understand our subject in some of its essential features. One of the most important distinctions to be made in the treatment of these forces is between those that are individual and those that are social and almost equally significant is the distinction between conscious and unconscious forces. The terms, conscious and unconscious, are here used in a restricted and technical sense [1] which requires a few words of explanation.

By conscious efforts of individuals we mean efforts of which they are conscious with respect to the particular end now under consideration, namely, the acquisition of wealth. One may or may not make a conscious effort to accumulate wealth. If I make such a conscious effort, the income or property which results therefrom is due to conscious processes. As a matter of fact, the distribution of wealth among individuals is largely the result of conscious effort, but by no means wholly so. Notice, first, that our activities which have no conscious reference to wealth-getting, nevertheless have a tremendous influence upon our economic situation. An

obedient, diligent, faithful son of fourteen or fifteen years of age doubtless rarely thinks of his obedience, diligence and faithfulness with reference to their economic value. But his efforts, although from our particular point of view unconscious, have their effects on his wealth acquisition. Similarly a mature man may make a conscious effort to put his life on a higher ethical plane, practising temperance instead of intemperance, etc.; he may have no conscious economic goal in this effort at self-reformation, although as a matter of fact his income may be doubled in consequence. Innumerable illustrations of this character will occur to the reader.

In the second place, the income of individuals depends to a very large and ever increasing extent upon the conscious efforts of society. In our own day society is awakening to a consciousness which is something new in its history. Social self-consciousness is one of the great forces in wealth distribution, and in its growth and development is to be found one of the prime causes of those movements of our own time which aim at bettering economic conditions.

Perhaps the expression *social self-consciousness* or *the self-consciousness of society* calls for some elucidation. We know very well what we mean by the self-consciousness of an individual, and we have considered its meaning with respect to the distribution of wealth; but what do we mean by the self-consciousness of society? The question really belongs to sociology rather than to economics and we have no desire to enter into refinements which are not called for by our present task. Observation and reflection show us clearly that there is such a

thing as a consciousness of society distinct and different in nature from the consciousness of the individuals who compose it.[2] Nor is this idea of the consciousness of society difficult to grasp. As a society our will finds one avenue of expression through legislation, and not only does our will find expression in this way but such expression is normally and regularly followed by action, in which other social agents, judicial and executive, appear. No individual in the United States may say of a law passed by Congress, 'That is my will.' It is the expression not of any particular individual, but of a collectivity, of society at large.

Society expresses its will through government, but it does so also outside the sphere of government. Government is only one of the avenues through which society finds self-expression and this particular self-expression is a public expression, using the term public here as an adjective corresponding to our word state, when state is employed in its generic sense to mean organised political society.[3] Social action expresses itself through public opinion which when thoroughly aroused is almost all-powerful; it then enforces the social will through many different channels, condemning some actions, applauding others, punishing those persons it dislikes and rewarding those of whom it approves. We have also organised private social efforts, embracing more or less large and numerous sections or classes of society. Labour organisations and manufacturers' associations are avenues of social forces. Consumers' leagues afford an illustration of innumerable organisations through which social forces seek to modify economic processes.

Religious bodies also play their part as social forces and occupy a large place in human history.

We have in our day a two-fold movement which must be considered in this connection; first, a weakening of the old classes based on political privilege and established by positive statute and long continued custom; second, a growth of economic classes, and especially the emergence of rather sharply defined classes of employers and employees, each with a menacing class-consciousness. The word "class-conscious" has played, and is still playing a great rôle in socialist agitation.

But most significant to-day is the growing, developing, powerfully increasing self-consciousness of political society—of the state as such. It has come to be the opinion of this society, expressed through its organs, that certain of its economic units do not have sufficient incomes for the satisfaction of real needs. We may mention, for example, the individuals employed in the sweat shops. Society sets about to raise the income of those so employed. Governmental activity is, to be sure, only one of the social methods employed, but consumers' leagues and other organisations sooner or later ask for state aid in their efforts.

But there are also unconscious social forces at work in distribution; and by unconscious forces, as we have just seen, we mean those in which there is no conscious effort to modify distribution, but in which the consciousness is directed towards other ends. Nowadays, however, our minds are so continuously directed towards questions of distribution, of wealth and poverty, etc., that hardly any important action of organised political

society is likely to be considered totally without reference to its possible consequences in distribution. But we have social actions in which other considerations are dominant; and in earlier times, social activity was far less a conscious activity. Law and order have been established and maintained as necessities of social coexistence, as conditions of general prosperity and not with reference to the promotion of any particular sort of distribution. Yet they represent social forces in distribution. The good enforcement of law and order has its effect on the income of individuals, but that effect is incidental. The law may be well enforced in one part of the country and loosely in another, and the difference in the enforcement of the law of the land will modify the distribution of wealth among the individual members of society, even if the result is not aimed at nor even considered. But even here economic influences are more and more frequently thought of; and a demand for the enforcement of law and order may exist as a result of the observation of the disastrous economic consequences of lawlessness.

The relation between conscious and unconscious or spontaneously operating social forces is not a fixed one but is variable and changing from time to time and from land to land. Nevertheless, it is a safe generalisation to say that with the development of civilisation, particularly of civilisation on its economic side, social self-consciousness continually wins new fields and gains on the unconsciously operating social forces. This is a necessary consequence of the extension of the division of labour, the increasing part played by exchange

and widening markets, all meaning new and more forceful economic ties, welding us all together more and more firmly; our local economic units growing into national economies and these in our own day gradually developing into what may be designated as a qualified world economy; not a world economy from which sectionalism and nationalism will ever disappear but something superposed on all the economies.

We may take up the three branches or lines of inquiry with which we are concerned in the distribution of wealth and examine them, one by one, with reference to the rôle of conscious social forces as contrasted with the part played by unconsciously or spontaneously operating social forces. Although in each one of these fields action for predetermined ends grows continuously more marked, we notice differences. More and more do we find a conscious modification of income distribution. We have the incomes which come to us partly because we work for them, in part also we have them because society has decided that we should have them, and not infrequently we have them because certain social forces, operating more or less unconsciously, have cooperated with our own efforts to secure them, or have even procured them for us without any efforts on our part. Such social forces are more particularly those which exist embodied in the institutions of society. Changes in property-values brought about through natural movements of population afford one illustration. The institution of inheritance serves as another illustration.

We pass now to product-distribution. How is this effected? The first fact to be noted is that it is brought

about chiefly through the operation of unconscious social forces; that is to say, by those forces which operate through institutions. The state here interferes for the most part only in a general way to modify and give shape to distribution among the factors in the production of wealth (land, labour, capital, and enterprise).

Besides the unconscious social forces above mentioned we meet with self-conscious social activities by which it is designed to modify product-distribution. Of these the protective tariff may be cited as an example. Without asking at this time whether a protective tariff is good or not, it is certain that one of its avowed aims is to increase the product which goes to labour, and thus to modify by a deliberate social effort the distribution of wealth. Its aim is to increase wages, absolutely and relatively. Similarly, there is a conscious social effort in the attempt to limit the share of capital through usury laws, although this attempt may fail of its object, as may the protective tariff. We have in both cases to do with deliberate efforts on the part of society at large to interfere with the product-distribution among the various factors which produce it. But the effect is general, not particular. Usury laws of the old American kind, for example, do not aim at lessening the income of capitalist A or D or G, but, by fixing a definite rate of interest, for example six per cent. in New York State, they seek more or less successfully to set certain limits to the share which goes to capital as a whole or to capitalists as a class. The same is true of the protective tariff; it is designed to affect not individuals, but classes.

But by the side of these public social forces, we find private social efforts, such, for example, as those of labour organisations. Their aim is to increase the share of the product which shall go to labour. They make conscious attempts to modify distribution in the interest of those whom they represent. Or, to express ourselves differently, the individuals who compose society become more closely interrelated and more conscious of interdependence and act accordingly. We have called such action as that here described a self-conscious expression of society; and this convenient terminology may be employed without any implication of assent, or for that matter of dissent, with respect to the idea that there exists a social mind, as an entity apart from individuals.[4] We have no desire to enter into this sociological question.

Passing over to an examination of the fundamentals in the existing socio-economic order, the first truth to note is that they are established not by individuals, nor by nature, but by human society. Society displays an ever clearer conception of purpose as it goes on in its development. Its action becomes more and more purposive, more and more deliberate.

The various underlying institutions which make up the organisation of society are the media, through which operate the social forces that largely shape and modify the distribution of wealth. But while it was not for that purpose that they were instituted, society not originally intending nor consciously aiming at such influence as is exerted in this direction, it is to be emphasised that even in the fundamentals the conscious efforts of society

are more and more directed towards a desired distribution. A great movement for regulating the modes of acquiring private property is sweeping over the world. This will later occupy our attention. We may in passing, however, notice the taxation of property as it passes from generation to generation, which as a matter of fact, whether a good thing or a bad thing, is beyond all question being shaped with reference to what is held to be a more equitable and presumably a more desirable distribution of wealth.

Notes and References to Chapter II

[1] P. 9. Even our conscious efforts are socially controlled in a very real sense. Through imitation, socially habituated modes of activity in wealth-getting and wealth-using are dominant. Into this truth we need not enter further here and now.

[2] P. 11. This social self-consciousness is something that cannot be attained by any process of addition; it is a resultant of many forces. As used in the present work it need not occasion difficulty. No metaphysical differentiation or explanation is called for in this connection. We are discussing real and vital forces for which we need terms, and those convenient and most readily understood are chosen.

[3] P. 11. It corresponds to the German words *öffentlich* and *staatlich*. The fact that we use the word state in its generic sense and also to mean one of our separate commonwealths going to make up our one American state leads to a good deal of confusion in thought, and perhaps also in action. It is unfortunate, also, that we do not have an adjective corresponding precisely to state. We think of stately, but that has acquired such a thoroughly different meaning that we cannot employ it in the sense with which we are concerned. We use then the term public here in the sense indicated, as an adjective corresponding to state in the generic sense. In the next sentence again the word public, as employed in public opinion, has a larger and more general meaning.

[4] P. 16. See again Professor Haney's article, "The Social Point of View in Economics," *Quarterly Journal of Economics*, November, 1913. Excellent as the article is, perhaps possible dangers of error of this kind are treated more seriously than is at present necessary.

CHAPTER III

WEALTH AND ITS KINDS. PRODUCTION AND DISTRIBUTION. STATICS AND DYNAMICS OF DISTRIBUTION

In distribution we deal with the concept wealth. This concept will receive further elucidation as we progress in our studies, but we must pay at least some attention to it at this point. The word wealth originally was weal, or that which produced well-being. From this earlier form the word was lengthened to wealth; but the old meaning of the word is still preserved in the Book of Common Prayer of the English Church, where the people are instructed to pray for the "wealth" of the king. As the weal of society and individuals depends so largely on their economic weal, it is the latter alone which has come to be thought of by economists when the word wealth is employed.[1] But for some purposes we may still employ the term wealth in a sense very nearly as inclusive as weal. This usage is exemplified in the term social wealth, when employed in its largest and broadest sense; for it then means all those goods which contribute to the weal, and especially the material weal, of society. Climate, beautiful scenery, as well as fertile lands, would be included. One reason for this inclusive use of the term social wealth is that the term exchange value has less significance for society as a whole than for individuals. At the same time, it must

be confessed that the term is somewhat vague and social wealth thus conceived is incapable of measurement. As a whole it can be described in general terms only. Social wealth, then, means quantities of goods, both free goods and economic goods. Free goods are open to all. By economic goods, on the other hand, we mean goods which generally have exchange value and which generally are procured by laborious exertion. They are goods so limited quantitatively that they do not satisfy all human wants. Normally and regularly they have exchange value; but valuable objects may be removed from the active and normal sphere of exchange-economy, for example, public buildings, old world cathedrals.

Economic wealth is restricted to economic goods. Economic goods are sometimes conceived of as simply a store or stock of material things, but it is more convenient in economics to follow the traditional usage and let them include services as well; and then to regard wealth from the two points of view, wealth as an accumulated supply of goods and wealth as a flow or income.

It is said truly that material goods render services, but we can avoid confusion by employing the term personal services. We thus speak of economic wealth as comprising commodities and personal services and make a distinction of legal and economic significance. The distinction is an important one and should be carefully remembered. Not a few economists have made the mistake of confining the term wealth to material things. But there is no hard and fast line between commodities and services. This subject has been presented admirably by Senior. He calls attention to the fact that often the distinction between the terms commodity and service is only a question of the point of view we take. Senior says that when we fasten our attention upon the act itself, we call the economic good in question a service; if on the result of the act, we call it a commodity. As an illustration he mentions the physician who is said to render a service, and the druggist who is said to produce a commodity. The shoemaker, says Senior, furnishes a commodity, but the bootblack renders a service; yet both have merely changed the position of things. The difference in these and many other cases is in the point of view. If we want to speak with absolute exactitude, we may say that the shoemaker renders a service in making us shoes, just as the bootblack renders a service, for the leather, the shoe, the blacking, and the blackened shoe are all material things and things produced by human effort. Yet in economics as in law we base many useful distinctions upon different points of view.[2]

The word wealth has also other meanings; for example, it may mean opulence as well as economic goods. The important distinction between wealth as a stock and wealth as income has already been mentioned. Both concepts are often expressed by the simple term wealth.

John Stuart Mill, in his *Essays on Some Unsettled Questions of Political Economy*, made permanency an essential test in his concept wealth, saying, "the wealth of a country consists of the sum total of the permanent sources of enjoyment, whether material or immaterial,

contained in it." [3] Here wealth is on the one hand, widened out to include permanent sources of enjoyment, whether these have economic value or not and, on the other, contracted by the idea of permanency, a relative concept. Evidently Mill had in mind here accumulated wealth rather than income-wealth, which so frequently perishes in the using.

These distinctions must be borne in mind in studying the various writers on the subject. Does the author in question mean economic goods? does he mean well-being? or is he talking about opulence? Does he mean accumulated wealth, or is he discussing incomes? To read the one meaning, when as a matter of fact the writer means some other, will often lead to great confusion and superfluous criticism.

In statistics wealth usually means wealth considered as a stock or accumulated supply of wealth existing at a certain time,[4] while economists more generally mean income, especially when speaking of the distribution of wealth. Quesnay, for example, often speaks of annual income (*richesses annuelles*). So does Adam Smith in his *Wealth of Nations*. They mean what is annually produced. The usual meaning of the term varies in different countries. In the United States the prevailing meaning is accumulated wealth, due in part to the fact that the American tax system is based largely on accumulated wealth, while in foreign countries it is based mainly on annual yield and income; therefore in England and in Europe generally wealth frequently means annual income. It is the wealth as income which is of more importance.

We may now glance at certain other distinctions, although most of them need not detain us long. We distinguish between social wealth in its broadest sense and social wealth in its narrower sense of economic wealth. The latter is the usual meaning in economics and is to be taken as the meaning intended in this work unless the contrary is indicated.

Another distinction often made is between social wealth in the narrower sense and private wealth. In this work we are dealing with social wealth, in the narrow sense of either an accumulated stock of economic goods or a flow of such goods as income, and also with private wealth. The two are not by any means the same thing. Private wealth means economic goods which yield utilities to the individual, and it may even mean something which detracts from social wealth. For example, a man, who owns and operates a lottery and grows rich thereby does not add to the social wealth. He may be growing richer while others, and even society at large, are growing poorer. But private wealth also includes perfectly legitimate and proper claims on others, of which the mortgage furnishes a typical example. Annihilate the mortgage and society is neither richer nor poorer; what the one person loses the other gains. Private wealth is a concept which belongs primarily to a discussion of individual distribution, while social wealth is a concept which receives special emphasis in production. This is a distinction upon which Lauderdale has dwelt at length in his work on *Public Wealth*, in which he distinguishes between public wealth and private riches. Chapter II of his book dis-

cusses public wealth and individual riches and the relation which they bear to each other. J. B. Say, Sismondi and French writers generally make this distinction as does Daniel Raymond in the United States. In Hadley's *Economics*, in Chapter I dealing with "Public and Private Wealth" public wealth is used as the equivalent of our social wealth in its large and inclusive sense.

Still another confusion of terms, or rather of different meanings of the same term, must be carefully avoided. We must distinguish between the three concepts private wealth, social wealth, and public wealth. The three concepts are clear and distinct. There are these three kinds of income: private income, social income, and public income, using the word public as the adjective corresponding to the noun state (German: *öffentlich*). A post-office building is public wealth and also, of course, social wealth.[5]

A further distinction which must be made is that between aggregate wealth and average wealth. The distinction would seem to be sufficiently clear, and yet we find that economists have in this particular not always had in their mind the same conception of wealth at all times in the course of their arguments. The confusion between these two concepts occurs perhaps most frequently when the wealth of one nation is compared with the wealth of another nation. We say, for example, that England and America are the two richest countries in the world. Generally when we use an expression of this kind we have in mind aggregate wealth; but sometimes we mean average wealth. If we should

say that Holland is a richer country than Germany we could hardly think of anything else than average wealth. When, however, we read statements concerning the alleged great wealth of some Oriental nations we note that the writers must have in mind aggregate wealth. In reality it is probably the fact that they are often deceived even as to aggregate wealth by the wealth of a very few. Modern political economy, beginning with the Physiocrats, has laid so much stress upon the general well-being and especially the welfare of the wage-earner, that the idea of average wealth has received an emphasis which was quite unknown to earlier ages. Cannan points out in an interesting manner the confusion of thought in Adam Smith. Adam Smith, as Cannan says, tells us in the second paragraph of his *Wealth of Nations* that a nation's wealth should be measured by the proportion between the product of labour and the number who are to consume it; but elsewhere, without warning, he uses wealth to mean aggregate wealth.[6]

Another preliminary observation must be made, and that is that distribution gives a standpoint from which to discuss public questions. There is scarcely any economic topic which cannot be presented from several points of view. Each one of the great divisions of our study, such as production, and distribution, simply gives us a standpoint. Take, for example, Davenport's *Outlines of Economic Theory*, in which all or nearly all the economic topics are discussed under Distribution. Our study leads us, therefore, to consider nearly all the topics in economics from the standpoint of distribution.

With the evolution of economic society, production

and distribution grow further and further apart; or to express the thought in other words, their relationships become less direct, more and more indirect. Let us consider for a moment an economic society in which there are only isolated households. This was the ideal of the ancients. The self-sufficiency of the household was characteristic of classical antiquity. So also in mediæval Germany we find this condition in the nature economy, or *Naturalwirtschaft* in the ninth and tenth centuries;[7] and the old English manor also affords an illustration of independent domestic economy as do to some extent the plantations of the South in America before the Civil War. In such a régime distribution and production are so directly related that they often appear to be the same process. The farmer finds his income in what he produces. It is as the direct fruit of the exertions of its own members that the household gets its income. But as society develops, division of labour increases. Following up this evolution of industrial society for centuries, we finally find a man producing, say, the three-hundredth part of a watch. This fraction of the watch is not his own, but he receives therefor his income in wages. There is a good deal of difference in kind between his product and what he receives as wages, although they may be the same in value.

This brings us very naturally to the distinction clearly made by John Stuart Mill between the nature of the laws governing production and those governing distribution. The laws of production, he says, are the physical laws of nature, while the laws of distribution are

the laws enacted by man; the former are part of the natural order, independent of and unchangeable by man, while the latter are social institutions, human laws and regulations of one sort or another, which man who has made can unmake. The laws of distribution, in short, are more arbitrary than those of production. Mill thus seeks to emphasise human responsibility within the field of distribution, while placing on nature, parsimonious and cruel in his opinion, the responsibility for the meagreness of production.[8]

Mill's statement is not true without qualifications, and even with his qualifications it seems inconsistent. What he says appears to apply neither to production nor to distribution. On the one hand there is an underestimate of the human factor and of its responsibility in production. For what are the laws of the production of wealth? Does its production depend merely on external nature? Is not the human factor the only truly active factor in the production of wealth, and is not society in large measure responsible for this human factor? It is not by any means a question only, of what the particular human agent does, but also of what his fellow men do. The fact is that production and distribution are much more closely related than Mill supposed, and he also failed to attend sufficiently to the reaction of the one on the other. Distribution reacts upon production in very important ways, and for this reaction, of course, even according to Mill's own view of the matter, society must be held responsible.

Production of wealth does not vary simply with the productive activities of nature. In some parts of the

world where nature is exceedingly prodigal, we do not find any large production of wealth. Often quite the contrary is the case. It is man that is of chief significance, not only in the distribution but in the production of wealth. Compare the productive possibilities of the savage economy obtaining in even the richest parts of the western continent before Columbus with those of men possessing Western civilisation and plunged (even without acquired capital) into a comparatively infertile region. Think also of the extent to which Germany has been changed through the efforts of human beings. Men are responsible for the manner in which they associate together, and for the manner in which the human agent carries on his activities in the production of wealth. What we really find in the physical laws, so far as production of wealth is concerned, is limitations of human responsibility. But the responsibility is not wholly absent.

Nor is Mill's statement of the matter quite true when we pass over to distribution. If the laws of distribution were a matter of human institution only, there would be a separation of the two fields, production and distribution, which as a matter of fact does not exist. Mill speaks as if he imagined some such condition of things as this: Men produce things for consumption. The products are all gathered in a heap first, and then they are distributed by human agency. Society determines what the shares and methods in this distribution shall be. But of course it might change the shares if it thought wise and adopt other methods, etc. This, as we have seen, is a wholly mistaken conception

of the nature of production and distribution and their relations to each other.

It has just been mentioned that distribution reacts upon production; and to this reaction we must give our further attention. Let us suppose for a moment that without any good reason society were to change the laws of distribution. Suppose that some Czar of the human race were to dictate what each person's share should be, and that his commands were obeyed. Let us suppose that one man, now receiving an income of $5,000 shall no longer have $5,000 but only $500; another with a millionaire income is assigned one of $1,250. Would production not be affected by this change in distribution? Unquestionably; and thus society finds itself limited in what it is possible for it to do in the matter of changing the laws of distribution; and these limitations are due in large measure to the reactions of such changes in distribution on production considered with respect to quantities and qualities of wealth produced and to direction of production. Of course it remains true that a great deal can be done by society in this matter, but it must act within limits.

The possibilities with regard to the regulation of distribution and of the limitations on human responsibility may be illustrated by reference to the communist settlements. There are associations of men like the Shakers which completely regulate distribution, but their production is so limited that the average income is not large. The Amana Society of Iowa, the most successful of existing communistic societies, with a great deal of valuable Iowa land, affords comfort to all, but

it is a comfort of a meagre sort, scarcely compatible with a high civilisation.[9]

This is perhaps the most appropriate place for a few preliminary remarks upon the importance of distribution, the position its problems occupy in the public mind, and the comparative neglect of production by economists. The mind of society has long been concentrated on distribution, and its unsolved problems have caused, and still cause, uneasiness. Similarly the attention of economic scholars has long been almost exclusively concentrated on the scientific and practical aspects of distribution—wages, interest, profits, monopoly gains, wealth and poverty occupy our time and consume our strength. All or nearly all our pressing economic problems are looked at chiefly from the point of view of distribution. It seems to be assumed that the problems of production have been solved, and we need only to distribute properly the wealth actually produced, or that which may be produced. That production is sharply limited is a thought that does not enter into the general social self-consciousness; and all questions of the day are so treated as to lead to distribution just as surely as all roads used to lead to Rome.

The attention given to distribution is not too great, but the attention given to production has long been altogether inadequate. This was well brought out during the years immediately preceding the panic of 1907 in the United States, when capital found ready employment, when the area of arable land was being extended, when improvements in agriculture were rapidly being made, and when the demand for labour was so great

as frequently to make satisfactory control over it extremely difficult if not quite impossible. If the foreman engaged in improving the streets in the place where the writer lives remonstrated with his careless and indifferent workmen, they often dropped their tools, knowing that another job awaited them and no questions would be asked. But in the struggle for parts of the wealth produced, the sharp limitations of production were perceived. Improvements are possible and are going forward, but a small percentage added to the incomes of those who feel that they do not now have enough would quickly exhaust the present possibilities of production, as is readily made apparent by statistical computations, showing what would be involved in an increase of ten per cent. in present production. We need a scientific study of the limits of production to show how great is the comfort that is universally attainable. It is apparent that this comfort finds its sharpest limitations in personal services. The rich man enjoys the attention of several persons, and the professional man with a family cannot live in comfort without at least one servant, and in most parts of the world he requires two or three. Whether this will be changed or not need not now occupy our attention. It is self-evident that a condition of general comfort which implies for each person the services of another human being can never be universal.[10]

We may next notice that distribution can be considered either statically or dynamically. The following is given as an approximate definition of the statics and dynamics of distribution:

By the statics of distribution we mean the treatment of the present system of distribution without reference to past or future distribution; by the dynamics of distribution we mean the treatment of the present system of distribution in relation to distribution in the past and in the future, dealing particularly with qualitative changes.

Our concept is in itself not a time concept, but qualitative changes take place in time. They are evolutionary, and it is only by an unrealistic abstraction that qualitative changes can be without reference to past, present or future.

The statics and the dynamics of distribution are parts of a larger whole, the statics and dynamics of economics. Mill has discussed the dynamics of economics in Book IV of his *Principles of Political Economy*, entitled "Influence of the Progress of Society on Production and Distribution." The statics and dynamics of economics belong to the still larger whole, the statics and dynamics of social forces.[11]

The expressions static and dynamic sociology were introduced by Auguste Comte. He says, "Social dynamics studies the laws of succession, while social statics inquires into those of coexistence." [12] Social statics gives a theory of order; social dynamics gives a theory of progress. But we must distinguish between qualitative change and quantitative change.

Dynamics suggests something more than mere change without alteration of other characteristics. Dynamics implies change, but we can at least conceive of a change which is simply quantitative. Let us suppose that in an Oriental society in the course of a century population has doubled, but the modes of production and exchange continue unaltered, while general economic relations remain as they were at the beginning of the century. Such a society would be called static. Dynamics suggests qualitative changes, alteration of types. Professor Lester F. Ward uses as an illustration of the difference between the two the charity work of the old type and philanthropy. The old charity work of which he speaks belongs to statics, while true philanthropy pertains to dynamics. The higher philanthropy looks into the causes of poverty and pauperism. It tries not merely to assist paupers but to cure the social body of pauperism. Dynamic actions take note of, and operate with, fructifying causes.

Statics concerns itself with social forces in equilibrium, whether this is in the present, past, or future. Growth, of course, means the opposite of equilibrium. It means continual change and transformation. Hence the growth in population is a dynamic force, because it almost inevitably brings about other changes, certainly in modern times, and especially in Western civilisation.[13] At the present time any realistic study of distribution must be dynamic, and a study of static distribution must be based upon an imagined condition of things. The constructive scientific imagination must arrest the flow of life forces and attempt to grasp the present without reference to the forces which brought it into being, and without reference to the future which springs from the present.

We have to consider in real life the present distribution, the result chiefly of individual efforts, operating

on the basis of private property, inheritance, contract, etc.,—in short, the present social order. But we have to consider more than the production which flows from the productive processes spontaneously, as it were. We have to consider, as already seen, self-conscious social efforts, actual or contemplated, to control the distribution of wealth among the social units. The tendency to modify the distribution of wealth among classes is perhaps less marked. But here as elsewhere the growing social activity is characteristic of social development.

If we take up the questions of wages, profits, interest, etc., we find them discussed in theoretical treatises very generally under the statics of distribution. On the other hand, when we discuss socialism or the various other social projects of the time, we deal with distribution dynamically.[14] But even relatively, spontaneous life is dynamic. The Industrial Revolution was the result, not solely but on the whole, chiefly of individualism, meaning thereby the efforts of individuals to better their conditions; and only gradually were the productive processes brought under more or less conscious control, while the social control of the distributive processes has been still slower, and is only just now fairly started. Yet how dynamic was this period! How marvellous the changes in production and distribution, and in the entire economic life! We have as a result the saying, none the less true because trite, that we live in a new economic world.

When we thus speak of the statics and dynamics of distribution, we do not mean that we divide our treatment of the subject into those two parts, following each other in such a way that the first will be separately treated and disposed of and then the other be taken up later; but we shall pass freely during the discussion from the one point of view to the other. They are not so much two separate fields as two different aspects of the same field. But we must always remember that in our actual life we deal with dynamic forces, and conditions of a stationary equilibrium are simply assumed as a scientific aid.[15]

Notes and References to Chapter III

[1] P. 19. See Cannan's *Theories of Production and Distribution*, Chap. I, "The Wealth of a Nation," pp. 1–2, where Cannan treats these terms at far greater length than here is possible.

[2] P. 21. See treatment of goods, commodities, and services in Ely's *Outlines of Economics*, pp. 96–98, where, however, wealth is restricted "to the stock of goods on hand at a particular time" and real income is defined as "the satisfaction which we derive from the use of material things or personal services during a period of time" (p. 98). The author is inclined to believe on the whole it is better to use wealth in the sense in which it is employed in the present work. To the older economists the word wealth, in "The Distribution of Wealth," implies first of all income. Ordinarily wealth means an accumulation or stock of goods and generally we can employ the terms wealth and income as distinct categories and do so without danger of confusion.

[3] P. 22. See Cannan, *op. cit.*, pp. 18, 30 *et seqq*. The quotation from Mill is from the 1844 edition, p. 82.

[4] P. 22. Petty's *Verbum Sapienti* in his computation of the wealth of the kingdom speaks of accumulated wealth. *Cf.* Cannan, p. 4. But, on the other hand, statisticians also make computations of annual wealth. To use the words of John Stuart Mill in the Preliminary Remarks of his *Principles of Political Economy*, "it is no part of the design of this treatise to aim at metaphysical nicety of definition, where the ideas suggested by a term are already as determinate as practical purposes require" (p. 2); on the contrary, it is the author's endeavour to restrict this discussion to the limits essential for present purposes, and to avoid some recent refinements of analysis which with their consequent terminology have to most people brought confusion rather than enlightenment.

[5] P. 24. It is unfortunate that in our elementary courses and treatises we have not reached such an agreement in our terms as to render discussions of these familiar terms superfluous in a work of this kind.

[6] P. 25. See Cannan's treatment, *op. cit.*, pp. 11–13, where other illustrations are given. The author gladly acknowledges indebtedness to Cannan's careful and discriminating discussion, but he has made also essential deviations.

[7] P. 26. See W. Lotz, *Verkehrsentwicklung in Deutschland, 1800–1900*, p. 3.

[8] P. 27. This point is discussed in Mill's *Political Economy*, Bk. II, Chap. I, § 1.

[9] P. 30. For the Shakers, see Ely's *Labor Movement in America;* also Noyes's *History of American Socialism* and Hind's *American Communities and Cooperative Colonies.* For Amana see the author's article "Amana; A Study of Religious Communism," *Harper's Monthly Magazine*, October, 1902; also Mrs. Bertha M. H. Shambaugh's *Amana, the Community of True Inspiration.*

[10] P. 31. The following quotations all imply ideals of distribution which lack a foundation in proved possibilities of production. John Galsworthy, in *A Message on Woman's Labour Day*, July 17, 1909, wrote: "We are, I firmly believe, within measurable distance of a world in which no one will work at a wage that will not by itself keep body and soul together. . . . Before the minimum wage—the only sound foundation for a decent industrial system—can be established and enforced throughout every branch of labour, there must come a period of disturbance and change. . . . Better to undergo the greatest sufferings for a few years than to go on all your lives working at starvation wages. . . . If you can link yourself with the women of America, France, and Germany, you will have a position such as women workers have never had since the world began."

Frederic Harrison has asserted:

"I have always held and taught that industry cannot be in a settled and healthy state until seven hours is made the normal standard of a day's labour and a fixed 'living wage' for a regular stated term is recognised as being merely the irreducible part of remuneration, the rest being proportioned to the profits resulting from the work done."—"Labour Unrest—A Prophecy," in *What the Worker Wants.*

Mr. A. M. Simons, editor of the national edition of the socialist paper, *The Milwaukee Leader*, advocates a six-hour working day, with an annual income of $2,000 for the worker. This same idea

finds expression in a late pamphlet by Mr. Fred. D. Warren, editor of the *Appeal to Reason*, entitled "Two Thousand Dollars per Year and a Six-Hour Day." In a recent communication to the writer, Mr. Simons has even gone further, stating that "an income of $10,000 per family (or an amount having a purchasing power equivalent to that sum at present) is easily possible, and I would be glad to defend that thesis with any one."

Mr. Galsworthy, like many others, assumes that there is in existence, or may readily be brought into existence, a quantity of wealth which will make possible his ideal—certainly a most desirable one. His underlying thought is that there is a flow of income-wealth which may be secured by a united and determined effort on the part of the workers. No suggestion is made that it is necessary to secure an enlarged production and that one of the most essential things is to increase the efficiency of the workers. Similarly the ideals in regard to a shortened working day rest only upon most superficial estimates of production.

When it comes to an income of $10,000 a year for every family, it is necessary only to examine into the consumption of a family with that income to show the absolute impossibility of this proposition. An appendix is added by Mr. W. I. King, Instructor in Statistics in the University of Wisconsin, in which an attempt is made to illustrate statistically the limitations of distribution in production.

[11] P. 32. See on this general subject two interesting articles: one is by Professor Lester F. Ward, on "Static and Dynamic Sociology," in the *Political Science Quarterly*, June, 1895; and the other by Professor Albion W. Small, on "Static and Dynamic Sociology," in the *American Journal of Sociology*, September, 1895. An ingenious discussion of the statics and dynamics of distribution is found in Professor John B. Clark's *Distribution of Wealth;* see Chap. I, especially pp. 29–35 *et passim*.

[12] P. 32. *Positive Philosophy* (tr. by Harriet Martineau), Vol. II, p. 70.

[13] P. 33. A very good article on the general aspects of the subject is found in the *Monist* for July, 1895, by Professor Joseph Leconte, "The Theory of Evolution and Social Progress."

[14] P. 34. Professor Small in the article referred to above places socialism under the statics of sociology. That might correctly apply to the earlier French socialism; but the modern socialist looks upon socialism as an evolution.

[15] P. 35. For an excellent treatment of the topic see Professor Alfred Marshall's Preface to the Fifth Edition of his *Principles of Economics*, pp. viii to xii, inclusive.

CHAPTER IV

THE PLACE OF DISTRIBUTION IN A SYSTEM OF ECONOMICS

We may now attempt to place distribution. Where is its place in general economics?

We may divide the whole subject of economics, that is to say, the entire field of economic study and research, into three main parts, following in this respect the Germans, and, what is more important, following what seems to be a natural division of the subject-matter. They are as follows:

I. General Economics.
II. Special Economics.
III. Public Finance.

The first of these divisions, general economics, gives a preliminary survey of the entire field of study. The second division, special economics, takes up particular topics, with special reference also to time and place. This part is sometimes called economic policy and sometimes practical economics, depending in part on the method of treatment and the place where emphasis is laid. It embraces items which as a whole do not fit in elsewhere. As an example of what is meant, consider forestry, a special topic which can be developed much further and more in detail in special economics than would be permissible in general economics. There seems to be no reason in the nature of things why more attention should be given to this subject than to many others, save as the exigencies of time and place may appear to demand it. And so with many other subjects. Special economics has been compared with general economics as branches to a tree.[1] The third division, public finance, deals with public revenues, their expenditure and their administration.

The three divisions of economics in Germany grew up naturally as a result of the position of the German universities in the life of the German states. The German universities have for two centuries or more held a position in German life like that which American universities, and especially the University of Wisconsin, have begun to occupy in the life of the American nation. They have been largely engaged in preparing men for civic life, for positions as civil servants, as trained and specialised *Beamten*, to use the German term which is as well defined as *Offiziere* in the army. The necessities of the case required that a treatment of general principles should be followed by a special and detailed treatment in practical application, according to the needs of time and place. At the same time, the financial life of the nation was of such paramount importance that public finance (*Finanzwissenschaft*) became a third distinct part of a general system that may be called political economy. Thus we find Justus Christoph Dithmar, one of the two men who were first[2] to hold professorships of political economy,[3] dividing his systematic treatise, called *Introduction to the Economic Sciences of the Police Power and Finance*, into five parts, with the following titles:

I. Concerning the Economic Science of the Police Power and Finance in General.

II. Concerning Economics. Book I. Concerning Land Economy.

III. Concerning Municipal Economy.

IV. Concerning the Police Power.

V. Concerning Finance.[4]

Of the nineteenth century divisions and titles in Germany we may take that of Knies as typical:

I. Theoretische Nationalökonomie (Theoretical Political Economy).

II. Praktische Nationalökonomie und Volkswirtschaftspolitik (Practical Political Economy).

III. Finanzwissenschaft (The Science of Finance). And Knies gives the following definitions: "By political economy we understand economics, economic policy (or practical political economy), and the science of finance."

"Theoretical economics investigates the general nature of the given subject."

"Practical economics takes economic phenomena in their historical form as subject of its investigations, and has in consequence a close connection with law; for example, gilds, exchange, banks, monopoly, as established by the government, and having their legal side. A great part of the law relates to economic things and it is necessary to study law. On the other hand, the law has a great influence on the economic life. Economic policy deals with the economic functions of government and chiefly with respect to legislation and administration. It has to consider also the past, for the economic life is a process of development."[5]

The development in England has been a different one, and it is due in part at least to external causes. The absence of a close connection between the English economists and the tasks of government has brought it about that English political economy has lacked a certain realism found in German economics and has been more speculative. And this separation has been increased by the study of government as a separate discipline which has made good progress in English-speaking countries. Moreover, in England, publishers could not have been found, nor a reading public, for bulky treatises in three or more volumes, such as are common in Germany. The English have generally been content with one volume economic treatises. Adam Smith had a fairly inclusive treatment in his *Wealth of Nations*, in which we find five "Books" with the following titles:

I. Of the Causes of Improvement in the Productive Powers of Labour, and of the Order according to which its Produce is naturally distributed among the different Ranks of the People.

II. Of the Nature, Accumulation, and Employment of Stock.

III. Of the different Progress of Opulence in different Nations.

IV. Of Systems of Political Economy.

V. Of the Revenue of the Sovereign or Commonwealth.

But there has been an inclination on the part of the

English economists to neglect public finance, owing to the circumstances which have just been explained; John Stuart Mill treating this important subject in Book V of his *Principles of Political Economy* under the head of the "Influence of Government", along with his discussion of the "Functions of Government in General" and the "Grounds and Limits of the *Laissez-faire* or Non-Interference Principle."

We notice also an inclination on the part of English and American writers to look upon public finance as separate and distinct from economics, and we have a volume on *Public Finance* by the English (Irish) economist Professor Bastable, and in the United States one by Professor H. C. Adams. But as economics comes to be more thoroughly cultivated and developed in England and America, we find tendencies in the direction of the German arrangements, beginning to assert themselves. Professor Alfred Marshall, as appears from the Preface to the Fifth Edition of his *Principles of Economics*, was at the time it was written planning a volume on National Industry and Trade, and a special treatment of Money, Credit, and Employment, also of the Functions of Government, but he said nothing of any purpose with respect to public finance.

Specialisation in economics has been carried further in the United States than elsewhere, and we find ourselves offering thirty or forty different courses in our American universities; but they can be arranged under the three general heads: first, general principles; second, special treatment of topics like money, banking, population, labour problems, and generally with emphasis upon policy (economic politics); and third, public finance.

Further discussions of these divisions would take us too far from our present task. We find distribution under general economics, so far as the principles are concerned. It is one of the traditional divisions in treatises on theoretical economics, other divisions being production and consumption. Exchange is frequently made a separate and distinct part of economic treatises, but it is in reality a part of the productive process, separated out for purposes of convenience and pedagogy.

But as treated in the present work, distribution is more than a part of general economics. It takes in the fundamental institutions of society, which could also be treated under production, although it is believed that distribution gives a better point of view. It passes on to the separate shares in distribution. It takes up individual fortunes, proposed and actual modifications in the distribution of wealth, and will not be complete in accordance with the intentions of the writer until the distribution of wealth is treated with reference to social progress. We have thus a general economic philosophy, presented from a point of view which gives a guiding thread and unity to the whole.[6]

After the general introduction, this entire field is covered in five "Books" with the following titles:

I. The fundamentals in the existing socio-economic order, treated from the point of view of distribution.

II. The separate shares in distribution.

III. Individual fortunes.

IV. Actual and contemplated modifications of the distribution of wealth.

V. Social progress and wealth distribution.

Book I, as it has been presented by the author in university lectures, is divided into the following "Parts":

Part I. Property, Private and Public.
Part II. The Inheritance of Property.
} Treated together as Part I of Book I in the present work.

Part III. Contract and its Conditions.
Part IV. Vested Interests (or Rights).
Part V. Personal Conditions.
Part VI. Custom.
Part VII. Competition.
Part VIII. Monopoly.
Part IX. Public Authority.
Part X. Benevolence, or the Caritative Principle, and Distribution.

Without entering into further details at the present time, enough has been said to place distribution in a system of economics, and to show the relation of the present treatise in a general way to the larger whole.[7]

Notes and References to Chapter IV

[1] P. 41. This comparison may be pushed too far. It indicates merely a general resemblance. See a discussion of it in Cohn's *System der Nationalökonomie*, Vol. I, *Grundlegung*, in his "Ueberblick": compare also his "Einleitung," 2nd Chap., "Die Nationalökonomie im Kreise der Wissenschaften."

[2] P. 41. Justus Christoph Dithmar "was one of the first two professors, whom Frederick William I appointed to the newly established chairs of Cameralistics (*Kameralwissenschaft*); Dithmar in Frankfurt an der Oder, Gasser in Halle. While Gasser had taken his point of view from Jurisprudence, Dithmar had come from History into Cameralistics." Translated from *Geschichte der Nationalökonomie in Deutschland*, by William Roscher, p. 431.

[3] P. 41. Called for a long time "cameralistics", *Kameralwissenschaften*. It may properly be translated political economy, as the development of the cameralistic sciences into modern political economy has been unbroken.

[4] P. 42. *Einleitung in die Oekonomische Polizei-und Kameralwissenschaften.*

I. Von den Oekonomischen Polizei- und Kameralwissenschaften uberhaupt.
II. Von der Oekonomischen Wissenschaft, Erstes Buch: Von der Landokonomie.
III. Von der Stadt-Oekonomie.
IV. Von der Polizeiwissenschaft.
V. Von der Kameralwissenschaft.

The reader may prefer the arrangement of another Cameralist, namely, Darvies, as given in Haney's *History of Economic Thought*, pp. 121–124. Haney's entire Chapter VIII on Cameralism may be consulted with profit in this connection.

[5] P. 43. The following is taken from the author's lecture notes, written when he was a student of Professor Knies:

"Unter Politischer Oekonomie verstehen wir die Volkswirtschaftslehre, die Volkswirtschaftspolitik, und die Finanzwissenschaft."

"Theoretische Nationalokonomie erforscht das allgemeine Wesen des gegebenen Gegenstandes."

"Praktische Nationalökonomie nimmt wirtschaftliche Erscheinungen in geschichtlicher Form als Gegenstand ihrer Forschungen und darum hat sie eine enge Verbindung mit dem Recht (z. B. Zunft, Wechsel, Banken, Monopol, etc., von der Regierung verliehen; haben doch auch ihre rechtliche Seite. Grosser Teil des Rechts bezieht sich auf wirtschaftliche Dinge und nötig diese zu studieren um Recht zu verstehen und wiederum darum auch Recht hat grossen Einfluss auf Wirtschaft)."

"Volkswirtschaftspolitik behandelt Aufgaben der Staatsregierung auf dem Gebiete der Volkswirtschaft (natürlich meistens auf dem Wege der Gesetzgebung und Verwaltung). Vergangenheit zu betrachten, denn wirtschaftliches Leben ist auch ein Entwicklungsgegenstand."

[6] P. 45. This is an ambitious plan, outlined years ago by the writer. It has been worked out unequally, but a great deal of it is in manuscript already, although not in finished form. Life is short and uncertain, but the author hopes that he may be able to finish it.

[7] P. 46. That is, as conceived by the present writer, many of whose colleagues would undoubtedly wish to dissent from his views regarding the scope of economics and the proper subdivision of the field.

BOOK I

THE FUNDAMENTALS IN THE EXISTING SOCIO-ECONOMIC ORDER, TREATED FROM THE STANDPOINT OF DISTRIBUTION

PART I

PROPERTY, PUBLIC AND PRIVATE

CHAPTER I

PROPERTY, PUBLIC AND PRIVATE, THE FIRST FUNDAMENTAL INSTITUTION IN THE DISTRIBUTION OF WEALTH

When we treat distribution philosophically and thoroughly, we must at once ask ourselves questions like these: What is the first thing which we have to consider in distribution? What is there behind the distribution which exists at any one time and place? Or, what have been the forces underlying the historical evolution of distribution? There is one answer, and only one, to this question. That which underlies the distribution at any given time is the socio-economic order which exists at that time. Not that the socio-economic order is the only thing that underlies distribution. The state of industrial technique, the bounty (or niggardliness) of the physical environment, the distribution of individual abilities and aptitudes as brought about by natural (including social) selection all underlie the distribution of wealth; but that which is dominant, that which reaches deepest in distribution is this order. The first thing in the discussion of distribution, then, is the existing socio-economic order, or for the sake of brevity, but less accurately, the existing social order.

There is such an order. It has been a defect of the English political economy that, while its existence has

not been denied, this order has been taken for granted, and little has been said about it. But it is the merit of the Germans that they have studied this order, and perhaps this is their chief service. Take, for example, Professor Wagner; the first part of his monumental work on political economy is called *Grundlegung der Politischen Oekonomie* ("Foundation-laying of Political Economy"), and is almost entirely taken up with the fundamental institutions of the existing order:—notice that the term used is not fundamental principles, for that might lead to misapprehension. Any writer may present what are his fundamental principles, but what Wagner discusses in his *Grundlegung* are the fundamental institutions.

What are these institutions which give us our social order on its economic side? (we employ this limitation for the economic institutions do not make up the whole of the social order, there being others not primarily of an economic character, such as the church, the family, etc.). There are several institutions of economic significance which we may call fundamental institutions of the first rank. We place them under five heads:

I. Property, public and private.

II. Inheritance: the transmission of property from generation to generation.

III. Contract and its conditions.

IV. Vested rights.

V. Personal conditions.

But the analysis may be differently made:

I. We could have property, and under this head deal with inheritance as a mode of its acquisition, although as will be seen later in this work, the position is taken that the right of inheritance is a different right from property. Vested rights can be regarded as property rights in more or less peculiar aspects.

II. Contract becomes the second fundamental institution, and

III. Personal conditions is the last one in this trilogy.

The analysis depends upon the way that we look at things and the purpose we have in view. There is necessarily an overlapping. Contract rights are, as interpreted by American courts, property rights, generally speaking. The Supreme Court of the United States holds that the right to make a contract is a property right.[1] Nevertheless, contract is treated by itself as a distinct right, although sometimes simply to get another point of view.

But it requires no deep study nor profound reflection to lead to the thought that property, and especially private property, means distribution. It signifies a distinction between mine and thine, and that is what we mean by distribution. We mean the assignment of either accumulated property or income to individuals for their use and exclusive control. So the very first thing that greets us is the idea of private property. The inheritance of property, broadly used as in this work, embraces those regulations which determine how property rights pass from generation to generation, and is so fundamental in our social order that this order could be upset by a radical treatment of inheritance.

Let us next consider contract and its conditions. Private property comes to us largely through contract.

How do we receive any income otherwise than through contract? If we are employed by others, contract regulates the condition of employment and determines the income that we shall receive. If we are engaged in buying and selling, we virtually make contracts and through these contracts receive our income. Apart from contract, indeed, there is the subject of gifts. Things may come to us as gifts, but ordinarily and regularly most of us receive our income chiefly through contract, or, to express the same thought differently, we receive through contract the portion of the national dividend which is assigned to us for our support and use. And we can see also in the cases continually coming before the courts for decision, how serious a mistake it is to overlook contract. Although in many particulars the law has lagged behind economic development, in this particular economic theory in its development has lagged behind the law, and economists have not kept pace with the law, because cases relating to income are constantly before the courts and are decided upon some theory of contract.

Vested interests or vested rights are generally rights arising through contract, express or implied. Ordinarily vested interests are the result of contract and property, but they may arise otherwise. While postponing a formal definition to a later place in this treatise we may now say that vested interests are rights of an economic significance which it is held cannot be adversely affected without pecuniary indemnification.

Then take personal conditions, also,—slavery and serfdom and conditions under free contract; surely we

must recognise that these are fundamental in distribution. We might say personal freedom instead of personal conditions, and very often we do find discussions of personal or industrial freedom; but the term personal conditions is used because historically it is more accurate, for we discuss not only freedom but its absence; and also because it is not a unit, but a complex concept and we may have a greater or less degree of it.

We have, then, five fundamental institutions in our economic order. These institutions we shall designate as fundamentals of the first rank. We have also five forces which operate to bring about distribution upon the foundations laid by these five institutions. We shall call these five forces fundamentals of the second rank. These five forces, or fundamentals of the second rank, are:

I. Custom.
II. Competition.
III. Monopoly.
IV. Authority (Public authority especially, although not exclusively).
V. Benevolence.

While all these fundamentals are mentioned in economic treatises, they are not discussed thoroughly and systematically. Frequently a mere allusion is found when thorough examination is required.[2]

We must examine these fundamentals, because they are not given once for all. If they were given once for all and were unchangeable, then we could take them for granted, saying that they constitute forces which

operate continuously, and simply put them to one side as forces which have existed thousands of years and which always operate in one direction and with the same result. But that is not the true condition of affairs. They are not fixed, but are in a perpetual state of evolution. And this must be carefully noted, that every change in one of the fundamentals produces a corresponding change in the distribution of wealth.

It is very often said, that if one wants to improve the distribution of wealth one must change men, and bring it about that they shall have different characteristics, making them more temperate, more industrious, more intellectual, etc., so that for one thing they shall weigh more accurately the advantages of the future when contrasted with the advantages of the present; in other words, so that they shall be ready to sacrifice the present to the future. While it is true that changes in men in these particulars will change distribution, the point emphasised here is this: Take men as they exist to-day in Germany, in England, in the United States, with their characteristics whatever they may be, with their individual qualities whatever they are, neither more nor less temperate, neither more nor less frugal and intellectual than now; gifted with neither more nor less foresight and self-control than now; nevertheless a change in the fundamentals will bring about a corresponding and commensurate change in the distribution of wealth.

Now if this be so, we cannot in distribution take our fundamentals for granted. There is a difference between changing fundamentals and changing the facts

to which they give rise. Some overlook this, although it is generally felt. There are some who say, in opposition to socialism, for example, that if we redistribute the wealth of to-day the old inequalities will appear to-morrow. But this scarcely touches socialism at all. Those who say this have in mind change in the facts to which the fundamentals give rise. But the radical socio-economic reformers do not care so much about the facts to which the fundamentals give rise as about the fundamentals themselves. They want to change the fundamentals, private property, contract, etc. And it must be admitted, that if the changes they desire are to be recommended, the socialists are proceeding in the right way to bring about these changes. They are attacking the fundamentals, and no doubt if the fundamentals could be changed they could change without limit the distribution of wealth; but on the other hand, their changes might bring about (a) disastrous results as to production, (b) other evil social consequences.

It may be asked, why not place personal conditions first? This might seem to be logical, for as the beginning and end of economic activity is man, why not begin with man instead of the institution property? Although this seems to be the logical thing to do, namely, to begin with man or the conditions under which man toils and acquires wealth, yet it is not the right thing to do, because we find on looking into economic history that man has been the tool of others, has lived for the gain of others, and that he has been in consequence private property himself. Consequently we cannot understand personal conditions until we understand

what private property means, because when historically we begin to examine personal conditions we come up against slavery, which means private property. Moreover the passage of the human element from private property to freedom has been a long and continuous process, still going on. To look at this same topic from a different angle, notice that personal conditions including freedom are limited by property rights and to-day vary more or less with the scope of property. And the subject of personal conditions also implies a treatment of contract, because to-day when we want to change personal conditions we encounter contract as an opposing force, wherever it is rigid and inflexible. You say you want to do so and so. You become a member of the legislature and persuade your fellow members to do so and so and the desired law is passed. But it is brought before the courts and declared null and void, because it is held to be contrary to constitutional provisions concerning contract. We must accordingly place private property before personal conditions, and we also have to examine contract before personal conditions.

The first fundamental institution in the distribution of wealth is therefore property, and especially private property; or we may express ourselves more elaborately and say that THE FIRST FUNDAMENTAL INSTITUTION IN THE DISTRIBUTION OF WEALTH IS THE SPHERE OF PRIVATE PROPERTY.

What do we mean by the sphere of private property? The sphere of private property points to the extensivity and the intensivity of property rights. The extensivity of the institution calls attention particularly to its relation to public property, and to free goods, because it finds its bounds extensively, on the one hand in free goods, and on the other hand in public property. Extensivity is not except incidentally a geographical concept; it refers rather to the number and kind of things that may be made private property. As an illustration of change in extensivity, take the public domain of the United States. We Americans had at one time an immense public domain in our country, which has mostly become private property. Public property has become less extensive, and private property more so. Private property in that particular instance has gained on public property. On the other hand, let us take the publicly owned forest land in New York State. Land once private has become public, so that in this particular, private property has become less extensive, and public property more extensive; for we are all familiar with the fact that New York State has acquired large tracts in the Adirondacks [3] and elsewhere. In that particular, private property has lost and public property gained in extensivity. Or we may take the Niagara Falls Park as an illustration; it was once private property but is now public property. The Prussian railway system also furnishes an illustration of growing extensivity of public property.

Now the intensivity, on the other hand, of private property, and also of public property for that matter, refers to the rights which property includes. Private property includes rights more or less numerous. Far from being a simple thing, it is complex, and has been

called by law textbook writers "a bundle of rights." [4] This is a good expression, and we can say that the intensivity of property relates to the size of the bundle, or perhaps better still to the number of sticks in it; a constantly varying number, sometimes including more, sometimes fewer. If the number increases intensivity becomes greater, and if it decreases intensivity becomes less. From 1750 to 1850 there was a general tendency on the part of private property to become more extensive and also more intensive. During the last thirty or forty years it is possible that private property has become rather less extensive, but it is not certain that it has on the whole lost anything in intensivity, having now lost and now gained.

Let us take a hypothetical case as an illustration: Suppose I own some real property and have certain shore rights. Let us suppose that they do not carry with them the right to exclude others from the stream or body of water, as is the case in Rhode Island along the shores of the ocean and the great bodies of water that are connected with the ocean. For, according to the charter of Charles II, the right of access to the shores, and the right to walk on them, belongs to the general public in Rhode Island, and the right to lands adjacent to the shores does not carry with it the right to exclude others from access to the shore. Now if that right should be conveyed, private property would become more intensive.[5]

The history of Massachusetts affords an illustration of legislation rendering the rights of private property in shore lands more intensive. According to the

common law rule, private ownership extended only to high water mark. A colony ordinance in the middle of the seventeenth century, however, extended private ownership to low water mark where the sea does not ebb above 100 rods. But it has been decided that the sea-shore could not be used by the public to reach the water, as that is private property within the hundred-rod limit, and subject to no public use.[6]

Take another illustration. It is held that in parts of Germany the rights of owners of forests do not carry with them the right to exclude others from the enjoyment of the forests as pleasure grounds, those owning the forests not having an unlimited right to exclude others from using them as pleasure grounds within limits, especially from the right to walk through them. What is technically called a servitude has arisen, as in some beautiful forests in Bavaria on the Starnberger See, through which the writer walked in the summer of 1911, the owner having no right to exclude the public, even had he desired to do so. But in the Prussian Parliament and in the Reichstag bills have been discussed which if enacted into law would have increased the rights of forest owners in this particular, giving them greater rights or strengthening their rights to exclude others from walking through the forests, and they would thus have made the right of private property a more intensive right than before. And similarly the right of private property may be made less intensive. Some rights in the bundle may be taken away.

John Stuart Mill says that the institution of private property does not necessarily in itself include the right

to exclude others from the enjoyment of great natural wonders, like Niagara Falls.[7] As construed, it has carried with it such a right. Let us suppose that through custom or statute that right is taken away. Then the right of private property becomes a less intensive right.

It has already been said in a general way in these pages that these fundamentals in the existing social order may not be taken for granted, because they are changeable. Let us notice furthermore that the changes in private property and in all the fundamentals are very largely the result of other economic changes. We have here perpetual action and reaction. The economic changes in division of labour and exchange, continually going on, bring about changes in private property and contract, in vested interests and personal conditions, and then these changes react upon division of labour and exchange.

The right of private property especially may not be taken for granted, although English writers have so treated it. This has been well brought out by Cannan in his *Theories of Production and Distribution,* where he says: "It probably never occurred to Adam Smith to speculate as to the possibility of society existing and enjoying necessaries, conveniences, and amusements without separate property. Separate property was to him a 'natural' institution, which existed in much the same form among savage tribes of hunters and fishermen as in eighteenth century England. Malthus thought separate property a necessary institution which would soon be reëstablished if its abolition were ever accomplished by followers of Godwin. Ricardo, as became a stock-

broker, took it for granted without any consideration. Consequently in almost the whole of the doctrines of these writers the existence of private property and the practice of exchange is assumed."

John Stuart Mill, however, says clearly that private property does not always mean the same thing, but is constantly changing, sometimes meaning one thing and sometimes another. He says it is the first thing to be considered in distribution, and so treats it. He does not handle the subject exhaustively, however, but simply touches upon it, and unfortunately other English writers have not advanced much further the study thus begun.

It may be said in general that the French economists do not differ essentially in their treatment of property and the fundamental economic institutions of society from the English. Jean Baptiste Say, for example, in his *Political Economy,* Book I, Chap. 14, uses these words in speaking of property: "It is the province of speculative philosophy to trace the origin of the right of property; of legislation to regulate its transfer; and of political science to devise the surest means of protecting that right. Political Economy recognises the right of property solely as the most powerful of all encouragements to the multiplication of wealth, and is satisfied with its actual stability, without inquiring about its origins or its safeguards." Notice that he says, it is one of the most powerful of all encouragements to the multiplication of wealth and then does not inquire into its origin, its stability, or its safeguards, thus implying that it always works in one direction and with uniform force.

In his *Cours Complet d'Économie Practique*, however, in Part IV, he discusses the influence of institutions upon the economy of societies. In Chapter 2 he uses words in regard to property similar to those already quoted. Nevertheless he devotes five chapters to different kinds of property. While these are creditable, they are on the whole formal and descriptive, and his treatment of property does not influence his general economic theory. Another French writer, however, deserves special mention in this connection, and that is Courcelle Seneuil, who discusses fundamental institutions in his *Traité d'Économie Politique*, the first edition of which appeared in 1858–9 and the third in 1891. His Book II of Vol. I is entitled, "De l'appropriation des richesses." There are two modes of appropriation, he says, based respectively on liberty and authority. He develops this idea at length and in a very suggestive fashion. A typical quotation is as follows (pp. 215, 216): "The faculties of the individual are developed and employed in that social *milieu* in the midst of which each of us begins and ends his existence; the laws of the appropriation (distribution) of labour and of wealth are thus *superimposed;* they are social, and emanate from a sovereign authority. One can at least imagine a social order in which distribution ('appropriation') is regulated in every detail by authority, but we are not able, except with great difficulty and by premising great changes in human nature as we know it, to imagine a system of distribution determined only by liberty."

Again, (p. 217) after discussing the growth of individual liberty, he says: "However, freedom of labour

and the right of property remain guaranteed, determined and limited by social authority, under the sovereignty of which the industrial hierarchy is established and modified every day by contracts, under general conditions which are very simple."

There is much more in this vein. Courcelle Seneuil himself thought this emphasis on the fact that liberty (as conceived by the classical economic writers) and authority (in the sense of social control, both direct and through institutions) were coördinate factors in determining distribution, was one of his principal contributions. *Cf.* Book I, Appendix No. I, p. 509.

The treatment of property and contract by Courcelle Seneuil deserves recognition. Unfortunately, his perception of the importance of the fundamental economic institutions did not lead in his hands to any large results, and the suggestions he made failed to produce a strong impression upon the French economists, just as the suggestions of Mill failed to produce the effect in England which might have been anticipated.

What is here given in regard to the English and French writers is merely suggestive and illustrative, and cannot be further elaborated in this place, inasmuch as to do so would take us too far into the history of economic thought.

English and American courts have likewise generally taken property for granted, basing it on theories of natural and inalienable rights. "The right of acquiring and possessing property" and having it protected, is one of the "natural, inherent, and inalienable rights of man." [Vanhorne *v.* Dorrance, 2 Dall. 310

(1795).] These "natural rights" are looked upon as growing out of the nature of man, not depending primarily on law but on the civilised state of human existence. [See Borden *v.* State, 11 Ark. 519, 44 Am. Dec. 217, (1851).] The theory of our law is that it would be impossible to have our present civilisation without the institution of private property in some form or other. As we shall see more clearly as we proceed, *the tendency is toward an increasing public interest in private property, but no tendency whatever is discovered towards an abrogation of the right and this is clearly the drift of the decisions of American courts.* Blackstone's account of the origin and development of the rights of property is interesting in this connection.[8]

Notes and References to Chapter I

[1] P. 53. American courts have uniformly held, that the "right to acquire and possess property necessarily includes the right to contract." [Leep *v.* Ry. Co., 58 Ark. 407 (1894) at p. 415; Mathews *v.* People, 202 Ill. 389 (1903); Commonwealth *v.* Perry, 155 Mass. 117 (1891); Frorer *v.* People, 31 N. E. 395 (1893)].

Interesting cases bearing on this "right" have come up in the courts, pertaining to certain kinds of labour contracts. See Shaver *v.* Penn. Ry. Co., 71 Fed. 931 (1896); Commonwealth *v.* Perry, 155 Mass. 117 (1891). See also dissenting opinion of Mr. Justice Holmes; Leep *v.* Ry. Co., 58 Ark. 407 (1894). These are merely illustrative. Many other references could be given.

[2] P. 55. Professor Commons in his *Distribution of Wealth* uses these words in speaking of distribution, "It is the outcome of social organization based on private property, division of labor, and exchange." He apparently does not mean here to give the result of a careful, philosophical analysis, but throws it out as a suggestion. This would imply three fundamentals, private property, exchange, and division of labour. This statement brings before us one of the corner-stones of the social order, namely, private property, and undoubtedly brings before us two of the main features of modern economic society, namely, exchange and division of labour which, however, do not seem to be fundamental in the same sense that private property and contract are. Exchange and division of labour are the natural outcome of the fundamentals. Given private property, contract, and competition, we must have sooner or later division of labour and exchange. They are the consequence of these fundamentals.

[3] P. 59. In 1910 the area amounted to 1,660,715 acres. Sixteenth Annual Report of the Forest, Fish and Game Commission of New York, p. 74.

[4] P. 60. An important case in which this idea of property as a bundle of rights is developed is Eaton *v.* The Boston, Concord and Montreal Railroad, 51 N. H. 504, pp. 510–2 (1872.)

[5] P. 60. The Charter of Rhode Island and Providence Plantations, granted by Charles II in 1663, specifies:

". . . they (the subjects) and every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish; and to build and to set upon the waste land, belonging to the said Colony and Plantations, such wharfs, stages and work houses as shall be necessary for the salting, drying and keeping of their fish, to be taken or gotten upon that coast." (Thorpe, *Constitutions*, Vol. 6, p 3219.)

And these rights are re-guaranteed in the Rhode Island Constitution of 1843:

"The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration." (Art. 1, Sec. 17.)

[6] P. 61. The Colony ordinance, 1647, stated that private ownership was subject to the right of navigation and other public rights, subject to "low water-mark where the sea doth not ebb above 100 rods." But the decision against using the sea-shore to reach water was given in Butler *v.* Atty. Gen. Mass., 8 L. R. A. (N. S.) 1047, 80 N. E. 688 (1907). See also the earlier case of Blundell *v.* Catterall, 5 Barn. & Ald. 268 (1821); also Farnham, *Waters*, Vol. I, p. 657. The right to bathe is recognised if water can be reached by public highways, landings, etc. Public regulation may be established governing the use of the shore, if public.

An interesting discussion of this ordinance is given in the leading case on the police power by Chief Justice Shaw, of Massachusetts, in Commonwealth *v.* Alger (7 Cush. 53) 1851; reprinted in Thayer's *Cases on Constitutional Law*, Vol. I, pp. 693–706. The date 1647 is as given in this opinion.

[7] P. 62. "The exclusive right to the land for purposes of cultivation does not imply an exclusive right to it for purposes of access; and no such right ought to be recognized, except to the extent necessary to protect the produce against damage, and the owner's privacy against invasion. The pretension of two dukes (1848) to shut up a part of the Highlands, and exclude the rest of mankind from many square miles of mountain scenery to prevent disturbance to wild animals, is an abuse; it exceeds the legitimate bounds of the

right of landed property. When land is not intended to be cultivated, no good reason can in general be given for its being private property at all; and if any one is permitted to call it his, he ought to know that he holds it by sufferance of the community, and on an implied condition that his ownership, since it cannot possibly do them any good, at least shall not deprive them of any, which they could have derived from the land if it had been unappropriated." *Principles of Political Economy*, Bk. II, Chap. II, § 6.

It is precisely in this spirit that a bill was introduced into the British Parliament in 1909, entitled "A Bill to secure to the Public the right of Access to Mountains and Moorlands in Scotland." It provides that, "Subject to the provisions hereinafter contained, no owner or occupier of uncultivated mountain or moorlands in Scotland shall be entitled to exclude any person from walking or being on such lands for the purposes of recreation or scientific or artistic study, or to molest him in so walking or being." [See 2, Bill No. 31, *British Parliamentary Papers*, 1909, Vol. I.] The provisions referred to are intended to prevent any abuse on the part of the general public of the rights granted which interfere with the legitimate use of the property by the owner. It is to be observed that it is restricted to Scotland. It has not as yet become a law, but is illustrative of the drift of opinion.

In England an organisation called "The National Trust" has been formed for the ownership of places of historic interest or natural beauty, in the interest of the public. It now controls thirty-five properties. People are urged to contribute to commemorate the late King Edward. *Country Life* (England), July 15, 1911.

[8] P. 66. See Blackstone's *Commentaries*, Bk. II, Chap. I.

APPENDIX TO CHAPTER I

THE DISCUSSION OF PROPERTY IN ECONOMIC LITERATURE

Although the classical English political economy neglected property we find the subject treated by writers who may be regarded as Adam Smith's predecessors and contemporaries, but with little appreciation of its economic significance. The treatment is chiefly found in works of a somewhat general character which come within the field of political and social science, or perhaps we may say political philosophy, using the expression in a broad sense. Such writers as Hobbes, Locke, More, Harrington, Ferguson and Godwin discussed property along with other social and economic subjects.

Hobbes and Locke give us theories of the origin of property, discussed later in this work (Chapter XXII of Part I). Sir Thomas More in his *Utopia* (1516) and Godwin in his *Political Justice* (1792) alike found the roots of political and economic evils in private property and recommended communism—Godwin anarchism as well. The discussion of property in Harrington's *Commonwealth of Oceana* (1656) has greater significance, because Harrington connects political and economic power, and advocates a wide distribution of landed property as a basis of the commonwealth. Ferguson's discussion of property in his *History of Civil Society* (1765) is formal and lacks economic significance. Other

writers in abundance could be cited who mention property and who discuss it in some of its phases, especially theological writers. But they do not give us an economic treatment of property.

On the other hand, we do find discussions of property of some economic significance by a class of writers who have been unduly neglected by historians of economic theories, namely, the authors of the older works on husbandry. Many of them show an appreciation of the significance of private property in land. Mention may be made of Blith's *Husbandry* (1652), of Jethro Tull's *Horse Hoeing Husbandry* (1733), and of the various works of Arthur Young and William Marshall, which appeared at the close of the eighteenth and early part of the nineteenth century; also of the various other authors who wrote the *Agricultural Survey of England* and reported to the old Board of Agriculture (1793–1825). These writers discussed tenancy in its various forms, also large and small holdings, compensation for improvements, occupying ownership—all economic questions of property. Arthur Young's oft-quoted remark that "the magic of property turns sand into gold" has real economic significance.

When we come to Adam Smith's *Wealth of Nations* we find a treatment of political economy which does not include any treatment of property showing its significance; but Adam Smith included property in the book which he planned but did not publish, the character of which is indicated by his lectures on Justice, Revenue, Police and Arms. But an examination of the notes of these lectures as published shows a discussion which is

purely formal and lacks even the first glimmering of an idea of the economic meaning of property.

It was, as we have seen, under the influence of the philosophy of nature, that the successors of Adam Smith dropped the discussion of property and of fundamental economic institutions generally. It is here especially that we see the influence of the Physiocrats and of the French, but, as noted already, Mill again took up the subject; unhappily, however, he was not generally followed in England or America. The treatment of property and contract was relegated to writers on jurisprudence, political science, moral philosophy, etc. Among these we find a noteworthy treatment in Bentham, who is said to have continued the older tradition, and likewise in Austin, whose work cannot be omitted from any mention of English contributions to the economic discussion of property. And some modern authorities on jurisprudence have followed the good example set by these older writers. Among these the late Professor F. W. Maitland is conspicuous. (See his *Domesday Book and Beyond*, 1907, and his *Collected Papers*, 1911.)

The early English socialists, however, necessarily discussed property and even to-day possibly the best discussion of property by English economic writers is found in the writings of the English socialists.

On the other hand, in Germany, the connection of economics with the actual life of the state renders it impossible that property could be omitted in economics. It is instructive to take an English textbook of political economy belonging to the classical school and compare

it with the discussion of political economy by Professor Knies in his *Politische Oekonomie vom Geschichtlichen Standpunkte,* first edition 1853, second edition 1883. In this book we find an appreciation of the significance of property in economic life and a discussion of it in different parts of the book. For example, in Part II, Chapter 3, we find a discussion of property in capital. In Book III, Chapter 2, we find a discussion of private property regarded as an absolute and unlimited right, and the refutation of this idea of private property; also illustrations given, by a discussion of property among the Greeks and Romans and the old Germans. Then follows an examination of various theories of property, and a discussion of the proposed extension of the concept of property to personal services and relations. All this is mentioned merely by way of illustration. It is contended that in universities, one chief function of which is to prepare men for life as servants of the state and in which political economy must therefore be realistic, property could not be neglected by any true authority, not even when the influence of the French social philosophy of nature was at its height.

Professor Cannan speaks about the neglect of property by English writers, and in glancing through his treatment of *Theories of Production and Distribution in English Political Economy from* 1776 *to* 1848, the author does not find that the word property occurs in the analytical table of contents.

It is interesting to turn to two or three modern English and American writers. President Hadley's work on political economy, entitled *Economics—An Account of*

the Relation between Private Property and Public Welfare, appeared in 1896. The title itself would indicate an exhaustive treatment of private property because it shows that public welfare depends upon it. While Hadley says more about property than most of the English works, his *Economics* does not differ essentially in its treatment of property from the classical English political economy. Hadley distinguishes between public wealth (social wealth in its broadest sense, including pure air, etc.) and private property ("rights of exclusion"): which suggests the emphasis laid by Lauderdale, Sismondi and others upon the difference between "private riches" and "public wealth". Property is, however, treated as essentially a unified concept, not as something perpetually in flux, changing the distribution of wealth with every change in its own content. The chief point in Hadley's treatment is the emphasis laid and well laid upon the favourable influence of property in increasing the production of wealth. Strangely enough he says little about property and distribution, although, as already seen, property itself means distribution.

Turning to Alfred Marshall's great work, the *Principles of Economics*, we find in the index under the "rights of property" reference to four different places. In the first reference (p. 48) the rights of property are discussed in a broad and liberal spirit; and it is worth while to quote what he says at this point:

"The rights of property, as such, have not been venerated by those master minds who have built up economic science; but the authority of the science has been wrongly assumed

by some who have pushed the claims of vested rights to extreme and anti-social uses. It may be well therefore to note that the tendency of careful economic study is to base the rights of private property not on any abstract principle, but on the observation that in the past they have been inseparable from solid progress; and that therefore it is the part of responsible men to proceed cautiously and tentatively in abrogating or modifying even such rights as may seem to be inappropriate to the ideal conditions of social life."

It will be seen that there is no reference here to any natural rights in support of property; but it is brought forward as a thing which ought to be treated carefully, because in the past it has been found inseparable from social progress.

The same thought is repeated on p. 721. On this page also we find a sentence which should be quoted:

"And private property, the necessity for which doubtless reaches no deeper than the qualities of human nature, would become harmless at the same time that it became unnecessary."

The idea is that property would become unnecessary if human nature changed in such a manner that all men should become angelic in character and at the same time it would become harmless. If property reaches to the same depth as the qualities of human nature do, it would seem to be thoroughly established.

The index refers also to p. 800, in which Marshall discusses the single tax. He speaks about the adverse effects of a change, especially a sudden change in taxation which should exempt buildings and lay the tax

exclusively on site values. He says truly that it would add to the value of some properties at the expense of others. He also says:

"But unless accompanied by energetic action on the part of urban authorities in planning out the lines on which towns should grow, it would result in hasty and inappropriate building; a mistake for which coming generations would pay a high price in the loss of beauty and perhaps of health."

And this can be seen in the United States where the property tax on site values gives us in many places a far nearer approximation to the single tax than we find elsewhere. While our system of taxation on full selling value is one of which the present author approves, at the same time he thinks we do have these evils of which Marshall makes mention, and that these evils are to be guarded against by such action as he suggests.

We are also referred to page 803, in which we are told that to abolish private ownership of land after it has been recognised would destroy security and shake the foundations of society. At the same time we do find approval given to a larger taxation of land at the expense of extreme rights in private property in land, and especially do we find a recommendation that the revenue yielded by such taxation should be used to secure air and light and play room.

Modern American writers appear generally to give more attention to property than the modern English economists do. This opinion seems to be substantiated by an examination of Professor Taussig's *Principles of Economics*. Turning to the index, five references

are found, but three of these are to whole chapters. In Chapter Fifty-four inheritance is discussed, and then, in Section Six, the grounds on which private property rests are examined. We find frank mention of some of the evils of private property with some exhortation, at least by suggestion, to the leisure class to make good use of their position of vantage.

The conclusion is finally reached that private property, inequality, and the leisure class will long continue to exist. Chapters Sixty-four and Sixty-five discuss this general subject in connection with socialism; but no new conclusions are reached. In Volume II landed property is discussed, and the conclusion again is reached that private ownership of land having been already recognised, should be continued so far as agricultural land is concerned; and we find under a discussion of urban land a certain favourable attitude toward measures which tend to bring into the public treasury increments in land values in so far as these are due to general social influences. We may say, then, in conclusion, that we do not find anything very different in Taussig from the treatment accorded property by the classical political economy. More descriptive matter is given, and the whole discussion is more realistic so far as property is concerned. Taussig is more closely associated with Mill than with any other English writer, although his admiration for Marshall is evident. It is interesting to observe that Mill was used by Taussig in his own classes as a textbook long after most teachers felt obliged to use some more modern writer.[1]

Note to Appendix to Chapter I

[1] P. 77. For the latest work of significance on the subject of this appendix the reader is referred to *Property, Its Rights and Duties—Historically, Philosophically and Religiously Regarded*, essays by Professor L. T. Hobhouse, Canon Rashdall, Canon Scott Holland and other writers, edited by the Bishop of Oxford. It is written from a sociological and ethical point of view.

CHAPTER II

ILLUSTRATIONS SHOWING THE IMPORTANCE OF PROPERTY IN WEALTH DISTRIBUTION

First, we notice that in our present socio-economic order distribution in its broadest sense is wholly a question of private and public property. If we should abolish private property, we would not have the present distribution which flows from private property as its deepest source; for with the abolition of private property, distribution would become a public function, inasmuch as the only other possible substitute is public property, and this necessarily carries with it distribution as a public process. The owner of property, the general public, would then have to bring about some sort of distribution. But we do not now take up the question in that broad sense. On the contrary, it is desired to show the influence that a modification of private property through the extension of private property or the restriction of private property, or through a change in the intensivity of private property, must have on the distribution of wealth. We may take up several kinds of private property and show how vast the changes are which can be reached in distribution while we still keep private property as an institution and modify it in extensivity and intensivity, and especially, for the present purpose, in extensivity.

Let us consider an illustration which readily suggests itself to one who reflects upon the distribution of property in the United States. It is said that the first Cornelius Vanderbilt, who founded the Vanderbilt family, made a fortune of one hundred million dollars out of railways, and it is said that he made it legitimately, it being claimed that he rendered very valuable services to the country and that these services were worth quite one hundred million dollars if not a good deal more. We are not, however, concerned with his economic service at the present time, but with the fact that through railway construction and the employment and management of railway property in one way or another, he acquired a fortune of one hundred million dollars. This fortune, as well as the subsequent fortunes of this very wealthy family, grew out of a certain kind of private property, namely, private property in railways. It was that institution, a product of law, which made the acquisition of this fortune a possibility. If instead of private property in railways we had had public property, we would not have had this fortune. This does not say that the Vanderbilt fortune is or is not a good thing, or that in some other way this family might not have become wealthy. We are simply studying the facts of the case. To bring out the significance of private property in railways in the United States, and particularly in New York State where the fortune was chiefly acquired, we might contrast New York with one of the German States. In Würtemberg, Germany, the railways were public property from the beginning and there was no opportunity for anyone through railway ownership to acquire a large fortune, because the railways were managed by officials receiving small salaries. There was in Würtemberg in the early days of railways in that State a very able railway manager whose services resembled in many respects those of the first Cornelius Vanderbilt, because the essential service of the first Cornelius Vanderbilt consisted in railway concentration and unification. One of the most important things which Vanderbilt did was to consolidate many lines into the great New York Central and Hudson River Line. The man in Würtemberg referred to effected a real unity in the administration of the railways in that State and developed and built up there a very excellent railway system; and his salary was less than $3,000 a year. But let us say that he received $3,000 a year. What would that mean capitalised? Let us say $50,000, although that is an overestimate of the value of a $3,000 salary, because life is so precarious. So that the one man received one hundred million dollars and the other man say fifty thousand dollars for his services, which is as two thousand to one. We have here, it would appear, two men of somewhat the same characteristics, of the same order of ability, and probably one man was of equal integrity with the other—we have no reason to suppose otherwise—but through a difference in property we have a vast difference in distribution. While the railway interests of Würtemberg are smaller than the railway interests with which Mr. Vanderbilt was concerned, this difference in their magnitude is not at all in proportion to the difference in distribution.[1]

And now we may take an illustration in which Germany and the United States play the reverse rôles. During our entire national existence the post-office has been a public institution, and no one has acquired out of post-office property and management a large fortune, although many men have rendered distinguished public services in post-office work in the United States. The Postmasters-General have received salaries scarcely sufficient to cover living expenses according to the standard of life imposed upon them by public opinion, while residing in the capital of the country.[2] Some of them have been men of capacity who have put their best talents into the postal service, but no American has ever legitimately acquired a fortune through connection with the postal service, and probably no one has done so illegitimately.

Now on the other hand the postal system in a great part of Germany and in a large part of the continent of Europe was for centuries a private institution just as American railways are, and the great postal magnates, as we would say, of the continent of Europe for nearly four hundred years were men who belonged to the family of Thurn and Taxis. The family grew rich and powerful through private property in the post-office, and the private management of the post-office system. In 1460 one Roger von Taxis erected the first post-office in the Tyrol. That seems to be the beginning of the post-office operations of this family. In 1595 the family received as a feudal grant the imperial post-office in the Spanish Netherlands. In 1601 the members of the family became imperial counts, and in 1686

they became imperial princes. About a hundred years later the family acquired by purchase four principalities. In 1803 the postal property and services of the family apparently commenced to decline because public authority began to encroach upon private management, and the family lost a number of the post-offices in the Netherlands on the left bank of the Rhine. For this they had to have an indemnity and they received therefor a principality, and in 1819 by giving up other postal rights they received another principality, and still another in 1867 for giving up further postal rights; then in the last named year by giving up all rights still left, they received nine million francs. Their possessions now amount to 730 square miles, making them one of the richest and most powerful families in Europe, and they became so through private property in the post-office.[3]

Here we have two contrasts, in the United States a large fortune acquired through railways, and in Europe an enormous fortune, together with high rank, acquired through the post-office. It is wonderful to trace for four hundred years the progress in wealth of this family, and this progress rests upon private property in the post-office. Now, what would have happened if the post-office and its management had been a public function for these four hundred years all over Europe? Of course we cannot say. Doubtless a family of such energy as this would elsewhere have acquired wealth, but the wealth that they did acquire rests upon the development in one direction of the institution of private property.

As another example we may take up the telegraph in the United States and show how fortunes have been acquired directly through it. The telephone, electric lighting works, and street railways are examples of certain lines of industry which are sometimes publicly and sometimes privately owned and managed; and every difference in property brings about a corresponding difference in the distribution of wealth. Let us consider also the systems of water supply in London and New York. In New York City the water works have been public property for a very long time. No one has acquired a fortune through the public ownership of the water works, but the water works have tended to the broad diffusion of well-being. With a very low charge for water service there has been for most of the time an abundant supply of water for public and private use. In London, however, the water works were for a long time private property, and many acquired large fortunes through those water works, while at the same time complaint was formerly made that the people were furnished but a scanty supply of poor water. However, the Metropolitan Water Act of 1902 authorised the public purchase of the plants of the eight private companies supplying London and the surrounding districts with water, and the supply is now pure and adequate.

Now it may be argued that in Germany and continental Europe while the family of Thurn and Taxis owned the post-office business it was so much better managed than it could have been in earlier ages by public authority in Europe, that there was on the whole a public gain. That may or may not be true. And the

same may be said of the railways in the United States and England. But with that we are not concerned now. We simply want at the present time to show the influence upon the distribution of wealth of certain developments of public and private property.

Two lists of rich men, lying before the writer, afford abundant illustrations of the influence of forms of private property on wealth distribution. The one list, published by the *New York Sun* in 1855, contains the names of wealthy citizens of the City of New York, and the other is a list of American millionaires, published by the *New York Tribune* in 1892, thirty-seven years later. Of course there are mistakes in both lists, but in a rough way we are perhaps not far wrong if we let the mistakes in the one offset the mistakes in the other. There is a general tendency to exaggerate fortunes, but this would probably be as apparent in one list as in the other.

The first fact which would attract the attention of anyone comparing these two lists is the immense increase in the number of large fortunes which has taken place during this period of thirty-seven years, and the changes in the idea of what constitutes a large fortune. In 1855, $100,000 was a large fortune in New York City, so that in this list published by the *New York Sun* in 1855 everyone is included who is reputed to be worth $100,000. On the other hand, the *Tribune* list includes only millionaires. The contrast is more marked than might appear at first, because the *Tribune* list is for the entire country and not New York City alone, where the concentration is far greater than in the country as a

whole. Let the little book giving the list for 1855 open where it will and glance down the page. It opens by chance at page eight. Here we find no fortune of one million dollars, and on the next page likewise we find no fortune of one million dollars. The highest fortune mentioned on either page is $800,000, which P. T. Barnum was reputed to be worth at that time, also a man by the name of Bartley was entered for the same figure. On the next page the largest fortune is $500,000, on the next $600,000, on the next $300,000; this makes five pages. On page thirteen mention is made of a fortune of one and a half millions, which James Boorman was said to be worth. So it is only on one of the six pages examined that we find a fortune of one million dollars. Turning now to the *Tribune* list we find very readily, if we open to New York City, men whose fortunes are reputed to be ten millions, twenty millions, fifty millions, and even more. If we examine further into this list we find that it gives the reputed sources of these great fortunes. The *New York Tribune* list was got together in order to prove that large fortunes were not due to the protective tariff, but it is of great importance in other connections than that of the protective tariff, although it did perhaps prove the point that the protective tariff is not the chief cause of large fortunes. We have in this list the name of Westinghouse, who made his fortune out of patented air brakes; Vandergrief, whose wealth came from petroleum investments; Shendley, who inherited real estate which increased in value, etc., etc. Other fortunes were made in different lines of industry: The Union Transportation Line,

rise in the value of real estate, coke manufacturing, oil pipe lines, leather tanning, Pennsylvania Railway stock, private bank stock, marble, locomotive building, telegraph companies, and telephones, railway stock and the management of railways figuring very largely. But the sum and substance of it all is this, we find among the sources of great wealth every kind of property; but public utilities, such as railways, street car lines, and telegraph lines and natural treasures, such as oil, minerals and forests, are especially prominent sources of the great fortunes of the country. Real estate is likewise frequently mentioned, but apparently has not been so potent a source of great fortunes.

However, we have not merely to do with the question of private property *versus* public property as the cause of particular kinds of distribution, but with the conditions under which private property is held; not only with the extensivity of property but with its intensivity. Consider, for instance, franchises as a source of fortunes. It makes a difference whether they are limited or unlimited. The mere fact that a franchise is limited exercises an influence upon the distribution of wealth. To illustrate this we might contrast the management of street car lines in New York City and in Berlin. In New York the street car lines are private property and are largely managed by private corporations with unlimited franchises. More recently, however, franchises have been limited, and the operations of all the companies are under the general control of two commissions.[4] In Berlin they are strictly limited, some of them expiring in 1911, when a contract was

entered into, regulating anew the time for which the right to use the streets was granted to the companies; also, the payments from the companies were raised and various details of administration were dictated by the city. The result is that while the street cars are the source of large fortunes and have had a great influence upon the distribution of wealth, a large part of the franchise value that has gone into a few pockets in New York City will in Berlin ultimately go into the public treasury and be diffused for the public good in low fares, etc.

Consider also the New Zealand land policy. It is the policy of New Zealand to substitute leases for full private property rights, and to bring it about that the increment due to general improvement shall flow into the general treasury. As a result, if we should look over a list of the wealthy citizens of New Zealand forty or fifty years from now, provided the present policy continues and is successful in achieving its purpose,[5] we would not find real estate playing so large a rôle as a source of large fortunes as it does elsewhere.

We must consider also the laws, which do not regulate private property itself, but the modes of its acquisition. These are a different thing from the laws which regulate property, and have an immense influence upon the distribution of wealth. We may compare France and England in this particular. The laws of inheritance in England have been designed with the purpose of bringing about to a certain extent the concentration of landed property, their purpose being to build up great families.[6] In France since the time of the Revolution the aim of the laws of inheritance has been to bring about the diffusion of property, and consequently the bulk of the property is divided equally among the children, instead of favouring the eldest son as in England; and the father of a family has very little power over the distribution of his property.[7] One might not think that in two or three generations, other things remaining the same, such a difference in laws of inheritance would bring about a great change in the distribution of property. But they have done so. They have operated "continuously and silently" to quote an expression used by Judge John F. Dillon; and although the laws are not radical, they have helped bring about an immense diffusion of property in France, so that real estate is being widely distributed. Agricultural France is for the most part cut up into a great number of small farms, although some parts are an exception to the general rule; whereas in England it is divided among large families; so that the "continuous and silent operations" of these laws have exercised a great influence upon the distribution of property, sometimes in one direction, sometimes in another. Much depends upon what the laws aim at accomplishing and how intelligently they are framed. Some socialists, especially the earlier ones, have proposed to introduce socialism simply through the action of the laws of inheritance, gradually reducing the amount of private property until it should be replaced by public property; and socialism would thus be inaugurated.

Even the laws relating to mere *transfer* of property other than by descent and inheritance have also an im-

portant bearing upon distribution. In countries where sale and transfer of land are involved and burdensome, there is less traffic in real estate than there would be otherwise and large estates are encouraged. Under the common law, there were many customs of feudal origin that have burdened and still burden land transfer in England. Blackstone describes these.

In Belgium, transfers of land have been hampered by heavy fees on deeds and by various charges. At last the agitation of the liberals and socialists has resulted in lessening the payments to the state by one-half, in the case of workingmen who buy land in the country and also in the case of land for the erection of workingmen's homes, and to that extent transfers have been facilitated. Nevertheless the total charges for transfers are still very high and in the case of an ordinary transfer of property valued at £500 would amount to 8-1/3 per cent.; even were that divided in two, the charge would be heavy. As transfers in Belgium are frequent, the conclusion is reached that other things may more than counterbalance heavy charges of this kind.[8] On the whole, there has been a marked tendency the world over to make the sales of land approximate in ease the sales of personal property. A legislature may crush any business by imposing onerous duties on transfers.

These are simply illustrations showing the influence of particular laws of property and laws governing the acquisition of property upon the distribution of wealth. Now if we have fairly grasped the import of these illustrations, it becomes clear to us how absolutely impossible it is to discuss intelligently and thoroughly the distribution of wealth without an examination into the economic aspects of private property, without studying them in their interrelations, and especially without considering quantitatively and qualitatively the relations of public and private property.

Perhaps at this point it may be mentioned as a bare suggestion that if we take away one after another various methods of acquiring large fortunes there will be increasing competition in the fields still left open to the great industrial leaders and that they may be expected to render their services under conditions more advantageous to the general public. If public utilities, etc., are publicly owned, opportunities for vast fortunes diminish. But international relations still furnish opportunities, and the exploitation of backward countries, etc., gives us many a "twilight zone" where there is inadequate social control.

But the enthusiastic reformer must be cautious in drawing practical conclusions. It is at least conceivable that public waste and civic demoralisation may result from this suggested extension of the sphere of public action and narrowing of the field of private activity. Also, it must be considered what use would be made by organised political society (state in the generic sense) of the potential gains of public industry. Would a better use be made of wealth as a whole than is made now?

Notes and References to Chapter II

[1] P. 81. At the death of Cornelius Vanderbilt in 1877, the New York Central and Hudson River Railway was 978 miles long; with the Harlem Railway and side lines there was an aggregate of 2,128 miles under one management, with a capital value of $149,000,000, half of which is said to have belonged to Vanderbilt and his family. Poor's *Manual of Railroads* for 1912 gives the mileage for the New York Central on Dec. 31, 1911 thus: Owned, 805.49 miles; operated 3,790.23 miles. This is exclusive of lines like the Lake Shore and Big Four which are controlled by the Vanderbilt interests. The *Statesman's Year Book* for 1912 states that on March 31, 1911, Würtemberg had 2,039 kilometers (1,264 miles) of publicly owned railways.

If we were to make a detailed comparison, we should have to make allowances for risk incurred by private capital in the case of Cornelius Vanderbilt, and other factors would enter in.

[2] P. 82. The first Postmaster-General received $1,000 a year. The present incumbent receives $12,000 a year; each of his four assistants, $5,000 a year.

[3] P. 83. For brief historical sketch of this family see Meyer's *Konversationslexikon.*

[4] P. 87. Two or three franchises granted before 1875 (by the State legislature) required compensation. The general street railway law of 1884 ensured that in cities of 250,000 or more, 3% of the gross receipts for the first five years, 5% thereafter, should go to the city. From 1886 to 1897 franchises were sold at auction to the company promising to pay the largest percentage of gross receipts to the city. This plan was unsuccessful. Franchises limited to fifty years with revaluation after twenty-five years were required and municipal ownership made lawful by the Greater New York charter in 1897.

New York has since 1905 had a municipal bureau of franchises, which undertakes to furnish information to the law department of the city and the Board of Estimate and Apportionment regarding all franchise applications, and to see that the companies live up to franchise obligations. Since that time a second bureau of franchises

has been established under the Public Service Commission of New York City's first district, so that now all new franchises must be approved by two commissions. See Wilcox, *Municipal Franchises,* Vol. II, Chap. 24.

[5] P. 88. The success of the measure is extremely problematical. Strong pressure, it is said, is being brought to bear by public land tenants to have their leases converted into fee-simple titles; or to secure leases for less than full value; and if the tenants prevail leases may be the source of individual fortunes. If the leases call for an annual rent payment, relatively less than the real estate taxes in a State like Wisconsin, they would to that extent be a more potent source of individual fortunes. And American experience warrants us in believing that it is not at all improbable that a lease system would have precisely this termination. The author expects to deal at greater length with this problem in the volume on *Landed Property and the Rent of Land.*

We find speculation in leaseholds in London and they may be the source of fortunes there, all depending upon how closely contract rent during the period of the lease approximates economic rent.

[6] P. 88. This is well brought out in McCulloch, *On Succession to Property,* especially in Chap. II on "Influence of the Law, or Custom, of Primogeniture."

[7] P. 89. "A man can only dispose of a half of his property by gift *inter vivos* or by will if he leaves a legitimate child surviving him. If he leaves two children he can only dispose of a third. If he leaves three or more he can only dispose of a quarter.

"A man can only dispose of half of his property, either by donation *inter vivos* or by will; if, though he has no children, he leaves one or more ascendants in both the paternal and maternal lines; and can dispose of only three-quarters if he leaves ascendants in only one line." *French Civil Code,* tr. by E. Blackwood Wright (1908), §§ 913, 914.

[8] P. 90. Rowntree, *Land and Labour: Lessons from Belgium,* pp. 61–66.

CHAPTER III

PROPERTY DEFINED AND DESCRIBED

We have been discussing property and it has been assumed that the reader understands what property is. While it has been described in a general way, no formal definition of it has been offered.

I. THE DEFINITION OF PROPERTY

Property is traced back by many to the distinction between persons and things. Philosophical writers, seeking ultimate causes, frequently find a foundation for property in this distinction between persons and things; the person having will and things being without will. Things without will, it is said, are under the absolute control of men with will. It is the purpose, the function, the design of things to serve persons with wills, because things have no purpose of their own. This thought is elaborated by a German writer in the following quotation: "The concept property rests in its final analysis in the opposition between person and thing. The thing, because it is without will, is destined to be governed by the person with will. This rulership is in itself unlimited; it reaches just as far as it is physically possible to exercise it. But it admits of limitations without changing its nature, and it is just as im-

possible for the legal order to renounce the limitation of the right of control over the single thing, as it is to fail to admit that in itself this right of control is without limits." [1]

A similar thought is found in Blackstone, who says: "In the beginning of the world, we are informed by Holy Writ, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth.' This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject." [2]

While one statement is characteristically English and the other is characteristically German, they are really the same statement in different forms and both mean the same thing. One traces back this distinction to Holy Writ and the decrees of the all-bountiful Creator, and the other makes the distinction turn upon will.

Both definitions imply, however, that property, whatever its first source, has to do with relations among men, and that its purpose is to subserve human welfare. One man or an association of men may own property, because property has to do with relations among men. Slaves cannot own property, however, because they are not full human beings. As they are simply chattels, they cannot enjoy full rights of property. When they have seemed to own property, it has been only by grace, and their rights have necessarily been even at best mutilated and imperfect. Chattels and things cannot own property. The case of a tree in Athens, Georgia, which

is erroneously said to own itself and the plot of ground around it, illustrates the absurdity of making property, in itself, a fetish independent of all human relations. A typical notice of this tree reads as follows:

"A TREE THAT OWNS LAND

"There is a tree in Athens, Georgia, which is a property-holder. In the early part of the century the land on which it stands was owned by Col. W. H. Jackson, who took great delight in watching its growth and enjoying its shade. In his old age the tree had reached magnificent proportions, and the thought of its being destroyed by those who would come after him was so repugnant that he recorded a deed conveying to it all the land within a radius of eight feet of it."

Of course the kind owner of the tree, who was an educated man, realised that the tree could not own land.[3]

But what has been said about the subserviency of things to persons does not carry us very far. We find this,—that things exist for the sake of persons; we find established a human control over things. But the essence of property is more than this. *The essence of property is in the relations among men arising out of their relations to things.*

We have not got property when we establish human control over things. That can be exercised by communities recognising no private property; for example, tribes of a primitive economic type and communistic settlements. In various ways associations of men may exercise control over things, but property means the relations which exist between men arising out of their

relations to things, and in the case of slavery, their relations to men who are treated as things. So that we have not gone very far when we say that property is the human control over things.

Several distinctions must be made before we proceed further. We all know that there are many things in this world which are of such a character that they are capable of satisfying human wants and that these are called goods. Some of these goods are called free, but it is generally overlooked that we have two allied and yet different concepts, designated as "free goods". One of these concepts is economic, the other legal. In economics we regard as free those goods which exist in quantities sufficient to satisfy all wants and are consequently without value, while economic goods are those which have value because they are so limited in supply that some wants must go unsatisfied. But in the legal sense free goods are those goods that are under no restrictive and exclusive control and are open to all for use and enjoyment.[4] Now it is with free goods in the legal sense that we are primarily concerned in this chapter; and we distinguish these goods from those goods which are objects of property. Very often the two concepts coincide but not always. Many goods are free for appropriation, wild growing fruit, game in new countries, etc., which nevertheless are so limited that they cannot satisfy all wants. These are economic goods. And when labour is required for appropriation of goods existing in superabundance, the appropriated goods become economic. We may indicate one classification as follows:

Economic	*Legal*
I. Free Goods	not potential property
	potential property
II. Economic Goods	not property
	property

Doubtless a more elaborate classification and various modifications could be made, if different points of view were taken, but this is sufficient for present purposes and should prevent confusion. Free goods change in number and importance, and the tendency of advancing civilisation is to restrict them in number and in importance. But still we have free goods in considerable abundance; for example, air, sunshine, and in many countries land, great bodies of water, wild animals, herbs, etc. Fish are generally considered free goods, although according to the English and American law, strictly speaking, they are owned by the state and are its property. That is the legal idea, but the state frequently does not make actual property of them, because property means control. They are economically objects of *potential property*. The state may exercise control over fish and game, as it very generally does in older and more densely populated countries; then they are public property. But in the United States they are usually treated practically as free goods, although they are according to law the property of the state. This has been decided in American courts many times. The following is one among many cases which might be cited:

"Suit was brought by the Willow River Club, composed of St. Paul capitalists, who bought several hundred acres of land in this vicinity for fishing purposes. Twelve cases were brought on the September term against residents for fishing on private grounds. Judge Bundy decided against the club and holds that 'it has been the settled law of this country ever since the landing of the Pilgrim Fathers, that the fish belong to the state for the benefit of the people.' The decision meets with general approval."[5]

In the case of Geer *v.* Conn., 161 U. S. 519 (1896), a somewhat similar question was considered. The question here was of the constitutionality of the General Statute of Connecticut (sec. 2546) forbidding the killing "of any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this State; or the transporting, or having in possession with intent to transport" such fowl beyond the limits of the State.

The United States Supreme Court, speaking through Mr. Justice White, upheld the constitutionality of this statute in these words:

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. . . . The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom

of contract and of full ownership which is an essential attribute of commerce."[6]

Notice the expression "qualified property". All this indicates a growing public control, and that in reality the potential public property is becoming actual; it is incipient public property. We return presently to the conception of qualified property.[7]

Economically and strictly, however, fish and game in Wisconsin and generally in our American States are, as already seen, not property at all. That is, they are treated as free goods and the State insists that they shall be so treated. Of course the State of Wisconsin may do what an older state like Prussia does, and exercise such a strict control over them that they would become actual public property.

Thus we have a distinction between free goods over which no restrictive control is exercised and those over which the state holds control to the extent that it will not allow private persons to gain exclusive control over them.

Objects over which the rights of property extend are objects conceived of as taken out of the mass of free goods and brought under the exclusive control of a person, and this control is called property.

It is stated that objects over which property rights are extended *are conceived of* as taken out of the mass of free goods. This is a frequent historical procedure, for legal and economic history reveals an ever narrowing field of free material goods; but it is nevertheless true that in an advanced economic society most objects of property were never free goods, but are the outcome of

human effort applied to land which has long been property, and to capital goods which are also property objects, and the products are therefore themselves from the beginning under that exclusive control called property. Our statement, therefore, is a logical and philosophical extension of actual historical truth.

The exclusive control spoken of may be public or private. If the control is vested in a political unit, as a city, state, or nation, then it is public property; but if it is vested in a private individual or group of individuals (*e. g.* a company) then it is private property. *That is where we make our beginning in distribution.* We have free goods; out of this mass objects are taken, and over these objects control is exercised by a person, and this is property.

Now we notice little movement in the opposite direction. As a general rule civilisation does not move forward in a straight line, but returns upon itself. To use a trite comparison, its growth is a spiral. And in the case of free goods we notice little movement away from restriction of the mass of free goods in the direction of the enlargement of the mass of free goods; but a movement towards an enlargement of public property accomplishes a result analogous to that which free goods accomplished in an earlier civilisation; but of this much more will be said later.

But let us have more formal definitions:

By property we mean an exclusive right to control an economic good.

By private property we mean the exclusive right of a private person to control an economic good.

By public property we mean the exclusive right of a political unit (city, state, nation, etc.) to control an economic good.

Qualified property. As we have already seen, this is something between free goods and goods over which full property rights are normally and regularly extended. These goods are mobilia, or, to use the term of our own law, "chattels personal", although there may well be conditions in which land occupies this halfway position provisionally only. But land is an appropriate object of property by its own nature, whereas those objects which give us our types of qualified property are things of which the private appropriation involves certain special difficulties. In Kent's *Commentaries on American Law* we find these definitions: "Property in chattels personal is either absolute [8] or qualified. Absolute property denotes a full and complete title and dominion over it; but qualified property in chattels is an exception to the general right, and means a temporary or special interest, liable to be totally devested on the happening of some particular event." [9]

Four main kinds of qualified property are wild animals, air, light, and water. Occupancy may make these property and actually does so under many conditions, but occupancy needs to be defined and the escape from an exercised control as in the case of wild animals is an event which works a loss of property right. Yet here, as in general, we observe a tendency towards a development of half rights into full rights, for example, water. Into all the legal complexities of this halfway station we cannot enter in this place. To

notice and describe briefly its existence is sufficient for present purposes.[10]

In various dog cases the courts have held that a dog is not strictly private property and yet not on the same plane with wild animals. An interesting exemplification of this halfway station, of this qualified property, is found in a case that was appealed from the Court of Appeals for the Parish of Orleans, the case Sentell *v.* New Orleans and Carrollton Railroad Co.[11]

A valuable Newfoundland dog owned by Mr. Sentell was killed by an electric car on the line of the New Orleans and Carrollton Railroad Co. Mr. Sentell sued for damages in the Civil District Court, and they were granted. The Court of Appeals reversed the decision and was supported in the reversal by the United States Supreme Court. The reversal was based on proof that Mr. Sentell had not complied with the State law, which required that the dog be placed upon the assessment rolls before its owner was entitled to the protection of the law.

Mr. Justice Brown gave the opinion of the Supreme Court, saying in part,

> "The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *ferœ naturœ* in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete. They are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds and similar animals kept for pleasure, curiosity or caprice. They have no in-

trinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food. . . . Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several States."

The fact that dogs are without the full protection of the law shows that they stand between those animals in which there is no property right and those in which the right of property is complete. It would require some special act to make them property. In the case of the dog it was assessment. In the case of a cow that would not be necessary. The right of the legislature to enact a law that the cow should not be regarded as property would not be recognised, but would be considered unconstitutional as invading the right of property, because in domestic animals the right of property is complete. Thus when the license is paid and a tag affixed to a dog the right of property is complete. But by a process of evolution, similar to that so frequently observed in the development of property, qualified property in the case of dogs tends to ripen into full property, as is shown in recent decisions.

This illustration shows that there is something between property and free goods; although it has comparatively little present practical importance or scientific

interest, nevertheless it has significance as an illustration of a growth from free goods to full property.

One or two other definitions of property may now occupy our attention. Blackstone says [12] that property is "that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe."

Here we note a tendency, characteristically English perhaps, to exaggerate somewhat the idea of property, although undoubtedly it is correct in the main. Blackstone says, "the sole and despotic dominion"; but the word despotic really does not belong to the idea of property; on the contrary it implies something which does not exist, as we shall presently see. Notice also the undue emphasis found in the word "universe". The exclusion of all individuals in this world of ours is surely quite adequate.

In Bouvier's *Law Dictionary* property is defined as "the right and interest which a person has in land and chattels to the exclusion of others."

Notice also a definition taken from the Austrian Civil Code which is quite similar, "Everything which belongs to anyone, all his corporeal or incorporeal things, are called his property. Regarded as a right, property is the liberty to do with the substance and uses of a thing according to one's wants and desires and to exclude every other person therefrom." [13]

The definition given by Raleigh in his *Outline of the Law of Property* is of importance because it brings out the idea of complexity which has already been men-

tioned. "Full ownership ('dominium')," he says, "is a complex whole made up of many rights; right to possess, right to use and destroy, right to sell and give away, right to lend and let for hire, etc." [14] The significance of this definition is the bundle of rights to which reference has already been made. It is to be noticed that after his enumeration of separate rights he adds "et cetera"; he does not pretend to enumerate all. About the right to destroy we will have something more to say presently.[15]

The following four definitions of property by American courts may be regarded as typical and are cited as bringing out points of interest and importance:

"The exclusive right of possessing, enjoying and disposing of a thing." McKeon *v.* Bisbee, 9 Cal. 137 (1858).

"The interest one may have in lands or chattels, to the exclusion of others." Wilson *v.* Harris, 21 Mont. 374 (1898).

"The highest right a man can have to anything; (the word) being used for that right which we have both to lands or tenements, goods or chattels, which no way depends on another man's courtesy." Jackson *v.* Housel, 17 Johns. (N. Y.) 281 (1820).

"The right of acquiring and possessing property and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense of property; property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in Society. No man would become a member of a

community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact." Mr. Justice Patterson, in Van Horne *v.* Dorrance, 2 Dall. 304 (1795).

This last definition illustrates a tendency to find an ideal, super-social and humanly uncontrollable foundation of property. It rests upon an unscientific eighteenth century social philosophy of natural rights existing prior to the formation of society and of a compact whereby men left a state of nature, surrendering liberties for the sake of protection and other advantages; and binding forever all subsequent generations by their alleged voluntary compact. All this has long ago been totally discredited by science.[16]

When we use the word property we generally refer to private property, but we must remember that there is public property as well as private property. Political units have a control, and public property is a very diferent thing from free goods, because the laws of property, as for instance those regarding theft, apply quite as stringently to public as to private property, sometimes even more so. The sharpness of the law of public property in the post-office is well known.

It is one of the great defects of current treatments of property that the concept public property has been inadequately treated by economists and publicists generally, with the result that false and one-sided conclusions have been drawn, and as a reaction from the harshness of one-sided and extreme concepts of private property we have the opposition of economic radicals

to private property. Distribution depends on public as well as private property, and the interrelations of these two are vital in any given distribution of wealth.[17]

But it must be borne in mind that, strictly speaking, property refers to rights only. Property is an exclusive right. Speaking accurately, then, property is not a thing but the rights which extend over a thing. A less strict use of the word property makes property include the things over which the right extends. We say of a farm, this is my property, meaning the land and improvements on it and not merely the right, or rather, the land and its improvements together with the right. But, strictly speaking, property is the right, and not the object over which the right extends.[18] [19]

Notes and References to Chapter III

[1] P. 95. "Der Begriff des Eigentums beruht in seinem letzten Grunde auf dem Gegensatze zwischen Person und Sache. Die Sache hat, weil sie willenlos ist, die Bestimmung, von der willensfähigen Person beherrscht zu werden. Diese Herrschaft ist an sich unbegrenzt; sie reicht so weit wie die physische Möglichkeit, sie zu üben. Aber sie gestattet Einschränkungen, ohne ihr Wesen zu ändern, und die Rechtsordnung kann auf die Begrenzung der rechtlichen Macht über die einzelne Sache ebensowenig verzichten, wie sie die Anerkennung dieser Macht als einer an sich schrankenlosen sich zu entziehen vermag." R. Johow, *Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich.* Begründung Sachenrecht (Berlin, 1890) Vol. I. Quoted by H. von Scheel, in article "Eigentum," *Handwörterbuch der Staatswissenschaften.*

[2] P. 95. Blackstone's *Commentaries on the Laws of England.* Bk. II, Chap. II.

[3] P. 96. The paragraph quoted is taken from the *Rochester Democrat* and appeared in the *Evening Wisconsin,* Milwaukee, March 31, 1895. The author is indebted to Professor Sylvanus Morris, Dean of the Law Department of the University of Georgia, for the real history of this case, and for the following interesting account:

"The tree stands on land once owned by Mr. W. H. Jackson. His admiration for it led him to adopt a unique method of preserving it. He made what is called a deed to the tree, conveying the land it occupies. It reads as follows:

"' For and in consideration of the great love I bear this tree and the great desire I have for its protection for all time I convey entire possession of itself and all land within eight feet of the tree on all sides.

"' (Signed) William H. Jackson.'

"The original deed was not registered, of course, and is now lost, and the contents were obtained from those who read it. However, this deed was not executed according to law and does not purport to convey the land but possession only. Of course, he (Mr. Jackson) knew perfectly well the tree could not own land. He was an edu-

cated man and I think an LL. D. of the University. This was about 1820. . . . His wishes have been respected. Findlay Street was opened, and the tree stands in the street. It is an immense white oak, and up to a few years ago, when damaged by sleet, was as symmetrical as any I ever saw. . . . A few years ago George Foster Peabody had an enclosure of granite posts and iron chains put around it, and a white marble block set up, with the words of the so-called deed carved on it. Every handbook of Athens contains descriptions, and there are numerous pictures, engravings, and photographs." Communications from Professor Sylvanus Morris to the writer, November 1 and 12, 1912.

[4] P. 97. We have to distinguish at times between legal theory and actuality. Public domain may virtually be a free good, yet not a free good in legal theory; so forests in mountains, so fish in streams. We return to this later on.

[5] P. 99. *Madison Democrat*, December 5, 1895, dated "Hudson, Wisconsin, November 27." The decision was rendered by the Circuit Court and the case never reached the Supreme Courts and consequently no record of it is found in the Wisconsin Supreme Court Reports. But a case on the general subject of state control over fish was decided by the Wisconsin Supreme Court in 1896, Bittenhaus *v.* Johnson, 92 Wis. 588 (1896). In this case nets used for illegal fishing were confiscated by the State, and the law was upheld.

[6] P. 100. Mr. Justice Field contributes a dissenting opinion, but his dissent is not based on the principle of ownership by the State of wild animals. See also Silz *v.* Hesterberg, 211 U. S. 31 (1908).

As this affords an especially instructive illustration of the ripening of property out of mere possesssion, the following notes are given, although the treatment is more detailed than in general is allowed in a work of the present scope:

"In animals *domitæ naturæ*—tame animals—a man may have as absolute a property as in any inanimate things." *Cyclopædia of Law and Procedure* (Vol. II, p. 304), citing cases 2 Ind. 377; 100 Mass. 136; 35 Vt. 247; 7 Coke, 18a; 2 Bl. Comm. 390.

In the same work: "Dogs are animals *domitæ naturæ* (37 Ala. 430; 34 N. H. 523; 20 N. C. 146; 30 Tex. App. 333: *accord; contra*, 75 Me. 562) and the law, both in England and the United States, recognizes property in and to them (citing cases from twenty-one states, the

District of Columbia, and England—about one hundred cases in all). Such property has been held, however, not to stand on the same ground as property in other animals, but is said to be base, inferior, and entitled to less regard and protection (citing six states, the United States, and England). Accordingly at common law and in some states, a dog has been held or said not to be the subject of larceny (citing about a dozen jurisdictions), not to be 'property' within general provisions for taxation (citing three cases), not to be inventoried and appraised as an asset of a decedent's estate (citing two cases) and 'case' will not lie for its intentional, though negligent destruction (citing four cases)." *Op. cit.*, p. 305.

The American and English Encyclopædia (2d ed., Vol. II, p. 347) says:

"At common law, there could be no larceny of a dog." (Citing nine cases.) . . .

"In many jurisdictions the common law rule has been changed by statute, either by specifically enacting that the felonious taking of a dog is larceny (citing authority 10 Geo. III, c. 18) or upon the ground that a dog is a domesticated animal (citing authority), 'personal property' (citing authority), or a 'thing of value' (citing authority) under the larceny acts."

The Wisconsin Statutes of 1898 (Vol. II, p. 2686, § 4415c) make punishable the larceny of birds, dogs, electricity, gas and water.

American Digest (Vol. 12, pp. 974–6) says:

"A dog is the subject of larceny, being comprehended within the term 'chattels,' as used in Code 1873, § 3907, defining such crime, 105 Iowa, 112."

Under 3 Comp. Laws, § 11,553 under phrase "property of another, any money, goods or chattels, etc.," a dog may be the subject of larceny. 133 Mich. 11.

"A dog is property of such a nature as to be capable of being the subject of larceny." 1 N. Y. Cr. R. 351.

To the same effect, 55 S. C. 322, a dog is a chattel within larceny act.

[7] P. 100. The following communication to a local newspaper shows popular opposition to the growth of the idea of property in fish and game.

"It is refreshing to see these basic American principles enunciated in such forceful and unmistakable Anglo-Saxon. There is no room

in Wisconsin for the game preserves of a Winans. No man nor coterie of men should be suffered to preëmpt the fowls of the air nor the denizens of the deep. Every citizen of our country has a certain inalienable right to fish and to hunt, under certain well-defined and reasonable restrictions in the direction of the general welfare and for the protection of game. These rights are as fundamental as the principles laid down in Magna Charta. Private fish and game preserves will forever be unfashionable in the United States. Possibly they may be tolerated, apparently legalized. Perhaps they may be stocked, protected, and replenished at the expense of the commonwealth; perhaps not. The people chafe under any tendency towards feudal customs of this sort. A frequent reading of such Monroe doctrine as this fittingly iterated by Judge Bundy will be welcomed." W. W. Warner, Madison, Wisconsin.

[8] P. 102. For criticism of the term "absolute" in this connection, see *post*, p. 135 *et seqq.*

[9] P. 102. Kent, Vol. II, p. 348, 14th ed.

[10] P. 103. The following cases illustrate the principle that wild animals, deer, bees, doves, fish, cats, whales, etc., are not subject to ownership, unless dominion over them has been secured, and that even then they are a sort of "qualified property". Goff *v.* Kilts, 15 Wend. (N. Y.) 550 (1836); Pierson *v.* Post, 2 Am. Dec. 264 (1805); Rexroth *v.* Coon, 15 R. I. 35 (1885); Commonwealth *v.* Chace, 9 Pick. (Mass.) 15 (1829); Manning *v.* Mitcherson, 69 Ga. 447 (1882).

That the ownership in wild animals, as far as ownership is possible, rests in the State, and that the State is not proprietor but rather trustee holding for the benefit of all the people, is illustrated in the following cases: Geer *v.* Connecticut, 161 U. S. 519 (1896); State *v.* Rapp, 104 Ia. 305 (1898); State *v.* Rodman, 58 Minn. 393 (1894); *Ex parte* Maier, 103 Cal. 476 (1894). And the State can make them subject to private ownership if it chooses; this can be done, *e. g.* with oysters. Proctor *v.* Wells, 103 Mass. 216 (1869); Martin *v.* Waddell, 16 Pet. 367 (1842); McCready *v.* Virginia, 94 U. S. 391 (1876). As to fish see: People *v.* Bridges, 142 Ill. 30 (1892); State *v.* Snowman, 94 Me. 99 (1900); Dunham *v.* Lamphere, 3 Gray (Mass.), 268 (1855); Lincoln *v.* Davis, 53 Mich. 375 (1884); People *v.* Doxtater, 75 Hun (N. Y.), 272 (1894).

As to free goods in court decisions, it is to be observed that light, air, and water as well as wild animals, are usually held beyond

the range of private ownership. But they can be reduced to ownership. "Water, when reduced to possession, is property, and it may be bought and sold, and have a market value, but it must be in actual possession, subject to control and management. Running water in natural streams is not property, and never was." Syracuse *v.* Stacey, 169 N. Y. 231 (1901). So of mineral oil; it is not property until reduced to possession. Dark *v.* Johnson, 55 Pa. St. 164 (1867).

In the large cities, light and air have a peculiar value. But American courts have not been inclined to recognise it. In London, skyscrapers would generally be an impossibility, because a tenant may acquire an easement in the light and air, and when an adjoining tenant or owner is about to put up a building he merely hangs out a sign "Ancient Lights" and it is notice to the person building that he must not infringe on the light and air of his neighbour. Elevated railways have been held by American courts to be no invasion of the right to light and air.

[11] P. 103. 166 U. S. 698 (1897).

[12] P. 105. p. 13, *op. cit.*, Bk. II, Chap. 1, p. 2.

[13] P. 105. "Alles, was jemandem zugehört, alle seine körperlichen u. unkörperlichen Sachen, heissen sein Eigentum. Als ein Recht betrachtet ist Eigentum das Befugnis, mit der Substanz u. den Nutzungen einer Sache nach Willkur zu schalten u. jeden anderen davon auszuschliessen." Quoted in article "Eigentum," in *Handwörterbuch der Staatswissenschaften* (1892), by H. von Scheel.

[14] P. 106. p. 1.

[15] P. 106. A celebrated Roman Catholic writer says that "Property is the physical medium of communion with God and with man." While there is truth in this it is poetic rather than legal or economic. Dr. Washington Gladden expresses the same idea in his *Tools and the Man*, when he says that "Property is communion with God through the material world."

[16] P. 107. The reader who wishes further discussion of this concept is referred to the excellent treatment of property by Mr. Justice Francis J. Swayze in a recent article on "The Judicial Construction of the Fourteenth Amendment." The elastic nature of the concept is well brought out by a comparative study of judicial decisions and the conclusion reached is in general harmony with the position taken in the present work, namely: "Upon the whole the decisions

lean in favor of the public, and towards the qualification of property rights." At the same time it is noteworthy that Mr. Justice Swayze does not attempt a formal definition of property but takes nearly five printed pages to describe the concept. See *Harvard Law Review*, November, 1912, pp. 13–18.

[17] P. 108. Our courts have necessarily been obliged to discuss the idea of public property in certain cases. As the State extends its functions, the question of the difference between private and public property becomes increasingly important and complex. The question has come before the courts in the interpretation of tax laws. States usually exempt "public property", or public property used for public purposes, from taxation. This does not embrace private property used for public purpose, but from which a private income is derived, such as a market house [State *v.* Cooley, 62 Minn. 183 (1895)] or a school [Mundy *v.* Van Hoose, 104 Ga. 292 (1898)] or an armoury owned by private parties and leased to the State [Board of Trustees *v.* Atlanta, 113 Ga. 883 (1901)]; that is, it seems to be a question of ownership, rather than a question of use. Public property is such as "is not used for purpose of private or corporate profit or income" [Mundy *v.* Van Hoose, 104 Ga. 292 (1898) at p. 300]. "That private property is used exclusively for public purposes does not change the nature of the property or the title thereto, so as to convert it into public property" [Trustees *v.* Atlanta, 113 Ga. 883 (1901) at p. 886]. "Private property cannot be converted into public property by the simple declaration of the general assembly" (*ibid.*).

In 1864 the Kentucky Supreme Court decided that certain property owned by municipalities, *i. e.* public property, was taxable under a statute then in force which exempted from taxation municipal property "used for public purposes of local government." The court said, "Whatever property, such as court house, prison, and the like, which becomes necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social and commercial capacity, as a private corporation, and for its own profit, such as vacant lots, market houses, fire engines, and the like, is subject to taxation. If, however, as just indicated, the property owned by the city as a private corporation is not used for profit to the city, but is dedicated to charity, it is not constructively subject to taxation under any existing law." [City of Louisville *v.* Commonwealth, 1 Duval (Ky.), 1,295 (1814) at p. 298.] This unusual decision was quite universally criticised (see Dillon on *Municipal Corporations*, § 1397, note 2, 5th ed.), and was reversed in City of Owensboro *v.* Commonwealth, 105 Ky. 344 (1899), in which case the court decided that fire apparatus and public parks came under the tax exemption. The words of the court are interesting from a sociological point of view:

"The municipal authorities are charged with the duty of maintaining the public health, and in the judgment of scientific men, it is essential to the public health that cities have and maintain parks where the people can breathe wholesome air. People of this enlightened age justify the levying of taxes to maintain them. They are just as much public property used for public purposes as are streets and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. The public have access to and enjoy both. In our opinion, the public park is public property, used for public purposes, and necessary to the proper government of the city."

The question that arises, as municipalities and States assume ownership of public utilities, is one of income, of use, not of ownership. A State has the right to tax its own property if it wishes (see Cooley on *Taxation*, pp. 263 *et seq.*, 3d ed.). And a State has a right to engage in any activities its people may determine upon. So it is no longer merely a question of using public property for governmental purposes.

See Walden *v.* Town of Whigham, 120 Ga. 646 (1904). In this case the town of Whigham opened a liquor dispensary and sold liquor. The court held that the building and the stock of liquors were "public property" and under the State law were exempt from taxation, even though the town had no legal authority to maintain such a dispensary. An earlier decision in the same State had held that "public property is not taxed whether income be derived from it or not" [Trustees *v.* Bohler, 80 Ga. (1887) 159, at p. 163].

The Delaware courts have attempted to mark a duality in the nature of public property: "Although the property held for the municipality is in fact public, as common to all the inhabitants of a city, it nevertheless may justly be said to be private property as being such property as is exempt from being taken or applied to

any other public use by the State, or by authority of the State, without compensation being made" [Coyle *v.* Gray, 30 At. (1884) 728, at p. 733]. This distinction may be justly termed airy and metaphysical and leads nowhere.

There is, of course, no mystical distinction between private and public property. It depends upon the state, upon sovereignty, to declare what it shall assume, as public functions, and to acquire the property necessary to carry out these functions. The distinctions between the property owned by the State and by private individuals are such distinctions as are inherent in the case, *e. g.* a city's property would not be subject to a mechanic's lien, or such distinctions as the State may, of its own volition, impose upon its property, *e. g.* exempting it from taxation.

[18] P. 108. Macleod is emphatic in his statement that "property in its true and original sense means solely a right, title, interest, or ownership; and consequently, to call material things like land, houses, money, cattle, etc., property is as great an absurdity as to call them right, title, interest or ownership. Neither Bacon, nor, so far as we are aware, any writer of his period calls material goods property; such a use of the word is quite a modern corruption, and we cannot say when it began." "Landed property, funded property, house property, real property, personal property, literary property, mean rights to land, rights to houses, rights to realty, rights to personalty, rights to payments from the nation, rights to the profits from literature and art, and so on." Nevertheless, although he protests against the usage, he himself employs the term property in the large sense. He says, for instance, that there are three distinct orders of "economic or exchangeable quantities," *viz.*, "I. Material things; II. Labour or Services; III. Rights: typified by the terms money, labour and credit." Now he says that property is the general term covering them all, although he said before that it only referred to rights. It is difficult to see how anyone can avoid using the term property in the large sense. We would have to employ a very awkward circumlocution to avoid its usage. Only we must remember that in the narrow sense property is a right.

Macleod, however, shows that he appreciates the importance of property when he says that it "is the key to all economics."

Henry Dunning Macleod, *Elements of Economics*, 1, pp. 141, 143, 144.

[19] P. 108. The distinction between property as rights, and the object over which the rights are extended is clearly brought out in Eaton *v.* The Boston, Concord and Montreal Railroad, 51 N. H. 504, pp. 511–2 (1872).

CHAPTER IV

PROPERTY. POSSESSION. ESTATE. RESOURCES

It is well at this point to distinguish between property and three allied concepts, namely, *possession, estate,* and *resources.*

Possession, as defined in Bouvier's *Law Dictionary,* is "*the detention and occupation of things; having things in keeping.*" This definition, not an entirely satisfactory one perhaps, will, however, do for present purposes. Possession as thus defined is something different from the concept property. Raleigh in his definition of possession as given in his work on the *Law of Property* says that to assert that a person is in possession of a thing means, "first, that he has the custody of a thing or control over it." Add to this Raleigh's words: "Or, at least, that he stand in such relation to it as will enable him to use it or receive income derived from it during the time possession lasts." It means, says Raleigh, "Second, that he manifests the will to maintain his relation to the thing, and to exclude other persons from acquiring control over it. Possession may be called the outward form of ownership, but the form may be present without the reality." While this is likewise not altogether satisfactory, it is nevertheless helpful in leading us to a distinction between possession and property.[1] It shows several things. First, that

the use of the word is not a clear and simple one, but rather confused and complex; and, second, it shows that there is a close connection between property and possession. Raleigh wants to make a distinction, and yet he finds difficulty in so describing possession that it will not amount to the same thing as property. He says that possession is the outward form of property, and yet the two are not identical. Now it is very true that possession tends to become property. We have a legal phrase, "Possession is nine points of the law," as if the two went naturally together; yet implying that possession is not property.[2] What we in our law term a bailment, as a hired horse, gives an instance of possession without property. We may employ the expression *mere possession* technically to indicate possession without property.

We may make the distinction between property and possession, that property carries with it, usually at least, the right to sell a possession, while mere possession does not amount to property and does not carry with it the right to sell. But this is hardly sufficient for our purposes; and it is doubtless quite insufficient even for legal purposes. Macleod following the Roman law makes much depend on the distinction between possession and property. He says that there is an essential distinction between the right of possession and the right of property and speaks of the "mere right of possession". This distinction between the two he brings out in the treatment of loans, of which there are two kinds, one kind conveying the right of possession only for a limited time, and another kind which transfers the right of prop-

erty. In one kind, the right of property passes with the loan, while in the other kind only the right of possession passes. In loans of the first kind the identical thing is returned, and only the right of possession passes. In loans of the second kind only an equivalent amount or equal value is returned. The distinction is based upon the nature of the things which are the subject of the loan. Things in which the right of property passes with the loan are called *fungibles;* or to employ the Latin term *res fungibiles.* And those in which the right of property does not pass are non-fungibles,—*res non fungibiles.* Now a loan in which the right of possession only is conveyed is called *commodatum,* as, for instance, a book or a horse; and the other kind is called *mutuum,* loans in which the right of property is transferred. In the case of a *commodatum* the identical horse or book must be returned, but the *mutuum* is a loan in which the right of property is transferred. "There is," says Macleod, "another kind of loan, in which the things lent cannot be used or enjoyed without their destruction, consumption or alienation. Thus, if a person borrows bread or oil or wine or coals, etc., he cannot use them without consuming or destroying them, and they are borrowed for the very purpose of being destroyed.

"Hence, from the very necessity of the case the property in such things must be transferred to the borrower; and he undertakes to return to the lender an equal amount of the thing lent in quantity and quality." Thus when a loan is made in money, the right of property in the money passes. "So a person who borrows money cannot use it unless he exchanges it away for

something else: consequently, the person who borrows money must acquire the absolute property in it.

"So if a person borrows a postage stamp, the only way a stamp can be used is to affix it to a letter, by which it is destroyed; hence the borrower must acquire the property in it."

Those things only are the subject of *mutuum* which consist in *pondere, numero, et mensura,* that is, which are estimated generically in weight, number and measure. These things are in the Roman law called *quantitates fungibiles.* But the *commodatum* consists of things which are returnable *in specie;* that is, the identical thing is returned. In the *mutuum* things are returnable *in genere;* that is, of the same kind and quantity, but not the identical thing. In the one case, the particular horse or book which was borrowed is returned; but on the other hand, if a bushel of grain is borrowed the thing is returned in the same quantity and of the same general quality.[3]

Blackstone had in mind the distinction between possession and property when he wrote the following: "Not that this communion of goods seems ever to have been applicable, even in the earlier stages, to aught but the *substance* of the thing, nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or to speak with greater precision, the *right* of possession continued for the same time only that the act of possession lasted."[4] He uses the expression "a kind of transient property", meaning by

transient property what we mean by possession as distinguished from property; for when in economics we discuss possession as distinguished from property, we mean as a rule that right of possession which continues for the same time that the act of possession lasts.

The great English jurist and philosopher, Jeremy Bentham, brings out admirably the distinction between property and possession in the following quotations:

"The better to understand the advantages of law, let us endeavour to form a clear idea of *property*. We shall see that there is no such thing as natural property, and that it is entirely the work of law.[5]

"The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now, this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest. . . .

"There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable."[6]

This distinction between property and possession lies at the bottom of the anarchist movement.[7] The anarchists propose to substitute possession for property, and they claim that if possession is substituted for property, then rent and other special privileges will be abolished. According to this, if you see a vacant piece of land, you take possession of it and use it, and hold it so long as you use it and no longer; for when you cease using it, you have no right, that is, no real, ethical right to hold it. The anarchists claim that when possession is substituted for property, rent will be abolished. While we cannot stop now and here to examine into the theory at length, it takes no profound critical analysis to show that inequalities would not thereby be abolished nor economic unearned increment. If each person should take in this way whatever property he found vacant and enjoy the right of possession, there would still be inequalities in the land and opportunities enjoyed by various individuals. Suppose you go into the heart of a great city where this anarchist régime is being introduced; you find a choice vacant lot and take possession of it; others do the same; the best land with choicest opportunities will be first seized, and the later comers will have to take the least choice sites and the least desirable of natural opportunities. Even if the

right of possession is enjoyed only so long as the act of use lasts, you will still have an immense advantage over the others in the possession of superior natural opportunities. Property means protection of one's right of enjoyment through the state, that is, through third parties, and to that the anarchists object. They say that the right of possession should last during use and then cease; then one's own physical powers backed up by public opinion would enable one to maintain possession and keep the desirable thing for one's own use. Thus the discussions of the so-called scientific anarchists turn upon this distinction between possession and property, and this among other things makes this distinction significant.[8]

It may be suggested at this point that it is impossible so to develop the concept possession in its economic and social aspects that it will conform to the ideas of the anarchists. Shall we allow possession to be held by agents? If not, a mere temporary absence (for example, to sell the products of one's land) would work forfeiture of possession. But if one can hold possession by agents, for how long? If for a series of years, the possibilities of unearned income at once appear. Where are we to draw the line? It is impossible. This is a mere suggestion. If the reader examines any legal treatment of possession and property (for example, that found in Holmes's *Common Law*) and attempts to separate the two in such a way as to carry out the anarchist programme, he will soon discover that he has attacked a problem bristling with insuperable difficulties.

We now take up estate as distinguished from full

property. An estate is a right in land that is less than full property, but a great deal more than possession in the sense in which we have used the word. In reality, an estate is a lease, but it is different in several respects from an ordinary lease. Estate is the term of feudal law which indicates that there is a right in the land superior to that of the one who has the estate in the land; or in other words, that the one who owns the estate has above him a superior owner. This applies especially to England and it was the rule at one time in many of the separate commonwealths in the United States. According to the common law of England full property in the land does not exist except in the Crown. The main proprietor, or superior proprietor is the Crown, and those holding under the Crown have an estate. The proprietor after the conquest was William the Conqueror, who granted estates; and in England it is for an individual still possible only to have an estate in land and not to have full property. Bacon says, "Property of lands by conveyance is first distributed into estates for years, for life, in tail and fee simple." It is a perpetual right, subject only to that superior right of the Crown or sovereignty. "An estate therefore," says Macleod, "is always a right of an inferior order to property; it in reality means a lease. As Bacon says: 'For estates for years which are commonly called leases for years. Such interests or estates in land were always given as the fee or reward for service rendered to the Crown. The last and greatest estate of lands is fee simple. . . . It is the greatest, last and uttermost degree of estates in land.'"[9] And yet even an estate in fee

simple is therefore something less than full property in land which is called "allodial".

For practical purposes the distinction is not of great importance. Under certain conceivable circumstances it could become important. Because if there is a superior proprietor, in whom a higher title is vested, then this superior, or proprietor has theoretically rights which he would not enjoy under full property. It has been held on that account that the Crown has special rights in England.

Estates are of various kinds, and, as Bacon says, "the last and greatest estate of lands is fee simple"; and that is something less than full property. Still, if the state, commonwealth, or sovereignty parts with this superior right, there remains eminent domain; and this really comes from the right of the sovereign superior to that of the individual. So that under allodial property in land,[10] as in the American commonwealths, there still remains eminent domain, and for practical purposes full or allodial property in the United States means no more than the right which the Englishman has in his land, although the latter has only an estate. For an Englishman may not be deprived of his estate without compensation, nor can the one who has full property.

We must now give our attention to still another concept,—namely, *resources*. We employ this term in the technical sense, corresponding to the German word *Vermogen*, as unfortunately we have no English word so definite and concise as this, but the accounting phrase net assets comes to about the same thing, regarded from a different point of view.[11] It is defined thus, "Resources, the aggregate of economic goods owned by a physical or legal person, after deduction is made of the person's debts and all valuable and rightful claims have been added." This concept is based, in part at least, upon the distinction between possession and property. You may have full right of property in things which do not belong to your resources. Bearing in mind the distinction between *mutuum* and *commodatum*, you may have the right of property, say, in grain; that is, you have those rights which go with the right of property, namely, an exclusive right of control. But there is claim against you, and you cannot say that all that grain belongs to your resources, because there is an offset, perhaps a chattel mortgage that must be subtracted. On the other hand, there are things which are comprised in the property of others against which you have claims. These claims must be added to the resources, the *Vermogen*.

Marshall uses the term "true net wealth" in a somewhat similar manner in his *Economics of Industry*. Marshall says when he speaks simply of a man's wealth that it includes first the material goods in which he has the right of property, and in his definition he includes a definition of "true net wealth":

> "These include not only lands, houses, furniture, machinery and other material goods which may be in his single private ownership, but also shares in public companies, debenture bonds, mortgages and other obligations, which he may hold from others, to pay goods to him. On the other hand the debts which he owes to others may be regarded as nega-

tive wealth and must be subtracted from his gross possessions before his true net wealth can be found."

And his wealth also includes, says Marshall, "immaterial goods, which are external to him, and serve directly as the means of enabling him to acquire material goods; such for instance as the good will of his business or his professional practice."[12]

Marshall says that wealth does not include those things, "services and other goods", which pass out of existence in the instant that they come into it; "they do not contribute to the stock of wealth and may therefore be left out of account." They are useful things, of course, but they perish as they come into existence, and therefore he excludes them from the stock of wealth. Those immaterial things which enable men to acquire material goods are included, but personal qualities and faculties are excluded because they are not considered as economic goods, economic goods being a means to an end and for the satisfaction of human wants; but when we reach man's personal qualities we reach that for which economic goods exist. Sometimes these personal qualities and faculties are called personal wealth, by a figurative expression; but we distinguish between personal wealth and external material goods or those immaterial goods which enable one to acquire external material goods.[13] All of these we place in resources. We have then the four concepts: *property, possessions, estate, and resources.* These ideas must be held clearly in our minds in order to understand subsequent discussions.

Notes and References to Chapter IV

[1] P. 118. Geldart, *Elements of English Law* (in "Home University" Series), p. 116, says: "The essence of ownership is that it is a right or an aggregate of rights. Possession, on the other hand, is primarily a matter of fact." But (p. 118) "possession is a fact to which legal rights are attached."

[2] P. 119. "The ambiguous character of the term 'Possession' is well known, and has been recognized by high authority. It has several meanings, and it may well have several different meanings in the same instrument." (Leslie *v.* Rothers, 2 Chap. 499, 1894). S. P. O.

[3] P. 121. Macleod, *Elements of Economics*, Vol. I, Bk. II, Chap. I, pp. 141–5, 298–302. Also, Macleod, *Theory and Practice of Banking*, Vol. I, pp. 90–95.

In Black's *Law Dictionary* under loan, *commodatum* is called loan for use and is distinguished from *mutuum*, loan for consumption:

"A loan for use is the gratuitous grant of an article to another for use, to be returned *in specie*, and may be either for a certain time or indefinitely, and at the will of the grantor. Code Ga., 1882, sec. 2126.

"Loan for use (called '*commodatum*' in the Civil Law) differs from a loan for consumption (called '*mutuum*' in the Civil Law), in this: that the *commodatum* must be specifically returned; the *mutuum* is to be returned in kind. In the case of a *commodatum* the property in the thing remains in the lender; in a *mutuum* the property passes to the borrower."

But the writer does not understand that the *commodatum* need be gratuitous; English law generally employs the term bailment for a loan which must be returned *in specie*, that is, a book, a horse; but a bailment may well be for hire.

For a further and scholarly treatment of the subject see Sohm's *Institutes of Roman Law* (translated by Ledlie), § 59, The Law of Things, § 79, The Law of Obligations, especially pp. 305, 375, 376.

[4] P. 121. Applied by Blackstone to the ground, to a tree, by a

law of nature. Blackstone, *op. cit.*, Bk. II, Chap. I, pp. 3–4 (Cooley's ed.).

[5] P. 122. Jeremy Bentham, *Theory of Legislation* (London, 1876), p. 111.

[6] P. 123. Bentham, *op. cit.*, pp. 112–3.

[7] P. 123. No reference is made here to the anarchist agitation, the use of violence, etc. The purpose is simply to discover underlying economic concepts.

[8] P. 124. It is interesting to notice that the American Federation of Labor once adopted a resolution in favour of possession of land instead of ownership. This resolution, known as Plank No. 10 in a proposed platform, reads as follows: "The abolition of the monopoly system, and substitution therefor of a title of occupancy and use only." It appears that, while these planks were adopted one by one at Denver, Colorado, in 1894, the platform as a whole was never adopted and seems to have no special significance; it cannot be taken to indicate that on the part of the American Federation of Labor it was ever intended to adopt this feature of anarchism.

[9] P. 125. Macleod, *Elements of Economics*, Vol. I, pp. 147–8.

Geldart, *Elements of English Law*, p. 125, says: "We may think of an estate as a portion of ownership more or less limited in time." In fee simple accordingly the limit in time is practically non-existent, as escheat will only come when the tenant dies intestate or without heirs. Reversions and remainders may be mentioned as future estates in lands.

[10] P. 126. Andrews in his *American Law* (Chap. on Real Estate), maintains that there is no such thing as tenure in America, that is, that the old feudal distinctions between estates in fee simple and ownership have vanished. For example, the New York Constitution of 1894, Art. 1, sec. 11, states: "All feudal tenures of every description, with all their incidents, are declared to be abolished." Thorpe, *Constitutions*, p. 2695, Art. 1, sec. 11.

[11] P. 127. We have in law the distinction between current assets and total assets on the one hand, and current liabilities and total liabilities on the other. If current assets are less than current liabilities, it means legal insolvency, while if total assets are less than total liabilities, real insolvency exists.

[12] P. 128. Marshall, *Economics of Industry*, Note III, pp. 52–3.

[13] P. 128. The distinction between personal qualities and wealth

is a somewhat artificial one. Man is the end, but personal qualities trained, are sometimes trained not as an end but as a means, just as land is improved in order to secure greater yields. So we sometimes must use circumlocution or adjectives, as personal wealth. Nevertheless the distinction between means and ends is of too great importance to be overlooked, and it is worth while to use circumlocution to avoid confusion.

Attention is called to Professor Irving Fisher's inclusion of human beings in wealth, in his *Capital and Income* and also in his *Elementary Principles of Economics*, Chapter I, where he distinguishes between wealth in this "broader sense", and wealth "in the ordinary meaning" from which human beings are excluded.

CHAPTER V

THE ATTRIBUTES AND CHARACTERISTICS OF PROPERTY

We now pass on to the attributes and characteristics of property, and we direct our attention in this chapter, more particularly, although not exclusively, to private property. We mention first as an attribute of property *value*. In property we have to do with economic goods, and economic goods are goods which have value, and value implies two things,—utility and scarcity. In law contracts read "for value received." If there were no value in a thing there would be no inducement to appropriate it. And thus regularly and normally one of the attributes of property is value. Property exists in things which men desire and which are so scarce that they are incapable of satisfying fully human wants, and people are willing to give laborious exertion in return for them.

We mention as a second quality of property *appropriability*. The objects of property must be capable of appropriation. If the air were capable of an appropriation exclusive in its nature it might cease to be a free good, and become property. But the air is not capable of such appropriation. The appropriation found in property is exclusive in its nature, and carries with it as an attribute the right of the proprietor *to control the action of others in respect to the objects of property*. This is shown by Holland in his *Jurisprudence* in the

statement that "private rights of property" signify "the capacity residing in one man of controlling with the assent and assistance of the state the actions of others."[1]

Property implies the assent of the state, and in this we recur to the distinction between property and mere possession. If you have possession only, you leave the field and another comes in and takes possession. If you have property, then the third person, the state, keeps out others although you be absent yourself.

This brings before us a principle of the most far-reaching importance. Where does social authority find its seat? Does it find its seat chiefly, directly, or immediately in government? We find some men obeying other men. We have only to go into the street, or to enter a factory, and we find one man commanding other men. We go into a shop, and we find one saying to others, 'go,' and they go; 'come,' and they come. Everywhere we see some commanding and others obeying. Why is this? Is there any law compelling them to do this? Ordinarily not. The seat of authority is private property. We may say that authority is economic, inasmuch as authority finds its seat chiefly in property. But it is in property that restrictions upon freedom of movement are for the most part found. They exist chiefly outside of government. Authority, in other words, is chiefly economic and not political and public. This is something which is being continually overlooked in theoretical and practical discussions. But, on the other hand, property, as a fully developed institution, has its foundation in government; and by a round-about and indirect way we come back to the

state, but the theoretical and practical differences are vast.

So we can conceive this condition of things. We might have a political restriction of liberty or freedom of movement which would amount to, say, 3, and fastening our attention simply upon this political act we say that liberty is diminished to the amount of 3, whatever 3 may be. But it may be that this political restriction has increased economic freedom to the extent of 6. Then we have a net gain of 3. This is merely a fanciful case, but the thing itself happens frequently. All wise protective labour legislation illustrates this principle. Employers may in some instances be restricted, as, for example, when they are not permitted to employ in factories children under ten years of age, but if the children in consequence are educated and brought up in habits of diligence and reasonable industry, the total gain in liberty greatly exceeds the loss. Well-meaning employees will themselves feel that they enjoy greater liberty. But a certain class of writers fastening their attention merely upon political action say, when they observe that a political act or law restricts freedom, that freedom has been impaired or lessened; yet they do not go further and ask what effect it has had upon economic freedom. We have to consider the two together, and it is a matter of fact, as anyone can find out by inquiry, that political restriction often means economic freedom. The restrictions upon our actual freedom are chiefly of an economic character.

Now in order to understand what industrial liberty means we have to consider both the political restrictions upon liberty and those restrictions which are economic in nature. So this brings before us a vital question in socialism. And the important question, which is so often overlooked by the socialists and their opponents, is this: Will authority be more wisely exercised when seated in government or when seated in private property? Will authority be more wisely exercised when it is political in nature or when it is economic in nature? [2] Now it is chiefly economic in nature. Will it be more wisely exercised if it become political? And another question is, Will authority be more wisely exercised when it has a mixed source, partly in economic and partly in political institutions? [3]

Furthermore, *Property is exclusive in its nature and not absolute.* A phrase is found in Roman law which, as a definition of property, is misleading. The phrase is, "*Dominium est jus utendi et abutendi re.*" Some have said that it means that the right of property carries with it the right to use or to abuse a thing, and so it has been actually claimed that property is the right to use or misuse a thing, and that the right of property carries with it the right to make a bad use of things. But such an idea comes from bad translation. *Abutendi* means to use up or consume a thing, not to abuse it, and that has been conclusively shown by Knies [4] in his discussion of the subject. While it means the right of using up or consuming, the Roman law never intended to give anyone the right of misusing a thing. This right might have existed in spite of the intent of the law, but it was contrary to the spirit of the law to give the right. It might have existed because it could not be prevented,

but it was never sanctioned.[5] Wagner also calls attention to the fact that, added to the phrase, "*Jus utendi et abutendi re,*" is the generally ignored clause, "*quatenus juris ratio patitur,*" "in so far as the reason of law permits." But Wagner claims that while *abutendi* may mean simply to consume, it does carry with it at least a suggestion or implication of misuse.[6]

The right of property is an exclusive right, but it has never been an absolute right. In so far as the right of property existed it was an exclusive right, that is, it excluded others; but it was not a right without limitations or qualifications. Notice the distinction between *exclusive* and *absolute.*

The truth is, there are two sides to private property, *the individual side and the social side.* The social side of property finds illustration in the right of eminent domain and in the right of taxation. If there were no such thing as the social side of private property, how could the right of taxation exist? Take whatever theory you please. Suppose you say that the right of taxation is payment for protection. I say, 'I do not want any protection,' and if my right in private property is an absolute right, is not that sufficient, provided, furthermore, that I ask no privileges? The fact that I do not want protection does not give me exemption, and it shows at once that there is another side to private property than the individual side.

So also with the right of eminent domain. It is utterly incompatible with the absolute right of private property. *Moreover, this social side of private property is not to be regarded as something exceptional.* On the

contrary it is an essential part of the institution itself. It is just as much a part of private property, as it exists at the present time, as the individual side is a part of it. The two necessarily go together, so that if one perishes the other must perish. The social side limits the individual side, and as it is always present there is no such thing as absolute private property. An absolute right of property, as the great jurist, the late Professor von Ihering says, would result in the dissolution of society.

The footpaths through the fields and forests so often found in Germany, which, open to the general public, add so much to the joy of life in that country, have been referred to before, and may serve as illustrations here. Another illustration of the social side of private property may be taken from the chapter on "Rural Life in England," in Washington Irving's *Sketch Book,* "The stile and the footpath leading from the churchyard, across pleasant fields, and along shady hedge rows, according to an immemorial right of way." [7]

All there is in these illustrations is the simple recognition of the social side of private property; and they do not signify that anyone has or should have a right to walk over fields generally. The social side of private property in the United States very seldom carries with it that right. That is only one development of this social side existing at a particular time and a particular place.

These public rights, namely, the open footpaths through English fields and German forests, doubtless had their origin partly in necessity. They suggest at least a slight resemblance or analogy to the right of way

acquired by a modern railway company through exercise of the right of eminent domain; for this also is based on necessity. Even now one may "travel on lands adjoining a highway when the road is founderous." [8]

In the case of the German forests, ancient common rights,—for example, the right of estover or the right to gather firewood, etc.,—probably have a connection with present rights. These public rights constitute in these cases what is technically called an easement or servitude, to use the term taken from the Roman law. But to give them a name and make them a distinct right does not alter the fact that they represent the social side of private property. All the rights together constitute the full rights of property.

Furthermore it must be pointed out with emphasis that the great definitions of private property do not give the right of absolute use, or that if they do there are limitations found elsewhere in the codes which give the definitions. Let us consider a few of these definitions of private property.

First, let us direct our attention to the definition of ownership or property as given in Sohm's *Institutes of Roman Law* under "The Conception of Ownership." Sohm expresses himself as follows:

"Ownership is a right, unlimited in respect of its contents, to exercise control over a thing. The difference, in point of conception, between ownership and the *jura in re aliena* is this, that ownership, however susceptible of legal limitations (*e. g.* through rights of others in the same thing), is nevertheless absolutely unlimited as far as its own contents

are concerned. As soon therefore as the legal limitations imposed upon ownership—whether by the rights of others or by rules of public law—disappear, ownership at once, and of its own accord, reëstablishes itself as a plenary control. This is what is sometimes described as the 'elasticity' of ownership." [Sohm's *Institutes*, tr. Ledlie, 3d ed. § 61, p. 309.]

It will readily be perceived that the term absolute is misleading. When it is said that the right is unlimited "as far as its own contents are concerned," it is merely stated that it is unlimited, so far as it is unlimited; for all conceivable limitations are compatible with this definition. The one valuable thought in this definition is the externality of the limitations upon ownership.

Second, let us consider the great Prussian code of the eighteenth century, framed at the time of Frederick the Great. It is given in A. L. R. (*das Allgemeine Landrecht*) Teil I, Titel 8, § I. The English translation of this would be: "The proprietor is that one who is competent directly himself, or indirectly through an agent, to exercise control over the substance of a thing or of a right, to the exclusion of others." But in section 27 it is added: "No one may misuse his property to injure others."[9] Here appears the idea of misuse and of what misuse may carry with it, and it opens the door to any amount of development of the social side of private property, because anything which we deem would injure others we might call a misuse. There would seem to be simply no limit whatever to the development of what may come under this second clause.

Notice that "the proprietor is that one who exer-

cises a control over the substance of a thing or of a right." The idea is that property includes rights as well as material things. Also notice that it is "the proprietor directly himself or indirectly through an agent." This would sharply distinguish property from possession; if it were mere possession, as conceived by the theoretical anarchists and advocated by them, it would read: "One who is competent himself to exercise control over the substance of a thing." But property means something more than that. It means to control, directly himself, or indirectly through an agent, or in any way, provided we do not injure others by a misuse of the property.[10]

We take up next the definition found in the Napoleonic code. Art. 544. "Property is the right of using things and of controlling them in the most absolute manner, provided that one does not make a use of them prohibited by the laws or ordinances." [11]

Notice that the words employed to describe the right of the proprietor are stronger than those found in the Prussian code. The Napoleonic code was to a great extent under the influence of the Roman or Civil Law. But perhaps it is also in the nature of the French mind to express the right of a private individual in a more unrestricted and unguarded manner.[12]

In the Napoleonic code stronger terms are used to describe the right of individual proprietors, but notice that it says, "property is the right of using things and of controlling them in the most absolute manner, *provided one does not make a use of them prohibited by the laws and ordinances.*" What is added qualifies what

goes before, or may do it under the proper circumstances, for what is there that cannot be prohibited by the laws and ordinances? It is conceivable, at any rate, that any sort of use one could mention may be prohibited by the laws and ordinances. According to this, we may pass ordinances against this or that use, and still have something left which we may call private property. The definition begins by assigning unlimited rights, and then takes back what has been given; it follows, therefore, that it is impossible to have that which the first clause gives.

Let us take up next the definition of Lord Erskine who says: "The sovereign or real right is that of property, which is the right of using and disposing of a subject as our own except in so far as we are restrained by law or paction;" [13] and then that of Lord Mackenzie who similarly says: "Property is a right to the absolute use, enjoyment, and disposal of a thing, without any restraint, except what is imposed on the owner by law or paction." [14] We notice in both cases again the same qualifying phrase. The right of the individual or private owner is stated very strongly, and then a qualifying clause is added.

The definition in the new civil code of the German Empire simply says that a proprietor has a right to use a thing as he sees fit, to the exclusion of others, in so far as there are no limitations which come through law or through the rights of third persons. This is again very much the same thing.[15]

The late Professor von Scheel, of the Bureau of Statistics of Berlin, in his article on "Property" in the

German *Dictionary of Political Science*, gives several definitions of property; and then adds that in some of them the limitations are implied though not expressed. But as already stated, if the limitations are not in the definitions themselves, they are in other parts of the law. He says that these definitions, which give the views of the most distinguished jurists, when they are reduced to their essence, simply say that property is the right of control subject to limitations by the legal order. If property is simply the right of control subject to limitations by the legal order, what is there, asks Professor von Scheel, to distinguish it from other rights? There are other rights of an economic order which he mentions. Now what distinguishes property from other rights is not the absence of limitations, not that these other rights are limited and property is unlimited, but the fact that property right is the basis of other rights in things (lease, etc.). Then he quotes another writer [16] to the effect that what is essential in property is not full and absolute control, but the fact that property has a strong tendency to develop into full and absolute control. And these definitions would point to such a development as natural.

Or we may say, in other words, that *the social side of private property will fail to receive adequate recognition and development unless an active conscious effort is made to bring this about.* We all know how easily the general public loses its rights, because the general public is apt to be less watchful than private individuals, and it requires a considerable development, such as we see in recent years in England, in order to protect the social

side of property. All these definitions give this idea, that the right of property is the right of exclusive control in so far as the laws and ordinances do not establish limits. Thus there is a tendency on the part of proprietors having influence to remove these laws and ordinances and lessen their significance in one way or another, and with these removed, we have a development into full and absolute control except in so far as property may be restricted on general principles.[17]

Now one thing which suggests itself is this. If property does not carry with it the right of misuse, how does it happen that so much misuse is tolerated? [18] We see property wasted and destroyed, and we see the law taking no steps to prevent the apparent waste and misuse. The fact is just this: The misuse or the abuse of things is not a part of the right of property when we reduce property to its essence, but it is something which may exist because no way can be devised to prevent it without interfering with the institution of property. It is difficult to frame laws which will prevent a misuse without at the same time preventing a proper use. But we hold that the law may go as far as possible in preventing a misuse.

At this point, it is well to distinguish between the abuse or misuse of property in a positive way to injure or interfere with others and the abuse in a negative way in wasting or destroying economic goods. It is a maxim of the law that one must not use his property to injure others, and while this cannot always be prevented, the law does much already. It is more difficult to deal with misuse of the second kind. Nevertheless, it is a part of

the nature of property that a misuse should be prevented, and if anyone can suggest any way of preventing a misuse, then the law may step in. But we have to do two things. We have to prevent misuse as far as practicable, and that must always fall far short of what is desirable; then so far as what remains is concerned we have to appeal simply to the individual and social conscience. We have to tell a proprietor that the selfish use he is making of his property is not according to the idea of property and that it behooves him to mend his conduct. We virtually say to him, 'We see no way in which we can prevent this misuse without at the same time preventing a proper use, so we must appeal to your individual conscience.' While this is all we can do for the time being, we do not give up the right of preventing by legal force this misuse, if any way can be discovered of accomplishing that end, without at the same time causing greater evils.

The riper a people, the more can be done to develop the social side of private property and to prevent waste and misuse. Abuses of individuals and the failure to respect proper rights of private owners render difficult many developments which could otherwise take place. "Give them an inch and they take an ell." Picnics on private land afford an illustration. Many a good-natured owner of beautiful picnic grounds on the shore of a lake or in a fine forest has allowed the general public the right to use his property, for picnics, only to find his generosity so abused as to oblige him to withdraw the privilege. And in cases of this sort private rights must first be protected and safe-guarded, for on

them depends our food supply and the satisfaction of our primary wants, until, at any rate, we are ready to abandon our existing order for socialism or some other new economic order.

Private property, then, does not carry with it the right of misuse; this right cannot be recognised and is the last thing which belongs to the idea of private property. One of the arguments advanced against private property is that it carries with it the right of abuse; but if that is no part of the institution itself, one who demands its abolition must first show that we cannot have the institution without such abuse or misuse as to outweigh its advantages. Some readers may think this all fanciful; that the right of misuse does exist; and that we see men everywhere who do not recognise the fact that their private property has any social side. Some might also ask, 'What evidence can you produce of any effort to prevent misuse?' We have already replied in part to this objection. Misuse exists and must continue to exist indefinitely because it is so difficult to prevent misuse without at the same time preventing a proper and legitimate use; but in so far as a way can be found for preventing misuse, that way will be resorted to; sooner or later, with the progress of time, and to an increasing extent, abuse and misuse will be restrained. When we have done our utmost, however, there will be still left opportunity for abuse, because we cannot draw up any general scheme of law and administration which will altogether prevent abuse. And, as already stated, when we have reached this point we must simply appeal to the individual conscience.

But the writer has before him a brief description of a case in which the court recognised the fact that abuse was not a part of the institution of property. It was a case which came before the Indiana Supreme Court, and is a noteworthy one.[19] Suit had been brought against a Mr. Townsend for burning natural gas in flambeau lights contrary to the statute of the State. This statute reads in part, "The use of natural gas for illuminating purposes, in what are known as flambeau lights, is a wasteful and extravagant use thereof, and is dangerous to the public good." The appellant contended that the statute was unconstitutional, because in opposition to the Fourteenth Amendment to the Federal Constitution. But the Indiana Supreme Court sustained the decision of the lower court that the law was constitutional, saying, "The act in no way deprives the owner of the full and free use of his property. It restrains him from wasting the gas to the injury of others, to the injury of the public." Ownership of natural gas was likened to ownership of wild animals, game or fish; and because of the similarity between these two kinds of property the Indiana court quoted from a decision made by the Supreme Court of Minnesota in the case, State *v.* Rodman: [20] "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common. . . . It (the State) may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also

by imposing limitations upon the right of property in such game after it has been reduced to possession." Thus the Indiana court held that, though gas brought to the surface in pipes is the property of the owner of the pipes, yet this property right is limited by the right of the State to prevent waste which is damaging to the public.[21]

But some have gone too far in the interpretation of this decision of the Indiana Supreme Court, and a recent decision of the Supreme Court of the United States of May 15, 1911, calls a halt, as it were, and warns us that the court is very keen in its watchfulness over the individual side of private property. Mr. Justice McKenna, in delivering the opinion of the court, said in reference to a later but similar Indiana case: [22]

"Ohio Oil Co. *v.* Indiana was a writ of error to the Supreme Court of Indiana to review a judgment of that court which sustained a statute which prohibited any one having the control or possession of any natural gas or oil well to permit the gas or oil therefrom to escape into the open air, and restrained the Oil Company from violating the statute. Against the statute was urged the rights of property assured by the Fourteenth Amendment of the Constitution of the United States. The case is a valuable one and clearly announces the right of an owner to the soil beneath it and the relation of his rights to all other owners of the surface of the soil. The right of taking the gas, it was said, was common to all owners of the surface, and because of such a common right in all land owners an unlimited use (against a wasteful use the statute was directed) by any it was competent for the State to prohibit. This limitation upon the surface owners of property was justified by the peculiar character of gas and oil, they having the power of self-transmission,

and that therefore to preserve an equal right in all surface owners there could not be an unlimited right in any. Gas and oil were likened to, not made identical with, animals *ferœ naturœ* and, like such animals, were subject to appropriation by the owners of the soil, but also, like them, did not become property until reduced to actual possession.

"But an important distinction was pointed out. In things *ferœ naturœ*, it was observed, all were endowed with the power of reducing them to possession and exclusive property. In the case of natural gas only the surface proprietors had such power, and the distinction, it was said, marked the difference in the extent of the State's control. 'In the one as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property, under such a condition, can be conceived because the public are the owners, and the enactment by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. Geer *v.* Connecticut, *supra* (161 U. S. 519). On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right of reducing to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. And this right, it was further said, was coequal in all of the owners of the surface and that the power of the State could be exerted for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession and to reach a like end by preventing waste. And further characterizing the statute, it was said, viewed as one to prevent the waste of the common property of the surface owners it protected their property, not devested them of it. And special emphasis was given to this conclusion by the comment that to assert that the right of the surface owner to take was under the Fourteenth Amendment a right to waste, was to say, that one common owner may

devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States.'

"The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it, a reduction to possession and property, not to take away any right of use or disposition after it has thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession they could not be deprived of any right which attached to it when in possession." [23]

Among other things, we should especially notice the emphasis which the Supreme Court of the United States, following the Supreme Court of Indiana, lays upon a certain likeness between the natural gas and wild animals which have to be actually captured or reduced to possession before the right of private property is fully established. It is not to be inferred that this reasoning would necessarily apply in full measure in the case of objects over which the rights of property have already been extended.

Long as this quotation is, its importance as an interpretation of the opinion of the majority of the court as to the actual law in the United States, justifies its

reproduction here. It must be safely anticipated that in time to come the power to prevent waste will be more fully asserted by our courts, and that thus the social side of private property will receive further development.

Waste is not allowed in the case of water in Colorado. The laws of that State make it the duty of the water commissioner to prevent water being wastefully, extravagantly, and wrongfully used in any ditch. The statute reads:

"The water commissioners of the several water districts of this state are hereby empowered, and it is hereby made their duty, upon the application of the owners of one or more ditches in their district, to immediately make or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is being made by the owners or consumers of water from said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully, or extravagantly or wrongfully used by its water consumers, or put to any use than that to which it is entitled to be used in the order of priority, at such times as the same is being needed by other appropriators, it shall be the duty of such water commissioners immediately to shut off the supply of water in such ditch to such an extent as in his judgment was wasted, or extravagantly, wastefully or wrongfully used." [24]

The extent, however, to which commissioners may go to prevent waste is a subject of controversy.

In France and also ordinarily in the United States a man may be restrained from setting fire to his house.

In the former country a spendthrift may also by an appeal on the part of his relatives be restrained from wasting his property; and in Massachusetts a guardian may be appointed for a spendthrift; it is the same in many other States; possibly in our country one could likewise make an appeal to the court, and perhaps our courts, on the ground of public policy, could in one way or another issue an injunction against the waste of property by private owners if it were clearly a malicious waste. An insane man can always be restrained and the care of property removed from him. Now it is true that this idea has not been very well developed. Professor Charles Gide says it is probably due to a superstitious respect for the sacred rights of property. We might rather say, it is due to a misapprehension in regard to what are the sacred rights of property, owing to a failure to recognise the social side of private property along with the individual side.

Another attribute which is sometimes ascribed to property is perpetuity. The statement is made by Professor H. von Scheel as a characteristic of property that it is unlimited in time, that is, not dependent upon a definite time; in other words, it is perpetual, and its duration is not dependent upon any event or upon the legal action of another person without the consent of the possessor. This same idea is apparent in Austin's definition. Austin defines property or *dominium* in a "strict sense" as denoting a right—indefinite in point of user, etc. But he also mentions various other uses of the term, one of these denoting "a right indefinite in point of user, but limited in duration; for example, a

life interest in movables." [25] It is on account of this idea that property must be perpetual that Professor von Scheel does not accept the concept "intellectual property" which is used in Germany and England. The term "intellectual property" means property in books, in inventions, patents and copyrights, property in the product of one's intellect. This property is a limited property, copyrights extending only over an extreme period of fifty-six years (twenty-eight years but renewable for twenty-eight years more) in the United States [26] and having a varying but limited duration in other countries. But it is the opinion of the author that to deny to copyrights, patents, etc., the title property is a mistake, for he agrees with Professor Wagner [27] who considers such property as true property. Why does property need to be perpetual? If by property we mean exclusive control, why need that exclusive control continue for ever? If I have property for fifty-six years, and have full and exclusive control for that period, a control subject to no one else, then I have the full rights of property. Of course, if I had only the right to use a thing for fifty-six years, over which somebody else had a higher right, that would be a different matter. That would be a lease, a contract right or limited inheritance or some other limited right. But here the thing itself expires in fifty-six years. My right does not pass over to another but becomes a free good. The single copy of a book which I hold in my hand will be property indefinitely until it is all used up and consumed,—a thousand years, if you please; but the intellectual property is not the paper or the cover of the

book; it consists in a certain expression, a form given to certain ideas, and that may expire in twenty-eight years or in fifty-six years, or a longer period as the case may be. It is intellectual property, and, it seems to the author, is full property, but it is property limited in point of time. No valid reason appears why we cannot have many kinds of property with varying duration, which after that duration expire and become free goods. At the end of the fifty-six years at the most anyone in the United States may make copies of a book; likewise he may use an invention when the patent expires.

We must here as elsewhere recognise evolution; we are developing an increasing number of limited rights. *Limitation* is one of the more significant and essential things in the development of property rights. Limitations make it possible to review and revise rights later when larger experience and increasing knowledge give more abundant light. Property has undergone changes in the past and is still undergoing changes now. We cannot look far into the future to see what will be the probable development; therefore we cannot attribute eternity to property even in the limited sense in which we use the term. Why then should we refuse the name of property to economic rights which have a definite duration, which are strictly limited in duration? If these rights during the time of their duration partake of all the characteristics of property, if they give exclusive control over things and rights for a certain time, why should they not be called property?

If one pleases one can classify property with respect to duration,—property of unlimited duration, property

of indefinite duration (newer franchises, during good behaviour, so to speak), and property definitely limited in time, say, twenty years, fifty years, etc.

We now pass on to the *varying intensivity of property*, of which mention has already been made in a general way. Property extends to various kinds of things and various sorts of rights. It extends to movables and immovables especially, and this is one of the most important distinctions. But it must not be supposed that we have the same laws for all kinds of property, for these laws vary with the varying intensivity of property. This is a point which has been made by various modern writers; among them by Professor Émile de Laveleye who brings out this point in the following words: "It is for economic reasons also that rights of property are more or less extensive,[28] according to the different objects to which they refer; being almost absolute in relation to objects which are movables, but already limited when we come to arable land, and still more restricted for houses and forests and finally for mines and railways closely hedged in by the intervention of public authority."[29]

Professor de Laveleye gives certain classes of objects, as we see, which differ from each other with regard to the intensivity of property. He says that property is almost absolute as far as movables are concerned, being more limited when we come to arable land; and still more when we come to forests, houses, mines, and railways. Professor Wagner brings this out in his discussion of mining property, showing that property in treasures under the ground has in Prussia and elsewhere

been separated from property in arable land, and that private property in undiscovered treasures beneath the ground has very generally been abolished. That is, the property in treasures beneath the soil is properly public property and its use is allowed to individuals upon prescribed conditions. It does not follow necessarily that because a man owns the surface of the land he therefore owns the natural treasures below the surface. The rule is quite to the contrary,[30] England and the United States being excepted, and even in the United States we are moving away from this idea which has seemed to those brought up under the influence of Anglo-American traditions to be grounded in the nature of things.[31]

The railways in the United States also illustrate our proposition. In American railways the stockholders have a kind of property which is as little intensive as any sort of property that could be mentioned, because we have so developed the social side of private property as to confuse those who have not grasped the general principles, and they call this property quasi-public or sometimes simply public. The former is not entirely incorrect, and may not be altogether objectionable but the latter is certainly incorrect, as has been well brought out in decisions of the Supreme Court of the United States, which hold that although the property is dedicated to a public use, it is private, and consequently to deprive its owners by legislation of a fair return on it is confiscation of private property.[32] Although we have in this case developed the social side of private property, there is really no occasion for confusing it with public

property. It is not public property but private property. The income from railways flows into private pockets. They are managed for private gain. And the real difference is simply in the degree in which the social side is developed. But American railways are not public property, for public property is property owned by public authority, and owned in the interest of the general public.[33]

Émile de Laveleye gives, as we have seen, a rough or informal sort of classification of the objects of property with respect to the intensivity of property. In the United States we would make a somewhat different arrangement, because our mining property is more intensive; but in saying this we speak about the property in treasures beneath the ground. When the treasures have once been seized, once taken out of the ground and separated from the ground, then they become movables, and there is a very intensive sort of property in these treasures. Thus in Prussia if a man opens up natural treasures below the surface of the ground, when he takes them out of the mine in accordance with the law, he has then property in movables which is property as intensive as will be found anywhere.

Notes and References to Chapter V

[1] P. 133, p. 11.

[2] P. 133. And thus exercised indirectly through government.

[3] P. 135. It should be observed that the author does not claim to have mentioned all sources of authority. Other tremendous sources are those found in family and religion: consider for example China and Turkey as illustrations of the force of parental authority and of a religion with fatalism as one of its main characteristics. Extreme socialists claim that property dominates the state in which it finds its sources: property is everything! This brings us back again to a crude materialistic interpretation of history.

[4] P. 135. Knies, *Geld*, p. 88: discussed by Wagner in his *Grundlegung*, 3d ed., Vol. II, pp. 37–38.

[5] P. 136. For the view that "*jus utendi et abutendi*" does not give the right of misuse, but only the right of consuming or using up, see also *Moralphilosophie*, by Viktor Cathrein, 4th ed., Vol. II, p. 310, note 1.

[6] P. 136. In Valentin Meyer's *Eigentum nach den verschiedenen Weltanschauungen* the extreme individualism of the treatment of property by the Romans is discussed critically and suggestively. On the one hand, the private owner abused his rights outrageously: on the other hand, he was at times called upon to make unwarranted sacrifices and was inadequately protected against confiscation. There was a dualism of private rights and state rights which only in modern times has been replaced by the social theory of property, a unified concept which is large enough to include both individual and social rights. On property among the ancient Romans, *v.* Meyer, *ibid.*, pp. 11–13. The whole first chapter, entitled "Das Altertum" is well worth reading.

[7] P. 137. Another similar illustration is taken from an article which appeared in the *Outlook*. Speaking about church-going in England the writer says:

"Church-going is aided by the advantages for pedestrianism which England affords. There are footpaths across the fields, easy to discover, which are as truly highways for the pedestrian, as the

road is for the carriage, and whereon the pedestrian has as much legal right as on the public road. Here in the Isle of Wight the Downs are all open to the public; and one may walk for miles over the green elastic turf, where walking is in itself a luxury.

"One reason for this larger liberty of the pedestrian is that the Englishman stands up, not only for his own rights, but for the rights of the public as represented in himself. In Scotland for years the moors have been open and unfenced. Latterly landlords are attempting to shut out the public in order to preserve them more effectually for game. But the public declines to be shut out. I had a conversation on this subject with an Englishman whose sweet pacific temper is known on both sides of the Atlantic. He is summering in Scotland, and is a great pedestrian. The gamekeepers every now and then undertake to warn him off the moors. 'I always,' he said, 'give the gamekeeper my card, and tell him that he is quite right to obey orders, but I am quite right to disregard them. But if his master thinks I am trespassing, he can bring a suit against me.' I have since learned that the rambling clubs of Scotland, of which there are many, have met with the same difficulty, have issued the same challenge to the landlords—not always in so gracious a spirit—to take the issue into the courts for decision, but the landlords never have ventured to accept the invitation.

"A little more sturdy resistance and a little less lazy good-nature would improve the American.

"L. A.
"Editorial Correspondence"
The Outlook, Sept. 14, 1895.

[8] P. 138. See article "Judicial Construction of the Fourteenth Amendment" by Mr. Justice Francis J. Swayze in the *Harvard Law Review* for November, 1912, p. 15.

[9] P. 139. "Eigentümer heisst derjenige, welcher befähigt ist, über die Substanz einer Sache oder eines Rechtes mit Ausschliessung anderer, aus eigener Macht, durch sich selbst oder durch einen Dritten, zu verfügen." But in paragraph 27 it is added: "Niemand darf sein Eigentum zur Kränkung oder Beschädigung anderer missbrauchen."

[10] P. 140. Here and in this entire chapter the author owes a great deal to the lectures of his teacher, Professor Knies.

[11] P. 140. "La propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse un usage prohibé par les lois ou par les règlements."

[12] P. 140. We may so look at these two codes from the social standpoint that the Napoleonic code will seem a far less liberal code than that of Frederick the Great. It is of interest to students of history to note that the code of Frederick the Great was a very liberal one. It was better, in many respects, than modern codes since that time. It protected the rights of private owners, but in general to an unusual degree the rights of the comparatively weak and defenceless members of the community as well. It also protected the rights of women to a greater extent than many other codes, and the rights of illegitimate children. So that the present German code is in some respects a retrogression as compared with the code of Frederick the Great, which we may call a broad, humane and progressive code of laws. In this connection one should read Dr. Anton Menger's *Das burgerliche Recht und die besitzlosen Volksklassen* upon which the present writer largely bases his view of this code.

[13] P. 141. Lord Erskine. Quoted by Macleod, *Elements of Economics*, Vol. I, p. 143.

[14] P. 141. Lord Mackenzie, *Roman Law*, p. 171.

[15] P. 141. *Das Bürgerliche Gesetzbuch*, p. 195. "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Recht Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschliessen." *Cf. Das neue bürgerliche Recht*, by Dr. Franz Bernhöft, 3ter Bd. Erster Teil, Zweiter Abschnitt, das Eigentum, § 20, der Begriff, pp. 50–55. See § 1136 of the text of *Das Bürgerliche Gesetzbuch*.

[16] P. 142. Dernburg, *Lehrbuch des preussischen Privatrechts*, § 181.

[17] P. 143. Professor John R. Commons, in his *Distribution of Wealth* (p. 93) states this when he says that private property is the residual claimant of rights. He takes the full rights over a thing, then sets aside certain of them and what is left is property. He has a long arrow representing the total rights of property, definite and indefinite, then sets off certain definite rights and what is left over is property. From the full rights of property he first sets off public partial rights. What are these? Eminent domain, right of way, taxation, nuisance, public policy (which is very indefinite),

fines, forfeitures, etc. These are various public partial rights which have to be taken away from the total rights of property. Then we have private partial rights. There is the right of easement, of leases, mortgages, trusts, contracts, inheritance. Then after we have taken away these definite rights, there is still something left over, the residuum, that is dominium, or the right of private property. The same would hold with regard to public property. When the public has property we have to set aside an indefinite residuum also.

This idea of Professor Commons is brought out in a definition of property found in a work by Wordsworth Donisthorpe called *Individualism*, which Professor Commons quotes, "Property is all those indefinite uses over a thing which remain over after the definite or specific uses of others have been deducted."

[18] P. 143. This topic has in recent years been treated by advocates of Conservation, notably by President Van Hise in his excellent book, *The Conservation of Natural Resources in the United States*. See also the article by Mr. Justice Andrew A. Bruce on "The Conservation of our Natural Resources and of our National Strength and Virility" in the *University of Pennsylvania Law Review* (Dec., 1909). The present chapter long antedates the Conservation movement, for it was substantially in its present form in the autumn of 1898.

[19] P. 146. Townsend *v.* The State, 147 Ind. 624; 47 N. E. 19 (1897). *Cf.* Mr. Justice Bruce's discussion of this and similar cases, pp. 140 *et seqq.* in art. cited.

[20] P. 146. 58 Minn. 393 (1894).

[21] P. 147. *Cf.* an article in *The Petroleum Gazette*, Titusville, May 27, 1897, for a popular presentation of this case, giving the view of an organ of interested parties.

[22] P. 147. Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900).

[23] P. 149. In the case of Oklahoma *v.* Kansas Natural Gas Co., 221 U. S. 229 at p. 252 (1911).

[24] P. 150. Revised Statutes of Colorado, 1908, § 3438.

[25] P. 152. Austin, *Lectures on Jurisprudence* (London, 1863), Vol. II, pp. 477–8.

[26] P. 152. Formerly twenty-eight years, and renewable for a period of fourteen years. At present twenty-eight years, and renewable for a period of twenty-eight years by the terms of the

Act of March 4, 1909 (Statutes at Large, Vol. XXXV, Pt. 1, pp. 1075–1088).

[27] P. 152. Professor Wagner discusses this in his *Grundlegung;* he considers copyright as property, as "geistiges Eigentum".

[28] P. 154. According to our terminology, this should be "intensive".

[29] P. 154. See his book *Luxury* (Sonnenschein Social Science Series), chapter on "Law and Morals in Political Economy," pp. 159–60.

[30] P. 155. This will find more detailed treatment in the author's *Landed Property and the Rent of Land*, in the discussion of mineral treasures.

But we give here and now the following acts and recommendations as illustrations of a rapidly growing movement in the United States.

Chapter 318 of an Act to provide for Agricultural Entries on Coal Lands (U. S. *Statutes* 1910, Vol. 36:583) contains this provision:

"That from and after the passage of this Act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only . . . whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine and remove the same. . . .

"Sec. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented together with the right to prospect for, mine and remove the same."

The Act of June 25, 1910, gave the President the power temporarily to withdraw from location and entry any of the public lands of the United States in Alaska, "and reserve the same for water power sites, irrigation, classification of lands, or other public purpose to be specified in the orders of withdrawals." (U. S. *Statutes* 1910, Vol. 36:847, Chap. 421, Sec. 1).

In his report for 1911 Secretary of the Interior Fisher made the following recommendation:

"I also recommend the enactment of legislation to permit the disposition of the surface of lands containing, or believed to contain, deposits of oil, under appropriate land laws, reserving to the United States for future disposition the deposits of oil therein." (Report, p. 11.)

"In fact, the enlarged application of the leasing principle to the public domain, generally will, in my judgment, more effectively promote development and protect the public interest than the present system. Certainly coal, oil, gas, asphalt, nitrate, and phosphate lands can be more appropriately developed by leasehold than by the present system of classification and sale of the fee which prevails with respect to coal. Many of the Western States have recognized and are acting upon this principle." (*Op. cit.*, p. 10.)

In another place it is stated that surface agricultural land is not cultivated because people hold the land for the unearned increment which they expect when the natural resources on said land are exploited. This results in retarding the surface development of our lands.

"Permission for the development of water power on navigable streams and from non-navigable streams on the public domain should be granted by the Federal Government only on payment to it of rentals which should be readjusted at periodic intervals of no longer than a decade under general provisions which will protect the interests of the investor and of the public." (*Op. cit.*, p. 14.)

Secretary Fisher adds that the permits should provide that the grantee will submit to reasonable regulation.

Along similar lines the Commissioner of the General Land Office has recommended the following legislation:

"Entry for town site purposes of lands valuable for coal, oil or gas, should be permitted, with provision whereby the Government will retain the title to the coal, oil or gas contents of the lands so entered, in like manner as such deposits or contents are excepted from conveyance by the act of Congress approved June 27, 1910 (36 Stat. 583)." (Report of Commissioner of General Land Office for 1911, p. 123.)

[31] P. 155. In Germany property in land in general carries with it rights upward indefinitely and downward indefinitely; but with important restrictions in the general interest. One of these is that

the owner of land cannot prevent the use of the air space above his land or the earth beneath, when he has no interest to forbid such use. He may forbid the postal authorities, for example, to attach wires to his house or to erect poles on his land. He is entitled to no damages when the wires go through the air at a sufficient height above his garden. No payment can be demanded for fictitious damages in the case of the use of the air above or the earth under the surface of the land. (*Das Burgerliche Gesetzbuch*, § 905, Satz 2.) It is likewise in general provided (§ 226) that a right cannot be exercised simply to injure another. See *Das Neue Bürgerliche Recht* by Dr. F. Bernhöft, 3ter Bd. 1ster Teil, § 20, §§ 54–55.

[32] P. 155. A case in point is that of the Interstate Commerce Commission *v.* The Chicago Great Railway Co., 209 U. S. 108 (1908). The Chicago Live Stock Exchange had protested that the giving of a lower rate to the packers on packing house products than to shippers of live stock, between Missouri and Chicago, was unjust discrimination and contrary to the public good. In deciding the case in favour of the defendants, Mr. Justice Brewer said, "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."

[33] P. 156. But the public and private nature of railways are so blended that considerable confusion has arisen in the decisions of the courts, especially in regard to damages resulting from railway accidents. A railway's property, so far as ownership and profits are concerned, is private property. But it is so clothed with a public interest that the state has gone to great length in regulating it, even fixing rates, which is limiting property.

Its business is a public convenience, even a necessity; the fruits of its business are strictly private property. The U. S. Supreme Court accepted this doctrine in a somewhat extreme form, in Western Union Tel. Co. *v.* Penn. R. R. *et al.*, 195 U. S. 540 (1904), and Mr. Justice Harlan, in a vigorous dissenting opinion, set forth the "social" view of the nature of railway property. See also Donavon *v.* Penn. R. R., 199 U. S. 279 (1905).

As to the nature of railway property, see the following: Swan *v.*

Williams, 2 Mich. 427 (1852); Trunick *v.* Smith, 63 Pa. St. 18 (1869); Adams *v.* Boston H. & E. E. R. R. Mass., 1 Fed. Cases, No. 47 (1870); Leavenworth County *v.* Miller, 7 Kan. 479 (1871); Talcott *v.* Pine Grove Tp., Mich., 23 Fed. Cases, No. 13,735 (1872); Atchison, Topeka & S. F. Ry. *v.* U. S., 12 Ct. Cl. 295 (affirmed 154 U. S. 637) App. (1876); L. S. & M. S. Ry. Co. *v.* C. & W. I. R. R. Co., 97 Ill. 506 (1881); McCoy *v.* C. I. St. L. & C. R. Co., 13 Fed. 3 (1882); Railroad Co. *v.* Iron Works, 31 W. Va. 710 (1888).

The tendency now is towards emphasising the public nature of railway property. The Interstate Commerce Commission has had its origin in this desire of the public to regulate railways; and the greatly increased powers of that body by recent legislation indicate the trend of the hour. See list of cases bearing on the authority of the Interstate Commerce Commission to regulate rates, etc., Appendix IV. Consult also Haney's *Congressional History of Railways*, pp. 225 *et seqq.* and Chap. XXI for a treatment of the development of Congress's interpretation of the Commerce Clause of the United States Constitution, which confers the right of control of interstate commerce.

CHAPTER VI

THE SOCIAL THEORY OF PRIVATE PROPERTY: OR, PRIVATE PROPERTY A SOCIAL TRUST

We have established the proposition that there are two sides to private property, and that both sides are so essential, that if either one is removed the right of private property must cease. Not only is it true that if the individual side is removed private property ceases, but it is just as true, though generally this is not fully understood, that if the social side of private property ceases to exist, the right must likewise cease to exist because private property then becomes an impossibility, inasmuch as it would destroy social life.

But we have not yet squarely faced the question, Which is dominant? This question we must ask and it must be answered. Which side is to be dominant, the social or the individual side? One side or the other must be dominant, because in the very nature of things the two have to come into contact, and one side or the other must yield in case of conflict. We must face this question, and we therefore lay down this proposition, which constitutes *the social theory of property*, namely: *Private property is established and maintained for social purposes.*

We are not now discussing the actual historical origin of property, but rather its logical and ethical basis and

justification, namely, what is the nature of the institution and what are the reasons for its maintenance?

Now what is the proof of this proposition? The proof is found partially in the actual facts, present and historical, of our social life and partially in the nature of organised society and its needs. We may begin with a very simple illustration, taken from comparatively modern history; namely, landed property in the United States. Why was landed property established in the United States? And why has it been maintained? Why is land made private property to-day? We had to choose in regard to this. There was a time when very little land in our country was private property. For a time after the country became settled only relatively small areas of land were taken up, and even the land put under cultivation was not always private property. We had to some extent the old institution of common property, common pasture land, and common forests, etc. But gradually private property in land was extended and now it is dominant throughout the country, there being in the older States comparatively little land which is still public property.[1] And private property was established for social purposes. The arguments and discussions concerning our public domain show this, more and more clearly as time goes on. It was indeed very generally assumed as something so self-evident that private property in land would conserve the general interests of society to a greater extent than public property, that the contrary view did not even occur ordinarily in the discussions of the subject. It was a general principle of our common law that to

every piece of property should be assigned an individual owner and this view and way of looking at rights was greatly strengthened by the individualism of the frontier. It was felt to be right that the individuals who settled the domain should own it; and this is still the belief of the vast majority of Americans who give their approval to the institution of private property in land; although now there are those who say it is not a good institution. These are, however, a small minority compared with the whole population. This institution of private property was not established secretly. The thing was not done in a corner in any hidden manner. There was no conspiracy about it. It was all open and above board. And it was established because Americans believed that private property was better than public property, holding that the people as a whole would derive the greatest benefit thereby.

Now, however, arguments are brought forward by those who think that private property in land is not the best institution and that not being the best institution, it does not promote to so great a degree the general public weal as some other institution would. These arguments have produced an impression and the result is that a desire is felt by many not to go so fast in converting our public domain into private property, in making the change from public to private property in land. And so here and there in the United States we are beginning to move a little more slowly in this particular. In some of the North-western States as in the Dakotas there are legislative and constitutional provisions, making it more difficult to change from public

property to private property than it has been heretofore by putting a high price on public school lands and providing that they must not be sold until they reach the established price.[2] The people who have been instrumental in bringing about these changes do not generally accept the proposition that public property in land is better than private property, but they desire that a portion of the increment in land values shall accrue immediately and directly to the general public, holding that the increment is partly due to the general social growth. Still more recently the Conservation movement has strengthened the feeling that we must proceed cautiously in changing public property in land into private property, especially in the case of mineral lands and forests.

When we turn to other countries we find that the arguments of those who oppose private property in land have produced a still stronger impression than they have in the United States. Under the influence of the belief that private property in land was preferable to public property, and under the influence of English economic thought, in the middle of the nineteenth century, Prussia began to sell her public domain, following in American footsteps, except that she charged the market value for the land which was sold. This policy continued for some time in Germany, Belgium, and elsewhere, and then came a reaction.[3] There were those who said in effect, 'We are not sure about the proposition laid down by Adam Smith and others that the private cultivation of land is better than cultivation under public authority.[4] We are not so convinced of

that as we once were. We see that in some cases public cultivation is as fruitful as private cultivation, in some cases more so, for example, forests. We see also that under public authority land can be leased as advantageously as by private individuals. So let us keep the public land which we have. Let us not part with that.'

But very generally those who hold the opinion that private property in land is desirable have separated forest land from arable land in so far as property is concerned, and have come to the conclusion that not private property but public property is desirable as the dominant form of property in the case of forests. In the case of mineral lands in the United States, the view of conservationists, following opinions of economists previously laid down, is inclined to favour public ownership.

New Zealand and other Australian colonies also illustrate the trend of world opinion. They have gone further than Americans have or than any European state has in the effort to retain public property, and even have changed back property from private to public, New Zealand having purchased some great estates in order to break up concentration in the private ownership of land, besides taking various other measures to the same end.[5]

The point of the argument is this: That in every case it is the social purpose which is dominant or becomes dominant and which controls the institution of private property in land. If it were clearly perceived by the people that public property is better than private property, then we would have public property in land. It

is the social purpose, the general welfare which has been in control. It is not generally as a result of conscious processes on the part of the many that the general welfare triumphs, but as a result of a social philosophy which few in the past could have stated. Doubtless in Athens in the time of Aristotle few reached the conclusion by a process of reasoning that slavery promoted the general welfare. The Stagirite presented this theory in his social philosophy, but social purpose becomes clearer and clearer to an ever widening circle. Private influence, to be sure, can make itself felt, more or less, sometimes properly, sometimes improperly. But the general view in regard to public interest will ultimately carry the day.

When we consider the establishment of new kinds of property, we see very clearly that it is the social purpose which decides the matter. "Intellectual property" as seen in copyrights, trade-marks and patents affords proof. Until quite recently the United States had only national copyright, and did not allow foreigners to acquire American copyright for their books. Arguments were, however, brought forward for the extension of intellectual property, and a few years ago copyrights were made international by the United States, following the previous practice of other countries. The arguments largely turned upon the social welfare. So also with trade-marks and with patents. There was no effective patent law in Germany until some forty years ago, when the German Empire was established, and it was argued that by the absence of such a law Germany suffered. In the United States social utility was urged

in behalf of international copyright. And the argument of individual justice was also brought forward; for it was held unjust that Americans should enjoy the results of the toil of an author and give him no reward for his labour. But is this "justice" anything else but social welfare? It certainly includes it. And the one who argued the question mainly on individual grounds, always had arguments to show that the interest of society would be promoted by the desired reform.

And why should the duration of these rights be limited,—the right of property in books and the right of property in inventions, etc.? What are the arguments advanced for the limitation of these rights? Nothing but the general welfare. We make a sacrifice for the time being in order to reward the inventor or the author because we think that thereby the social welfare will be promoted and inventions will be stimulated, but we do not propose to suffer the disadvantages of monopoly in regard to these things for more than a limited term of years. We do not hold that the rule of reasonable returns demands that we should do more.[6]

A still more important and convincing kind of proof is seen in arguments defending private property when attacked as a whole, or when any particular species of private property is attacked. Those who urge the defence of private property feel it incumbent upon them to show that because private property as a whole or a particular species of private property does promote the general welfare, it is therefore worth while to maintain the institution, and in these arguments designed to show the benefits resulting to society from private property we

find these proofs brought out. The arguments of Henry George and of the socialists, and also those of John Stuart Mill afford illustration. They all endeavour to show that private property in land is or is not more beneficial than public property.

But that is not all. We have something that is perhaps even more convincing. Laws and institutions at present clearly assert the superiority of the claims of society over those of the individual. Whenever conflict is clearly perceived between the general public interest and the individual interest with respect to property, and when at the same time a way to prevent harm is clearly perceived, then there is no hesitation. The individual has to yield his claim every time. It is not always perceived how harm can be averted, but whenever it can be prevented the individual side has to yield to the social. As previously seen, abuses exist, not because they are part of the institution, but because no way has as yet been perceived of removing them by general rule; and laws must operate by general rule. When we go beyond this, as already stated, we have nothing left but appeal to the individual conscience.

The institution of eminent domain affords further illustration. What does it mean? It means precisely this,—that there is a conflict between the individual interest and the public interest.[7] The use of certain land is required for public purposes and the individual use of that land is injurious to society. That is, it keeps society from carrying forward certain undertakings which society deems important and valuable. So

the individual side of property has to give way to the social side. Private property disappears and public property takes its place. The individual may insist very strongly that he desires to retain his property. He may say, 'It is my property, and I am attached to it; it belonged to my father and to my grandfather before him. You offer me compensation but I do not care about that. What I want is this particular property.' But however much he may protest he has to give it up. And increasing use of eminent domain and demands for its further extension have this basis.[8] Probably nowhere has this point been brought out more clearly than by Mr. Justice Holmes, in the following utterance:

> ". . . The dogma of equality makes an equation between individuals only, not between an individual and the community. No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death. It runs highways and railroads through old family places in spite of the owner's protest, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, but still sacrificing his will and his welfare to that of the rest." [9]

There are public purposes and even private purposes which make it for the general interest of society that one private party should give way to another, and even in such cases the exercise of the right of eminent domain is not unknown. In the State of New York and probably in most of our States, that is the case with land which is surrounded by other land, when a right

of way or right of access to the land may be condemned; and it generally obtains as a common law right. In New York it is necessary to summon two juries, one to decide whether a right of way is needed and then another jury to condemn the land and award the damages which must be paid.[10] It is probable that somewhat similar arrangements exist in most, if not all, of our States.

We find further proof in the sanitary laws of disinfection and quarantine. There the public interest is very sharply enforced against private property. Private property has to yield and it is sometimes destroyed, either with compensation (partial or complete) or without compensation. Boards of health are usually given arbitrary power in regard to contagious diseases and to nuisances, and the citizen who thinks himself aggrieved has no redress. The procedure is regulated by statute.[11]

The laws with respect to cruelty to animals give further proof. An animal is property. Can I not, therefore, do what I will with my own? The law says: 'No, you may not do what you will with your own, because what you do offends the conscience of society. Your right is a limited but not an absolute right; and therefore you may not do what you will with your own.' It cannot be replied that this simply regulates the manner of use and does so in the public interest, for this concedes the entire principle, because regulating the manner of use for the public interest is establishing the social side of private property and making that dominant. And that is all we contend for,—the right of regulating

the manner of use of private property in the public interest. The laws against cruelty to animals afford a peculiarily interesting development of the theory that society has a real interest in private property. The courts not only punish a cruel owner who maltreats his beast upon the street or in public, but the vigilance of the law in many states reaches the acts of cruelty committed in private called "passive cruelty". Overdriving and overloading horses and other work animals, shooting captive pigeons for sport, cock-fighting, even hunting a captive fox, have been declared cruelty to animals and the offenders punished.[12]

Or, consider certain laws which govern the consumption and use of opium. May I not do what I will with my own? No. Because in this case and in that of intoxicating beverages what you wish to do is considered injurious to the general public.[13]

The laws concerning marriage also modify and restrict individual rights of property, and do so for what is considered the general welfare.

In the laws which attempt to prevent suicide and which punish attempted suicide we see clearly that the right is not recognised to do as we will with our own. From these we see also that we cannot say, 'The right to do what I will with my own proceeds from my right over my own person.' Your right over your own person is a limited right. In New York State and elsewhere legislation with respect to suicide punishes an unsuccessful attempt at suicide. On the other hand, however, while I may not take my life, I am compelled to yield life itself, to give my own person completely, for my

country. So we cannot trace an absolute right of private property to the absolute right over one's person, because on the one hand we may have to give our life for the general welfare, and on the other hand we must not take it.

This then is the theory of the social side of private property: it is what Professor von Ihering calls the *Gesellschaftliche Eigentumstheorie*. And by him it is stated in almost classical form in these words:

"*It is, therefore, not true that property according to its idea carries with it an absolute right of control. Property in such a form cannot be tolerated by society and never has been tolerated. The idea of property cannot carry with it anything which is contrary to the idea of society.*" [14]

It is asserted frequently by the pulpit and by the press that private property is a social trust. This is a true statement. It is true not only in a vague and general way, but in an economic and legal sense. We have here given us a solid foundation for the doctrine of stewardship. It is possible, however, that to many this doctrine of stewardship is agreeable precisely in proportion as it is vague and indefinite. The view here presented gives us the point of departure for a criticism of existing social institutions, and also for the work of social reconstruction, and progress.

There are endless controversies about the right to regulate the use of private property. Judicial decisions in regard to the regulation of the use of private property are not harmonious. When regulation is allowed, as it frequently must be, judges too often seem perplexed in regard to the justification of the regulation and try to bring

it in by a back door, so to speak. The right to regulate, however, is not an exception, but a part of the institution, and, as already stated, every abuse could properly be removed if a way could be devised for the removal. The right to regulate is a part of the very idea of private property, and is in the line of an ideal development.

Let us take as an illustration a decision given by the author's learned friend in Baltimore, Mr. Justice Harlan, of the Supreme Bench of Baltimore City. There was no ordinance in Baltimore regulating the width of houses in any part of the city, but an ordinance had lately been passed which provided, "That no such permit shall be granted unless in the judgment of the said Judges of the Appeal Tax Court, or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property, etc." Now it appears that one William H. Hampson proposed to build four houses on a lot which he owned in Baltimore City, running through from Boundary Avenue to Preston Street. He planned to erect on this lot two three-story houses with two-story back buildings fronting on Preston Street, one of the houses on each street to be 12′ 8″ and one 12′ 4″ in width,and had been refused a permit, lacking which he could not build without subjecting himself to a penalty. The owner brought suit for mandamus in the Superior Court of Baltimore City, in January, 1890, to compel the Appeal Tax Court to issue a permit to build the four de-

sired houses. Mr. Justice Harlan decided in favour of the plaintiff on constitutional grounds, claiming that one incident of the ownership of property is that the owner can use it as he sees fit, so long as he does not create a nuisance, and such a regulation would deprive him to that extent of the right of property without compensation. The ordinance was passed in the interest of the general public, because it was deemed desirable that the city should be as beautiful as possible and an already beautiful part should not be rendered less beautiful, which would be the case if these narrow houses were erected. Consequently the Appeal Tax Court, which had the matter in charge, would not issue the permit, as the plans did not correspond with the city ordinance, holding "that the four buildings proposed to be erected as described in the application and the plat filed by the said Wm. H. Hampson, in their size, general character and appearance would not conform to the general character of the buildings in the locality where he proposed to erect the same, and their erection would tend to depreciate the value of the surrounding improved and unimproved property." Mr. Justice Harlan, however, ordered the mandamus and compelled the Appeal Tax Court to issue the permit, the question having been argued before the court on constitutional grounds, and in such a case he considered that it would deprive the owner of the right of property without compensation. In view of the regulations which we have long had in cities regarding the use of private property, it would seem to have been incumbent upon the court to decide whether this particular regulation was inconsistent

with the right of private property. Now, according to the author's idea, this regulation was not necessarily against the right of private property, because this right carries with it a social side; it exists for social purposes. But it appears that no argument was made in favour of this position although doubtless the court would have been glad to listen to an argument on the other side, but the city attorney making none, and the only argument being made by the plaintiff's attorney, the learned judge naturally gave his decision in accordance with the arguments presented.[15]

Surely a strong argument could have been made, for cities from time immemorial have regulated the use of property to a great extent, and in foreign cities regulations may be found similar in spirit and purpose to the ordinance in Baltimore. But without going to foreign cities we have regulative ordinances and regulations of a sweeping nature in our own land. Consider, for example, New York City. Here we find a condition of things which is described in the *Real Estate Record and Guide*, a leading real estate newspaper of the city, as follows:

"The building law authorizes the Superintendent of Buildings to make regulations for the inspection of passenger elevators and for the construction of fire-escapes. The tenement house law authorizes the Superintendent of Buildings to make regulations for light and ventilation and for plumbing and drainage. . . ."

The building law has many details, and some are mentioned, as follows:

"The present building law is the growth of the past

thirty-five years. . . . Conceding that it needs some modifications, our building law stands as the model law of the great cities of the world."

This is an expression of the opinion of real estate owners themselves. Conservatism in change was urged by the *Real Estate Record and Guide* and the tenement house law was criticised in some particulars, but on the whole it was said to be a model law. This is in an editorial in the issue of November 23, 1895 entitled "For a revision of the laws relating to Buildings"; in another article on "the New Tenement House," a multitude of details regarding tenement house law is given. This is a law somewhat distinct from the general building law. According to this, transoms are allowed in some instances, "providing the door-casings and jambs are made fire-proof by an outer covering of tin." Air shafts are regulated. Each water-closet must have an opening to the outside air; the floor of each water-closet must be made waterproof with asphalt, cement, tile, metal or some other material.[16]

We have here regulations quite as far-reaching as those provided by the Baltimore ordinance which was declared unconstitutional; although the New York regulations are based not on grounds of beauty but of health and morals. But æsthetic considerations as entitled to decisive weight by our courts are merely of slower development, and in the cited building ordinance we have an illustration of an instance in which the right of private property was made by the court to include more than it need include.

In this connection it is important to notice that the

question whether public purpose might embrace things which increase "the picturesqueness and interest of life" was decided affirmatively by Mr. Justice Holmes in the case of Hubbard *v.* Taunton, January 8, 1886. The question was raised by a petition of ten taxable inhabitants to restrain the city from paying two hundred dollars for twelve public concerts. The amount involved was small, but the principle was sustained at this comparatively early day, and thus we may say that æsthetic considerations in general were permitted to come within the scope of public purpose.[17]

We must clearly face the issue. If private property is a social trust, then it has been objected that "society may abolish the trust." That is true, though it seems like a strange doctrine in consideration of some teachings that we hear based upon the theory of natural rights. But let not the reader accept this view merely because the author supports it. It follows necessarily from the nature of society. Moreover, the conclusions upon this subject reached by the ablest thinkers in various professions are in substantial agreement, and as it is one of such supreme importance, it may be permissible to adduce quotations from the religious teacher, the ethical teacher, the social philosopher, and the jurist.[18]

Suppose we begin with Moses. Sometimes when it is proposed to regulate property, Moses is quoted. The law of Moses says, "Thou shalt not steal," and Moses ranks as one of the greatest legislators in the world's history. But this same Moses who said, "Thou shalt not steal" also laid down regulations for the use of private property which go a great deal further than any

laws which have ever been passed or even proposed seriously in any American legislature. He regulated private property to an extent that would be declared unconstitutional in the United States, and we would have to change our State and national Constitutions radically to make possible such intensive and extensive regulations of private property as those provided for by the Mosaic legislation. So it will not do to quote "Thou shalt not steal" against those who urge that the state should regulate the use of property.[19]

Let us take the expression of Dean Fremantle, of Ripon, on this subject:

"The nation is the most complete of all the societies of men now in existence. We are necessarily pledged to it with our whole existence in this world, for it has the power of directing and even resuming all our possessions, and of life and death of our own persons." [20]

So far as England is concerned Dean Fremantle lays that down as both a legal and an ethical principle. It belongs to the state by right to resume all possessions, should this be for the public good.

We quote also from another divine, the economist Rev. W. Cunningham, D. D., LL. D., Archdeacon of the diocese of Ely, Fellow and Lecturer of Trinity College, Cambridge. The quotation is taken from a little leaflet called *The Church's Duty in Relation to the Sacredness of Property*.[21] Speaking of the sacredness of property, he says that it is sacred because it is a trust from God, and we must not interfere with the trust and the corresponding responsibility; and yet he recognises the state's right

to regulate and even confiscate under circumstances, and says further (pp. 9–10):

"The Christian conception of the sacredness of property enables us to see the grounds on which it is entitled to respect, and the aims which men should keep before them in using their possessions. I think it helps us to see, too, the grounds on which it may be rightly taken away. The civil power is ordained by God for the punishment of evildoers and the praise of them that do well, and it may be the duty of the state to interfere with and readjust the relations to property,—in God's name. The private man must recognise the sacredness of life, and dare not kill, whatever wrong he may have suffered; but the state may—in God's name—condemn to death. Just so, the private individual ought to have regard to the sacredness of property, however poor he may be; but the state may interfere with it in God's name; and interference thus made will not be dictated by private greed, but by public uses. . . . From time immemorial, in cases of gross misuse, the state has stepped in to confiscate property. Possessions used for seditious or criminal purposes are rightly regarded as forfeited. Between these extremes of interference with full compensation, and of confiscation pure and simple there may be many grades."

That means, as Dr. Cunningham says, that man has in property a trust from God, and whatever interferes with the trust conferred upon him interferes with his responsibility; but he recognises, nevertheless, the right of the state to regulate and even confiscate under certain circumstances, although not the right of the individual to do the same. He recognises a higher right on the part of the state above that of the individual. He admits also both the right of the state to take property with full compensation, and, under cer-

tain circumstances, the right of confiscation, which, however, is not allowed by the Constitution of the United States. Two special points are made by Dr. Cunningham in this leaflet. First, he claims that not the amount of property will determine the interference, but the kind of use to which the property may be put; second, that in any interference the aim should be to carry out God's will and bring about a worthier use,—"to see that the divine will is more effectively realised among men."

Next we may cite the following quotation from Dr. Thomas C. Hall, now Professor in Union Theological Seminary, New York City:

"THE DIVINE RIGHTS OF KINGS AND PROPERTY

"To open the sermons of the orthodox divines preached during the struggle of the English people against regal tyranny is to enter a region of thought well-nigh impossible for us to-day. The divine right of kings to misgovern finds no longer a place in English thinking. It is perfectly well understood that rulers and governors are only the chief servants of the community, and that how far their rule is to be restricted or even taken from them altogether is purely a matter of communal expediency. We have not lost sight of the fact that government is divine, that laws are eternal, and that the enforcement of even imperfect enactments of law is mercy. Yet we are realizing more and more that the instruments of government are not government, that the enactments of law are not law, that individual interests are not the whole of life, and that the highest individualism can reach its fruitful development only in the highest development of communal relationships.

" In a few years there is little doubt, thoughtful men will

be looking back with amazement upon a literature that deals with the divine rights of property in much the same spirit that orthodox preachers dealt with the divine rights of kings in the day of King Charles. There are divine rights of government and of property, but these divine rights are not individual possessions. Property of any kind, whether in land or in the products of the land, can only be held by individuals in so far as its holding does not interfere with the higher claims of the communal life. Only because thrift, ambition, caution and industry are individual virtues necessary to the conserving of the communal life and because these are encouraged by the protecting of property by the community, is it a matter of communal expediency that there should be carefully guarded individual usufruct in property of all kinds. It is, however, being constantly borne in mind that the community has never surrendered its claim whenever a still higher expediency demands the surrender of property to the communal best interest. This is acknowledged in the right of eminent domain, in the right to tax and in the right of condemnation wherever public health or public safety demands such condemnation, and the matter of possession is no waiver of this ultimate right of that higher expediency that would reward industry and thrift." [22]

Turning now from the religious teacher to an ethical philosopher, we quote from the late Professor Friedrich Paulsen, of the University of Berlin, a "conservative writer on ethics", who says:

"If it is true that expediency supports us in our private property, if it is true that we hold it by the consent of society, as a trust for the race, the same expediency may finally demand that we surrender it, the same society may withdraw its consent and ask that the trust be used otherwise." [23]

And from Locke we have a quotation,—the opinion of a great philosopher, and one who especially had

great weight with the fathers of the United States, the framers of our Constitution. Locke says:

"In governments, the laws regulate the right of property, and the possession of land is determined by positive constitution." [24]

From Benjamin Franklin we have the following quotation:

"Suppose one of our Indian Nations should now agree to form a civil Society; each Individual would bring into the Stock of the Society little more Property than his Gun and his Blanket, for at present he has no other. We know, that, when one of them has attempted to keep a few Swine, he has not been able to maintain a property in them, his neighbors thinking they have a Right to kill and eat them whenever they want Provision, it being one of their Maxims that hunting is free for all; the accumulation therefore of Property in such a society, and its Security to Individuals in every Society, must be an Effect of the Protection afforded to it by the joint Strength of the Society, in the Execution of its Laws. Private Property therefore is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing."[25]

Now let us take the views of economists. Here is a quotation from a conservative writer on economics of a past generation. Thomas Cooper, Professor in the University at Columbia, South Carolina, published a work on Political Economy in 1829 (second edition) from which we take the following:

"All rights are creatures of society, founded on their real or supposed utility, and requiring the force of society to protect them. All duties and obligations arise from our obligations to each other." Chap. III, p. 63.

"But whatever be the existing regulations concerning property, particularly landed property, in any country, they are the mere creatures of society, from which alone they can derive protection and security. . . . In a state of society rights are conceded because they are found or presumed to be necessary or conducive to the well-being of society; they are protected by the force of the community, and they may be abrogated whenever it can be *shown* that they have an *opposite* tendency" (p. 66).

"The right of making a will is founded entirely on the permission of the law; and is meant as a stimulus to industry, and a fruitful source of production and accumulation that would never take place without it" (p. 67).

Professor Bastable, of Trinity College, Dublin, says of the state:

"It is entitled to claim all the services and property of its subjects for the accomplishment of whatever aim it prescribes to itself. When stated in so rigid a form, the proposition is likely to awaken dissent, and yet from the strictly legal and administrative point of view, it is a commonplace since the time of Austin."[26]

Bastable refers to Austin's *Province of Jurisprudence Determined;* Hobbes's *Leviathan,* Chap. 18; and Bodin's *De Republica,* Book I, Chap. 7. There are undoubtedly actual obstacles and limitations to regulation, and Bastable says that these actual limits are found in obstacles set by external nature and by sentiments of the subjects. We may add also by the nature of political organisation,—especially the constitutionalism of the United States of America.

In his *Studies in Economics,* Professor Smart says, "The stewardship of wealth is not ethical only; it is

political." [27] And he makes an argument in which he mentions the national debt, based on the security of future taxation, taxation being based on private revenue.

Professor H. von Scheel says, that it cannot be objected that the legal theory of private property is absurd because it makes it possible for the state to abolish private property, inasmuch as there is no doubt but that it is within the province and power of the state to abolish private property. This is possible, although we cannot at the present time conceive it as something which is desirable. He fully concedes that it is the complete and ethical right of the state to do whatever it will with property, in the public interest.

Professor Wagner says of private property, that it is an historical, relative and legal concept,—a concept which has grown up in law in past times, and one which is relative and variable, involving certain rights of control and exclusion, and that these rights are not unalterable but are subject to change.

Professor É. de Laveleye, in his work on *Luxury*, part entitled "Laws and Morals in Political Economy," p. 159, says:

"It is economic utility which is the true basis of property, and this it is which determines what shall be its privileges, obligations and limits."

Noteworthy is the following recognition of the idea of property as a public trust, in Hadley's *Economics*. He speaks about the man who gambles away his money as violating a public trust, and says:

"The man who gambles away his money is not simply parting with his enjoyment, but with his control of the industrial forces of the community. It is not like selling his labor, it is like selling his vote." [28]

We will now take some legal opinions. The English jurist, Lord Bramwell, in an article in the *Nineteenth Century*, says:

"Private property ought to exist, if for the good of the community, in such things, and to such extent, as would be for the good of the community; . . . if it could be shown that existence of private property was not for the good of the community, the institution ought to be abolished." [29]

We have the following also from "The Laws of Property" by Lord Coleridge, in *Macmillan's Magazine*, April, 1888:

"The right of property, as Mr. Austin has shown, has never existed, even in its most absolute form, without some restriction.

"The object of the restrictions placed in England for many centuries upon powers of settlement and devise is invariably stated to have been to prevent mischievous accumulation of property in few hands.

"That fifty or a hundred gentlemen, or a thousand, would have a right, by agreeing to shut the coal mines, to stop the manufactures of Great Britain and to paralyze her commerce, seems to me, I must frankly say, unspeakably absurd."

In a decision of the Supreme Court of North Carolina we find a noteworthy opinion:

"Is there any reason why the state shall be denied the power to tax a succession, whether it be by the gift *inter vivos*, or by the will or intestacy? *Property itself, as well as the succession to it, is the creature of positive law. The legis-*

lative power declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another. The right to give or take property is not one of those natural, inalienable rights which are supposed to precede government, and which no government can rightfully impair. There was a time when at least as to gift by will it did not exist; and there may be a time when it will seem wise and expedient to deny it." [30]

The following quotation [31]—and the last to be given—is from Huxley,—the opinion of a natural scientist who thought a great deal on national problems.

"At present the state protects men in the possession and enjoyment of their property, and defines what that property is. The justification for its so doing is that its action promotes the good of the people. If it can be clearly proved that the abolition of property would tend still more to promote the good of the people, the state will have the same justification for abolishing property that it now has for maintaining it." [32]

Notes and References to Chapter VI

[1] P. 166. It has been stated that a remnant of the feudal idea can be seen in our vast public domain. The state "owned" the land, and actually gave title to it; for example, the deeds of Ohio or of Wisconsin go back to the United States government and the Northwest Territory, just as deeds in England go back to some royal patent or grant or charter, the theory being that the state, while owner of the title, is only a trustee for the people—is agent of the people—and disposes of the public domain as the people may decide. In our earlier history they frequently decided unwisely, it seems now. For example, Ohio practically gave away all her school lands. Yet, nevertheless, the case is not quite so clear as some of the critics of America would have us think. The need of settlement was felt to be urgent, for additional settlers brought many advantages to those already in the new States, and cheap lands were the inducement held out to draw settlers. Moreover, the right of taxation was reserved. The lands of the University of Wisconsin were sold "for a song", but the State recognises the claim of the University in appropriations which would equal the rent on a large domain. A more extended treatment of this topic belongs elsewhere.

[2] P. 168. The details are given in an unpublished paper by Professor Allyn A. Young, entitled "The Administration of Public Lands by American States with Special Reference to Constitutional and Legislative Provisions Delaying the Conversion of Public Property in Land to Private Property."

[3] P. 168. The city of Ulm, Germany, is especially interesting in this particular, because we can put our finger precisely on the dates when the one policy yielded to the other.

The nineteenth century, up to the close of the eighties, witnessed a diminution in the area of the publicly owned land. For this there appears to have been several reasons. It is stated by the Mayor that it was desired to increase the money capital of the city (*den Geldgrundstock der Gemeinde*) and then also that the municipal administration authorities lost a due appreciation of the economic and social significance of a well thought out policy of landownership.

It seems to the writer highly probable that we have here to do with one of the evil consequences of a false economic philosophy, namely, the *laissez faire* policy, which spread from France and England throughout the world. It was not until the practical consequences of this philosophy were beginning to be overcome by another economic philosophy that Ulm began again to increase the area of municipally owned land, which decreased during the nineteenth century until about 1890. In 1837 the city sold two tracts (the bleaching grounds, the *obere Bleiche* and the *untere Bleiche*) comprising 104 *Tagwerke*, for 40,000 florins, equivalent to 68,000 marks, and in 1892 these same grounds were repurchased at a cost of 435,000 marks,—an experience like that which the University of Wisconsin has had, only there the difference was in some cases, as nearly as the writer recollects, as one to one hundred, instead of a ratio of one to not quite six and a half. In spite of sales, in pursuance of its social and economic policies, the land owned by the city has constantly increased since that time. The number of hectares bought from 1891 to 1909 amounts to 489½, approximately, and the number of hectares sold, to nearly 164, giving a gain in land of about 325½ hectares. But the land sold has brought the city over a million marks more than all the lands purchased, so this land, as well as the million marks, is profit, and yet only the minor part of the gain to the city, the greater part consisting in improved dwellings and in an increased number of home owners. See article by the writer on "Ulm on the Danube. A Study in Municipal Land Policy and Its Provision for Workingmen's Homes." *Survey*, December 6, 1913.

Belgium has had a similar experience. In the first half of the nineteenth century the local political units or parishes were encouraged by the central government to sell even recklessly the land they owned, and now they look longingly upon this land, which has increased greatly in value. The central government has reversed its policy and has made it difficult for these same local sub-divisions to sell land, and sales have practically ceased.

[4] P. 168. See Adam Smith, *Wealth of Nations*, Bk. V, Chap. II, Pt. I; Cannan ed., Vol. II, pp. 307–309.

[5] P. 169. But there is reason to think that New Zealand has attempted to depart too far from private property in land, for it has not so far proved practicable to substitute true leases for property.

The public leases are being changed in such a way as to make them resemble fee simple titles. *Cf.* on this subject Le Rossignol's *State Socialism in New Zealand*, Chaps. II and III. This subject is reserved for more extended treatment in the author's *Landed Property and the Rent of Land.* Here it is adduced merely for illustrative purposes.

[6] P. 171. This is the position taken by the Supreme Court of the United States with respect to patents. In a recent decision the following words were used by Mr. Justice Hughes:

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use and sale. As was said by (deriving) Chief Justice Marshall in Grant *v.* Raymond, 6 Pet. 220 (1832), pp. 241–243: '*It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions* (italics not in the original). . . . The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. . . . The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, of the exclusive right to make, use and sell the things discovered for a limited time.'" Dr. Miles Medical Company *v.* John D. Park & Sons Company, 220 U. S. 373 (1911), at p. 401.

[7] P. 172. This is clearly stated by Chief Justice Lemuel Shaw: "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *Sic utere tuo ut alienum non lædas.*" Commonwealth *v.* Tewksbury, 11 Metcalf (Mass.), 55 (1846), at p. 57.

In the case of People's Gas Co. *v.* Tyner, 131 Ind. 277 (1891), at

p. 281, it was held that "The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others." It is settled that the owner of a lot may not erect and maintain a nuisance thereon whereby his neighbours are injured.

[8] P. 173. For example, Professor Dr. Paul Oertmann of Erlangen on "Enteignungsrecht" at Bundestag der Deutschen Bodenreformer in Dresden, June 7, 1911; in *Jahrbuch der Bodenreform* 7ter Bd. Zweites Heft, July, 1911; also the following report of a Bavarian commission, advocating extension of the right of eminent domain as a necessary step in improvement of dwellings: *Enteignungsrecht, Ortsstrassenrecht und Wohnungsreform in Bayern.* Schriften des Bayer. Landesvereins zur Förderung des Wohnungswesens (E. V.) Heft 4, 1911.

The United States Supreme Court has defined eminent domain as follows: "The ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes." Charles River Bridge *v.* Warren Bridge, 11 Peters, 420 (1837).

The essential limitation is found in the fact that it must be for a public purpose, and this is to be defined in the first instance by the legislature. The only restriction on the government is that it must compensate the owner for the taking and it must not be unreasonable and arbitrary. See the following cases: Bonaparte *v.* Camden & A. R. Co., 3 Fed. Cas. No. 1617 (N. J. 1830); Raleigh & G. Ry. Co. *v.* Davis, 19 N. C. 451 (1837); Garrison *v.* City of New York, 21 Wall. 196 (1874); Lance's Appeal, 55 Pa. St. 16 (1867); Lamb *v.* Schottler *et al.*, 54 Calif. 319 (1880).

[9] P. 173. Holmes, *The Common Law* (Boston, 1881), p. 43; *cf.* p. 48, last paragraph.

[10] P. 174. Here the author has in mind a concrete case in the Catskill Mountains.

[11] P. 174. The following cases illustrate this point: Kollock *v.* City of Stevens Point, 37 Wis. 348 (1875); Lynde *v.* Rockland, 66 Me. 309 (1876); Spring *v.* Hyde Park, 137 Mass. 554 (1884); Train *v.* Boston Disinfecting Co., 144 Mass. 523 (1887); Whidden *v.* Cheever, 69 N. H. 142 (1897); Schmidt *v.* Muscatine County, 120 Ia. 267 (1903).

[12] P. 175. See U. S. *v.* Jackson, 4 Cranch C. C. 483 (1834); U. S. *v.* McDuell, 5 Cranch C. C. 391 (1838); Waters *v.* People, 23 Colo. 33 (1896); McKinne *v.* Ga., 81 Ga. 164 (1888); State *v.* Bosworth, 54 Conn. 1 (1886); People *ex. rel.* Walker *v.* Special Sessions, 4 Hun. (N. Y.), 441 (1875); State Horse Cases, 15 Abbot's Prac. Rep. N. S. (N. Y.) 51 (1873); State *v.* Pugh, 15 Mo. 509 (1852).

[13] P. 175. See cases on Police Power, Appendix IV, p. 873, for restriction on selling liquor and opium, also prohibiting gambling.

[14] P. 176. While others before von Ihering have held this view it is of special significance that the thought should find this beautiful expression in the words of a jurist. It is as follows:

"Es ist also nicht wahr, dass das Eigentum seiner 'Idee' nach die absolute Verfügungsgewalt in sich schlösse. Ein Eigentum in solcher Gestalt kann die Gesellschaft nicht dulden, und hat sie nie geduldet—die 'Idee' des Eigentums kann nichts mit sich bringen, was mit der 'Idee der Gesellschaft' in Widerspruch steht." *Der Zweck im Recht* (3d ed.), Vol. I, p. 523.

[15] P. 179. This is the case of Hampson *v.* Appeal Tax Court. For many details in regard to it the author is indebted to Mr. Justice Harlan, from whose communication of November 18, 1912, the following is given.

"On demurrer I held that the answer was insufficient in law; that the ordinance giving the Appeal Tax Court the power sought to be conferred was invalid on constitutional grounds; that it conferred upon an administrative board power to deprive one of the beneficial uses of his property by arbitrary and uncontrolled action, not based upon reasons of public safety, public health, public morals, public convenience or any other recognized ground for interfering with property rights under the police power; and that this would not be due process of law, without which one cannot be deprived of life, liberty, or property. The opinion was oral, and the case is not reported, but the papers can be found in the Clerk's Office of the Superior Court of Baltimore City, and the case is No. 48 of the cases instituted in 1890. No appeal was taken, but twelve years after, in 1912, the ordinance, the terms of which I have quoted, was brought before the Court of Appeals in Bostick *v.* Sams, 95 Md. 400 (1902) . . . where it had been invoked by the Judges of the Appeal Tax Court to justify their refusal to allow a 'Zoo' to be erected on the north east corner of Maryland and Mount Royal Avenues,

and the Court of Appeals held that a citizen has a common law right to build upon his land in such manner as he chooses without regard to whether his building will conform to the general character of the buildings in that locality; that this right cannot be abridged by a municipal ordinance; that there is no provision in the charter of Baltimore City which authorizes it to confer upon an agency like the Appeal Tax Court a power so vague and undefined in its scope and so arbitrary in its character as that contained in this ordinance; that the charter power to regulate buildings in said city is limited to regulations guarding against dangers arising from unsafe construction or from the use of inflammable materials, or some similar exercise of the police power.

"The City of Baltimore has not undertaken to make any definite regulations as to the width of houses. Regulations as to the height of houses have been sustained in other states as a proper exercise of the police power, and in the case of Cochran *v.* Preston, 108 Md. 220 (1908), the very interesting question was raised as to whether the height of buildings in a definite area around Mount Vernon Place could be limited to promote a purely æsthetic purpose. It does not appear in the report, but the fact was that the Municipal Art Society had had prepared, for the purpose of preserving the beauty of Mount Vernon Place and preventing the Monument from being dwarfed by the immediate proximity of sky-scrapers, an act which the legislature had passed, providing, 'that from and after the date of the passage of this Act, no building, except churches, shall be erected or altered in the City of Baltimore on the territory bounded by the south side of Madison Street, the west side of St. Paul Street, the north side of Center Street, and the east side of Cathedral Street, to exceed in height a point seventy feet above the surface of the street at the base line of Washington Monument.' The court found a more substantial reason for the enactment of the law in the suggestion of counsel for the appellees that the purpose of the legislature was to protect the handsome buildings and their contents, located in that vicinity, and also the works of art clustered there, from the ravages of fire, but its answer to the suggestion 'that regulations which are designed only to enforce upon the people the legislative conception of artistic beauty and symmetry will not be sustained, however much regulations may be needed for the artistic education of the people' is, 'Such is undoubtedly the weight of

authority, though it may be that in the development of a higher civilization the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes.'

"I think I should make the same ruling today as I did in the Hampson case on an ordinance of the same character, but there is no doubt that the limits of the police power have been and probably wisely, extended by the courts in late years. There are some notable instances in the Supreme Court of the United States."

[16] P. 180. All this is adduced simply by way of concrete illustration. Since the time referred to the tenement house laws of New York have become more stringent; but the old quotations used years ago in the author's lectures are kept, for they are as apt as if they appeared yesterday. This fact shows the continuity of our development.

[17] P. 181. Hubbard *v.* Taunton, 140 Mass. 467 (1886), at p. 468.

[18] P. 181. Doubtless for the scientific reader who has long occupied himself with economic discussions these quotations may not be required, but it is hoped that this work will find readers among those who are laymen (so far as economics is concerned) as well as by specialists in economics.

[19] P. 182. There is something bearing on this in D. G. Ritchie's work on *Natural Rights*. Speaking of the use of force by civilised nations in connection with the conquest of barbarous people, he says:

"We cannot call such conquests 'international burglaries.' The word burglary can only be used metaphorically in cases where there is no common criminal law to which both parties are subject, and the use of the term involves a naive acceptance of the *status quo*, analogous to what is implied in calling any legislative interference with ancient rights of property, confiscation or theft." *Natural Rights*, p. 234.

[20] P. 182. See his book *The World as the Subject of Redemption* (1885), p. 231.

[21] P. 182. One of the leaflets published for a time by the Church Social Union, Series A, No. 2, 1895.

[22] P. 185. Thomas C. Hall in *The Kingdom*, February 14, 1896.

[23] P. 185. Quoted by W. L. Sheldon, *International Journal of Ethics*, for October 1893, Article, "What Justifies Private Property?"

[24] P. 186. *Treatise on Civil Government*, § 50.

[25] P. 186. "Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania," 1778, *The Writings of Benjamin Franklin* (ed. by Albert Henry Smyth, 10 Vols., N. Y. 1905–1907), Vol. X, p. 59; also quoted in *The People*, New York, April 9, 1893.

[26] P. 187. Bastable, *Public Finance*, Bk. I, Chap. I, p. 38. The doctrine of the supremacy of the sovereign power in the matter of property is traced back by Mr. Justice Holmes to Baldus in the following interesting citation:

"Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since the days of Hobbes (*Leviathan* c. 26, 2). A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes a law on which the right depends. 'Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.' Bodin, *Republique*, i. c. 8. Ed. 1629, p. 132. Sir John Eliot, *De Jure Maiestatis*, c. 3. *Nemo suo statuto ligatur necessitative.* Baldus, *De Leg. et Const. Digna Vox* (2d ed., 1496, fol. 51b. Ed. 1539, fol. 61)." Kawananakoa *v.* Polybank, 205 U. S. 349, at p. 353 (1907).

The reference should read: Baldus, *De Leg. et Const., Digna Vox* 2. Edition 1496, fol. 51 b. Ed. 1539, fol. 61.

The official reporter was in error in writing second edition, as if perchance two editions had appeared in 1496! Digna Vox refers to a particular chapter or part of the book, and 2 is a subdivision in Digna Vox.

Dean John H. Wigmore kindly furnishes the following full reference to the complete edition of the works of Baldus (Venice, 1599), which is in the Law Library of the Northwestern University, Evanston, Illinois, the title being taken from the title page itself: "*Baldi Ubaldi Perusini jurisconsulti in primum secundum et tertium Codicis libros Commentarii*," edited by Imolenus and B. Celsus, Lib. I, Tit. de Legibus et Constitutionibus Lex. IV, Digna Vox. The separate

volumes of the edition do not have volume numbers. The quotation is at fol. 64.

[27] P. 188. P. 295.

[28] P. 189. P. 120.

[29] P. 189. *The Nineteenth Century*, Vol. XXVII, p. 449, in art. on "Property."

[30] P. 190. The case is Pullen *v.* Commissioners, 66 N. C. 361 (1872).

[31] P. 190. T. H. Huxley, in "Administrative Nihilism," an address published in the volume *Method and Results* (New York, 1899).

[32] P. 190. A clear-cut statement of the essential nature of all corporations as public in aim is given in a case cited in Haney's *Business Organization*, p. 87. It is the case Mills *v.* Williams (11 Iredale N. C. 558), where the court says, "The purpose in making all corporations is the accomplishment of some public good." This is a judicial recognition of the social theory of corporate property.

Professor Roscoe Pound has written an admirable article entitled "The End of Law as developed in Legal Rules and Doctrines," *Harvard Law Review*, Vol. XXVII, No. 3, January 1914, in which he shows how law, passing through various stages in its evolution, has now entered the stage of "socialization"; and this means the recognition of the social theory of property and contract. This article will appear in his forthcoming and eagerly awaited book, *Sociological Jurisprudence*, which is especially recommended as collateral reading.

CHAPTER VII

PROPERTY AND THE POLICE POWER

The peculiar position of property in the United States has often been made the subject of discussion and the criticism of this position has been favourable as well as unfavourable; some regarding the constitutional safeguarding of property in our country as a bulwark of civilisation and others looking upon the sheltered position of property as a force standing in the way of a satisfactory evolution of human rights.[1] But this position has perhaps never been fully understood. It is a matter of gradual growth and is closely connected with certain rights, which form indeed a large and complex bundle of rights, called in American jurisprudence, "the Police Power". We have here to do with one of the most remarkable developments in the history of jurisprudence.

Now let us consider the circumstances under which this growth, only very partially premeditated and foreseen, has taken place. At the time of the formation of the National or Federal Constitution in 1789, the States comprising the Union were thirteen. These States yielded rights to a central government very reluctantly, and these rights were enumerated, making the federal government one of carefully enumerated powers, while the separate States had the residuum of

sovereignty. But these separate States had already provided themselves with written Constitutions or at once proceeded to do so. Having originally had charters from the mother country they liked to see their rights and duties expressed precisely and definitely. But it was especially their rights which they thought of, not merely because, like children, colonies generally think more of rights than duties to the common mother, but because the thinkers of the eighteenth century on the whole paid so little attention to social duties that the concept of social duty itself is one that hardly seems to fit into its social philosophy.

They had become jealous of authority, and the individualism of the latter part of the eighteenth century contributed to this sentiment. The individual's rights must find expression in bills of rights, based on English experience, English history and eighteenth century social philosophy, and these bills of rights became parts of written Constitutions.

We begin now to see the elaborate character of the American government. The people gave to the legislature only certain powers and reserved others—powers which could become effective only through changes in Constitutions—and this gave little concern at a time when the accepted social philosophy favoured negative rather than active constructive economic policies. While the American people early recognised that they had before them governmental tasks of a positive nature, these were largely either of a political kind, such as the extension of manhood suffrage and the adjustments of State and nation, or of an economic kind compatible

with that dominant individualism which prevailed until the latter part of the nineteenth century. And then the powers granted to legislative bodies were divided again into federal powers and State powers. And over this complicated mechanism were set courts as umpires and guardians, the supremacy in case of conflict between federal courts and State courts, going to the federal or central courts.

Now the liberal and even the radical social philosophy of the latter part of the eighteenth century emphasised the property of the individual and had little sense of society, and perhaps even less state-sense or state self-consciousness.[2] The French Constitutions of the Revolutionary Period proclaimed and emphasised the rights of private property and had no reference to widespread socialisation of property. Both land and capital were conceived of even by the radicals of the day as private property. This is seen in "A Declaration of the Rights of Man and of the Citizen," adopted by the National Assembly of France, Aug. 26, 1789 (Article 17), which reads:

"Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and this only on condition that the owner shall have been previously and equitably indemnified." [3]

Thomas Paine's writings, regarded as extremely radical in his day, accepted private property along with his advanced ideas.[4] Likewise the American Bills of Rights and Constitutions framed in the eighteenth century and all those framed up to the present time

have emphasised private property. The date of the Federal Constitution, as already stated, was 1789, but in 1791 ten amendments were added, commonly called "The Bill of Rights," of which the fifth includes this clause:

"No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

This restriction limits the Congress of the United States, and in the still earlier Constitution of Massachusetts (1779–80), Article I reads as follows:

"All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Such provisions are found generally in the Constitutions of the separate States. But one other provision of the Federal Constitution has now chief force in determining the position of property in the United States and that is a part of Article XIV, an amendment adopted in 1868 after the Civil War. It reads as follows:

"No state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

All these guarantees of rights and property are found in Amendments to the Constitution and not in the original instrument, which was political rather than

economic in character, but the original Constitution contained one provision of vast importance, for it prohibited the States from passing any "law impairing the obligation of contracts." We have this treatment of fundamental economic rights in our American constitutional system, and as a contract is regarded by American courts as a property right, these provisions relate to property. The Constitution provides also guarantees of vested rights or interests and of personal freedom, which, with property and contract, make up the four most fundamental economic rights of modern society.

But what is in the Constitution needs interpretation and this has been given in judicial decisions, which fill many and many a ponderous tome. Gray's *Cases on Property* alone fill six large volumes and it has been stated that all reported cases number over three hundred and fifty thousand, and of these cases those bearing on property constitute a large proportion. For over one hundred years American judges have been giving meaning to property and one of the things which is most apparent is the impossibility of maintaining any hard and fast concept of property. Property is an exclusive right. "Very well, then," says the owner of a farm, "no one shall pass over my land": but society lays a street across the land and the judges must justify this and must so interpret property as to make this act consistent with the concept property. Society establishes an easement—a right to traverse the land, but compels payment of damages to the owner. And in the United States, if the owner of the land receives a benefit from

the street, he must pay for this benefit in a special assessment, so the land owner's exclusive right is violated and he frequently has to pay heavily into the bargain for the violation of his exclusive claim. The proprietor's right is exclusive to his beasts, but unless he makes regular payments to society for its various purposes, including the education of other men's children, his horses and cows may be taken from him and sold at public auction and the proceeds used for the general good. But all this time the Constitution guarantees rights of property and all the resources of a great nation are available for the protection of property. If necessary a million armed men would without a moment's hesitation be put into the field to defend the rights of the proprietor and a great navy stands on guard for the same purpose. And no Congress, no legislature may presume to violate the rights of property. Nor, save as in harmony with the written Constitutions and in consonance with the judicial interpretation of these Constitutions, may elected representatives of the people presume to define property and give their definition binding force.

This is a situation which is unique and a unique arrangement has come into being to meet this situation. Property, private and individual, is permanent, inviolate, sacred, but it must serve social interests and the welfare of society must come first. In practice the social theory of property holds in the United States as well as elsewhere; and this is brought about by the power of the judge to declare what private property carries with it, and what it does not carry with it; and this power is called the police power: the centre of

socio-economic conflict in the United States. For the economist the chief element in the police power is its relation to property, using the term in its broad, inclusive sense.

The police power is regarded as primarily a legislative power, and it is true that legislative bodies provide in their enactments materials for the work of the courts. But the legislative power has no inherent limitations, and as in all lands, so in the United States, it goes without saying that legislatures are presumed to seek the public good only. What is peculiar in the United States is that controlling influence of courts given them by American Constitutions and within the limits of these Constitutions; this peculiarity has given rise to the modern use of the term police power. As a peculiar institution, the police power is essentially judicial, and it is as a judicial power that it requires discussion in the present connection; and from this point of view we may define it as follows: *The police power is the power of the courts to interpret the concept property, and above all private property; and to establish its metes and bounds.* The judges, in their decisions upon the accordance of legislative acts with the written Constitutions, tell us what we may do with property or what acts bearing on property are allowable. The police power shapes the development of the social side of property. It tells us what burdens the owner of property must bear without compensation. Now notice the words "without compensation" for under the right of eminent domain, a man's property may be taken for whatever is deemed a public purpose, but with compensation. Thus in shaping

property rights, eminent domain while actually going *pari passu* with the police power logically begins where the police power ceases.[5] Many efforts have been made to define police power, but the present author ventures to contend that from the economic point of view, so far as property is concerned, it is essentially the *power to interpret property and especially private property and to give the concept a content at each particular period in our development which fits it to serve the general welfare.* The police power means the general welfare theory of property. It signifies "the principle of public policy" with respect to property.[6] This idea above all others gives unity to the concept of police power.

The *Encyclopædia Britannica* gives no article on police power, but in the Index under Police, there is a reference to the United States and in an article by Judge Simeon E. Baldwin on American Law, the topic "Police Power of the States" is found in the margin and a treatment comprising two-thirds of one column is given. It is often said that this is a development peculiar to the United States, because elsewhere, and particularly in England, parliamentary bodies decide what may and may not be done and this continuously gives shape to property without any careful and prolonged and exhaustive treatment of the concept property. The difference between the American method and the English method is this: Parliament decides what is to be done and it is done, regardless of its effects on private property. Parliament, as the highest court in the land, combines judicial and legislative powers[7] and its last utterance is the utterance of sovereignty and it may

invade the essential rights of property as the idea has been understood heretofore. On the whole private property has until recently been as well protected in England as it has been anywhere, and this has been due to the weight of property in the councils of the nation. Humanity and progress have secured generous recognition and played their rôles in England. England has been a pioneer and has led the world in protective labour legislation and in some ways is still ahead of her chief competitor in this field, namely, Germany: and all this has been consistent with the position of property in Parliament which, always comprising many men of property, has been representative of the wealth of England. But the non-propertied classes are receiving increasing recognition in Parliament and in the conflicts of Parliament the fate of private property in its infinite details must be settled for England.

In the United States the people as a whole have reserved to themselves the right to decide upon the fate of property by placing it in their fundamental law and this fundamental law can be changed only very deliberately either by an action of Congress, and this requires two-thirds of both houses and a ratification by three-fourths of the States, or by another method which requires a vote of a similar majority.

It has frequently been said that the Constitution of the United States has become practically unamendable, but two important amendments have recently been made—one rendering a federal income tax constitutional—and the other replacing the old method of electing senators by the legislatures of the States by the

method of popular elections—both amendments of a decidedly progressive character. If it finally appears that after all the method of amendment is faulty because too slow and because it gives a minority too great power, the method itself may be changed according to the general constitutional provisions already described.

The American method thus leaves to a body of experts, the best and most highly trained and most highly specialised known to the United States, the determination of property and the other fundamental economic institutions of society. If it is proposed to introduce this, that or the other social reform, affecting as do most reforms property interests, the judges decide whether or not anything in the proposed measure is in real conflict with the essential idea of property, as they deem it defined in the Constitution at that particular time. If it is, we are not yet at the end of our resources, as many Americans have in concrete cases seemed to suppose, for we still have the right to take property and condemn rights and privileges under the right of eminent domain, by paying just compensation.

The method followed in America then necessarily secures the development both of the individual and social sides of property and likewise necessarily renders the idea of property a flexible one, adapted to the actual situation. It is manifestly impossible, or, to speak more accurately, in the course of actual experience it is demonstrated that it is impossible, to make payment for all burdens imposed on property. It becomes evident beyond all doubt that private property is held subject

to certain burdens imposed in the general interest—sometimes, too, rather grievous burdens. The requirement that fire escapes should be placed on buildings although the law did not require them when the buildings were constructed, serves as one of hundreds of illustrations. And here we have this special body whose function it is to say just how far these burdens may go without compensation, and just when compensation is called for. In other words, we have as a consequence a development of the idea of vested rights which corresponds to ever changing conditions of time and place; for the police power may vary more or less from State to State, the Supreme Court of the United States again setting the limits of variations and acting as umpire between various interests and various economic classes, the haves and have-nots included.

The people in America are thus guarded against that excessive development of vested rights which the late Thorold Rogers thought already taking place in England and which apparently filled him with anxiety for the future.[8]

What is described may seem a mere ideal. And it may be asked: how can a progressive thinker thus praise that excess of conservatism in the United States which even conservative thinkers have felt called upon to condemn, while warm-hearted thinkers, fired with the enthusiasm of humanity, have at times been filled with despair, deploring in tears the apparently insuperable obstacles standing in the way of improvements like workingmen's insurance, improved dwellings for the poor, the æsthetic development of cities; property

rights, again and again and again, interposing a veto and crying a halt?

This is a large subject and only one or two suggestions are possible at this time and place.

First, let us consider one favourable aspect of American development up to the present time. The United States is a country which has grown from a handful of colonists to a population of something like one hundred millions, covering a continent and all that in a century and a quarter, reckoning from the adoption of the Constitution. The population has come from the four quarters of the earth, lacking common tradition, lacking even a common language, heterogeneous, ill-assorted apparently, many with wild vague ideas of liberty—all to be welded together into a nation. How difficult the problems of orderly, safe progress are, is to be seen by the experience of other parts of the world—say France, where common traditions developed by long history and the unified nationality should make the task far easier. But especially do several of the South American Republics—to say nothing of Mexico and Central America—reveal something of the task set the United States. But in the United States with ample acknowledgments of all defects, we do find order, we do find progress, continuous, uninterrupted progress—an advancement in numbers, in wealth, in education and, with all its crudities, a civilisation growing in appreciation of the higher goods of life.[9] And for this, it may be claimed, no one factor is more to be thanked than American judges.

But in the second place, we have had many evils, not

due to the system of government, courts included, but to features which do not inhere in it as its essential features.

Our courts have often been narrow and doctrinaire and given to legal scholasticism which sometimes makes one think of mediæval discussions regarding the number of angels who could dance on the point of a needle.[10] Corrupt American courts have rarely been. They have had a one-sided legal training, and in this they have been very English. They have lacked that broad training in economics, political science and sociology which on the Continent of Europe is being more and more insisted on. Our courts, for example, are just beginning to appreciate beauty—æsthetic purpose—as a public purpose which private property must subserve. They allow a man's property to be cut up to promote traffic and to encourage growth in numbers and they permit heavy burdens in special assessment to be laid on him to cover costs, but they balk at building regulations which aim at harmonious urban development, although the latter may add to the value of the property of an entire section. They have a very feeble development of the sense of social solidarity, when it comes to certain restrictions on property—a large sense when it comes to other restrictions. A man may build and shut off light from his neighbours, he may often put a building on his property which injures the property of his neighbours, a building quite unsuitable to the district in which it is placed, and his neighbours are held powerless. Sometimes it seems that American property coupled with American liberty means the right to use

one's own to injure one's neighbour *ad libitum*. Yet on other occasions, the interests of the community are considered carefully and American courts in special assessments go to a length which a Dutchman regards as an invasion of the sacred rights of property and considers impossible, although desirable, in Holland, and which the Duke of Argyle regarded as confiscation when something of the sort was proposed under the term "betterment tax" for London. And when it comes to natural gas we find American courts forbidding the private owner to waste gas which comes to the surface on his land, because thus he injures the property of others, inasmuch as the supply in nature's reservoirs is limited and the gas flows in underground channels from one surface owner to another. All these distinctions are quite arbitrary so far as the nature of things is concerned and they do not find any sufficient justification in ancient custom.

But the remedies are obvious. First, we need an adequate modern legal education conceived not from the point of view of private practice, but from the point of view of public interests. We want schools of jurisprudence in the broadest sense. And then as judges, all disclaimers to the contrary notwithstanding, do have real and very great legislative powers, only those should be selected as judges who have an enlightened twentieth century social philosophy.

But we are still not at the end of our American development, for we are supplementing our courts with commissions like the Wisconsin Railroad Commission, and the Wisconsin Industrial Commission. Society

has become so complex that in many intricate cases the ordinary judicial procedure is quite inadequate, and it is necessary to provide the courts with funds and instrumentalities for investigations or to transfer part of their work to other special bodies. Generally American States are choosing the latter method of meeting the situation and creating commissions of experts who are provided with the financial resources and the human machinery to investigate cases. These commissions give decisions in opinions which in reality are judicial in nature and which courts in most cases must accept, because the commissions alone have the facts upon which the decisions rest. Frequently when the courts have gone astray in their decisions as in the Bakers' Case (Lochner *v.* N. Y., 198 U. S. 45, treated at length in Part II, Appendix to Chapter VIII of the present work) it is because the decisions have not been based on an accurate statement of facts and social theory. We see that social purpose in this case also finds a method of escape from difficulties which economic evolution has brought with it.

With the development of the judiciary which has been described, supplemented by appropriate quasi-judicial agencies like the commissions which have reached perhaps their highest development in Wisconsin,[11] it may be maintained that the American method of developing and protecting private property is the best ever devised.

And what is here said about property holds equally with respect to contract, vested rights and personal freedom. The police power tells what regulations are

consistent with freedom of contract, etc. And all this is something which no man could have foreseen. It is a result of the action of English common sense, of English political wisdom, of German and Scandinavian sturdiness, in short of the intellectual and moral qualities of the Teutonic races, brought to bear on novel conditions.

Police comes from the Greek word πολιτεία, and it means policy, public policy, the welfare of the state—or of society organised as state. And this old meaning of the term is found in use in England certainly until the latter part of the eighteenth century. Adam Smith's definition of police as presented in the published notes on his "Lectures on Justice, Police, Revenue and Arms," is as follows: "The objects of police, the cheapness of commodities, public security and cleanliness, if the two last were not too minute for a lecture of this kind. Under this head we will consider the opulence of a state." [12] And as Professor Cannan shows us this part of Adam Smith's lectures dealing with police became finally his *Inquiry into the Nature and Cause of the Wealth of Nations.*[13]

Gradually, however, the word came in England and America to have the narrow meaning of "an organised civil force for maintaining order, preventing and detecting crime, and enforcing the laws." (*Century Dictionary.*) At the same time, however, we have the legal and larger meaning: "Public order: the regulation of a country or district with reference to the maintenance of order; more specifically, the power of each state . . . for the suppression or regulation of whatever is injurious

to the peace, health, morality, general intelligence, and thrift of the community and its internal safety." (*Century Dictionary.*)

Now this legal scope of police has grown and become more positive and constructive in character until under the peculiar constitutional conditions obtaining in the United States, it has acquired its old scope.

It is instructive at this point to consider the German use of the corresponding term and of "Police Science" (*Polizeiwissenschaft*) dealing with police. And we can do no better than to turn to the article on "Polizei" by Professor Edgar Loening in the *Handwörterbuch der Staatswissenschaften* (First edition, 1893).[14]

Loening discusses under *Polizeistaat und Polizeiwissenchaft* the concept *Polizei.* In the sixteenth and seventeenth centuries the mediæval state was transformed into the modern state, taking on new functions. Many of these, like education, were transferred from the Church. Included within the functions of the state was the maintenance of law and order as a condition of economic prosperity, without which the army could not be maintained and other public duties be performed; but this was only one among other functions. The entire social and cultural life was embraced within the sphere of the state, and this was all included under police. "Thus the state gradually drew the entire cultural life of the nation within the sphere of its activity and these new functions of the state were all included under the expression the establishment and maintenance of good police." [15] Separated were private law, criminal law, what the Germans call *Rechtspflege* (Justice), military affairs and finance. In the eighteenth century this idea was formulated scientifically. "In 1705 appeared the first volume of the great work, in folio, of La Mare, *Traité de la Police* (the 2nd and 3d volumes appearing in 1710 and 1719; 2nd ed. in 1722.") Both editions appeared in Paris, and in 1738 a fourth supplementary volume appeared. The wide circulation of the work is indicated by its appearance in a separate edition in Amsterdam also. It discussed the internal administration of France, with special attention to Paris. In 1713 Frederick William I of Prussia separated out police in this sense from military and financial affairs, etc., and made it equivalent to internal administration. This was the prevalent meaning in the eighteenth century literature under the name of *Polizeiwissenschaft,* and continued to be the meaning until recent times. See, for example, Robert von Mohl's *Polizeiwissenschaft* (3 vols., 3d ed., 1866). But von Mohl placed police in the narrow sense under *Rechstpflege,* making it a further subhead under the name preventive justice (*Präventivjustiz*), that is the activity of the state which has to do with the prevention of criminal disturbance of the peace.

Professor von Loening discusses further the narrow concept of police as meaning the prevention and suppression of disturbances of public peace and order. Louis XIV in 1667 established police in this narrow sense to put down lawlessness in Paris. This was taken from the city and transferred to a state official, the "*Lieutenant général de la police.*" Frederick the Great followed this example in 1742 and transferred the police

power from the Magistracy (*Magistrat*) of Berlin to a royal director of the police. J. St. Pütter first treated police in this narrow sense scientifically in his *Institutiones Juris publici Germanici* (1st ed., 1770, 5th. ed. 1792). According to him, the function of the police was to prevent future evils (*cura avertendi mala futura*) and he opposed this to the positive right of promoting the public welfare (*jus promovendi salutem publicam*).[16]

As in the United States all property is held subject to regulations, restrictions, and burdens under the police power, it is appropriate to quote from opinions of the United States Supreme Court giving the views of that high tribunal in noteworthy cases. In the celebrated Slaughter House Cases (1872) we find the following said of the police power:

"*The power is, and must be from its very nature, incapable of any very exact definition or limitation.* Upon it depends the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. As says another eminent judge, '. . . Persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this, no question ever was, or, *upon acknowledged general principles, ever can be made*, so far as natural persons are concerned.' (Thorpe *v.* Rutland & Burlington R. R. Co., 27 Vt. 139, 1854)."

This is clearly stated by Chief Justice Lemuel Shaw: "All property is acquired and held under the tacit condition that it shall not be used so as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *Sic utere tuo ut alienum non laedas*." [17]

In the case of People's Gas Co. *v.* Tyner, 131 Ind. 277 (1891), at p. 281, it was held that, "The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others." It is settled that the owner of a lot may not erect and maintain a nuisance thereon whereby his neighbours are injured.

But another step forward was clearly and definitely taken in 1906 and 1907 when the Supreme Court of the United States rejected the view that the police power was merely negative in character and took the position that it was a positive and constructive power.

In a decision rendered in 1907, in the case of Bacon *v.* Walker, appealed from the decision of the Supreme Court of Idaho, we read (204 U. S., 311, 317, 318), (the plaintiffs) "have fallen into the error exposed in C. B. & Q. R. R. Co. *v.* Drainage Com., 200 U. S., 561, 592 (1906). In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public health, the public morals, or the public safety . . . (the power of the state) is not confined as we have said to the suppression of what is offensive, disorderly, or insanitary. It extends to so dealing with the conditions which exist in the state as to bring out of them the

greatest welfare of the people. This is the principle of the cases which we have cited."

Still more noteworthy is the opinion of the court as expressed by Mr. Justice Holmes in Noble State Bank *v.* Haskell.

"'The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, *or held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare.*'" [18]

Now there is more in this police power than regulation of property relations and contractual relations. But there is no difficulty except where property and economic relations are concerned. No one objects to general benevolence—to doing good without cost—so when we consider police power, its essence is the interpretation of property, and when we consider the real essence of the police power as found in the leading American decisions we find that it is consistent with this concept. *It is that power of the courts committed to them by American Constitutions whereby they must shape property and contract to existing social conditions by settling the question of how far social regulations may, without compensation, impose burdens on property.* It seeks to preserve the satisfactory development of the individual and social sides of private property and thus to maintain a satisfactory equilibrium between them. And it is noteworthy that compensation may be given when property is destroyed under the police power Tuberculous cows are killed in Wisconsin. but a limited compensation is granted to the owner in pursuance of sound public policy, for it lessens the temptation to conceal disease and it diffuses the loss.

Regulation depends on the past—on what was done in England when the Constitution was framed, that is, precedent—but likewise on present conditions and sentiments, as seen in the quotation given from Mr. Justice Holmes.

It is not necessary to cite a great array of cases to prove the accuracy of the position here taken. The cases mentioned already in this work show the development of this idea of the police power. In the Indiana Gas Waste Case,[19] it was held that the owner of gas could not waste it in "flambeau lights" because that involved the waste of his neighbour's gas, drawn from the same general source of supply. In a different natural gas case in Oklahoma it was held that the legislature could not prevent the transportation of gas into another State because that imposed an unwarranted burden on property.[20, 21]

The cases involving æsthetic consideration turn on the allowable burdens on property. Mr. Justice Holmes decided that a small tax for amusements and æsthetic enjoyments was permissible,[22] but the Superior Court of Baltimore decided that a regulation of the width of building in a particular part of the city in the interest of a harmonious urban development implied a burden inconsistent with the idea of private property.[23] On the other hand the regulation of the height of buildings on Copley Square in Boston was sustained both by the Supreme Court of the State and the Supreme Court of the United States. But compensation was provided for

the owner of a building which had already been carried beyond the prescribed height.[24] Turning to the quasi-judicial opinions of the Wisconsin Railroad Commission, we find that similar considerations determine these decisions. When the council of the city of Madison ordered the wires and poles of the Madison Gas and Electric Company to be removed from the streets in a certain section of the city, the Commission overruled the council, because it involved an unwarranted burden on the property of the company concerned, intimating, however, that if the ordinance had involved a general scheme of improvement, the decision would possibly have been different.[25] And in a former case, a somewhat similar ordinance of the city council of La Crosse was upheld because it involved a more general plan of beautification and under the circumstance the owners of property had to bear the burden without compensation.[26] The taking of private property for public purposes of an æsthetic character under condemnation proceedings is a different matter and involves different principles. What is then involved is the question of public purpose which alone can justify the taking of private property; furthermore the question of taxation of private property in order to pay for the property taken. All this will receive consideration later.

If we consider the cases which have been the subject of more or less bitter controversy and which have by some been held to warrant the so-called recall of judicial decisions, we shall find that they imply the correctness of the view here presented of the police power. We may consider as illustration the cases cited by Professor

Albert M. Kales, of the Law School of the Northwestern University, in a paper read before the Illinois Bar Association in which he advocated the recall of decisions of State supreme courts. Three cases cited, merely typical, are described as follows:

"Since 1886 our Supreme Court has held void acts of the Legislature compelling mine owners to weigh coal mined and to pay the miners on the basis of such weight, because such acts took the mine owner's liberty and property without due process of law, contrary to the provisions of the State Constitution.[27]

"The United States Supreme Court, however, has held that a similar act from Arkansas did not violate the 'life, liberty and property' clause of the fourteenth amendment.[28]

"Since 1892 our Supreme Court has held void State acts regulating the keeping of truck stores by owners of coal mines and factories, because they deprived such owners of liberty and property without due process of law, contrary to the State Constitution.[29]

"In 1886 the Pennsylvania Supreme Court held void an Act which prohibited the payment of wages to miners in anything but money.[30]

"Yet the United States Supreme Court holds that such Acts are not in violation of the 'life, liberty and property' clause of the fourteenth amendment.[31]

"In 1896 our Supreme Court held void the barbers' Sunday law, which forbade the employment of barbers on Sunday, because the act violated the 'life, liberty and property' clause of the State Constitution.[32]

"But the United States Supreme Court sustained a like Act from Minnesota, declaring that it did not violate the 'life, liberty and property' clause of the Federal Constitution." [33]

A notable work on the Police Power is that by Mr.

W. G. Hastings, the "crowned" essay which was awarded a large prize by the American Philosophical Society in 1900. After reviewing in an able manner the decisions bearing on the police power, he comes to the conclusion that the police power is a fiction, but the whole book is a demonstration of the position taken in this chapter.

We cannot now and here go further into the police power to which we return later. But the careful student of the subject would do well to study the cases mentioned under the *Police Power* in Appendix IV and the cases cited under the Police Power in Thayer's *Cases on Constitutional Law*; also Goodnow's *Social Reform and the Constitution* and Freund's *Police Power*.[34] Enough has been said to show that its existence is based on the social theory of private property. When the student first examines property and contract as found in American Constitutions, he may not unnaturally be filled with despair in respect to future progress, for they seem to be hard and inflexible institutions. But social purpose is like geological force; it sweeps majestically on, over-riding all obstacles, and shaping all institutions to its ends. No Canute may by his feeble utterance stop the rising tide of reform and progress—hence the development of the police power.

The police power is held to belong to the separate States in the United States; and this is simply because they have the residuum of sovereignty. But the Federal Government has essentially the same powers in enumerated cases; and confusion has arisen because it has

not always been seen that the essence of police power is social control over property.

The Federal Government exercises its control over property through the Admiralty, Navigation and Commerce clauses of the Federal Constitution and, as time goes on, these mean more and more. They have ever increasing significance in the control of property inasmuch as these clauses give the Federal Government a very far-reaching regulation of transportation by sea and land, and regulation means control of property. There have been many conflicts between State and nation with respect to the control of transportation. The nation gains an ever increasing field. Even commerce which at first appears to be intrastate is found to have a connection with interstate commerce and thus passes under Federal regulation. The question of regulation is one of how far the Federal Government may go and here the question is one of property.

Take the case of Munn *v.* Illinois.[35] It was thought by many that as a result of this decision the legislature might use its own discretion in determining the rate of compensation for rail transportation. But subsequent decisions of the United States Supreme Court have developed the idea that if private property is deprived of its return through rate regulation, private property has been taken without compensation. Private property is valuable only on account of the return which it yields and when the owner is deprived of a fair and legitimate return on his property, it is taken from him. This applies, it may be observed incidentally, to the proposal of Henry George for taking the rent of land

from the owner for public purposes and leaving the owner the bare title. This takes all the meat out of the nut and leaves only the worthless shell. American courts very properly regard this as taking property without compensation.[36]

Regulation is allowed but it must be reasonable. The property should have what would be regarded as a normal return under competitive conditions. It has been held in cases of regulation in New York City for gas [37] and in Knoxville, Tenn.[38] for water that 6 per cent. is a reasonable return on property, and that the regulation of property in these cases is legitimate if this return is allowed. The Wisconsin Railroad Commission has added this: that the return to property invested in public utilities must be sufficient to produce a supply of capital.[39]

Two things help us to determine the economic concept, property: the first is what has been; for this we go back in large part to England and the common law. Here we have precedent. This was brought out in the already cited leading case by Mr. Justice Shaw given by Thayer under Police Power.[40] But in the second place it is to be observed that we are not bound by precedent exclusively. Broad scope is given to prevailing opinion. As stated by Mr. Justice Holmes, it is shaped "by the prevailing morality or the strong and preponderant opinion" as to what "is greatly and immediately necessary to the public welfare." [41]

Notes and References to Chapter VII

[1] P. 200. See article in the *Independent* for April 18, 1908 by President Arthur T. Hadley entitled: "The Constitutional Position of Property in America;" also in the same periodical articles by Jesse F. Orton, namely: "Confusion of Property with Privilege: Dartmouth College Case," First Article, Historical; Second Article, Legal, August 19 and 26, 1909; "Privilege becomes Property under the Fourteenth Amendment: the Consolidated Gas Decision," First Article, Franchise Value; Second Article, Land and Pavement Values, October 12, 1911 and March 28, 1912; "An Amendment by the Supreme Court," December 5, 1912.

[2] P. 202. State is here used in its generic, scientific sense.

[3] P. 202. Ogg, Frederic Austen: *Social Progress in Contemporary Europe*, 1912, pp. 38–39. This declaration is translated in Robinson, *Readings in European History*, Vol. II, 409–411.

[4] P. 202. The following quotation may serve as an illustration:

"Government is nothing more than a national association; and the object of this association is the good of all, as well individually as collectively. Every man wishes to pursue his occupation and to enjoy the fruits of his labours, and the produce of his property, in peace and safety, and with the least possible expense. When these things are accomplished, all the objects for which government ought to be established are answered." *Rights of Man*, Chap. IV.

[5] P. 207. "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain,

and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same." Commonwealth *v.* Alger, Supreme Judicial Court of Massachusetts, 1851, 7 Cush. 53. See also Thayer, *Cases on Constitutional Law*, p. 698.

[6] P. 207. *Cf.* on the principle of public policy as expressing the philosophy back of the police power, Haney's *Business Organization*, pp. 143–4.

[7] P. 207. See article in the *Harvard Law Review*, November 1913, by Herbert Pope, entitled "The Fundamental Law and the Power of the Courts."

[8] P. 210. See his article on "Vested Rights" in the *Contemporary Review*, Vol. LVII, pp. 780–796 (June, 1890).

[9] P. 211. When we look at American civilisation from the point of view of labour it is surely a great deal to be able to say that many an adult person living in the Mississippi Valley has never seen an able bodied man long seek work in vain. This conclusion is based upon answers put by the author to students in his classes. It can also safely be said that during the more than twenty years that the author has lived in Madison, Wisconsin, the labour supply has been nearly always continuously less than the demand and a great deal of labour worth doing has gone undone because no competent person could be found to do it at what was regarded as good wages. During a great part of this time it has been impossible to find competent and willing men ready to work in one's garden at twenty-five cents an hour.

[10] P. 212. As an illustration may be cited the reasoning which leads to the conclusion that a law forbidding a working day for women in shops and factories of eleven to fifteen hours is an invasion of their liberty to make free contract.

[11] P. 214. The state regulation of public utilities and railroads in Wisconsin affords a splendid example of recognising the social side of property and of paring down the bundle of rights held by the private owner. The accounts of utilities are kept according to the uniform form prescribed by the Commission. Frequent reports to the Commission are required. The Commission fixes the rate which is reasonable, allowing only a certain percentage of profit on the actual present cost of plant and investment plus any uncompensated cost of building up the business. The municipalities may buy the utilities, if they so desire, at a valuation fixed by the State Commission. The service rendered by private companies or municipal plants is regulated by and must meet the requirements of the State Commission. Depreciation of plant must be provided for. Extensions of plant must be made if found necessary by the Commission. Here certainly is a great paring down of the former rights of the private owner. He still owns the property it is true, but his ownership carries with it a management under public direction. The private owner at times seems little more than a manager of the concern.

[12] P. 215. See *Lectures* of Adam Smith, edited by Cannan, p. 3.

[13] P. 215. "The portion of jurisprudence dealing with 'Police' thus became with the exception of a scrap about security and bare mention of Sanitation, an 'Inquiry into the Nature and Causes of the Wealth of Nations.'" *Ibid.* p. 27.

[14] P. 216. See also Haney's *History of Economic Thought*, Chap. VIII, Kameralism, and A. W. Small's book *Cameralism* for further information on this topic.

[15] P. 216. "So zog der Staat nach und nach das gesammte Kulturleben des Volkes in den Kreis seiner Tätigkeit ein und diese neuen staatlichen Aufgaben wurden unter dem Ausdruck der Herstellung und Erhaltung guter Polizei zusammengefasst."

[16] P. 218. This is from Loening's article on *Polizei* in the *Handwörterbuch der Staatswissenschaften.*

[17] P. 219. Commonwealth *v.* Tewksbury, 11 Metcalf (Mass.), 55 (1846), at p. 57.

[18] P. 220. Noble State Bank *v.* Haskell, 219 U. S. 110 (1911), p. 111.

[19] P. 221. Townsend *v.* The State, 147 Ind. 624, 47 N. E. 19 (1897); Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900).

[20] P. 221. Case of Oklahoma *v.* Kansas Natural Gas Co., 221 U. S. 229 at p. 252 (1911).

[21] P. 221. The following group of cases in regard to waste of waters is especially instructive in this connection. In Hathorn *v.* Natural Carbonic Gas Company, 194 N. Y. 326, 87 N. E. Rep. 504 (1909), the New York Court of Appeals passed upon a statute of 1908 relating to the protection of natural mineral springs, which prohibited the pumping of percolating water or natural carbonic gas from wells

bored into the rock, first, absolutely and without qualifications; second, when the result of so doing would be to impair the natural flow or the quality of the waters or gas in the springs or wells of another person; third, when the object of so doing is to extract and collect the carbonic gas for market. It was held that the first and second prohibitions are unconstitutional as taking the use and enjoyment of private property; a land owner being prohibited from extracting waters from a bored well on his premises for purposes connected with the use of his premises, even if it does not interfere with others. He has a vested right to draw percolating water from under his lands by pumps for purposes legitimately connected with the enjoyment of his lands, even though it interferes with others.

The third prohibition is constitutional; the land owner having no vested right unreasonably to force the flow of percolating waters for any purpose not connected with the use or enjoyment of his land. (See *Decennial Digest*, Constitutional Law, sec. 92.) The court distinguishes the case of Huber *v.* Merkel, 117 Wisconsin, 355, 94 Northwestern, 354 (1902), where the Supreme Court of Wisconsin held unconstitutional a statute providing in substance that any owner or operator of an artesian well who permitted it to discharge more water than was reasonably necessary for his use, thereby diminishing the flow of water in another artesian well in the same vicinity, should be liable for damage. The New York court disapproves some of the broad statements made in the opinion of the Wisconsin court, sustaining the right of the owner of lower artesian wells to waste the water to the ruination of artesian wells higher up.

There is a steady trend of decision in America away from the English rule that there are no correlative rights in the percolating waters oozing through the earth. The case of Forbell *v.* New York, 164 N. Y. 522 (1900) took the lead in the East; Katz *v.* Walkinshaw, 141 California 116 (1903), took the lead in Western jurisdictions. The Wisconsin court goes to the extraordinary extreme of holding that not only are there no correlative rights at common law as to the percolating waters, so that the owner may divert, consume or waste them with impunity; but that a statute restricting the owner of an artesian well to what is reasonably necessary for his use is not a proper exercise of the police power; and that the right of a land owner to be malicious is a property right which cannot be taken away or impaired by the community, except under

the power of eminent domain. This case was decided on English authority before the current of American authority set the other way, but it is one of the most reactionary cases in the books in the limits which it sets upon the police power.

In the case of People *v.* New York Carbonic Gas Company, 196 N. Y. 421, 90 Northeastern, 441, the New York Court of Appeals explains its decision in the case of Hathorn v. Natural Carbonic Gas Company, 194 N. Y. 326, *supra*. It is there explained that the act of the legislature must be supported as a regulation of the conflicting rights of land owners who derive enjoyment or profit from the use of these waters within the earth and of their constituent ingredients or gases. In that aspect the enactment was a proper exercise of the police power, by which government regulates the intercourse of citizens and insures "to each the unimpaired enjoyment of his own, so far as is reasonably consistent with an equal enjoyment of rights by others."

The court goes on to say "It is for the interest of the state that no one should use his own property improperly; but the state could not, under the plea of protecting its natural resources, arbitrarily arrest the work of the defendants and deprive them of the right to prosecute a lawful business, whatever its effect on the subterranean mineral waters and gases. Such a use of the police power would be highly unreasonable, and irreconcilable with the rules of law under which rights of property have been held and recognized. . . . It does not appear that the state has any property in mineral springs to protect. The land affected is held in private ownership; and if the rights of an owner to its full use and enjoyment in lawful ways are destroyed or impaired, that the constitution of the state forbids, unless, when taken for public uses, just compensation be made."

Cullen, C. J., in his concurring opinion says: "It is urged that the public have such an interest in the mineral waters of Saratoga, because of their great curative and health-giving properties, that the Legislature may interpose for their protection under the right of the state, in the exercise of its police power, 'to protect and develop its natural resources,' even though the waters themselves are the property of private persons. I deny that the police power vests in the Legislature any such right. . . . But under that power the Legislature cannot require an owner to use his property for the advantage and benefit of others, or of the public, or even for his own

benefit, nor restrict him from devoting it to such purpose as he sees fit, or even from wasting it, provided such use does not conflict with the rights of others or of the public. A man owning a coal mine may mine the coal and waste it, regardless of the interest of the present generation or of succeeding ones. It is not that such conduct would not be an evil, but because the people who framed our system of government, taught by experience, deemed it wiser to trust the use of property to the dictates of the intelligent self-interest of the owner rather than to subject it to governmental interference."

In other words the Hathorn case is supported as an adjustment of conflicting private rights and the apportionment of the common property rights among several owners. Could there be a more complete repudiation of the idea that property is a trust, or owes any social obligations, or that the police power extends to the expression and assertion of social, public or community rights and interests as a limitation upon the exercise of private rights? This position is disheartening to conservationists particularly. It is unethical as anti-social. The view expressed with respect to the adequacy of self-interest to control was long ago rejected by science. On the other hand with general enlightenment we have reason to believe that the courts will also take a larger and more scientific view. Past experience warrants this belief. Furthermore in a better legal education and in proper selection of judges, as recommended in this work, we have remedies.

[22] P. 221. Hubbard *v.* Taunton, 140 Mass. p. 468.

[23] P. 221. Hampson *v.* Appeal Tax Court—not of record—but *cf.* Bostick *v.* Sams, 95 Md. 400 (1902) and Cochran *v.* Preston, 108 Md. 220 (1908). And see extract from letter from Mr. Justice Harlan of Maryland in Part I, Chap. VI, note 15, pp. 195–197.

[24] P. 222. Attorney General *v.* Williams, 174 Mass. 476 (1899).

Statute regulated height of building, but provided compensation for same. Is this a constitutional regulation? Knowlton, J. suggests that case might go on theory of safety, as other statutes in other States on height usually go. (p. 478.) The court suggests that the city in planning this square is planning a park.

On p. 480 (of parks): "For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. This æsthetic effect

never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated."

[25] P. 222. *In re* Application of the Madison Gas and Electric Company to Review an Ordinance of the City of Madison, etc., Wisconsin Railroad Commission Reports, Vol. 12, p. 293 (1913).

[26] P. 222. City of La Crosse *v.* Wisconsin Telephone Company, Wisconsin Railroad Commission Reports ,Vol. 7, p. 435.

[27] P. 223. Millett *v.* The People, 117 Ill. 294 (1896); Ramsey *v.* The People, 142 Ill. 380 (1892); Harding *v.* The People, 160 Ill. 459 (1896).

[28] P. 223. McLean *v.* Arkansas, 211 U. S. 539 (1908).

[29] P. 223. Frorer *v.* The People, 141 Ill. 171 (1892); Kellyville Coal Co. *v.* Harrier, 207 Ill. 624 (1904).

[30] P. 223. Godcharles *v.* Wigeman, 113 Pa. 431 (1886).

[31] P. 223. Knoxville Iron Co. *v.* Harbison, 183 U. S. 13 (1901).

[32] P. 223. Eden *v.* The People, 161 Ill. 296 (1896).

[33] P. 223. Petit *v.* Minnesota, 177 U. S. 164 (1898).

[34] P. 224. Professor Freund defines the police power as follows:

"*It (the state) exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of these who are unskillful, careless or unscrupulous.*"

Professor Freund supplements his definition with the following remarks:

"It has been inferred from this vagueness of the term police, that the idea of the police power must be equally undefined, and a recent author has gone so far as to deny its existence, treating it as a fiction, and holding it equivalent to indefinite supremacy. The inference is, however, unwarranted. As soon as the idea of the police became the centre and foundation of a governmental power, the exercise

of which had to justify itself in the face of constitutional limitations, the courts were bound to use the term with greater care, and to attempt to define it. From the mass of decisions in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. . . . It (an examination of statutes and decisions) will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, that is, capable of development." *Police Power* (1904), pp. 3, 6.

[35] P. 225. Munn *v.* Illinois, 94 U. S. 113.

[36] P. 226. This idea is admirably developed in Eaton *v.* The Boston, Concord and Montreal Railroad, 51 N. H. 504 (1872), especially pp. 510–12. This case is of special importance because it is stated in the opinion that property may be taken if value is removed or greatly lessened although the mere empty titles or "insignia of ownership" are left.

[37] P. 226. Consolidated Gas Co. *v.* New York, 157 Fed. 849, 855, affirmed in 212 U. S. 52.

[38] P. 226. Knoxville *v.* Water Co., 212 U. S. 9. *Cf.* Smythe *v.* Ames, 169 U. S. 466 (1897); Stanislaus Co. *v.* San Joaquin, etc., 192 U. S. 201; Steanerson *v.* Great Northern R. C., 69 Minn. 374. See also list of cases in note on p. 296, Sec. 312 of Beale and Wyman on *The Law of Railroad Rate Regulation.* Only the limits of space prevent a much fuller discussion of the cases, but after all the reader must remember that this is primarily an economic treatise and not a law book. Only illustrative cases can be given.

[39] P. 226. Hill *et al. v.* Antigo Water Co., 3 W. R. C. R., 623, 726, 764 (1909); *In re* Menominee and Marinette Light and Traction Co., 3 W. R. C. R. 778, 793 (1909); Superior Commercial Club *et al. v.* Superior Water, Light and Power Co., 10 W. R. C. R., 704, 758 (1912).

[40] P. 226. Commonwealth *v.* Alger, Supreme Judicial Court of Mass., 7 Cush. 53 (1851), given in Thayer's *Cases on Constitutional Law*, Vol. I, pp. 693, 695–6.

[41] P. 226. Among hundreds of cases the following are cited as having interest in this connection: State *v.* Redmon (Wis.) 114 N. W. 137 (1907) considers the right of the public to compel the closing of the upper Pullman berth when unoccupied (decided against the public); the law was slightly changed and prohibited the railway company from lowering the upper berth when unoccupied and this law was sustained by the Supreme Court of Wisconsin in State *v.* C. M. & St. P., 152 Wis. 342. (Feb. 1913) the court holding that sec. 1636p (L. 1911, Ch. 272) is a general law designed to contribute to the general welfare of all the people: Bonnett *v.* Vallier (Wis.) 116 N. W. 885 (1908) dealing with the regulation of tenement buildings (held that the law was unreasonable and unconstitutional and therefore void); Benz *et al. v.* Kremer *et al.* (Wis.) 125 N. W. 99 (1910) dealing with the regulation of bakeries (law upheld); State *ex rel.* Wausau St. Ry. Co. *v.* Bancroft, Atty. Gen. *et al.*, and State *ex rel.* Jackson Milling Co., *et al. v.* same (Wis.) 134 N. W. 330 (1912) (States do not have the right to confiscate property under guise of regulation): Ives *v.* South Buffalo R. R. Co., 201 N. Y. 271 (1911). This is the well-known case in which the Court of Appeals of New York State overthrew the compulsory insurance law of that State, holding that it took property without due process of law, and going back to the common law of England to ascertain what constituted property. The court said, "One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." The law was held to be repugnant to the State and Federal Constitutions, but it was intimated that the people of New York were competent to change the content of property in the particular under consideration by changing the State Constitution, and this they have done and a new compulsory insurance act has been passed and the Fourteenth Amendment of the Federal Constitution has not been invoked.

On the other hand, some of the States have brought pressure to bear on the employers voluntarily to adopt compensation schemes, and this they have done by weakening their defences when suit is brought against the employers. This pressure is the result of the abolition of the defences found in the doctrines of "fellow servant", "assumption of risk" and "contributory negligence". (With

respect to this pressure, see the article " Sequel to Workmen's Compensation Acts ", by Jeremiah Smith, *Harvard Law Review*, January, 1914, especially pp. 248–9). But are these defences not part of the institution of property? The courts have answered "no". The Supreme Court of Massachusetts expressed this view July 24, 1911, in reply to a request from the legislature for an opinion: "The rules of law relating to contributory negligence and assumption of risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the legislature may change them or do away with them altogether as defences" (209 Massachusetts 607).

CHAPTER VIII

WHAT MAY I OWN?

The theory of property having been elaborated, the question now is, what doctrine concerning ownership and the limits of ownership will naturally follow from this theory. It is not desired to give any opinion in the nature of an exhortation, nor has the author in this place a desire to elaborate any speculations of his own. The present aim is simply to show what naturally and inevitably follows from the views concerning the nature of property that have been presented.

There can be no doubt that people at the present time are more or less puzzled concerning ownership. Nearly all persons whom we would call morally normal fix the limit somewhere, some too closely, but most of them not closely enough. We meet such people any day in any community. We find, for example, people who will not own land. The author recalls such a case: a man who thought land ownership was ethically not allowable and who even had gone out of his way to avoid land ownership which came to him naturally and would have brought to him large gain. This man, it seemed to the author, carried his convictions decidedly too far; but most people are not sufficiently sensitive in regard to the responsibilities of ownership. This is brought out by the opposition to any proposal to affix

the names of the owners to the pieces of property which they own in undesirable sections of the large cities. There is a strong objection on the part of owners of property in the slums to have it known who owns the property.[1]

Now following the theory of property which we have discussed, what is the view which must be maintained concerning ownership? May I own land even when I think that public ownership of land is better than private ownership? Let us suppose that I am an adherent of municipal gas works. Is there any impropriety in my owning stock in a private gas plant? We have come to the conclusion that private property is a social trust; this means that it is a trust from society, a social institution, and, inasmuch as it has been established by society, an individual, as an individual, cannot change it. We must make use of external valuable things, which must be under some form of control, and we are responsible as members of society and not as individuals for that kind of control which the institution of private property carries with it. The individual cannot if he would change the institution of private property in land. If the individual thinks that some other form of property is better, or that there ought to be some modification in the institution of private property in land, he may by persuasion endeavour to modify and direct the opinion of his fellows, but he must then leave it to the society of which he is only one member to make or not to make this change.

But something more is to be said. If private property is a social trust, has the individual a right to refuse that trust? Is it not incumbent upon the individual to show why he may refuse that trust? Let us consider the case of the man who went out of his way to avoid the ownership of land. Might not society say to him: "Private property in land has been established as a social trust; accept this trust and use it for the interest of society. You say you think that nationalisation of land would be a good thing, but that is something of which society has not as yet become convinced. In the meantime, private property exists and it involves a trust, not only a privilege but an obligation." So it would seem that, from his own point of view, this man should try to extend his opinions and endeavour to persuade society to adopt his views; when he has done that, he has done his full duty in that matter. If he refuses the trust, it will very likely fall into the hands of less conscientious persons than he is, who would not make as good a use of it as he would make.

However, if such a person feels very strongly on the subject and thinks that the very best thing which could possibly happen to society would be the nationalisation of land, the consistent line of conduct for him is to own the land and to take any gain that would result from the ownership of the land and use it for spreading his views. It was said during one campaign that Henry George owned land, and it was pointed out as an inconsistency. But supposing it true that he did own land, wherein was he inconsistent if he held the social view of private property? He could say, "Until society adopts my views I will accept the trust and make the best use of it that I can." And the same would hold with

regard to private ownership of gas stock, railway stock, etc. On the other hand, it is reprehensible if a man on account of his private interests suppresses his own opinion or attempts to suppress the opinions of others; but that is an entirely different matter.

We have here to do simply with the question of expediency. Even if we think that municipal ownership of gas works is better than private ownership, we must acknowledge that as long as the cities of the country do not adopt this view it must be admitted that those who have supplied a real need through private gas works have conferred a benefit upon their fellow citizens. There is a need felt for the light they furnish, and whoever furnishes this light is entitled to remuneration for his services. And as we must have some kind of regulation, either through public or private property, it is simply a question of expediency. What is best for the community? Where are the limitations? We want gas, and railway service, and the use of land. They must be either public or private property.

Are there then no ethical limitations upon the right of ownership which flow from the social theory of property? Consider the case of gambling hells and property used for gambling purposes. Now can a person whose views are ethically sound, and who tries to regulate his conduct by ethical considerations, own property used for gambling purposes, to disgrace and degrade his fellow men? Certainly not. Here it is not a question of expediency, not whether we shall have public or private ownership, for it is not admitted that we want the thing at all. So a person who attempts to govern his

conduct by ethical considerations cannot participate in the ownership of such property.[2]

How will it be then with the ownership of property in which intoxicating beverages are sold? That will depend, it would seem, exactly on what one thinks of the liquor traffic. If we think it necessary and desirable, if we hold that all that is needed is moderation in the use of alcoholic beverages, then we cannot condemn the person who owns the property in which the traffic is carried on. But if we say that the liquor traffic is wrong, that it works evil and only evil, that it is in no sense desirable, then we must condemn the ownership of property used for such purposes. But we might indeed come to the conclusion, that we should be governed according to the circumstances of time and place. In a country like Germany the abolition of such beverages is, for the present at least, absolutely out of the question. There the author has seen a board of foreign missions meeting in a beer hall to discuss their work over their glasses of beer. The best people of the country, generally speaking, use intoxicating beverages, and it would not be considered desirable to abolish the use of such beverages. It is quite conceivable, on the other hand, that in South Dakota the desirable thing and the socially expedient thing, would be the entire abolition of the traffic in intoxicating beverages, and one would have to reach a corresponding conclusion concerning the ownership of property connected with the traffic. Much depends on the will of society: when that is not clear, a greater load is thrown on individual judgment.

We have here to do with strictly economic considerations. We accept the current ethical views of leading thinkers belonging to various professions. We do not ask what are the sanctions and fundamental principles of ethical conduct, but we inquire into certain economic concepts and the ethical consequences which flow from accepted opinions.

There are cases which seem to lie between the two clear-cut cases of, let us say, agricultural land and gambling hells; and it is these cases which puzzle people, especially that of traffic in intoxicating beverages.

And here, simply by the way, the author wishes to make another suggestion. A traffic like that in intoxicating beverages seems to have various effects upon character, according to the circumstances under which it is conducted. If the traffic is a forbidden one, and the best people in the community regard it as deserving of moral condemnation, it seems to have a degrading effect upon character. On the other hand, in a country like Germany, it might not be easier to discover any ethically deleterious effects of this business than of the shoe or dry-goods business. Many sorts of traffic have varying effects on character, according to the circumstances under which they are conducted.

Take another illustration of this. In patriarchal times slavery had a very different effect upon character from that which it probably would have to-day in a northern community, say in certain sections of Wisconsin, if the circumstances were such that slavery could be developed there. It would certainly be under a ban, and would very probably have a disastrous effect

upon character. But how different the case of slavery in our own Southern States before the war! Its abolition has never anywhere been an easy matter. The question has always to be asked, What can be done as an alternative, so far as the individual is concerned? Consider the case of the individual slave owner in the ante-bellum South. Here slavery was established as an institution, permitted by the country as a whole, and the individual as such could not abolish the institution. He could emancipate his own slaves if others had no property claims upon him which made this impossible; but the slave owner had to ask himself, "What will be the effect of individual emancipation?" And when he compared the condition of freed slaves with the condition of these who were not free, it seemed at least open to question whether or not, so long as the institution existed, one did better to retain his slaves and treat them well, or to emancipate them. Many conscientiously held the belief that the former alternative was preferable; and it was quite possible to hold it. But, if any slave owner undertook to prevent a fair discussion of the question and thus prevent general emancipation, that would be a different matter, because that would raise a question concerning the ethical character of the institution as a whole and not of an individual case only. The author here is simply trying to point out the difference between what an individual may ethically do when he has no control over a social institution and what he ought to do providing the social institution itself were under his control.

Let us take another case. This is not a very serious

one, but after all it is brought forward in newspapers. Some one says to me: "You call property a social trust. You have ten thousand dollars and I have none. I want you to divide with me." But it goes without saying that it does not follow from the doctrine of property which we have laid down, that a man who has ten thousand dollars should give even a cent to the man who has none. For whatever the sum may be that he has, so long as it is in his hands, it is a trust from society, and I cannot say to him, "Now you must divide with me." I must show him that when he divides with me he is promoting the social weal and discharging his trust; he must be convinced before dividing with me that in so doing he is making a better use of his property than any other use he could make of it. The very fact that I am so impertinent as to suggest the question, suggests also the negative answer.

Another question has been raised. In the case of land ownership, for instance, will not my example count for more if I abstain from ownership in case I hold views like those of Henry George? Henry George might have said that people would misunderstand him, and on account of the weakness of his brethren he would not put a stumbling block in their way. But to what extent one should yield to the weaknesses of one's fellow men is an entirely different question. In the case of a great leader like Henry George, it would perhaps be better for the sake of his influence that he abstain from land ownership, not because there would be any inconsistency in ownership, but because it might not be an expedient thing on account of the misapprehension to

which it would give rise. The objective soundness of his views is not considered at all in this connection.

Not long ago the question of "tainted money" was much discussed in the United States. Many held it contrary to sound ethics to take for religious and philanthropic purposes money which had been acquired by notoriously unworthy methods. The real question at issue was whether acceptance of the money implied an endorsement of unethical practices and encouraged their continuance, a question of a concrete kind which could be solved in each case only by a knowledge of the conditions, individual and social, of time and place. Generally speaking, what is desired is a beneficial use of wealth and a burden of proof would seem to rest upon those who oppose such a use on account of the indirect consequences of the acceptance of gifts. If money has been badly acquired, and wrongs committed cannot be specifically remedied, the natural thought is that the money should be put to some good use at the earliest possible moment. But there may be critical occasions when wealth is given as a bribe to secure immunity from public condemnation or to win public favour for socially unworthy conduct, and in such cases the rejection of gifts is required by sound ethics. But into this problem we need not now further enter.[3]

Now from all this the author formulates what he will call the ethical law of ownership: *When the service or commodity furnished is socially desirable, and especially when it is clearly and generally recognised as such, private property in the goods connected with the traffic or business is ethically permissible if legally allowed.*

When the service or commodity furnished is socially injurious, and especially if it is clearly and generally recognised as such, private property in the goods connected with the traffic or business is reprehensible whether legally allowed or not.

Notes and References to Chapter VIII

[1] P. 238. In the summer of 1912 the author noticed in Dresden in the large main hall of a house with several apartments a tablet, conspicuously posted, with the name and address of the owner. This appears to be a common practice in Germany and is to be recommended as attaching responsibility to ownership. On the other hand, a German professor, when a few years ago conducting investigations in the slums of London, was frequently unable to ascertain the ownership of specific pieces of property. When he inquired of the superintendent or caretaker, he was several times told that the owner's name could not be divulged as that was a confidential matter.

There are a good many people, some of prominence, who advocate making the owner of property used for gambling, etc., legally liable for the misdeeds committed in or on his property, and it is said that bills have been introduced into various legislatures making the owner of houses liable if he rent his property for illegal purposes. It may be questioned whether this is not going beyond what can be demanded either by economics or ethics, as the owner cannot have a power which would be commensurate with his responsibility. But the owner may rightfully be called upon to acknowledge plainly his ownership.

[2] P. 241. From a strictly legal point of view, it may be said that the discussion at this point turns rather on the proper permissive use than the right to own. If the use can be changed to a proper one, no ethical objection is to be urged against ownership.

[3] P. 245. This question has been treated in a different medium by Bernard Shaw in his plays, *Mrs. Warren's Profession* and *Major Barbara*.

CHAPTER IX

THE CONSERVATIVE NATURE OF THE SOCIAL THEORY OF PROPERTY

It may be said safely that the theory of property which has been presented will seem to some startlingly radical. But first appearances are often deceptive. The truth is that this theory gives us a firm foundation for private property, in fact a very bulwark of private property. Let us examine some of the conclusions to which the *social theory of property* leads.

First, it leads to a conservative view of the state. If this theory is true, it gives us at least a utilitarian basis for the state, because it determines in this respect what conduct is for the general welfare.

But the social theory of property leads naturally to what we may call the historical theory of the state, a theory which has been held by great leaders of thought in all ages and in all lands, and which alone has stood the test of examination by wise men and the reflection of philosophers for generations. It is a continuous growth and as such it corresponds to essential human needs. This in itself gives it an ethical character.

Again, notice that the state determines the character of conduct in certain very important economic particulars; that which determines the character of conduct must itself be ethical. It is thus difficult to see any es-

cape from the view that the state is an ethical person, provided the social theory of property is correct. And the view that the state is an ethical person is in its general influence a conservative one, militating against anything like revolution and anarchism. Control over our lives and our property rests with the state, and such control cannot proceed from contract: for how can an agreement between private individuals establish ethical rules in a community? There must be something behind contract. In fact, contract cannot exist apart from the state. Agreements may exist, but contracts presuppose the existence of the state.[1] In fact we may safely speak of the *contract theory* of the state as something which is relegated to the rubbish heap of past theories.

Some readers, and especially those trained in Greek thought and German philosophy, will at this point naturally recall the view that the state in its idea and essence is a divine institution, however unworthy may be the men who at particular times and places gain in it positions of influence and control. Other readers will look upon such a theory as the outcome of a misleading idealism and still others will fear that it carries with it a false organismic idea of the state and society. The author cannot now and here enter into an exhaustive discussion of these different views, for which space is too limited. But whatever theory of the state is adopted, the weighty responsibilities which devolve upon all who direct and shape its various activities receive new emphasis when it is perceived that the state determines such important rules of conduct as those

which are necessarily involved in the laws of property. Even if the state is a mere aggregation of individuals—in the opinion of the author an entirely unscientific view—it becomes apparent that the phrase "sacredness of the ballot" is vital and full of meaning; and religiously disposed people will feel like commending anew the old American custom of "election sermons", in which preachers laid it upon the consciences of their flocks, that all the tasks, obligations and privileges of citizenship were of a solemn character.

Thus, without going further into the nature of the state, we may sum up these considerations by saying that the social theory of property is a conservative one inasmuch as it leads to a conservative view of the state.

And in the second place, it is a conservative theory because it renders the institution of property a flexible one which can be bent and shaped to meet the exigencies of the social situation. If the institution is simply one and indivisible, then it cannot be bent, it is inflexible, and we have either to accept it just as it is or reject it, there being no middle ground. We might infer from many utterances of the press at the present time, and even from some expressions by more thoughtful persons, that the institution is one and indivisible, and inflexible. Consider this quotation, for example, "The person who clings with a sense of possession to the smallest coin in his pocket has voluntarily given adhesion to one of the great institutions of our present civilization." [2] Anyone who clings to any article of property he may have gives adhesion, it is said, to the institution of property. That may be true, but it does not follow therefrom that he

gives consent to all that the institution of property carries with it at the present time; for the institution of property is not eternal and unchangeable, like the granite of the mountains. It is true that we all hang together, and that you cannot attack the millionaire's palace, without threatening the widow's cottage. If you attack the millionaire's palace you make an attack upon the institution of property—using the word attack in a strict sense—but it does not follow that we cannot modify the institution so as to lead to a modification in the distribution of wealth, without injuring the widow's cottage. It does not follow because the millionaire pays a tax of three per cent. and the widow pays a one per cent. tax that the institution of property is threatened by this progressive taxation. Neither the widow's cottage is necessarily threatened thereby nor the millionaire's palace.

In the third place, the social theory of property is a conservative one because the institution finds its limitations in the social welfare.

And first of all, note the conservative influence which this theory of property had upon John Stuart Mill. He said:

> "If, therefore, the choice were to be made between Communism with all its chances, and the present state of society with all its suffering and injustices; if the institution of private property necessarily carries with it as a consequence that the produce of labour should be apportioned as we now see it, almost in an inverse ratio to the labour—the largest portions to those who have never worked at all, the next largest to those whose work is almost nominal, and so in a descending scale, the remuneration dwindling as the work grows harder and more disagreeable until the most fatiguing

and exhausting bodily labour cannot count with certainty on being able to earn even the necessaries of life; if this or Communism were the alternative, all the difficulties, great or small, of Communism would be as dust in the balance. But to make the comparison applicable, we must compare Communism at its best, with the régime of individual property, not as it is, but as it might be made. The principle of private property has never yet had a fair trial in any country. . . . They have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist." [3]

But because he did not hold that view, but did hold the view that it found its limitations in the social welfare, he said, for the present at any rate he would hold to the institution of private property.

Now take this view of property in connection with certain arguments concerning land, advanced by followers of Henry George and other men of a similar way of thinking. Sometimes a case like this is brought forward. Let us suppose that on a certain island, which is not connected with any other land, there are a great many people, and gradually all the land on the island is acquired by one property owner. What does the right of private property carry with it in such a case? Among other things property normally carries with it the right of eviction. There is no other land to which the people can escape, and they will be drowned in the depths of the sea. We use Henry George's own language:

"And to this manifest absurdity does the recognition of the individual right to land come when carried to its ultimate—that any one human being, could he concentrate in himself the individual rights to the land of any country,

could expel therefrom all the rest of its inhabitants, and could he thus concentrate the individual rights to the whole surface of the globe, he alone of all the teeming population of the earth would have the right to live." [4]

This state of things would follow acceptance of a view of private property which made it an indivisible, unchangeable institution. But if private property finds its limitations in the social well-being, then such a land owner may not drive people off his property to betake themselves to the sea and perish in the waves, because long before that point is reached private property will find its limitations, since society cannot think that its welfare will be found in its own destruction. It is only a narrow and cast-iron view of property which will admit of such an argument. In fact, conservative writers in the Roman Catholic Church have based their defence of landed property upon the social view. Reference may be made to a work called *Champions of Agrarian Socialism,* written by Rev. Victor Cathrein, S. J., and also to a brochure, entitled *Henry George and Private Property,* by Professor John A. Ryan of St. Paul Seminary, Minnesota. Cathrein says in the work referred to: [5]

"Property in the objective sense, or objects of full ownership, are only external material things. Hence it is that nearly all the older expounders of the *Jus Romanum* and many theologians also define ownership as the 'right of fully disposing of a material object within legal bounds.' From this clause 'within legal bounds' it is manifest that the Justinian Code also never knew an *absolutely* unrestricted right of property. Not only was the subordination of human proprietorship to the supreme dominium of God never ques-

tioned in the Christian Roman right, but the principle was universally acknowledged that positive law according to the *necessary* demands of the public weal, could restrict the valid as well as the licit use of private property, especially in land. Proof of this are the so-called legal servitudes which for the sake of public interest limited in many ways the free disposal of landed property."

Father Ryan, in his brochure, issued in 1912, similarly says: "In answer to George's argument and illustration we say, first, that the right of ownership created by first occupancy is not unlimited either in power or in extent; and, second, that the injustice resulting from private landownership in practice has in very few instances been due to first occupation of excessively large tracts of land. The right to appropriate land that no one else has yet claimed does not include the right to take a whole region or continent, so that all subsequent arrivals are obliged to become tenants of the first. There seems to be no good reason why the first occupant is justified in claiming as his own more than he can cultivate by his own labour, or with the assistance of those who are under contract to labour for him, or who prefer to be his tenants or his employees rather than independent proprietors. Neither is the right of private landownership unlimited in its powers or comprehension. Even though a man should have become the rightful owner of all the land in a neighbourhood, he would have no moral right to exclude from its use persons who could not without extreme inconvenience find a living elsewhere. He would be obliged to let them cultivate it in return for a fair rental. The Christian conception of the limitations of private ownership as to its comprehension, is practically illustrated in the action of Pope Clement IV., who permitted strangers to use the third part of any estate which the proprietor refused to cultivate himself." [6]

It is precisely this social theory of property which is advanced in the quotations in opposition to what rightly

or wrongly is called by Cathrein "agrarian socialism". And it is as true of the English law as of the Jus Romanum that it has never known an unrestricted right of property. The following quotation from Mr. Justice Alexander A. Bruce brings out this point clearly and accurately:

"The constitutions, State and federal, do not anywhere guarantee any absolute property rights nor right to liberty. The guarantee is merely that no person shall be deprived of life, liberty and property without due process of law. The right to liberty and property was never absolute under the English law, and the American constitutions have never been construed as going further than guaranteeing the continuance of the rights which existed at the time of their adoption." [7]

Henry George, curiously enough, rejects the right to tax private property, and we see again the radical nature of his doctrine in a different direction. If property is something absolute, it is difficult to find any justification of the right of taxation, because, look at this as one will, it does mean a development of the social side of private property. The right of taxation does mean a limitation of the right of private property, and a claim on the part of the general public grounded in the social side of the institution. And thus this absolute view of property held by Mr. George, which leads him to reject private property in land, also leads him to reject taxation. Both, he says, are robbery; for he claims that land belongs to society or to the individual absolutely; as, then, it cannot belong to the individual absolutely, it must belong to society so far as the unearned value is concerned. Other kinds of property that I own, the

house that I have, the money that I have belong to me absolutely, and as they belong to me absolutely there is no such thing as any right of taxation; and when the tax collector comes and I yield to the superior force which is back of him, I am robbed.[8]

In the fourth place, the view of property which has been advanced is a conservative view because it protects private property in its true sphere. To place restrictions on an unjust or injurious sort of property does not endanger private property as a whole. If private property is a unit, then every unjust use of property endangers the institution as a whole. The question which has really to be asked is whether a particular unjust use of property or an injurious sort of property is any necessary part of the institution of property.

The abuse of the idea of private property has been injurious in the past, and has to a certain extent endangered property. There was a time when even sovereignty was regarded as private property. "Territorial sovereignty was regarded as the hereditary property of a family." [9] And to some the institution of property doubtless seemed to stand or fall with the idea of property in sovereignty. The state, so far as it was sovereign, belonged to the reigning family, it was thought. Many held this idea in mediæval times, and they may have said, "If you give up this idea you endanger the whole idea of property." But it has been given up. Sovereignty is no longer anything but a social trust. And private property has been strengthened by this change.[10]

So also with slavery. It was said that if slavery was abolished the institution of property itself would be

endangered, and that those who attacked slavery were revolutionists. But slavery has disappeared, and the institution of property is stronger even than it was, because that abuse of the idea has disappeared.[11] In the future, other rights will be changed. And as they are changed, as property rights correspond more closely to the demands of society and more truly promote the social weal, the institution of property will be strengthened.

Unless it comes to such a pass that the institution in its very essence is injurious, there can be no ground for a general attack on private property. Invasion of the rights of private property appears the more unjustifiable if provision is made for the needs of the general public.

It may be true that private property is safer in any part of the world in so far as the institution itself conforms to the social theory of property. Germany is a country which in some respects carries far this recognition of the social theory of property; but, on the whole, private property rights are probably better respected and protected there than elsewhere. There seems to be more hesitation, for example, about trespassing upon its rights there than in America,[12] where private property is by no means always sufficiently respected. This is seen, for example, in the neighbourhood of many large American cities where it is impossible to raise fruit, vegetables, etc., because they are so often stolen almost under the owner's very eyes, so that some simply abandon the effort to use their land in this way.

But when provision is made for all true social needs,

then we can accompany such provision with a stricter enforcement of the rights of private property. For instance, if there are no public playgrounds, there is a strong temptation to trespass upon private property. Playgrounds supply a need felt in every community. The children must have playgrounds, the boys want fields for their games, and people want pleasure-grounds through which they can stroll; if provision is not made in public property for the satisfaction of these needs, then there is a continual temptation to trespass upon private property. More public property would be a protection to private property in most countries, perhaps in all.

The question may also be asked whether the failure to make private property conform to the social theory of property has not been one of the causes of the downfall of the older civilisations. Was not that the case with Rome? Consider the decline and fall of the Roman Empire. Private property was, in part at least, the cause, on the one hand, of poverty and want, and on the other hand, of wanton luxury and moral degradation. But when things came to that pass in Rome, "the remedy for the disease was even more dreaded than the disease itself." [13]

Notes and References to Chapter IX

[1] P. 249. This receives further treatment in Part II of the present work. See some illuminating observations on this subject in Adam Smith's *Lectures*, ed. Cannan, pp. 11–13.

[2] P. 250. See the article in the *International Journal of Ethics* of October 1893, entitled "What Justifies Private Property?" by W. L. Sheldon.

[3] P. 252. Mill, *Principles of Political Economy*, Bk. II, Chap. I, § 3.

[4] P. 253. Henry George, *Progress and Poverty*, Bk. VII, Chap. I, p. 310.

[5] P. 253. Translated, revised, and enlarged by Rev. J. N. Heinzle, S. J., President of Canisius College, Buffalo, N. Y. The quotation is found on p. 99.

[6] P. 254. John A. Ryan, *Henry George and Private Property*, pp. 4–5.

[7] P. 255. "The Anthracite Coal Industry and the Business affected with a Public Interest," article in the *Michigan Law Review* of June 1909. Read especially pp. 627–635. Mr. Justice Bruce in this article develops the idea of "property affected with a public interest" which means social regulation where the public welfare requires it and it must be remembered that day by day an increasing mass of property is recognised by the judiciary as being clothed with a public interest. This means necessarily the social theory of property as it has been developed under the American constitutional system. The following citations of cases are given: Munn *v.* Illinois, 94 U. S. 113; Lake View *v.* Rose Hill Cemetery, 70 Ill. 192; Allnut *v.* Inglis, 12 East 527; Brewster *v.* Miller, 101 Ky. 275; Hurley *v.* Huddingfield, 156 Ind. 416; Gould *v.* Electric Light Company, 60 N. Y. Supp. 559; Canada Railway *v.* International Bridge Company, 8 App. Cas. 723; State *v.* Telephone Company, 17 Neb. 126; Haugen *v.* Albina Water Company, 21 Ore. 111; City of Tampa *v.* Waterworks Company, 34 South. 631; Mobile *v.* Water Supply Company, 130 Ala. 379; Wheeler *v.* Irrigation Company, 10 Col. 582; People *v.* Budd, 117 N. Y. 1; State *v.* Brass, 2 N. D. 482; Brass *v.* North Dakota, 153 U. S. 391, 14 Sup. Ct. 857; Peel Splint Coal Co. *v.*

State, 36 W. Va. 802; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421; Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. 1; Dayton Coal Co. *v.* Barton, 183 U. S. 23, 22 Sup. Ct. 5.

[8] P. 256. See his work *A Perplexed Philosopher*, where he makes the following statement:

"The truth is that customs taxes, and improvement taxes, and income taxes, and taxes on business and occupations and on legacies and successions, are morally and economically no better than highway robbery or burglary, all the more disastrous and demoralising because practised by the state. There is no necessity for them. The seeming necessity arises only from the failure of the state to take its own natural and adequate source of revenue—a failure which entails a long train of evils of another kind by stimulating a forestalling and monopolisation of land which creates an artificial scarcity of the primary element of life and labor, so that in the midst of the illimitable natural resources the opportunity to work has come to be looked upon as a boon, and in spite of the most enormous increase in the powers of production the great mass find life a hard struggle to maintain life, and millions die before their time, of overstrain and undernurture." (p. 243.)

In his *Progress and Poverty* Henry George expresses himself thus:

"Nature gives to labor; and to labor alone. In a very Garden of Eden a man would starve but for human exertions. Now here are two men of equal incomes—that of the one derived from the exertion of his labor, that of the other from the rent of land. Is it just that they should equally contribute to the expenses of the state? Evidently not. The income of the one represents wealth he creates and adds to the general wealth of the state; the income of the other represents merely wealth that he takes from the general stock, returning nothing. The right of the one to the enjoyment of his income rests on the warrant of nature, which returns wealth to labor; the right of the other to the enjoyment of his income is a mere fictitious right, the creation of municipal regulation, which is unknown and unrecognized by nature. The father who is told that from his labor he must support his children, must acquiesce, for such is the natural decree; but he may justly demand that from the income gained by his labor not one penny shall be taken, so long as a penny remains on incomes which are gained by a monopoly of the natural opportunities which Nature offers impartially to all, and in

which his children have as their birth-right an equal share." (pp. 376–377).

But Henry George and his followers have frequently expressed themselves far more strongly and have made a clear-cut distinction between rent as public property, which cannot be taken for private purposes without robbery, and all other income which, being the result of labour and effort belongs, they allege, to the category of absolute private property, of which the owner cannot be deprived without robbery. The position has also been taken by single taxers that the government must be supported by the single tax, and that no other tax may be levied. It is said government must be content with its own income and adjust itself to that income like private individuals, and in the early days of the single tax agitation in the United States a great deal of attention was given to showing the adequacy of land rents for all public purposes. Expressions like these can be found frequently enough in the periodical and pamphlet literature devoted to the single tax. In his *Progress and Poverty* and in his posthumous work *The Science of Political Economy*, Henry George expresses himself generally with more caution. Also some of his more recent followers are more careful and guarded, and in the second passage quoted above the reservation is made that what man produces should not be taken from him for public purposes "as long as there is any public property that might be employed for that purpose." In the quotation given from *Progress and Poverty* a similar reservation is made. But he would allege spoliation, inasmuch as in his opinion the rent of land is ample. This subject is briefly discussed from the point of view, first, of social reform and, second, of public finance in *Outlines of Economics* (revised ed. by Ely, Adams, Lorenz, and Young) on pp. 363–365 and 595–597.

[9] P. 256. Bluntschli's *Modern State*, p. 43.

[10] P. 256. Lord Eldon thought that the abolition of the rotten boroughs endangered all property in England. "Ich erinnere nur an die Rede des alten Lord Kanzlers Eldon, der behauptete, mit der Aufhebung der rotten boroughs sei alles Eigentum in England bedroht." G. Schmoller's *Grundfragen der Sozialpolitik und der Volkswirtschaftslehre*, 2d. ed., p. 73.

[11] P. 257. The question of abolition without compensation to the owners is a different one. Certainly it is possible to argue

strongly that it would have been better for the institution of private property in the future if North and South had agreed upon abolition of slavery with compensation, and war had been prevented.

[12] P. 257. The writer speaks only from observation.

[13] P. 258. The present writer has no disposition to dogmatise on the vexed problem of the causes of the fall of Rome. This is thrown out merely as a suggestion.

CHAPTER X

A DISCUSSION OF THE KINDS OF PROPERTY [1]

We have considered the nature of property in general and have treated certain phases of private property in particular. We must next attempt to classify property with respect to owners and with respect to the objects over which property rights are extended. We wish to know the purposes of property and to ascertain how various property arrangements affect the public weal. But property is not a unity but rather, as we have seen, a bundle of rights, and what holds for certain kinds of economic goods will not hold for others: also we must consider the evolution of property with respect to the different classes of owners.

Is public property better than private property? This is really a question which cannot be answered. What has to be considered is whether for particular categories of economic goods—also frequently for particular places and in given periods of time—we have to recommend public ownership or private ownership. It is impossible therefore to proceed far in our inquiries without classification, and this will now be undertaken.

First of all we make a distinction between the classification with respect to the owners of property, called *property subjects*, and the classification of the things

over which the rights of property are extended, called *property objects.*

AA. *Classifications with respect to property subjects.*

When we consider property from this point of view we make several different classifications, not mutually exclusive.

First, we have a distinction of great historical importance, and one not wholly without present economic significance.

I. Common Property, and

II. Property in severalty.

Common property is a step beyond free goods; and in many cases, if we use strict terminology, we must speak of common possession instead of common property; the common possession ripening in many cases into full common property. Possession, incipient ownership, sometimes full property, is asserted by groups of various kinds, perhaps tribes, perhaps associations of a different character. The holdings of American Indians illustrate this distinction: the older form of possession or ownership was tribal, and this still prevails to some extent, although for a long time it has been the aim of most men who would elevate the Indian to replace common property and its collective responsibility with property in severalty and its individual responsibility. Very generally in primitive times associations enjoying common property were based upon ties of blood, real or assumed. We have the common pastures and common forests which have been so general in early civilisations and which have extended down to our own day in some parts of the world. We have in New England a survival in the term "common" as applied to the Boston park which bears that name, and the Boston Common is a present day property survival from an earlier stage of economic evolution. A typical European illustration is found in the *allmendes* of Switzerland, generally mountain pastures which are enjoyed in common by members of a community, or township, as we might say; sometimes by a certain class of the community.[2] Similar arrangements may still be found in the mountainous parts of Bavaria and of North Wales and in many other places.[3]

Common property is something separate and distinct from private property and also from public property; it is an institution which fits with difficulty into modern economic systems and perhaps with still greater difficulty into modern legal systems, especially those of England and America. We observe a general tendency in modern times to find an owner in some natural person or to develop by some legal fiction, an artificial legal entity, a private corporation of some sort, out of the association.[4] In many cases public property has grown out of common property and there are transitional stages in which it is difficult to draw the line. Large tracts of forest land in Germany never were individual private property; formerly some of these forests were common property and have now become public property. In modern times grounds and buildings, belonging to what is legally simply a private corporation, have in some cases economic arrangements for a common use which are more or less similar to those of common property,—for example, a club-house, and golf links.

Property in severalty is undoubtedly in general better for those who have attained the highest stages of economic civilisation. It leads to a greater production and it is not clear that it leads to a worse distribution, although unquestionably to a far more unequal one. At any rate, it would generally be conceded that the universally greater production outweighs any possible deterioration in distribution. Nevertheless it is always a mistake to impose institutions corresponding to one stage of economic civilisation and to the psychical natures of the men who produced it, upon a different and lower stage of civilisation with men of different characters. We must take into account time and place. We have to consider the ripeness for change from common property to property in severalty. While for people who have reached our stage of civilisation property in severalty is better than common property, with possibly few exceptions, is it true for people in every stage of development? There has been controversy in regard to the Indians, as to whether they are ripe for the change. It is a general opinion that they are prepared to derive benefit from the passage or transition from common property to property in severalty. But the author has never been quite so sure. Since we have so widely introduced property in severalty and tried to force it upon the Indians, we have seen developments which are not altogether satisfactory. The result thus far has not altogether told for property in severalty in their case, and the difficulty is just this,—that those who have advocated property in severalty for them have not considered relativity. They have not connected it with

the general social and industrial development of the people. Property is not one conception, the same at all times and places, but is a relative conception which must change with change in civilisation. The change from common property to property in severalty is an evolutionary one and in this sense natural but to be found beneficent it must not go ahead of the change in the people. The Indians may not have the idea of property and may give away whatever they have, even their birthright, for a mess of pottage whereas if they are taken together in the reservation, each exercising a certain control over the other, and with the alienation of property made impossible, the result might be a greater production under common property than under property in severalty, as well as a better distribution.[5] Everyone who is acquainted with what has taken place in the last few years must be convinced that we cannot force rapidly the industrial evolution, and must view with apprehension the giving to the Indians of property in severalty. Furthermore if we are going to extend our government elsewhere, for example in the Philippines and in other remote islands, peopled by those living in primitive conditions, we shall have under our government people in different stages. We cannot at once decide even so comparatively simple a question as that of common property *versus* property in severalty, but must examine the conditions of industrial and moral development.

Especially noteworthy is it that in Ireland, where very advanced ideas of land tenure are being carried out, common pasturage for small groups is occasionally be-

ing provided, and that one of the radical proposals for land reform in England includes precisely a similar arrangement.

We have in more modern times a distinction between public and private property. So we take as our second classification:

I. Public property.
II. Private property.

Our classifications are not mutually exclusive. We have here simply a classification according to a somewhat different principle. Public property is now sharply defined as property belonging to a certain political unit which is a legal person. We have at the present time in law natural persons and artificial persons, or legal persons and legal entities. The property of the city of Madison, Wisconsin, is as sharply defined as the property of any individual in the city of Madison; but this is something quite different from the common property of the earlier times.

Our next classification is one of great importance in the discussion of modern distribution and modern economic problems in general. It is as follows:

I. Individual property.
II. The property of partnerships.
III. Collective corporate property, divided into:
    1. Collective property of private corporations.
    2. Collective property of quasi-public corporations.
    3. Collective property of public corporations and bodies.

This distinction between property controlled by the

individual and property which is controlled by the collective body is, as already intimated, one of prime importance in modern discussions. It is said that we are passing away from the régime of individual property in capital to collective property in capital; but the collective property is largely the property of private corporations. The change from individual to collective corporate property in capital is a most momentous change which has been taking place in the last fifty years. We have been passing over from the régime of the one to the régime of the other in various forms. That is, the private corporation is an expression of collectivism just as much as gas works owned by the city. It is simply a different sort of collectivism.

It is very important to make this distinction between individual property and collective corporate property. In collective corporate property there are, to be sure, shares, and these are owned as individual property; but no one of these shares is the corporation nor all of them if considered individually. A, B and C own the shares individually, but as individuals they are not in an economic sense the corporation. That is a separate economic entity, and legally also it is generally looked upon as a distinct entity.[6] A share of stock in a corporation simply represents an equity or right in it. The régime of individual property in capital is passing away with the régime of individual production; but in agriculture we notice a pursuit in which production is still carried on individually for the most part; and land, together with the capital invested in it, is still mainly owned individually. We need not stop now to consider

statistics, but simply note the well-known fact that a large part of the productive property in the most highly civilised countries of the world to-day is collective corporate property. Much remains in individual ownership, but collectively owned capital is on the whole dominant. To this general rule there are exceptions of which the chief have been mentioned.

Partnership property may be regarded logically as a step in the evolution from purely individual property to corporate or collective property, although it is a step which in actual evolution has often been omitted, for when large amounts of capital were required for single enterprises and the organisation of corporate enterprises with limited liability was made easy, a great movement in the direction of corporate and collective property at once took place. The property of quasi-public corporations, such as privately owned railways, gas works, etc. is also logically an intermediate stage between the property of private corporations and property of public corporations. It is private property, but subject to a far-reaching social control, involving peculiar burdens and disabilities.

It is possible to carry the classification further, but this would involve refinements taking us too far afield for present purposes.

Notes and References to Chapter X

[1] P. 263. The author should perhaps put first the late Professor Knies's lectures among his sources for the present chapter, but second would come Professor Wagner's *Grundlegung*, 3d. ed., Vol. II, pp. 193–210; also p. 273, § 129B. But while credit is freely given for help and while no departure from others has been made simply to create an artificial appearance of originality, this topic has been so thoroughly worked over by the author, and for his own purposes so many changes from other classifications have been made, that no one else may be held responsible for what is here presented.

[2] P. 265. It has frequently happened that as this local political organisation has grown and changed, some people going away and others coming into the community, a distinction has been made between the political community and the economic community, only the latter participating in the advantages of the *allmendes*.

[3] P. 265. Professor Wagner speaks of church property as common property, and from the economic point of view it may perhaps be looked upon as such.

[4] P. 265. John Stuart Mill gives as illustration the experience of the English in India, who in earlier days, not being able to grasp the idea of common property of village communities, did in some cases a great injustice by making out of the common property private property and giving it to a chief or head man, who was only a tax gatherer. They searched for the owner, taking it for granted that as land in England had an individual owner, land in India must also have an individual owner, and they simply mistook the tax gatherer, the Zamindar, for a private owner. This has often been adduced as a typical illustration of the evil resulting from a failure to understand economic history and the significance of economic stages. See Mill's *Principles of Political Economy*, Bk. II, Chap. IX, § 4.

[5] P. 267. Difficulties of the old arrangements are not overlooked. They were not satisfactory; and it is not attempted here and now

to offer a solution. It is simply intended to emphasise the fact that we must be cautious in cases of this kind.

[6] P. 269. There is a present tendency in legal decisions to look upon A. B. C. as being the corporation, when they own all the stock. See on this point, Haney's *Business Organization and Combination*, pp. 82 *et seqq*. This, however, has little bearing on the precise point under discussion, which turns upon the economic and social distinction between individual property and different kinds of collective property.

CHAPTER XI

A DISCUSSION OF THE KINDS OF PROPERTY (Concluded)

BB. *Classifications with respect to property objects.*

We pass now to a classification which is based upon differences in the objects of property, in the things over which property rights extend rather than in the persons in whom the property right is vested.

In a historical treatment it is well to make a distinction which is not found in any of the books, namely, that between:

I. Property in human beings, and

II. Property extraneous to and exclusive of human beings.

Historically this distinction is important because we are growing away from property rights in human beings. We still have vestiges of these rights, as in the cases of peonage in the South, the contracts binding Italian immigrants in the North, the practical enslavement by the whites of the natives of the Congo, etc. These denote a quasi-property in human beings, but the old forms of such property are certainly passing away, and their going indicates marked social development. Or we may express ourselves differently and say that on the analogy of land, ownership is generally a thing of the past, but various sorts of "estates" in human beings still exist.

The next classification is: [1]

I. Property in corporeal things.[2]

II. Property in personal services.

III. Property in relation to persons and things.

Property in personal services means right to services, and property in relation to persons and things includes the so-called intellectual property,— patents, copyrights, trade-marks, good will.

We next have the distinction between:

I. Property in mobilia.

II. Property in immobilia.

This classification needs to be brought into connection with the following one, according to which goods are divided into two classes, enjoyment goods and production goods. It cuts across it somewhat. We can, for example, have enjoyment goods which are mobilia and enjoyment goods which are immobilia. So too, production goods can be both mobilia and immobilia.

The distinction between property in mobilia and property in immobilia is one of great importance. The difference in the periods in which property was developed is one which brings out the difference between property in mobilia and property in immobilia, property in immobilia being of far slower development. There are several reasons for this: In primitive periods abundance of immobilia, including land, and migration rendered the exclusive appropriation of immobilia difficult. Yet another reason is that mobilia or movable things represented at first more labour, more toil and effort than the immobilia. The mobilia stood for an incorporation of labour power. The immobilia in primitive

society were the product of nature; they represented the nature factor. In the course of development this particular difference, though it does not disappear, is diminished. As time goes on, more and more work is intermingled with the nature factor, with what nature gives. Especially is this true with land, and included in immobilia we have chiefly land.[3] There are bridges, ditches, houses, machinery, etc., connected permanently with the land and improvements, which after a while we cannot distinguish from the land. For instance, we cannot go into a country like Holland and always distinguish between what nature has done and what man has done. Yet even in the case of the steam railways of Wisconsin, the land has been valued separately from the tracks, ties, and other improvements which make the railways and spoil the land for other uses. Probably in few cases would the separate valuation be more difficult.

Land represents more and more the results of human effort of one sort or another. We may therefore say that in this particular, as time goes on, the distinction between mobilia and immobilia is less sharply defined than in primitive times. Doubtless it is on this account that the statute law makes less distinction in later than in earlier times between property in mobilia and in immobilia. Nevertheless, the law may go too far and we may go too far in this respect. The difference which does actually exist even in modern times may be overlooked. But recent discussions, like those of Henry George, sharpen the distinction for us; some of them even exaggerate it.

However, a fuller treatment of this important topic belongs to the part of the present work which deals with Landed Property.

Again we have the distinction between:

I. Property in enjoyment (consumption) goods, and

II. Property in production goods.

I. Enjoyment Goods.

If we had a word which defined the idea of enjoyment goods as sharply as does the German word *Gebrauchsvermögen*, it would be well to use it here for property in consumption goods. But in the absence of a clearly defined word, we may use the current phrase property in enjoyment goods, or the abbreviated expression enjoyment property which the discussions of modern theories have made familiar to us all.

We have, then, these two great classes, goods for use and goods for production, the former for immediate enjoyment, the latter for mediate enjoyment.

The two main classes of goods for production are *capital* and *land*. Capital we do not use for immediate enjoyment; it produces the things which we use immediately, though this distinction is not always a sharp one so far as an individual good is concerned. Some objects can be used either for enjoyment or for further production, *e. g.*, a board for the use of children in a see-saw, or for use in the building of a house. We have, however, to make somewhat different distinctions when we discuss the classification of objects of property from an individual point of view, from those which we make when discussing it from a social point of view. That which to the individual is productive resources may be to society simply enjoyment goods. The food of labourers, for example, from their point of view and from the general social point of view is enjoyment property; from the purely individualistic point of view of an employer, it is productive. That is akin to the distinction which we make between individual production and social production. Individual production means acquisition for the individual, and the individual may acquire things though he may not produce them for the good of society. The gambler may acquire, but socially the work of the gambler is destructive and not productive. Generally a distinction is made between the tools (capital) with which a workman has to earn future consumption goods, and consumption goods. The moral systems of classical antiquity recognise a distinction of this kind, as did also the Old Testament. In Deuteronomy XXIV: 6, it is said that "No man shall take the nether or the upper millstone to pledge: for he taketh a man's life to pledge." And in Exodus XXII: 26 we find, "If thou at all take thy neighbour's raiment to pledge, thou shalt deliver it unto him by that the sun goeth down." Modern law as found in American States makes distinctions which have a like intent.

The distinction between enjoyment goods and production goods is one which has been emphasised by the socialists, especially with reference to property; in general they hold that property in consumption goods should be private, while property in production goods should be public.[4]

Let us consider the further division of property in enjoyment goods. If we desire, we can go far in dividing

and subdividing enjoyment goods,[5] but it leads rather to confusion than to enlightenment in a general treatment of our subject. A few general remarks must suffice.

The distinction between goods which must be individually used and those which admit of a large collective use is one of importance in property arrangements. It is apparent in enjoyment goods for individual use that we have strong ground for private property. But when goods are of such a nature that they admit regularly of collective use, the question must be whether as private property they will afford as much benefit to society as they will if public property. Take, for instance, parks,—Central Park in New York City or Lincoln Park in Chicago. If private property, these would be used by a few private individuals who would derive enjoyment from them; but they are adapted to a larger use and they afford more pleasure if used collectively. There is opportunity for development of public property along this line.

On the other hand, there may be certain kinds of goods, which, though admitting of a collective use, will not always secure the largest total enjoyment through that collective use, as in the case of books, for example, which are constantly needed by students. Although the books are capable of collective use, yet the total amount of social benefit is greater if we have private property in a very large proportion of all books. We have, to be sure, effective public property in the great collections of books, but private collections for use by individuals who need the books near at hand are also necessary.

We thus divide enjoyment goods into classes, some

to be used collectively, some individually, and some both collectively and individually.

We find often that the sum total of satisfactions is far greater when we have collective use, which is favoured by public property, than when we have individual use, which is favoured by private property. *We have a ground for public property in enjoyment goods when relatively the cost diminishes with the number who enjoy the goods under consideration.* Consider again public parks, where the increase in the cost of enjoyment is relatively small as the number enjoying the goods increases; consider public libraries, large collections of pictures, etc. Many believe it wrong that one of the greatest works of art should be the private property of any individual, or that a private individual should attempt to exclude others from the enjoyment of some natural wonder, as, it is alleged, did the owner of property around Loch Lomond recently.

But we must observe this also,—that there is a varying degree of ripeness for collective enjoyment. We may say that *the more highly developed a nation or community of people, and the greater their capacity for enjoying collective property, the stronger the argument for a large amount of collective property in enjoyment goods.* It would not be possible to give a crude, half civilised people the same opportunities for collective enjoyment as those which can be given to a highly civilised nation. They would not know how to use the objects of property; or they would misuse them. So the ripeness and social sense of the people determine how large will be the utility derived from public parks.

We must consider, too, certain conditions of time and place. In the South in the United States, for example, we have obstacles imposed in the way of public property on account of the antagonism between the white people and the negroes. This is one reason why there are so few public libraries in the South. Taking things as they are, whether they ought to be so or not, in some cases there the alternative to private property is what we may call quasi-public property, *i. e.*, private property in the legal sense, but private property of a charitable corporation existing for philanthropic or educational purposes.

Enjoyment goods of different kinds and qualities should also be distinguished with respect to their quantities, whether they are in the hands of a single individual or in the hands of society. Has the individual enough for bare existence? or for comfort? enough for the higher life of art? or so great a quantity as to tempt to injurious luxury and excesses? And, similarly, are enough goods produced in a given society at a given time to enable all to have comfort? to enable all or only a portion of society to enjoy the higher things of life? No entirely satisfactory ideals of distribution can be framed until we have something like approximate knowledge of the actual and potential possibilities of production.

The law sometimes makes a distinction between property in goods sufficient for bare support—the necessaries—and property in goods in sufficient abundance to supply the comforts and luxuries of life; also a further distinction between enjoyment goods and production goods. For instance, when it comes to the taking of property for the benefit of creditors, the law sometimes fixes a certain limit and recognises the difference between the means of comfortable living and a bare support.[6]

II. Production goods.

The first main classification is between

1. Capital, and
2. Land.

1. Capital. Though capital may be further subdivided in a variety of ways, for present purposes, it is not necessary to bring forward and discuss all possible classifications. Here as elsewhere we have the distinction between the mobilia and immobilia to which attention has already been called. Money, a specially mobile kind of capital, is under laws of property [7] which would not in every particular apply to factories.[8] An elaboration of the distinctions between "fixed", and "circulating", "specialised", and "free" capital belongs in a general treatise, or in a special treatise on capital or on some aspects of capital problems.

2. Land. Classification of the different sorts of land is of the highest importance in a treatise on property, for property arrangements which apply to one kind do not apply to another. Land is not all alike; it has peculiarities which give us different varieties of land. Naturally, however, there are certain things which can be said with respect to land in general.

Men in all parts of the world in many different ages have known that there are peculiarities in land. Certainly in earlier times it did not seem so natural a thing that there should be property in land as that there

should be property in movable things. We find this expressed in many ways and in many laws. In a recent law in the Servian code, a distinction is made between landed property and other property. There it is said that "the right of property over products and moveables acquired by human exertion is based on nature herself and is established by natural laws." But "the right of property over realty and soil, whether cultivated or uncultivated, is confirmed by the constitution of the country and by civil laws." Here is not only an implied distinction, but an expressed distinction, interesting in a code comparatively recent.[9]

A discussion of land laws and their reform does not belong here, the purpose being simply to show that there are certain peculiarities in land which have received recognition.

The idea of the Mussulman law, as stated by Professor Gide, is that land is not a fit subject for property until, on the one hand, work has been incorporated into it, and until, on the other hand, it has been rendered socially useful. These are the underlying ideas, although they may not be very well carried out, just as many of our laws, and many of the precepts which we accept in the Bible, are not carried out in practice. But the ideas are at any rate recognised in a modern code, in this new Servian code. Such ideas as this show a recognition of the difference between landed property and other property.

We find similar underlying ideas in the land legislation of the United States, which aims at connecting

service with the acquisition of property in land. We have the homestead laws, which give a farm but in exchange for the service of living on it and cultivating it. The desert land acts aim to induce men to make "dead land" living land by giving property in land as a reward of labour. The same thought is embodied in the Tree Claim act, and very generally in American legislation under which property in land is acquired. Often the practical application of the idea has not been satisfactory, but the idea itself appears clearly enough.

Now taking land as a whole, we have first the classification:

a. dead land,
b. living land.

Dead land is unused, uncultivated land; living land is land which has been redeemed from its wild state and brought under cultivation. The distinction cannot always be clearly drawn, but it finds legal expression.

Next we have the great distinction between:

a. land for subsurface appropriation of natural gifts, and
b. land for surface appropriation or utilisation.

a. Land for subsurface appropriation of natural gifts. Here we have to do with mineral lands. The great Prussian mining law of 1865 makes a distinction between land of this kind and other land, especially ordinary agricultural land, recognising private property in one, and, generally speaking, not in the other; recognising, as we have seen, private property in the minerals and not in the land itself. This distinction has a very important bearing, and it is essential that it be under-

stood. For a long time many people in the United States and in England seemed to forget the distinction, so far as practice was concerned at least. We must have different kinds of laws for these two sorts of landed property.

b. a′. Land may be used simply for the appropriation of the natural gifts on the surface. Under this head may be classed natural forests, fruit growing wild, game, etc., the surface of the land being here considered as property from which we may gather what nature affords. Man may put forth exertion, but his labour is essentially that of mere appropriation instead of giving direction to the forces of nature.

A further subclass (b′) is cultivated land, or arable land, land which is not wild land, but which has been brought under subjection, which has been tamed; living land as contrasted with dead land. Under cultivated land we find various classes, as pastures, meadows, gardens and cultivated forests, which have to be ploughed, cultivated, and planted only at long intervals. It is only in the newer countries that we have natural forests. In the older countries forests are cultivated like any other crop. To that we in the United States must also come.

The laws which would with propriety apply to natural forests would not apply to cultivated forests. Private property would in some respects seem to be especially suitable for natural forests and public property for cultivated forests. So far as the appropriation of natural forests is concerned, private persons will appropriate and utilise them, although wastefully, but private owners will not provide the cultivated forests; so it would seem to be desirable that these should be public property. That is from the standpoint of production. From the standpoint of distribution we might not come to the same conclusion, because it might not seem fair that a few persons should be allowed to take possession of what nature has produced. We might say also from the standpoint of distribution that there would not be the same injustice in private property in cultivated forests because these forests would be the result of an outlay of capital and labour, or, to use the most comprehensive term, of economic energy. We in the United States are giving over our forests to private individuals and not reserving those rights which would secure to the general public at least a portion of the increment which might accrue therefrom, but as the natural forests are being used up we are coming over to public ownership of cultivated forests.

All this is simply brought forward here suggestively, the main aim being to show varieties of property arrangements.

c′. Building sites. The distinction between building sites and agricultural land is a clear one. Municipalisation of land, for example, is a different thing from nationalisation of land. In our cities we cannot advantageously have unrestricted private property in building sites. We at once recognise the necessity of restrictions which do not apply to agricultural land. Professor Wagner thinks that under building sites we might have two heads, *viz.*, sites in large cities and sites in small cities, and in some respects this distinction

would hold inasmuch as the social control is much greater in the former.

d′. Highways of all kinds.

a″. Roads admitting of general use, canals, rivers, and the sea so far as it is property at all.

b″. Highways that admit only of a limited use, generally only of a unified use; that is, use under one control. Under this head we have all highways on which vehicles move upon tracks.

Law recognises in these two subclasses a different sort of property from the kind or property which is recognised in agricultural land. We have, for example, public property in canals, in New York State, and a free use of highways, roads and streets generally. We have also private property in highways, such highways as those of the second class, railways, etc. But we restrict such property and hedge it in as we do not property in arable land, recognising that we have here to do with a different sort of property.

c. Shore and riparian lands. The property arrangements respecting shore lands are of great economic significance and have an important influence both upon the production and distribution of wealth. It is by traversing shore land that access is gained to water and it is of no avail that water is a free good if there is no access to it. Private ownership of the banks of a stream in an arid region may involve virtual private ownership of public land back from the stream, while people may be deprived of the enjoyment of lakes and seas by the exclusion resulting from private property in the shores.

A whole city may be at the mercy of private owners of the shores of the harbours. On this account it is now generally regarded as sound policy for cities to own the shores of navigable waters upon which they are situated; and for this reason also it is recommended by an important commission in England that the laws should under suitable restriction render accessible to the public the shores of the waters surrounding Great Britain, even when privately owned.[10] The Province of Ontario, Canada, is solving the problem in keeping shore lands in public property and allowing regulated use to private owners.[11] In the Dominion of Canada itself the right to the foreshores of public harbours is vested in the government itself, and the latter regulates the sale or lease of such lands.[12] As already stated, the Constitution of the State of Rhode Island reserves shore rights to the general public.[13]

In this place it is sufficient to say that no kind of land requires more careful and special treatment than shore lands. We have brought before us all those questions comprised under riparian rights.

d. Land and water. Land used for fishing and for the cultivation of oysters and other kinds of sea food so far as there is any ownership in such land.[14]

e. Property in water. This is of importance in many connections and with the growth of irrigation has attained new significance. As we use the term land in economics in its broad sense, water is here included. Fishing could be considered in this connection, and the question raised whether property in water should carry with it property in fish or not.[15]

This finishes our classification.[16] The significance of it is readily apparent; but it is especially brought out by discussions of the land question. We see that it is not enough simply to distinguish between mobilia and immobilia, a distinction recognised from time immemorial. With the development of society we develop new classes of goods; we have call for new and different sorts of property. Otherwise property would not fulfil the purpose for which it is designed.

Again we are reminded that property is a bundle of rights and not a single right. It cannot as a unit be attacked nor defended. In such a case both attack and defence are likely to be too sweeping. The socialists do make a distinction between enjoyment property and production property, but they do not go far enough in their analysis. It does not follow because private property in public streets is undesirable that private property should be condemned. We have come to a time when there is need of a more careful analysis. The development of civilisation requires this. In our economic development we have gone ahead of positive statute law, and our great problem is to bring the law and public administration up to the stage of economic evolution which we have reached.

To recapitulate, we have found these various classes of property:

AA. *Classifications with respect to property subjects.*

A. I. Common property.
II. Property in severalty.

B. I. Public property.

II. Private property.

C. I. Individual property.
II. The property of partnerships.
III. Collective corporate property.
1. Collective property of private corporations.
2. Collective property of quasi-public corporations.
3. Collective property of public corporations and bodies.

BB. *Classifications with respect to property objects. Four main classes.*

A. I. Property in human beings.
II. Property extraneous to and exclusive of human beings.

B. I. Property in corporeal things.
II. Property in personal services.
III. Property in relation to persons and things.

C. I. Property in mobilia.
II. Property in immobilia.

D. I. Property in enjoyment (consumption) goods.

Classified further with reference to the following considerations:

1. Number of users.
(1) Individual use.
(2) Collective use.
(3) Individual and collective use.

2. Adequacy of supply, of goods. (Necessaries, comforts, luxuries, etc.)

II. Property in production goods.

1. Capital.

(1) a. Mobilia.

a′ Money, b′, c′, etc.

b. Immobilia.

a′ Buildings, b′, c′, etc.

(2) a. Fixed capital.

b. Circulating capital.

c. Specialised capital.

d. Free capital.

2. Land.

(1) a. Dead land.

b. Living land.

(2) a. Land for subsurface appropriation of natural gifts.

b. Land for surface appropriation or utilisation.

a′. Land for appropriation of natural gifts.

b′. Cultivated land, with pastures, meadows, gardens, and artificial forests as subclasses.

c′. Building sites.

d′. Highways.

a″. Of general use.

b″. Of limited use.

c. Shore and riparian lands.

d. Land under water.

e. Property in water.[17]

Notes and References to Chapter XI

[1] P. 274. The writer takes this from the lectures of his teacher, Professor Knies.

[2] P. 274. *Sacheigentum, Sachgüter.*

[3] P. 275. *Cf.* Wagner, *op. cit.*, pp. 200–210, where the reader may find a classification similar to that which follows in this chapter. While it is different in important particulars, the author wishes to acknowledge his indebtedness to it for helpful suggestions.

[4] P. 277. This statement requires many modifications to give us a correct view of socialism. They believe we should, in the socialistic state, still have public parks; and on the other hand the more moderate socialists certainly would allow the future socialists to own individually certain tools of production,—saw, hammer, perhaps even a small piece of ground for a garden.

[5] P. 278. As is done by Professor Wagner.

[6] P. 281. This is an interesting relaxation in the rigour of the law, in favour of humanitarian progress, for it was not a right recognised by common law, and is entirely a creation of statute law. Under common law not only was all the property of a debtor liable for his debts, but he was liable to imprisonment as well. In America we have not only abrogated imprisonment for debt, but have made a certain part of the creditor's property immune from seizure for debt. This is not done, however, primarily in the interest of the debtor, but in the interest of his family, and therefore in the interest of society, the debtor's obligations to support his family being "obligations higher than such as bind him to pay his debts." McMurray *v.* Schuck, 99 Am. Dec. 662 (1869). See also Wright *v.* Pratt, 31 Wis. 73 (1872); Wilcox *v.* Hawley *et al.*, 31 N. Y. 648 (1864).

[7] P. 281. See People *v.* Williams, 24 Mich. 156 (1871); Pirie *v.* Chicago Title Co., 182 U. S. 438 (1901); *In re* Fixen, 102 Fed. 295 (1900); Kuter *v.* Mich. C. Ry., 14 Fed. Cases No. 7955 (1853); Patterson *v.* Wilson, 101 N. C. (1888), 584 at p. 588.

[8] P. 281. On money as capital, see Hadley's *Economics*, Chap. VII, "On Money," especially p. 181.

[9] P. 282. See Gide's *Political Economy*, Bk. IV, Chap. III, § V

(English tr., p. 454). Professor Gide suggests a distinction based upon the cultivation of the soil, and there is a similar idea shown in the Mussulman law. Professor Gide says that the Mussulman law restricts property in land to such land as has been the object of effective cultivation, and calls it living land in contra-distinction to uncultivated, or dead land. The latter, it holds, should be collective property. When any man has put life into dead land, it shall belong to none other. "The following are the labours which are thus to transfer land to private ownership:

"To cause water to flow as a spring, either for drinking or for watering fields;

"To divert water from submerged tracts;

"To build upon uncultivated ground;

"To make a plantation thereon;

"To break it up by tillage;

"To clear away the undergrowth which renders it unfit for cultivation;

"To level the ground and remove stones therefrom."

By the operation of these laws in Algeria and Java, collective property in land in these countries is even now of great importance. On the other hand, in France there are fifty million acres of dead land; this is two-fifths of the area of France, and of this only fifteen million acres belong to the state and to the various communes. Holland does not sell its colonial lands but leases them for periods of seventy-five years. In China, all land left tenantless, either through failure of heirs, or by abandonment, reverts to the government. Anyone may cultivate it, and then apply to the magistrate for full property rights in it. These are granted unless the original owner will resume cultivation. See Jernigan, *China in Law and Commerce*, p. 135. All of this note is according to Gide.

[10] P. 287. This Royal Commission on Coast Erosion and Afforestation recommended that "a clear right of passage by foot on all foreshores in the United Kingdom, whether crown property or not, should be conferred on the Public, in addition to the rights of navigation and fishing which they already possess," and further recommended as regards the public use of the foreshore for such purposes as "bathing, riding, driving and collecting seaweed, etc. that the Board of Trade should be empowered by order, after a local inquiry, if necessary, to define such public use and its extent in localities where it may be desirable in the public interest, that it should be exercisable." See art. "Gains and Losses on the Coast," in *Country Life* (England), July 1, 1911; also *Third and Final Report of the Royal Commission on Coast Erosion and Afforestation*, Vol. III, Pt. I (1911) for a fuller discussion of the same.

[11] P. 287. In laying out townships in the province where there are navigable rivers and large lakes, an allowance of four rods is reserved around the shore. Some departure from this practice is made in the case of laying out islands for pleasure and parks and summer resorts, but in such cases reservation of free access is specified in all patents. Under the Mining Act of Ontario, section 52, subsection 3, it is provided that "wherever a claim includes land covered with water there may be reserved to the Crown the surface rights in a strip of land along the shore 66 feet in perpendicular width from the water's edge, and such other rights of access and passage to, from and over the water as to the Minister may seem desirable." Communication to the writer from Honourable Aubrey White, Deputy Minister of Lands and Forests, Province of Ontario, November 26, 1912.

[12] P. 287. Section 34, Subsection 3, of the Expropriation Act, Chap. 143 of the Revised Statutes of Canada stipulates as follows:

"Any portion of the shore or bed of any public harbour vested in His Majesty, as represented by the Government of Canada, not required for public purposes, may on the joint recommendation of the Ministers of Public Works and of Marine and Fisheries, be sold or leased under the authority aforesaid."

The policy of the Canadian government in this regard is to give the riparian owner first consideration. The foreshore abutting on street-ends is always reserved for the use of the municipality. In all cases the use of the property for industrial purposes is an important factor in the consideration of such applications. For this information the author is indebted to Honourable A. Johnston, Deputy Minister of Marine and Fisheries, Canada.

[13] P. 287. See p. 95.

[14] P. 287. In the case McCready *v.* Virginia, 94 U. S. 391 (1876) at p. 395, the United States Supreme Court upheld the power of the State of Virginia to prohibit citizens of other States from planting oysters within the tide waters of Virginia.

[15] P. 287. See Van Hise, *The Conservation of Natural Resources*

in the United States, pp. 263–64, in which is discussed the importance of the sea as a source of food supply.

[16] P. 288. A further discussion will be found in that part of this work dealing with landed property.

[17] P. 290. From another point of view, we may take farm land as a unit and we have a classification which is useful from many points of view. Taking the farm as our starting point, the author offers the following as a valuable classification, for which he is indebted to his colleague, Professor Henry C. Taylor, of the University of Wisconsin:

(a) Lands used for building sites, lots, etc.
(b) Tillage lands.
(c) Permanent meadows.
(d) Permanent pastures.
(e) Forests.
(f) Waste lands.

CHAPTER XII

THE GENERAL GROUNDS FOR THE MAINTENANCE OF PRIVATE PROPERTY

It has been stated that private property has been maintained for social purposes. Consequently, this chapter must consist of a discussion of the social purposes which it accomplishes or is capable of accomplishing. The limits of space will not permit an exhaustive treatment of this large subject, and our statement of purposes must be brief and general.

What has already been said leads us to suppose that not all useful things are equally suitable to be the objects of private property. We can divide the subject with reference to the kinds of useful things with which we are concerned, and ask whether we shall have free goods or property. In the case of the ocean and the great American lakes between Canada and the United States, it is decided that free goods are desirable. In the case of certain other things useful and valuable we have to ask whether they shall be property or free goods, and if we decide that property is desirable, whether we shall have private or public property, and then we can go through the various classes and examine each by itself.

We compare first enjoyment (consumption) goods, and capital goods, the latter not existing for their own

sake but for the sake of the things produced by them. We have not the same basis for private property in the one case as in the other, because capital exists for the sake of the enjoyment goods. We ask, then, What effect does private property or public property in capital have upon the use of enjoyment goods? Then we must make a subdivision such as we have made between those which can be used collectively and those which can be used individually,—on the one hand pleasure-grounds, art galleries, and the shelter of the home, which can to a limited extent be used collectively, on the other hand food, clothing, etc., which are used individually.

We will not in this chapter enter upon an exhaustive discussion of private property from all the standpoints indicated, although we will bear them in mind and have something to say of the various kinds of property; or to speak more accurately, the various kinds of goods considered with respect to property. In another part of this general work something more nearly approaching an exhaustive treatment of land will be given.

Two general points of view must be borne in mind when we ask what are the grounds for the maintenance of private property.

A. If we had not to consider the past, but were making a beginning now without any past to bind us, then we must ask, What social purposes does private property subserve?

B. But no practical application of general principles is safe until the present has been brought into relation with all the past out of which it has grown. Conditions of time and place must be considered. Nevertheless,

this point of view, which has been so properly emphasised by economists of the historical school, in opposition to the unhistorical absolutism of eighteenth century social philosophy, may push us too far; for in some treatments it appears to carry with it a fatalistic justification of whatever is, and suggest that no country has any great lessons to learn from others,—a bigoted Philistinism which is anything but scholarly. In their economic life modern nations more and more closely resemble each other; the institutions of one country follow, more or less rapidly, similar economic institutions elsewhere. And the past must not forever bind us and fetter us. It must suggest caution and a painstaking consideration of ways and means.

Then furthermore, and in close connection with the foregoing, we must in our examination have regard to the stage of evolution which has been reached in the part of the world for which the examination is conducted. In one stage private property for some kinds of goods would be the sort most desirable, while in a later stage public property would be better. Consider the uncivilised blacks of Africa. They have not reached a condition which will admit of any great amount of public property. In uncivilised parts of the world generally public property must be limited sharply either because men are so ignorant or so dishonest or because the conditions for the proper administration of public property are wanting. But when a less civilised country is under the protection and tutelage of a more highly civilised one, public property may be preferable, under the administration of the more advanced country, to private

property of some sorts which would carry with them grave dangers of exploitation.

Also, in less advanced stages of civilisation such as that found in the Philippine Islands, it is quite possible that what is wanted is neither private property nor public property but something preceding full property, namely, some development of common property; and it may be that in the United States a mistake has been made in not considering exhaustively all the possibilities in this direction before passing over to property in severalty for the Indians.

Let us now not attempt a treatment of property with respect to stages of evolution, but consider in a general way the modern nation.

What social purposes does private property subserve? It is our motives which make the wheels of industry go round. We have a desire to acquire private property, and this desire, which is universal, leads to activity in acquisition, and this activity in acquisition leads to production because production for most men is the means of acquisition. We wish to satisfy our wants. Through production we can satisfy our wants because through it we reach property.

We may also take notice under this head of the joy of property [1] as one great motive for production; the delight of owning and of doing substantially as one wills with one's own; the pleasure of building, repairing, and refitting a home to suit one's taste; the satisfaction of making the last payment on one's house and feeling that it is "all one's own." Ownership is a source of happiness and a stimulus to industry. It acts as a social

force favouring production precisely in proportion as there is a wide way open to success in this respect. And because in the United States in the past the resources have been so great and the population comparatively small, there has been a wide way open to success in this direction, and consequently we have had an immense stimulus, such as the world has never seen before, to the accumulation of wealth.

It is perhaps landed property particularly which serves as a stimulus to the accumulation of property. Land in itself is not a product. That is found ready-made. But the desire to secure land, even a city building lot upon which no work has been put by any human being, serves as a stimulus. The land of the country in a certain way acts as a savings bank. Property is accumulated and the individual, as it were, puts it into the land where it is stored up to be got out again in return for the land, provided land maintains its value; and in a progressive community, on the whole, land increases in value rather than falls in value. While land is an individual and not a social savings bank, as a stimulus to savings, private property in land adds to social wealth. Through the purchase of land many young men make their beginning. It is the general mode of the acquisition of property by professional men in the United States. They purchase a little land and when they have paid for that they purchase more, until they accumulate a competence. It is the testimony of a great many men who have acquired wealth that it was, in the first instance, through land that they received a start.

Certainly within limits, the inequalities of property serve as a stimulus. We could not have a large and satisfactory production of wealth without having inequality. We desire first to supply our material wants, and then we try also to equal others who are ahead of us, or perhaps try to outstrip them. We see that others have more than we have, and we say, "Why cannot we have more as well?" and we are stimulated to put forth new energies. Inequality affords the greatest stimulus when there are gradual gradations in wealth throughout the community. The ordinary man does not feel the stimulus of the wealth of somebody who has a thousand times as much as he has. Very likely if there were no one between them he would feel discouraged and disheartened. But, on the other hand, he feels strongly impelled by the desire to accumulate as much as one who has a little more than he, with whom he comes in contact. He will see that another family is a little better off and has certain comforts which his own has not, and he will try to get these comforts and conveniences. Thus it is true that within limits inequality of property does serve as a stimulus.[2]

Under production *we notice the care and excellence in the management of valuable things brought about or encouraged by property.* The proprietor, it is said, generally takes better care of his things than anyone else, and makes better use of the instruments of production which are at his disposal. Consequently things are handed over to children to be their own, in order that they may learn to take care of them, and we have the idea of exclusive control. Ownership of property cultivates care. This tendency is shown by the difference in the cultivation of farms which are rented and those which are owned, a difference which can be noticed both in America and Europe. Arthur Young, in the eighteenth century, spoke about "the magic of property", which turned sand into gold; he had in mind small farmers who out of a farm of sand would produce a fertility which would bring them gold. Rented houses, furnished and unfurnished, also afford illustration of the general principle; for in the present condition of the social conscience one cannot always build as good a house to let as to live in. But if people have themselves owned valuable homes, fine furniture, etc., then they are likely to take better care. Ownership has thus a valuable educational value.[3]

In the third place we notice in connection with property that ownership is connected with the development of personality. Private property gives one a sphere of action, accompanied with responsibility. It gives, as it were, room or space within which personality can be cultivated. As a matter of fact, it is often through ownership of property that personality is cultivated and developed.

Through ownership of property personal liberty is protected, and that assists in the development of personality. Individual property, it has been said, is the expression of personal liberty and its protection.

Mrs. Humphrey Ward in her novel *Sir George Tressady* says:

"To both, possession—private and personal possession—from the child's first toy or the tiny garden where it sows its

passionately watched seeds, to the great business or the great estates, is one of the first and chiefest elements of human training, not to be escaped by human effort, or only at such cost of impoverishment and disaster that mankind would but take the step, supposing it conceivable that it should take it, to retrace it instantly" (p. 141).

This shows the advantages of property in human training. Another writer uses these words:

"Private property is realised liberty. It is, in its first idea, the guarantee to an individual person of what has been wrought, through the exercise of his personality, by labour and abstinence. It is essential to the development and maintenance of personality in this work-a-day world. It is requisite for the very existence of the family. But Socialism, even in its mildest type, means the confiscation of private property, the destruction of the family, and the annihilation of individual freedom."[4]

Of course this last is a strong expression, which the socialists would not admit. They say that they do not desire the confiscation of private property, or its abolition, but rather its firmer establishment so far as enjoyment goods are concerned.

Booker T. Washington often speaks of the advantages of private property to the negro in his development. In his report of the Fifth Annual Conference (Tuskegee Negro Conference), he says:

"We may have many things to discourage and disappoint us, but I believe if we do our duty in getting property, Christian education, and character, in some way or other the sky will clear up, and we shall make our way onward." [5]

Also notice this by a careful observer:

"The man who owns a house and is in possession of the

elements by which he is sure of making a living has a great aid to a moral and religious life." [6]

In the fourth place, and under the head of distribution perhaps rather than under the head of production, we notice this advantage, the use of private property for the development and satisfaction of higher social needs. The few always go ahead of the many and they light the way of progress. The ownership of property with inequalities of property makes it possible for them to encourage social development along various lines. This means a great deal and would mean still more, if those who had considerable property were always the same ones as those who desire the development and satisfaction of higher social needs. But it is possible for even a few people with large means to do so much for the development of society along certain desirable lines that we have here a strong argument for private property. Take the case even of freedom. The few can protect freedom by the use of their property in cases in which the majority care little for freedom. The few who appreciate the existence of certain higher needs, of certain studies, for instance, which do not appeal to the masses, can encourage their cultivation by endowment through public or private institutions. If in the public schools certain lines of work are not sufficiently appreciated, some one with means, if he realises this, can say, "Here are certain lines of work which are not appreciated as it seems to me they should be; I will myself bear the expense of making these lines of work effective, either temporarily or permanently." In this way improvements will be made. Thus considerable amounts of

property in the hands of some private individuals make it possible for them to assist in the development of society along certain desirable lines, bringing about the development and satisfaction of higher social needs.[7]

Fifth. But a still more general and fundamental consideration is this,—that private property is the cement of society; it binds men together. One Scotch writer, Sir James Mackintosh, speaks of property as a "nourisher of mankind, the incentive to industry, the cement of human society." [8] The protection and development of property bring men together and unite them. We can see that in business partnerships and corporations, in industrial organisations. Private property brings men together in large coöperative associations. Lieber says in his *Political Ethics* (p. 112) that "property is the surest and firmest bond of society." According to Professor Trent,[9] slavery was the cement, and practically the only cement, binding together the South as a distinct section before our Civil War. But, on the other hand, slavery separated the South from the rest of the country and so caused social disunion as well. Private property then can be a social cement or it can be a social disorganiser. When the property objects are not the things over which the rights of property ought to be extended, then it may serve as a source of social disintegration. Also when unwisely distributed property may divide class from class.

Finally, we may notice in the effort and self-denial necessary to acquire and increase property a stern discipline in character; this same effort and self-denial may, on the other hand, lead to degradation and disease of

character when the desire of acquisition is not properly balanced by other motives.

We have spoken in a very general way about the positive benefits which property brings to us. Only in the last few remarks have any negative considerations been brought forward.

When we bring the past into connection with the present, we find still stronger arguments for private property. We have adjusted ourselves to it; it has grown up during thousands of years of human history, and corresponds to our psychical natures, for it is the outcome of these natures in their external environment; and changes must be considered with reference to our mental make-up.

Endowments springing out of the past must be critically and fairly examined before we proceed to radical changes in property arrangements. Endowments have frequently been abused, but they are so intimately bound up with much of the educational, philanthropic, and religious life of the world that grave consequences would follow any changes which would annihilate them. Changes in endowments are frequently needed and strong arguments for social control can be adduced. This is not the place for a discussion of endowments, the aim being simply to point to them as among the institutions which have to be considered in a discussion of property.

[1] P. 298. *Wonne des Besitzes*, to use a German term.

[2] P. 300. J. B. McCulloch supports the law of primogeniture as found in England on the ground that the inequalities produced by it stimulate the production of wealth. Even those, who, like the present author, are unwilling to accept the conclusion that primogeniture is on the whole desirable, cannot fail to admit the strength of his arguments and to grant that the economic history of England affords a substantiation of their partial truth. Naturally the question should be asked, what other arrangements can afford the stimulus of primogeniture without its evil. See McCulloch, *On the Succession to Property Vacant by Death*, Chap. II, "Influence of the Law or Custom of Primogeniture," pp. 27–42.

[3] P. 301. In this respect compare public and private ownership. It is a humiliating spectacle to see abuses, too frequent, of public property. Even university students, who should stand for the higher things, have been known to be guilty of making ugly cuts in beautiful mahogany tables in a reading room which should be their pride and joy. But in cases like this, the situation is not hopeless. An appeal to conscience and proper administrative methods generally lead, in time, to better things.

[4] P. 302. W. S. Lilly, in art. "Illiberal Liberalism," *Fortnightly Review*, November, 1895.

[5] P. 302. Report not published. But some negro leaders, for example, W. E. Burghardt Dubois, feel that Booker T. Washington goes too far and exalts property at the expense of the higher things of life.

[6] P. 303. Rev. D. Mayo, LL.D., in an address on "The Duty of Educated Negroes." *Report of the U. S. Commissioner of Education*, Vol. I, 1898–9, p. 1248.

[7] P. 304. Socialists employ private property, that is gifts of private property, for their agitation; and the Progressives in the United States would not be where they are had they not had gifts from men of wealth to aid in their educative work.

[8] P 304. Speech in the Commons on the Reform Bill, *Miscellaneous Works* (1868) p. 586.

[9] P. 304. W. P. Trent, *Southern Statesmen of the Old Régime*, p. 269.

CHAPTER XIII

A CRITICAL EXAMINATION OF THE GENERAL GROUNDS FOR THE MAINTENANCE OF PRIVATE PROPERTY

At the present time we shall make only a cursory review of the general grounds for the maintenance of private property. Let us examine some of the more manifest aspects of the problem of property which suggest themselves in view of the outline presented in the foregoing chapter. We shall return to this subject in connection with the development of property, also in the examination of the theories of property, as well as in some other parts of our work. We now take only a bird's eye view of the subject.

We say that property produces such and such beneficial effects. But does property produce only beneficial effects if large amounts are in single hands? We are speaking here about accumulated property, not so much about income. What is the position of men without property, especially those who have no tools of their own but are dependent upon others for the tools and implements of production? These are called the Proletariat, a name which naturally enough is regarded by those belonging to this class as having a most undesirable suggestion.

But what are the disadvantages of those who lack

property? The disadvantages under which they labour are brought out by a consideration of the advantages of property to those who have it. First of all we mention the lack of independence which goes with the absence of property. One who has not accumulated property incurs the danger that he will become dependent upon others, and in a way this may be injurious to the development of his personality. We have the saying that a year's subsistence is the price of one's own emancipation; in other words, a man is not free until he has accumulated a year's subsistence. That is not wholly true. A person may have a good deal of independence although he has almost no accumulated property, but he certainly incurs danger of dependence.

Without a certain amount of accumulated wealth, a man is largely a slave to his immediate environment. He cannot move to another place though conditions of employment there are much more favourable. He cannot travel in search of better opportunities. He cannot secure proper treatment in a long case of illness and so is likely to have his earning power seriously diminished. He cannot cease immediately remunerative effort in order to obtain education or training which will better fit him for future usefulness to himself, his family, and society. He cannot take vacations or pleasure trips and thus renew his energies and invigorate his mind and body. He cannot readily make use of the alternative of going into business as an independent entrepreneur and thus escape the wage-earning field, for he has not money and usually lacks credit. He cannot by investment share in the general opportunities for financial gain.

Second, the person without property is always in danger of drifting downward in the social scale. Our present organisation of society recognises accumulated property as the common safeguard against misfortune and adversity. In case of continued illness, of serious accident, of death or other disaster, the propertyless must appeal to charity for support. The humiliation resulting from such an appeal almost inevitably tends towards a loss of self-respect, a weakening of the moral fibre and, in many cases, to pauperisation. Property, then, under present conditions, is not only the price of progress but the price of security.

With our prevailing system of taxation, government is largely supported by the property owner. As a result, voters without property are notoriously careless of public waste and extravagance. Graft on public contracts, useless bond issues, unnecessary public employees, general mismanagement too often go uncondemned if some trifling personal gain can be obtained for the voter by the retention in power of the guilty officials. This is one of the foundation stones upon which corrupt political machines rest. The property owner who is once made to see that the burden of the graft or waste falls upon his shoulders is ordinarily anxious for better government.

Moreover, in so far as property furnishes a necessary sphere of development, the one who lacks property lacks that sphere of development which comes with ownership. Then the question to be asked is this,—Can the man without property find the same sphere of development in the use of the tools of others? He does

not have the same responsibility. He does not reap the benefits, to the same direct and immediate extent, of energy or capacity in the management of the implements of production; and yet, in some ways, a sphere of development is provided in the use of the productive property of others.

When we come to consider very large amounts of property, we find that they do not always produce all the beneficial effects which have been attributed to property. Instead of sturdy independence, very large amounts of property may produce a desire or inclination towards oppression and arrogance and may cultivate undue pride. There is a great danger that very large amounts of property may lead to indolence—not so much on the part of those who have accumulated the property as on the part of their successors—and also to great waste and extravagance. But when these large accumulations do fall into the best hands, they promote the social weal and have vast power for good.

Let us examine into the number of property holders in order to estimate the benefits which we derive from property. What is the number of property holders, and how does this number compare with the number of non-property holders? This gives us one standpoint of criticism. Are many deprived of property, and how do the institutions of the various countries compare in their action upon the accumulation of wealth? What is the relation of city to country, and the influence of each upon the acquisition of property?

Let us review briefly the evidence of available statistics as to the present personal distribution of wealth

in the United States, the United Kingdom of Great Britain and Ireland, France, and Prussia in order to have a necessary foundation for a critical examination of the general grounds for the maintenance of private property.

In the United States, no recent extensive study of wealth distribution is at hand. The Massachusetts Bureau of Statistics of Labor made a careful investigation of the size of estates of decedents in that commonwealth for the years 1889 to 1891 inclusive. Unfortunately, no inventories were filed for 5,611 of the 13,960 estates probated during this period. In the opinion of the investigators, the estates for which no inventories were filed were probably fully as large, on the average, as those for which inventories appear.[1] If we assume that the size and distribution of the inventoried and non-inventoried estates were the same, we shall probably attain results sufficiently accurate for present purposes. We shall further assume that the probated estates of males were all estates of men over twenty-five years of age. There were probated, undoubtedly, some estates of males under twenty-five years of age, but the number was probably insignificant. The errors in these assumptions are not likely to be large enough to vitiate seriously the results for the purposes for which they are here used.

In 1889, there were, in the State of Massachusetts, 11,722 deaths of males over twenty-five years of age.[2] The death-rate was slightly less in the other two years of the period, making the total estimated deaths of males over twenty-five years of age 33,740. Of these, only 13,960 had estates which were probated. It is

probable that a very small percentage of the remainder possessed property exceeding five hundred dollars in value. With these assumptions, the distribution of wealth among the decedents in Massachusetts in the period 1889 to 1891 would be as follows:

ESTIMATED [3] DISTRIBUTION ACCORDING TO VALUE OF ESTATES OF ALL MEN OVER TWENTY-FIVE YEARS OF AGE DYING IN MASSACHUSETTS DURING THE PERIOD 1889–1891 INCLUSIVE

Size of Estate	No. of Estates in Class	Value of Estates in Class	Percentage of Total No. of Estates	Percentage of Total Value of Estates
Under $500	21,746	4,000,000	64.45	2.06
$ 500 but under $ 1,000	1,467	1,080,000	4.35	.56
1,000 " 5,000	5,716	14,220,000	16.95	7.32
5,000 " 10,000	2,000	14,040,000	5.93	7.22
10,000 " 25,000	1,611	25,320,000	4.77	13.01
25,000 " 50,000	537	18,710,000	1.59	9.62
50,000 " 100,000	335	23,360,000	.99	12.01
100,000 " 200,000	176	24,020,000	.52	12.37
200,000 " 300,000	59	14,510,000	.18	7.47
300,000 " 400,000	28	9,620,000	.08	4.95
400,000 " 500,000	18	8,440,000	.05	4.34
500,000 and over	47	37,110,000	.14	19.07
Total	33,740	194,430,000	100.00	100.00

Average Value of Estate $5,760.

A later study, along lines similar to the one just cited for Massachusetts, was made for estates probated in 1900 in six counties of Wisconsin, by Dr. Max Lorenz. By making assumptions identical with those used for Massachusetts, we arrive at the following estimates for the distribution of wealth among male decedents over twenty-five years of age in Wisconsin in 1900.

ESTIMATED [4] DISTRIBUTION, ACCORDING TO VALUE, OF THE ESTATES OF ALL MEN OVER TWENTY-FIVE YEARS OF AGE DYING IN THE COUNTIES OF DANE, GRANT, MANITOWOC, MILWAUKEE, RACINE, AND WINNEBAGO IN THE STATE OF WISCONSIN IN THE YEAR 1900

Size of Estate	No. of Estates in Class	Value of Estates in Class in Thousands of Dollars	Per Cent. of Total Number of Estates	Per Cent. of Total Value of Estates
Under $500	1,570	471	67.323	4.29
$ 500 but under $ 1,000	74	53	3.174	.48
1,000 " 2,500	165	286	7.076	2.60
2,500 " 5,000	161	633	6.904	5.76
5,000 " 7,500	108	607	4.631	5.52
7,500 " 10,000	75	617	3.216	5.62
10,000 " 15,000	66	788	2.830	7.17
15,000 " 25,000	50	845	2.144	7.69
25,000 " 50,000	33	1,116	1.415	10.16
50,000 " 100,000	12	835	.515	7.60
100,000 " 500,000	16	3,492	.686	31.79
500,000 and over	2	1,244	.086	11.32
Total	2,322	10,987	100.000	100.00

Average Value of Estate $4,710.

For the United Kingdom, an annual statement of the distribution of taxed estates appears in the *Statistical Abstract*. The figures for estates under £500 are somewhat confused and no record is kept of the untaxed estates, these consisting of all under £100 in value. Unfortunately, no report is made as to the division of estates between males and females. The following table has been computed on the assumption that this division is in the same ratio as in Massachusetts. The total number of deaths is estimated from the *Reports*

of the Registrar General on Births, Deaths, and Marriages in England, Wales, Scotland, and Ireland.

In order to secure statistical regularity, the figures for the years 1907 to 1911 inclusive have been averaged throughout.

ESTIMATED [5] DISTRIBUTION OF WEALTH AMONG MEN OVER TWENTY-FIVE YEARS OF AGE DYING IN THE UNITED KINGDOM. FIGURES AVERAGED FOR THE YEARS 1907–1911 INCLUSIVE

Size of Estates	No. of Estates in Class	Value of Estates in Class in Millions of Pounds	Per Cent. of Total No. of Estates	Per Cent. of Total Value of Estates
Less than £100	162,311	9.74 [6]	79.23	4.57
£ 100 but under £ 500	22,320	7.72	10.89	3.62
500 " 1,000	6,818	6.75	3.33	3.17
1,000 " 10,000	10,920	47.56	5.34	22.31
10,000 " 25,000	1,478	30.12	.72	14.13
25,000 " 50,000	548	24.67	.27	11.57
50,000 " 75,000	180	13.82	.09	6.48
75,000 " 150,000	162	21.15	.08	9.92
150,000 " 250,000	55	13.08		6.13
250,000 " 500,000	32	14.45	.05	6.78
500,000 " 1,000,000	11	9.96		4.67
1,000,000 and over	5	14.19		6.65
Total	204,840	213.21	100.00	100.00

Of all large nations, France apparently furnishes us the most complete record of estates. Practically all of the estates of adults are probated. We shall, therefore, simply quote the figures given in the *Annuaire Statistique* for 1910, p. 221. Percentages have been computed therefrom and added to the table.

DISTRIBUTION, ACCORDING TO VALUE OF ESTATES PROBATED IN FRANCE IN 1909

Size of Estate in Francs	No. of Estates in Class	Value of Estates in Class in Millions of Francs	Per Cent. of Total No. of Estates	Per Cent. of Total Value of Estates
Excess of debts	13,897		3.533	
1 to 500	103,438	26.96	26.301	.470
501 " 2,000	101,178	129.94	25.722	2.264
2,001 " 10,000	110,427	543.25	28.076	9.464
10,001 " 50,000	48,755	1,026.51	12.396	17.881
50,001 " 100,000	7,692	529.56	1.956	9.224
100,001 " 250,000	4,822	758.74	1.226	13.218
250,001 " 500,000	1,720	605.66	.437	10.551
500,001 " 1,000,000	810	554.40	.206	9.658
1,000,001 " 2,000,000	373	512.17	.095	8 922
2,000,001 " 5,000,000	145	425.61	.037	7.414
5,000,001 " 10,000,000	46	303.30	.012	5.284
10,000,001 " 50,000,000	10	179.94	.003	3.135
50,000,001 and over	2	144.40		2 515
Total	393,315	5,740.44	100.000	100.000

Prussia levies an income tax based on the amount of wealth of each family. This gives a basis for ascertaining approximately the distribution of wealth among the families of that kingdom. The following table is principally quoted from Professor Taussig.

ESTIMATED [7] DISTRIBUTION OF WEALTH AMONG PRUSSIAN FAMILIES FOR THE YEARS 1908–1910 INCLUSIVE

Family Wealth in Marks			No. of Families in Class	Amt. of Wealth of Class in Millions of Marks	Per Cent. of Total Number of Families	Per Cent. of Total Amount of Wealth
Less than		6,000	8,600,000	21,930	85.127	20.84
6,000	but under	20,000	731,700	9,510	7.243	9.04
20,000	"	32,000	262,300	6,140	2.596	5.84
32,000	"	52,000	203,800	7,700	2.017	7.32
52,000	"	100,000	160,500	10,590	1.589	10.06
100,000	"	200,000	79,900	11,030	.791	10.47
200,000	"	500,000	43,400	13,670	.430	12.99
500,000	"	1,000,000	12,600	8,520	.125	8.10
1,000,000	"	2,000,000	5,300	7,150	.052	6.79
2,000,000	and over		3,000	9,000	.030	8.55
Total			10,102,500	105,240	100.000	100.00

In a progressive, democratic country the estates of decedents are ordinarily larger on the average than the possessions of those living in the community, simply because those who die average considerably older than those left alive and hence have had more time to accumulate wealth. On the other hand, wealth is distributed among *families* rather than among *individuals*. In Massachusetts, 37.9 per cent. of the number, and 26.7 per cent. of the value of all estates probated belonged to women. In France, apparently, a still larger percentage of estates belonged to females. These women are, in most instances, members of families and their possessions must be taken into account in estimating the family wealth. The statistics apparently indicate that, in England and Prussia, women own a smaller percentage of estates than in America. In

those countries accumulation is also slower than in America. In France, the country in which the women apparently own the largest percentage of the estates, the people are noted for their thrift. The women, however, probably own relatively small amounts of property. Taken on the whole, therefore, it seems fairly safe, in each of the countries mentioned, to offset the estates of women against the probable excess of the estates of the dead over those of the living; and to assume that the distribution of probated estates is approximately representative of wealth distribution among living families. This will, of course, be only a rough approximation and will affect to some extent the correctness of the figures for the absolute amount of wealth in each class of families. It should, however, vitiate but slightly the accuracy of the figures showing the relative shares of wealth held by the different percentages of the families when these are arranged in order according to the amount of wealth possessed.

The benefits of private property are secured in part by a comparatively limited amount of wealth. Less than five hundred dollars cannot, however, in normal cases, be considered sufficient to add greatly to individual independence, but the family possessing from $500 to $2,000 has its freedom of action largely increased and its security in times of adversity greatly enhanced. We usually speak of those families having wealth ranging from $2,000 to $50,000 as the middle class. They may be said to receive most of the benefits of private property in so far as it gives freedom and security and they may also engage in small business under-

takings of their own. These people suffer little from the evil effects of over-accumulation since they have too little to permit of permanent indolence or great extravagance and luxury. This amount of property seems, therefore, in many respects to satisfy our ideals.

The following table shows approximately the percentage of families in each country included in each of these broad wealth classes.

APPROXIMATE PERCENTAGES OF THE FAMILIES OF DIFFERENT COUNTRIES IN EACH GENERAL WEALTH CLASS [8]

Wealth of Family	*Massachusetts*	*Wisconsin*	*United Kingdom*	*France*	*Prussia*
	1890	1900	1909	1909	1909
Less than $ 500	64	67	79	60	75
$ 500 to 2,000	11	8	9	24	13
2,000 " 50,000	23	24	11	15	11
Over 50,000	2	1	1	1	1
Total	100	100	100	100	100

An examination of the table reveals the fact that, in no one of the given countries, does a larger fraction than two-fifths of the people possess any considerable amount of property. In England, in fact, nearly four-fifths of the families own less than £100, and Mr. Chiozza Money [9] would make the percentage of propertyless families even greater. The small property owners constitute nearly a fourth of the families of France, but only about a tenth of the families of the other nations. The middle class in which the maximum benefits of private property are supposed to be exemplified forms approximately one-fourth of the American population, but only about one-seventh of the people of France and

one-ninth of the inhabitants of Prussia and the United Kingdom may be grouped under this head.

The tables previously quoted reveal the fact that a surprisingly large share of the wealth of the world is collected into a few hands. The percentages of families owning one-half of the wealth of the respective States and countries are about as follows:

Massachusetts	1 0
Wisconsin	1 2
United Kingdom	4
France	8
Prussia	1 7

The above figures show a striking degree of concentration of private property in the hands of a very small fraction of the population. This is not in itself a desirable distribution of property.

A great difference in the relative number of property owners between city and country in this respect is obvious in the United States and was shown conclusively by the late Dr. Charles B. Spahr in his book *The Present Distribution of Wealth in the United States*. In the country the number of property owners was comparatively large and in cities it was small. In New York City less than one-third of the families owned any registered property whatever, while in five agricultural counties in New York, having no town of over four thousand, nearly three-fourths owned registered property,[10] and even the remaining one-fourth had some personal effects. Many of them were tenants, but owned perhaps a couple of horses, wagons, a cow, or something of that nature.

But other considerations must be adduced. One of these is the benefit society derives from the institution of property as a stimulus to propertyless persons to accumulate property. To what extent, we may ask, does this happen? To some extent, certainly, because we find persons passing from one class to the other. It depends upon many conditions. It depends, for one thing, upon age and the opportunities that are found for investment, also upon the training and education of the population and its character with respect to energy, capacity, ambitions. One of the most important considerations, frequently overlooked, is the question of age. Where sufficient opportunities exist and where men and women are properly trained to utilise these opportunities, it is no hardship for able-bodied young people to be without property; particularly if they have homes as a place of refuge in time of temporary illness and incapacity. When from our present point of view we compare one country with another or one section of a country with another, we must attach great weight to the distribution of the population in age groups. A State in the western part of the United States where the average age indicates that the people are largely young adults, could be in an excellent condition as to property and its distribution, although the average accumulation might be very small.

With respect to opportunities for investment we observe the difference between the city and the country. In New York City the opportunities for investment in land are comparatively few for the person of small means, because a great deal of money is there required

to purchase even a single lot, and real estate is the investment which, as a rule, is most suitable to the workingman both with respect to his ability to judge it intelligently and with respect to safety and return on the investment. Favourable opportunities in New York are open to only a few, and comparatively few accumulate property there.[11] But in the country villages in America the workman earning but $2 a day may hope to accumulate some property. He can buy a village lot and gradually pay for it and build a house, mortgaging the ground for the money to build the house. The author knew of a case of a man working for probably not over $1.50 a day who owned three houses, which he had secured by buying a little property at a time in this way. In New York City a very modest lot would cost $5,000, and such an investment is out of reach of the ordinary wage-earner, because even if he could get the money for the first payment, the interest charge on $5,000 would be, say, $250 a year, and that would amount to over seventy-five cents a day at once. In England, it is one of the admitted defects of the present economic situation that the rural districts afford little opportunity for investment and that there is no "agricultural ladder" upon which people can climb. Both parties have programmes which they claim will remedy this situation.

But something further is to be said: we have considered the number of owners of accumulated property. But there are also those who have large incomes and small property, who naturally derive the benefits of property. They may have in a considerable degree the

independence and the opportunities for development, which property gives, but they cannot have the opportunity which comes from managing their own property if they do not acquire it. They are in danger of falling into the ranks of those without any property.

We have, in what has been said, a standpoint for a criticism of the institutions of the country, with respect to its natural resources, examining into the effect which natural resources and institutions have upon the accumulation of property. And among these institutions we must include the organisation of industry, and inquire what effect the existing organisation of industry has upon the accumulation of property by the many or by the few.

From this point of view we can take up a new country and compare it with an old one. We find in a new country that inasmuch as, other things being equal, the natural resources are not so fully appropriated as in an old country, there are greater opportunities for accumulating property in considerable amounts. These opportunities serve as a stimulus and lead to great economic activity, indeed frequently to an excess of economic activity. This explains the wonderful economic activity of the people of the United States, where opportunities are abundant and where there is a general hope in the breast of every man that he may secure some of these opportunities, and where as a result we witness an intense struggle to secure them. In this respect England is relatively speaking at a disadvantage. But England is not altogether at a disadvantage so far as laws and institutions are concerned. On the contrary,

in some particulars the laws are more favourable in England than in the United States; for example, factory legislation, and insurance institutions. But the natural resources have largely been appropriated in an old country like England or Germany, and in these countries there cannot be so many opportunities until man-made opportunities in education, savings facilities, etc. replace the natural opportunities of an earlier stage of development.

The laws for the utilisation of natural resources will have an influence upon the acquisition of property and also upon the economic activity of the members of the community. For example, American and Canadian homestead laws probably favour in a very considerable degree economic activity and the acquisition of property by large numbers. These laws, while far from perfect, have operated favourably in the United States in several ways. The land has been practically given away, or given in return for service in its development, and in comparatively small tracts; this has afforded chances to many and not allowed anyone to monopolise the land. In earlier days it was very naturally supposed that there was land enough for everybody. We have the song with the refrain "Uncle Sam is rich enough to give us all a farm." The writer remembers that song sung in his childhood by those belonging to his father's generation. That was supposed to be almost literally the case.[12] The public domain seemed vast, and many had the hope that they could acquire a farm and through land ownership and opportunities for the production of wealth could at least take their place among the well-

to-do. Laws and institutions which permitted or even favoured the appropriation of large tracts of land by individuals were in that respect discouraging to the mass of the people of the Southern States in the American Union. Naturally the laws which regulate the utilisation of natural resources must be adapted to particular conditions. The same laws will not hold in an agricultural state which are applicable to the plains of the West. And a mistake has been made in the application of American homestead laws to the plains in the far West which must be owned in comparatively large tracts. We discover a failure, also, to regulate the riparian rights along streams, and consequently the streams have in some instances been seized and the land extending back for an indefinite distance therefrom has been practically appropriated, because of a failure to adapt the laws for the utilisation of natural resources to particular conditions.[13] Laws for the appropriation of natural treasures in various countries may be compared from this point of view.

We may likewise consider inheritance laws, and ask whether they tend to a wide diffusion of property or not, or to large accumulations which are discouraging to the mass of the people. Tax laws may also be compared with respect to their influence on the diffusion of property among the wealthy, the well-to-do, the middle class, and the poor; and we observe that in so far as they favour the increase in numbers of the middle and well-to-do classes they increase the total social benefits which we derive from property, and they strengthen the grounds for the maintenance of private

property, if we have given these grounds correctly. But we must also consider this: Do they discourage activity in production and thus diminish the total wealth to be distributed? Do tax laws possibly take the property of the middle and well-to-do classes and use it for the benefit of the people of low standards, where the added income often becomes merely an incentive to idleness, debauchery, or increased propagation of undesirable citizens, while, at the other extreme, the very rich escape with but light tax burdens? Do the laws seem oppressive and drive people from the country, as is said to be the case in England?

We may take up also the loan policy of a country, and ask how that influences the diffusion of property, and in particular whether it is favourable or not to the middle and well-to-do classes. When from this point of view we compare the loan policies of the various countries, we find that our American policy has been defective because it has on the whole been favourable to the accumulation of that form of individual property—public debts—by the few rather than by the many. Until recently certificates of indebtedness (bonds) have been sold to the general public almost exclusively through banks and investment companies and are still mainly so sold; and their contract is chiefly with those who have relatively large amounts of property. American federal bonds have come to be owned very largely by national banks (and that means their stockholders) and State and municipal bonds are owned in large quantities (indirectly) by insurance policy holders and savings bank depositors. How much can be done and is

done elsewhere to secure a wide diffusion of ownership of public bonds is easily seen by one who studies the arrangements of a German state like Bavaria, where the post-offices advertise conspicuously and persuasively State bonds and where it is made easy for one to invest in them. The wide diffusion of the public debt of France is well known. The placement and diffusion of public debts can be considered from other points of view and possibly different conclusions as to the desirability of their wide diffusion reached, but with them we are not at present concerned.[14]

We could consider from this point of view also the laws which relate to education, to labour protection, etc.; also such institutions as the savings banks. They operate in favour of the accumulation of property by those who will derive the greatest benefits from it. They help to secure the emancipation of large numbers by giving them a year's subsistence and a desirable independence. But we find that in this particular until recently the United States lagged behind the highly civilised parts of the world with which we like to compare ourselves,—behind England, Germany, France, Belgium, Switzerland, Italy, and some other countries. We had outside of New England few private savings banks. And in no part of the country were postal savings banks found. Fortunately we have at last corrected this evil.

Then we consider the organisation of industry with respect to its influence upon the accumulation of property by the middle and well-to-do classes, by the wealthy and the poor, and we find that, as has already been intimated, the tendency in the organisation of industry

is towards the accumulation of property in the hands of the few. So strong has been that tendency in recent years that in England it has perhaps offset the movement in the other direction. We have strong self-conscious social action to bring about wide diffusion, giving us in that particular one of the most remarkable periods in the world's history. It operates through laws of taxation, educational laws, factory acts, and savings banks. But it is open to doubt whether this action has been able to offset this tendency in the organisation of industry of which we have spoken. The control of large amounts of capital tends to the ownership of large amounts of capital. Capital can, of course, be divided into small shares, but if the industry is large the great bulk of the property in the industry is likely to be owned as well as handled by the few. An individual can buy a single share in a railway company, but even if he does buy a single share in a great railway corporation, he has no power in the management of the railway, and does not derive the benefits of the property so far as property affords a sphere of activity. It hardly occurs to the ordinary man to invest a hundred dollars in a railway share, because it is such a small amount relatively that he would feel helpless in the face of the great amounts with which he would be associated. Individual property turns some things over to certain people for management in such a way that they suffer the loss if they manage things poorly or receive the benefit if things are well managed; and these benefits are not received in full measure in such a case as that under consideration.

In this connection we also notice our imperfect laws concerning corporate industry, which allow the big men who have control to acquire the property of the small men, and very frequently by illegal means. This is the familiar and well known process of forcing or "freezing" out the small stockholders.

And even if we have favourable laws regulating the management of corporations and requiring the publicity of accounts, etc., still the influence of modern industrial organisation is in itself not for a wide diffusion of property, but on the contrary favours its accumulation in the hands of the few, although it results in such a largely increased production as to give to even the less favoured portions of the community, wage-earners, etc., more than formerly. And when, therefore, we find laws which are defective and a defective management of these laws, they accelerate still further the accumulation of property by the few. But by education and other wise forms of social effort, other forces may be, and are being, brought into play to counteract this tendency.

Now we have to consider, furthermore, *the influence, favourable or unfavourable, of property owners upon the acquisition of property by non-property holders.*

The grounds for the maintenance of private property are based upon the benefits which private property yields to the citizens. Therefore, if those who have property exercise an influence which is unfavourable to the acquisition of property by non-property holders, we have to that extent an offset to the advantages of property, and at least conceivably we have something which may turn the advantages into disadvantages. Let us

suppose that the benefits which society derives from property in the hands of one class in the community are represented by *4a*. Let us suppose, however, that these property owners exercise an adverse influence upon the accumulation of property by others, having the spirit of the monopolist in wanting to keep the property and to prevent others from accumulating property. Let us suppose then that their adverse influence is measured by *8a*. Then on the whole the property does more harm than good. We have to compare this influence with other possible influences, for under different arrangements other classes of the community might have property which would be beneficial to the extent of *12a*. Suppose we have a great and wicked monopoly, as great and wicked as any reputable person ever supposed any monopoly to be. Suppose it attempts to keep certain fields to itself and consequently to restrict the number of property owners in the community. Those who are in the monopoly might themselves derive benefits from property which would be measured by *4a*. They might confer certain benefits upon society, and the total advantages might amount to *8a*. But we have to consider the community as a whole, and conceivably we may have here adverse influences equal to *12a*.

The grounds for the maintenance of private property assume that private property is beneficial; we would therefore have to ask, What about those classes of the community who do not enjoy the advantages of property? Here we have an offset to the advantages. The movement is not simply in one direction. We might infer, indeed, from many works on property that we had

a movement in one direction only. But that is not the case. We have to consider these various cross-currents in order to reach a judgment which has any value. We have to examine the different kinds of property and the different kinds and classes of property owners. What influence then does this or that sort of property have upon the accumulation of property by others? It may be that monopolists can be found who not only prevent others from accumulating further property, but who may take from them the advantages of property which they have. That is then something we have to consider very carefully, namely, the influence, favourable or unfavourable, of property owners upon the acquisition of property by non-property holders. Railways may, for example, be managed in such a way as to give property to some and prevent others from accumulating it. Then we have on one hand the benefits to some part of the community which are on the other hand neutralised, wholly or partially, by the effect on the other part in that it prevents a wide diffusion of property.

Another illustration. We may take the case of urban land held for purely speculative purposes, and held when it is really needed for productive purposes. We find cases where men for the sake of speculation "sit down" on property which is needed for productive purposes, putting people to inconvenience and discouraging them and preventing in a certain measure the accumulation of property. Suppose a man owns in New York City, which is on a narrow island, a strip of property in the heart of the island, and the population has so grown up around it that it has become desirable property; but he

holds it out of use and compels people to go to the other side or into Jersey City when his property would be a far more advantageous situation for their purpose. He is using property to discourage the accumulation of property. But we must also consider to what extent the disadvantage to the community of holding urban property out of use is offset by the encouragement afforded for the future construction of new buildings without tearing down unsuitable structures which might have been erected.[15]

Something more is to be considered in this case. We ask, What are the benefits which private property confers? and it can also be asked whether there are any *substitutes for private property*; also, in the United States, can we maintain past stimuli? can we replace them with new? The peasant proprietors are said to show the advantages which result from private property, and this seems to be confirmed by Belgium and parts of Prussia in which we have peasant ownership, and where the farms are cultivated by the owners. But in England we find good cultivation and excellent utilisation of the land under the leasehold system, it being an exception to the general rule when the owner cultivates the land. So, as far as some of the benefits of property are concerned, we find that under certain conditions the leasehold answers in large degree even if not fully the same purpose, so far as cultivation is concerned, but probably not so far as the accumulation of property is concerned.

If we have these benefits with leases in England, we might under a good system of public administration

have the same benefits from public property leased by the cultivators. Probably in Prussia, for example, the lease from the state produces the same beneficial effects as the leases from private individuals, and perhaps better effects, because a lease from the Prussian state is better than the average lease from private individuals. The state often gives a longer lease, and is careful not to exact a rental which is ruinous to the man who pays it, because that would lead to poor cultivation. In Ireland and in the United States we do not find that rented farms are generally accompanied by the enjoyment of the full benefits of private property. We find that leases in these countries do not seem to work well. Leases appear to work satisfactorily only in exceptional instances, probably better in England and Germany than elsewhere. In England the tenant farmer, although he does not own the farm, is usually a man who has a considerable amount of property apart from the land, and on that account he enjoys relative independence.[16] In considering leases and the benefits which leases of public property would confer, we have to take into account the duration of the leases and whether they carry with them sufficient reward for the improvements made by the cultivator of the soil. Because, unless the leases carry with them reward for improvements, the improvements will not be forthcoming. That is one of the things which after an examination of the different sorts of land tenure we find to be essential.[17]

Our treatment is not complete unless we inquire into such substitutes for property as are found in the insurance schemes of many modern nations, particularly Germany. It is undeniably true that in Germany insurance accomplishes some of the purposes of property and removes some of the disadvantages of its absence. One of the purposes of property is security for the future, and the sick funds and old age pensions provided by modern insurance schemes give a considerable measure of security as well as a feeling of security. Indeed, there are not lacking those who say that one of the bad features of German insurance schemes, providing as they do for most contingencies in the life of the wage-earner, is such a feeling of security for the future as to discourage accumulation, and thus make the supply of capital smaller than it might be otherwise. It is alleged that the ordinary German is not so thrifty as he formerly was and does not save so much relatively; this is attributed, in part at least, to insurance. "Why should I save," says the wage-earner, "when in my old age, and in case of accident or illness I shall be taken care of, and my family will receive a large part of my wages even in case of disability." But the truth of this contention is strongly disputed by others. It is also possible that small old age pensions may encourage saving by rendering the outlook for the future less gloomy for the very poor but industrious, by holding out the prospect of obtaining a competence for old age by a small addition due to saving.

This is not the time or place to enter into all the pros and cons of all-inclusive insurance. Unquestionably it accomplishes some of the purposes of property; and in reply to those who say that it results in a lower meas-

ure of thrift, it may be said that the insurance itself results in large accumulations which may be used as capital. As a matter of fact, in Germany they are sometimes used as loans to cities and building associations which aim at improving the dwellings of the poorer people.

Recapitulating then, we find that property is not a single idea. It is not a word which stands for just one thing and nothing else, but it stands for a number of complex ideas. Moreover we find that we cannot say that *property is a good thing or a bad thing without qualifications or limitations.* Suppose we say that property is a good thing. Then we might say, "Let us make the ocean property." But if we think about it, we shall see that that would not be a good thing, because it would not promote human interests to the extent that it now does as a free good. There would be very nearly a unanimous agreement concerning that point. The nations of the world would take up arms to fight against a proposition that the ocean should become property, either public or private; because if it becomes property, it would be under the exclusive management of some person, public or private, or some combination of legal entities, and that would not be a good thing. We want it to remain a free good, and this status is so important that we are willing to fight for it. We need not dwell upon that, however. We have only to consider how the nations are aroused at the prospect of any one of them having control. The nations of the world look askance, more or less, at Great Britain, because her navy is so great. It seems almost as if she had the ocean under her control; but she never has had, and the nations of the world do not propose that she ever shall have. The same thing holds with respect to the great lakes and other great bodies of water throughout the world. *So we cannot say that property in itself is a good thing or a bad thing, without an examination of the kinds of goods and the kinds of economic goods.* We must make a distinction between free goods and economic goods. And when we treat public and private property, we cannot say that either form of *property is a good or a bad thing without qualifications or limitations.* If we say that public *property is a good thing without making any qualification,* we at once land in socialism. If we say that private *property is a good thing without limitation,* then we should turn all the property of the world over to private persons. It is safe to say we could not have any real government without property. Property is power, and it is questionable to what extent even a real government of the people is possible without ownership of property by the government. We may ask indeed with how little public property we can have a real people's government instead of a government which proceeds from private property.

With regard to all this there is a very general agreement on the part of political philosophers. We have therefore to make a separation and have to discuss the whole subject from the standpoint of private property and of public property. We have also to discuss the subject from the standpoint of the subjects of property and of the objects of property; we have to take up one kind of property after another, or strictly speaking, the

kinds of goods over which the rights of property are extended. We have considered this in regard to the ocean and we can consider it in the case of human beings. When we abolish property in human beings, we say that such abolition is a very good thing and that we must have neither public nor private property in human beings. The point to emphasise is that we must proceed in just this way through all these classes, in order to reach a clear judgment concerning property.

And the reader must be cautioned not to draw the conclusion that society is to use all its resources to bring about the distribution of wealth which in itself is to be regarded as the best. Evils flow from the institution of private property, but we must exercise care not to diminish the benefits by our efforts to reform it. The relation of large accumulations to efficiency in production must be viewed with respect to established customs and social psychology. Some advantages of large individual fortunes have already been mentioned which are not to be readily sacrificed. Change must be gradual and evolutionary, aiming to reach a goal which always recedes. In other words, it is for society to move in the right direction.[18]

Notes and References to Chapter XIII

[1] P. 311. *Twenty-fifth Annual Report of the Massachusetts Bureau of Statistics of Labor*, p. 66.

[2] P. 311. *Eleventh Census of the United States; Vital and Social Statistics*, Pt. III, p. 186.

[3] P. 312. Estimates made by W. I. King from the figures given in the *Twenty-fifth Annual Report of the Massachusetts Bureau of Statistics of Labor*, p. 266.

[4] P. 313. Estimated by W. I. King, from the *United States Census for 1900* and the manuscript study by Max Lorenz on "The Distribution of Wealth in Six Wisconsin Counties."

[5] P. 314. Estimated by W. I. King from the *Statistical Abstract of the United Kingdom* for 1911, p. 42.

[6] P. 314. Average size of estate assumed to be £60.

[7] P. 316. Estimated by W. I. King from the *Statesman's Year Book* and F. W. Taussig, *Principles of Economics*, Vol. II, p. 243.

[8] P. 318. Estimated by W. I. King. For the statistical distribution of wealth, consult further the article by G. P. Watkins in the *Publications* of the *American Statistical Association*, Vol. XI, pp. 31, 41, and 48; also the article by Warren Persons in the *Quarterly Journal of Economics*, Vol. XXIII, pp. 443, 445.

[9] P. 318. L. G. Chiozza Money, *Riches and Poverty*, p. 51. The estimates there given show ninety per cent. of the people of the United Kingdom to possess less than £100. This is probably too high if we figure on the basis of the family.

[10] P. 319. Spahr, *The Present Distribution of Wealth in the United States*, pp. 57, 63. It is with some hesitation that the book of this gifted young economist is quoted. It was written in 1896, and as it was in many ways a pioneer work, the author deserves the praise due to one who independently strikes out in new paths. At the same time it shows weaknesses which as gifted an author, writing now, would not exhibit. Its figures can be criticised at many points, and it is not free from exaggerations. It has, however, not been fully replaced by any subsequent work and can still be studied with profit by the discriminating. If we make liberal allowances for

error with respect to the property owners in New York City we have still a striking contrast.

[11] P. 321. Some effort has been made to overcome urban disadvantages by coöperative combination, several uniting in the ownership of the apartment house or flats in which they live. While thus far not much has been accomplished in this direction, it will be certainly possible in the future to do more than has yet been done to open up to the man of small means the advantages of participation in the ownership of property in great cities.

[12] P. 323. In a congressional debate in 1789, Thomas Scott, of Pennsylvania, said, "One of the most unhappy things we could do, would be to refuse selling those lands in less quantities than by the million of acres; it would certainly be a cause of disgust, if not of separation." *Abridgement of the Debates of Congress*, Vol. I, p. 100.

[13] P. 324. See art. on "Irrigation" in the *Atlantic Monthly* for November, 1900.

[14] P. 326. See H. C. Adams, *Public Debts*, Chap. III, "Social Tendencies of Public Debts."

[15] P. 331. Probably no country has ever gone so far as have the States in the American Union in preventing the kind of abuse of private property in land which is mentioned in the text. Generally the States tax urban unimproved land upon its selling value, theoretically on its full selling value, and often actually upon a close approximation to this, at times perhaps going beyond true selling value. Land owners have also very generally to pay for the streets and street improvements. See the author's discussion of this subject in the Proceedings of the Meeting of the *Verein für Sozialpolitik*, in Nuremberg, October, 1911.

[16] P. 332. In England the present system of concentrated ownership of agricultural land with its cultivation almost exclusively by tenant farmers has according to the admission of all parties broken down.

[17] P. 332. When the author comes to Landed Property, land will receive more careful treatment.

[18] P. 336. On the statistics of the distribution of wealth, in addition to the works already mentioned, the reader may consult Bowley, *Elementary Manual of Statistics*, Part IV, Chap. IX; the monograph by G. P. Watkins, "The Growth of Large Fortunes," published by the American Economic Association, Vol. VIII, No. 4, Third Series, November 1907; Warren Persons's article on "Variability in the Distribution of Wealth and Income" in the *Quarterly Journal of Economics*, Vol. XXIII, p. 445; "The Distribution of Ownership," by J. H. Underwood, Vol. XXVIII, No. 3, 1907, in the Columbia University Studies in Political Science; and in the same series, "The Distribution of Incomes," by F. H. Streighthoff, Vol. LII, No. 2, 1912. For England consult especially the *Report from the Select Committee on the Income Tax*, together with the Proceedings of the Committee, Minutes of Evidence, and an Appendix, 1906. (H. of C. No. 365, 1906.)

On the subject of this chapter in general, the reader will find valuable suggestions in *L'Utilité Sociale de la Propriété Individuelle* by Adolphe Landry.

CHAPTER XIV

THE PRESENT AND FUTURE DEVELOPMENT OF PRIVATE PROPERTY

We have considered the grounds for the maintenance of private property and have gained some ideas in regard to its present and future development. We are not dealing with prophecy here, but we aim at tracing out existing forces, at discovering the direction in which we are moving, and any proposals made for reform rest upon our analysis and investigations.[1]

We have seen the ends for which private property is established and maintained. Its future development must aim at accomplishing these ends more fully, and a development of private property brought about by the endeavour to make it accomplish these purposes more fully must be largely the result of self-conscious social activity. We have reached a period in the development of society when self-conscious social action has been to a considerable extent attained. Our age is becoming one of social self-determination, and we cannot, if we would, go back to a period of social infancy. We notice movements actually going on which take five directions, all of which are destined, as those responsible for these movements think, to improve the institution concerned, namely:

I. An increase in the mass of free goods.

II. A restriction of the extent of private property and corresponding extension of public property.

III. A development of the social side of private property.

IV. An extension of private property along certain lines; development of rights akin to private property.

V. Changes in the modes of acquisition of private property.

Let us take these up in the order mentioned.

I. The increasing mass of free goods is an important movement, which has attracted little attention, probably because it is an exception to the general rule that as civilisation advances free goods give way to property. These free goods are very generally intellectual goods, ideas to which we fall heir with the expiration of specific pieces of intellectual property. As patents and copyrights expire, the ideas formerly covered by property become free to all. The increasing mass of common knowledge, free as the air, to be used by all in proportion to capacity, is one of the most precious treasures of the human race.

Other exceptional cases may be noted. The Sound between Denmark and Sweden used to stand in a quasi-private relationship to the former country, which exacted tribute from vessels passing through it. It is now entirely free.

Education has become largely free to the individual, and we have an increasing mass of services, like music in public parks, which are offered freely to all, and are at least quasi-free goods.

II. Restriction of the extent of private property, and generally speaking, corresponding extension of public property.

The restriction of private property, of which mention is here made, necessarily extends public property, for we have reference to those things which must be made objects of property—valuable things which must be placed under property control. The only question is whether this property control shall be public or private. As we have already seen, there have in the past been some few cases when it was desirable to restrict private property without the substitution therefor of public property. That was the case with slavery. That improvement was brought about by the abolition of the very idea of property, and not by the substitution of one kind of property for another. The same is true with respect to sovereignty. The mediæval idea was that it was private property and that the king could sell or mortgage his sovereignty. What was needed in this was to abolish that idea of property, and it has been done; the modern sovereign does not regard his throne as private property. The same holds true also with regard to public office. The modern idea of office is not that of property but that of a trust, although some of our spoils-politicians cannot even now understand that. In England the property idea of public office was at one time developed to such an extent that a man could actually sell an office for cash, for instance, an office in the army. What is wanted in such cases, then, is to abolish the idea of private property; but these cases are exceptional.

In regard to the extension of public property, illustrations readily occur. Public pleasure and playgrounds are examples. In cases of this sort the purposes of property are better subserved by a collective use; in fact, in cases of this kind the only possible satisfaction of the real needs of the vast majority in cities, and even in smaller places, must be through public property. We cannot have the need for playgrounds, etc., satisfied through private property; and if we do not make provision for public needs, then private rights will be invaded.

Natural wonders, historical scenes, etc., fall under this head; for example, Niagara Falls. Places of historical interest and many beautiful pieces of property ought to be public property and not private. There ought to be modes for the acquisition of such property, and where necessary the right of eminent domain should be extended to make it possible to acquire property of that kind. A society in Massachusetts has as its aim the reservation of pieces of ground which will better subserve their purposes if they are public property than if they are private property. It is called "Trustees of Public Reservation." And in England we have "The National Trust" with precisely similar aims. One of the objects of this Massachusetts society is to preserve public rights on the shores of the ocean.[2] Such a State as Colorado needs a society of that kind to call attention to these matters; for in Colorado there are immense opportunities for acquiring at a trifling sacrifice great natural wonders and beautiful parks for the permanent benefit of the general public. Thomas

Arnold speaks of it as an evil that so little property is reserved for public purposes. He speaks of this as the result of false and degrading theories of civil society and *laissez-faire*.[3] Of course he does not mean to speak in opposition to private property in its own sphere, but he is speaking about the undue extension of it in places where it does not belong.[4]

Forests, as already mentioned, come under this head. We know why it is that there is going forward at the present time a development of public property in this direction. We have already mentioned the practicability of a connection of various economic purposes with purposes of recreation in the case of forests, for forests make beautiful parks and pleasure grounds. The case of Frankfort on the Main, Germany, which has a forest of approximately thirty thousand acres, affords illustration, as does Lynn, Massachusetts, of a city which is making a beginning in this direction. It is especially desirable to connect forests with water works systems, so that the stream furnishing the supply may be lined with forests on each side and thus not be polluted. Opportunities are continually neglected for acquiring the banks of streams and planting trees along them. Also with proper methods an amount of game may be raised, in publicly owned forests, which will be an appreciable item in the food supply of a nation, at the same time affording a desirable variety in our food.[5]

With respect to a most important, and indeed an increasingly important class of undertakings, we have to choose between policy two and policy three mentioned at the beginning of this chapter, namely, between a

restriction of the extent of private property and a development of the social side of private property, between the "keep out" and the "let alone" policy.[6]

The "keep out" policy means that the state keeps out, or abstains from ownership and industry; and the "let alone" policy means that the state does not interfere with individuals in their economic operations. If the state violates the "keep out" policy it may make an industry like transport a public industry, and then, so far as this industry is concerned, there is no interference with this private industry, because it is public from start to finish. If, however, the property employed in transportation remains private property, it is necessary to violate the *laissez-faire*, or "let alone" principle, because unregulated private industry is here inadmissible. It is on this account that these two terms describe so well the two different policies. We have to move along one line or the other, and within limits we have to make a choice. The general tendency in most countries is to move along the first line; but now in the United States a former apparent tendency has perhaps been lately reversed and the present movement appears to be along the third of these lines, manifested in the increasing public control exercised over so-called public utilities, railways, gas works, etc. In the case of water-supply the main movement in the United States is for public ownership and there is clear indication of a purpose on the part of the American people to hand over to public ownership that whole class of undertakings which we call natural monopolies,—those lines of business in which competition is excluded by the nature of the

case,—that is, permanent successful competition,—provided control as opposed to public ownership does not prove successful. It is planned to treat these monopolies more at length hereafter.[7]

There is no universal tendency to develop along the one line or the other, so far as all monopolies are concerned. In addition to natural monopolies, we also have copyrights and patents. These are social monopolies in which there is no tendency to develop public property at the expense of private property. But these social monopolies are themselves limited in the general interest; society, on account of the great advantages in the encouragement of invention, having decided to endure the inconveniences of private monopoly for a time which will be short as compared with the history of the nation. So far as railways and telegraphs are concerned, it is a choice between two and three. We have to violate one of two principles, either the "keep out" principle or the "let alone" principle, inasmuch as in the very nature of things we must have one or the other. In the case of competitive business we rely upon competition for the regulation of production and distribution, but in public utilities we must have public regulation in one of two forms either in the form of public property or in the form of private property regulated, or, to use two technical expressions, we must have control or ownership.[8]

We have, then, these methods of regulation, the method of ownership and the method of control. There are difficulties in any method. We do not escape difficulties by passing over from private property to public

property. Nor do we avoid difficulties by the reverse process. The question is which method affords the greater advantages and the lesser difficulties, and along which line in the long run we are going to succeed best.

There are certain facts to be noticed in our present discussion, and one is that in the case of railways, telegraphs, etc., the third line of development has to be carried so far that many of the attributes of private property disappear. Eventually the social side of private property in these cases receives such a development that those attributes of private property which give it its distinctive advantages are greatly diminished both extensively and intensively. This can be shown by the fact that they are often spoken of as public property, which, as already seen, they are not. But the fact that we use that term shows that the social side is developed to an unusual extent, and when we develop to an extreme the social side of private property, then the attributes of private property begin to disappear, and, consequently, many of the advantages of private property disappear also.

Notice also that when we have private enterprises controlled, special skill and knowledge are likely to be on the side of private enterprise. This is because technical skill is acquired in the management of these enterprises and those outside who are expected to control them are without like opportunities to acquire this technical skill. Too frequently those who lack the special skill attempt to control those who are giving their entire lives to this sort of business, and we have an unequal contest by the very nature of the situation.

Especially is this the case when we have a few great companies supplying a large part of the country with local electric transport. The author once had a friend who was attorney for one of the greatest electric combinations in the country and who went to all parts of the country to argue his side of the case before municipal committees. Think how unequal was the knowledge and talent on each side! In many small cities there was simply the ordinary municipal council, entirely new to the business, while on the other side was a man of very unusual talent who gave his whole time and energy to this business and was always arguing the same case. We could not expect, under such circumstances, that the public interests could be adequately guarded and protected.

But on the other hand, we now have our Interstate Commerce Commission with increased powers,[9] comprising men of capacity, some great experts giving their entire time to the regulation of transport, and we have an increasing number of ably manned State railway commissions, and the experiment of control is being made under more favourable auspices.[10]

And there is something further to be considered in our argument. In such cases the government says to the owner and managers of private property: "You must manage this property not as you see fit but as we see fit, and yet you must take the responsibility of it. You must manage it at your own risk and not in a way that would seem to you to be fit and proper, but in a manner which seems to us fit and proper."

We are endeavouring to unite two antagonistic principles, as is observed when we place together the expressions *private* property and *public* utilities. We thereby take from private property a large part of those peculiar qualities which make it a blessing; and perhaps this cannot be better brought out than in the following utterance of an experienced railway manager:

"The main thing about any employment that makes it attractive to strong men is the opportunity, under conditions affording much freedom of action, to exercise their best initiative, put forth their best energy, and thereby achieve the best results of which they are capable; and many railway officers feel that the ever-increasing restrictions that regulation is putting on railway management are depriving them of this opportunity. The public has small conception how the hundreds of federal and state laws regulating railways, passed in recent years, and the innumerable orders that are constantly being issued by the Interstate Commerce Commission and the forty-two state commissions, tie the hands of railway officers. Doubtless much of the regulation is needed; perhaps all of it is well intended; but the public has unfortunately tried to adopt a policy of regulation that will prevent railway officers from doing anything that they ought not to do, and has overlooked the fact that to hedge men about with restrictions of this sort may, at the same time, so narrow their freedom of action as to make it impossible for them to do many things that they ought to do."[11]

It suggests itself that *public* property in *public* utilities would give a union of harmonious principles, but immense political difficulties arise when we attempt to solve our economic problems in this way. While the magnitude of the problems involved is appalling whichever horn of the dilemma we choose, it may suggest itself that the *nature of things* has a wonderful way of

working itself out sooner or later, and in this case the nature of things means *public* property in *public* utilities.

But another sort of difficulty attending the control of privately owned public utilities must be mentioned. It lies in the nature of things that those who are controlled should attempt to escape such a control. Those who are controlled would not be human if they did not think the control often unjust and oppressive, even when it is not so, because they look at things from their own point of view and do not appreciate the public interests. How could we expect such appreciation? It would be difficult at best, but when the men in control are more or less selfish and unscrupulous, the result is inevitable,—an attempt to escape from control. And this explains many of the political phenomena of our own time. This is the reason that the railways and the local and municipal monopolies are in politics. It is to escape control or to give direction to control; for example, to see to it that men of the right kind are appointed on State railway commissions and the Interstate Railway Commission; probably not often men who can be corrupted but those in sympathy with the private point of view. It was openly stated by the friends of one of our presidents, when a vacancy occurred on the Supreme Bench of the United States, that he would take into account the wishes of the railway people in the appointment, although it was not stated that he would be exclusively governed by them. We had come to a pass where it was expected that those in power would ask the railways what kind of a man they would like to regulate them.[12]

The history of the Interstate Commerce Commission is instructive in this connection. In the first enthusiasm and fervour following its establishment good men were selected and consented to serve, for example, men like Judge Cooley, of the University of Michigan, who was the first chairman of the commission at a salary of something like $8,000 and who refused a salary from a railway company of $25,000. But the nature of things seemed gradually to assert itself and in the opinion of many we witnessed an effort in one way or another to shape this control in such a manner that it would not be disadvantageous to the parties controlled.

A dangerous state of affairs has been seen in Chicago and in many other cities where a street car company can very well afford to pay $150,000 for a single vote in the municipal council, whenever great issues like the extension of franchises are involved. We see in the nature of things a strong temptation, growing out of control of private property when carried to extremes, and that there is this perpetual conflict and disturbance in public life and danger of enormous corruption. But the new life and vigour of our recent commissions and of the Interstate Commerce Commission and the probity and capacity of many commissioners give renewed hope to advocates of control and throw some doubts upon what has appeared to be "the nature of things". This great experiment of control is of world-wide significance, and its outcome must be awaited with the greatest interest.

As has been said, we want a development of the social side of private property in general. That is the third

line along which private property must be developed. But here the trouble is undue development. It can very well happen that a certain principle works well until carried out beyond a given line. Aristotle says that virtue consists of a mean between extremes. Private property must naturally and spontaneously promote the public welfare in order that it may yield the best results. This general principle in regard to public property is formulated by the author as follows:

THE PRINCIPLE OF GUIDANCE IN CHANGES FROM PRIVATE TO PUBLIC PROPERTY AND FROM PUBLIC TO PRIVATE PROPERTY

Private property yields the best results when the social benefits of private property accrue

a. *Largely spontaneously;*

b. *When occasionally they are easily secured by slight applications of force;*

c. *When the social benefits of private property are secured as the result of single public acts occurring at considerable intervals.*

d. *Private property may yield excellent results, when in more or less frequent cases a continuous and considerable application of force may be needed to bring its management up to a socially established ethical level.*

But in proportion as the social benefits desired are secured by increasingly intensive and increasingly frequent applications of public power, the advantages of private property become smaller as contrasted with the advantages of public property.

What we have already stated ought to make these various points clear, but we will illustrate them briefly. Take (a),—"private property yields the best results when the social benefits of private property accrue largely spontaneously." Agricultural land affords an illustration. In the main there is an identity between the interest of the farmer, owning and cultivating his land, and the interests of the general public. That is the rule in the United States. We have the farmer owning and cultivating his land and following that line of conduct which is in the interest of the public, even when he does not think of that interest. He wishes to secure a large crop with relatively small expenditure. This is also in the interest of the general public. In the case of rented land and absentee landlordism, we do not have such an equal identity of interests between the land owner and the general public as we do where the farmers own the land and cultivate it. It is conceivable, even if highly improbable, that we may have in the case of rented land a development which will remove the advantages of the private ownership of agricultural land. Very fortunately we have at the present time no such development in sight in the United States, but in Ireland a development was reached which greatly lessened the advantages of private ownership. However, a remedy is being found, even in Ireland, which is compatible with private property.

Take (b),—"private property yields the best results when occasionally the social benefits of private property are easily secured by slight application of force." That would hold in Germany with respect to the public use

under suitable restrictions of private forests as pleasure grounds, or, in England with regard to those walks across private fields, to which the public has a right called under the law easement or servitude. The public has a right to walk through the fields and in the paths, and to go over the stiles. If there is resistance to the public right, it may be necessary occasionally to apply force, but if this is done vigorously, so as to show that the public will maintain its rights, there is not necessarily any great conflict between public and private interests.[13]

Notice in the third place (c),—"private property yields the best results when the social benefits of private property are secured as the result of single public acts occurring at considerable intervals." Here the writer has in mind taxation, as representative of the social side of private property. This is one among several views to take of taxation,—to consider it a return to the general public and to society for their interests in private property. Considering it in this way, we have interference with private property, but it is only an occasional interference, although it may be at the time a very vigorous and far-reaching one. The case of the inheritance tax furnishes an illustration. Here we have a far-reaching interference, but for other purposes it is necessary to have a complete inventory of the property, and it is usually not very difficult to enforce the payment of inheritance taxes. This payment occurs only once in a generation and does not in a marked manner interfere with the benefits of private property. The chief inconvenience is the payment of the tax.

Sometimes it is claimed that great manufacturing enterprises, like the works of the United States Steel Company in and about Pittsburg, Pennsylvania, are peculiarly public, or in other words that they have a public side which places them in an entirely different class from the ordinary business. It is difficult to recognise this if it is stated without qualifications.[14] But even if we do admit the principle, it does not necessitate that perpetual interference with private business, which removes the advantages of private property. The interference would be simply occasional through a board of conciliation and arbitration. No one goes farther in such interference than the people of New Zealand actually go at the present day when they have compulsory arbitration. Here we have occasional interference whenever there is an actual struggle or a likelihood of a struggle between the employer on one side and the employed on the other.[15]

Next consider (d),—"private property may yield excellent results, when a continuous and considerable application of force may be needed." This principle would give us protective labour legislation. It is added purposely to provide for this, because a continuous and considerable application of force is necessary in order to secure obedience to the law which protects women and children and in some cases men. The purpose of the law is to bring business up to the socially established ethical level, where competition may be carried on without child labour and without excessive length of the working day. In order to establish this level, we must have recourse to force in more or less frequent cases. Never-

theless, if we have a good administrative system of inspection with a thorough enforcement of the law from the start, the various business enterprises and their managers very soon fall into line and the friction gradually diminishes. Nevertheless, we have to maintain perpetually a board of factory inspectors for control and to apply more or less force in certain cases, especially in the case of those factory employers who are disinclined to obey the law. Now in such cases, we may have a considerable amount of interference and yet not remove the advantages of private property. The interference does not extend to the entire business, but only to certain aspects of it; otherwise the private owners may do substantially as they will. Nevertheless, we have to admit that in proportion as the social benefits desired are secured by increasingly intensive and increasingly frequent applications of public power, the advantages of private property become smaller and the grounds for passing over to public property become stronger.

Now while it is often true that beyond a certain point we cannot carry the development of the social side of private property and retain the advantages of private property, it is also true that in general we do want a further development of the social side of private property. And to some extent this view will naturally show itself in legislation; but it will show itself to a still greater extent in judicial decisions, because these now frequently fail to recognise the social side of private property. It will perhaps also show itself in the development of taxation.

Notes and References to Chapter XIV

[1] P. 340. This is the reason why the author changed the title of this chapter from "Reform of the Institution of Private Property." That title conveys the idea of something too subjective, and it is not his aim to make this chapter a discussion of any subjective ideas, but rather an examination of objective forces, and so far as opinions are taken into account, they are regarded as forces. When opinion reaches a certain point, it moves and shapes actions, and to this extent only are opinions considered.

[2] P. 343. The case of Rhode Island has been mentioned, where through the charter of Charles II the rights of the general public were reserved, so that the people of Newport cannot shut out the general public from the shores.

[3] P. 344. *Miscellaneous Writings*, p. 78.

[4] P. 344. The author thought of this several years ago, as he was walking through Bryn Mawr, Pennsylvania, one day. When one walked through that beautiful place one was beset on every side by restrictions of private property. There was no place to sit down and rest. One could only keep moving on and enjoying from the walks what one saw of the beautiful grounds. There should be in such places some opportunity for public enjoyment of collective property. But this was not so, and one would have this feeling in wandering through many of our American cities, especially of that size. However, this evil is being rapidly corrected, as is illustrated by the author's home city, Madison, Wisconsin, with its many public parks, its spacious university grounds, and its many miles of pleasure drives. And this is simply a part of a wide-spread movement, more pronounced in America than elsewhere, although we Americans are still far from having the equivalent of the beautiful German forests.

[5] P. 344. The literature of city planning may well be consulted in this connection. See especially the annual reports of the National Conference on City Planning, the two monthly magazines *The American City* and *Der Städtebau;* also articles in current periodicals. Wisconsin is making notable progress in this direction. The area

of publicly owned forest land is constantly being increased by purchase, the state forest preserves at present approximating 400,000 acres, and having been placed under the supervision of a competent forester, Mr. E. M. Griffith. It is intended to use these forests for pleasure purposes also, and a plan has been devised whereby for a nominal sum the State leases land on the shores of lakes in the State forests to those who desire to use a tract for summer camps and homes, on application to the State Forester. For a description see Report of the State Forester of Wisconsin, 1909–10, p. 99, issued by the Wisconsin State Board of Forestry.

[6] P. 345. See Newcomb, *Principles of Political Economy*, Bk. V, Chap. I.

[7] P. 346. They have already been treated by the author elsewhere, especially in his *Monopolies and Trusts*.

[8] P. 346. The author in his classification (see his *Monopolies and Trusts*) rules out the so-called capitalistic monopolies, those businesses which are alleged to be monopolies by virtue of mere mass of capital, holding that we can always find some ground for monopoly in other features or characteristics of the business. The sugar trust affords illustration. It used to be said that that was a monopoly on account of the amount of capital employed and the skill with which it was managed. But we now know that an explanation can be found in other causes.

When the author was lecturing to his class on this subject in 1898 (the date of the first draft of this book) and still earlier, the case was not so clear as now. Then he could not, however, accept a current belief in the unique skill in the management of the sugar trust as an explanation of its monopolistic position. He knew that sugar refiners in Baltimore had been driven out of business by what they claimed to be unjust discrimination between their port and New York. Then, furthermore, he had evidence which made him believe that the railways discriminated against competitors in favour of the trust. A gentleman of high standing whom he knew personally, and who was a wholesale grocer, told him that the sugar trust sold sugar to wholesale dealers either "laid down" in the place in which the wholesaler was located, or at the factory of the refiner. Suppose you were in Chicago or Milwaukee. As a wholesaler, you could pay a certain price at the refinery or a higher price in Chicago or Milwaukee, as the case might be, with the freight paid; but the

wholesaler found it advantageous to buy sugar laid down in his own city, allowing the trust to pay the freight bill, which would seem to indicate that the sugar trust had rates which the wholesaler could not procure.

Nor must we forget that the sugar trust secured an advantage over its competitors by corruption of customs officials, whereby false weights were used and the imported sugar of the trust was underweighed and consequently undertaxed—one of the most disgraceful episodes in the history of American government corruption. The trust thus had a marked and unjust advantage over all competitors, although it seemed that competitors also were guilty of corruption.

The present author is prepared to admit now that in addition to all other remedies we need a very great development of the legal concept of unfair competition with punishment of unfair practices in order to give a desirable scope to competition. Moreover, it is admitted that mere size increases the necessity of some public regulation. An old-time strike in a small iron mill had little direct effect on the public. But a strike at Pittsburg or Gary would have a disastrous effect.

[9] P. 348. See Appendix IV, list of cases on power of the Interstate Commerce Commission, p. 879.

[10] P. 348. As one indication of progress in this direction, it may be mentioned that the University of Wisconsin has established working fellowships in connection with the State insurance, tax, and railroad commissions, the appointees working half-time in the University and half-time in the service of the commissions, the design being to train men for the service of the State.

[11] P. 349. B. L. Winchell, Chairman of the Executive Committee of the Frisco System, "The Drift towards Government Ownership of Railways." *The Atlantic Monthly*, December, 1912, pp. 746–7.

[12] P. 350. For a time there appeared to be deterioration in the Interstate Commerce Commission. "A new broom sweeps clean."

[13] P. 354. In 1865 Mr. G. J. Shaw-Lefevre (now Lord Eversley) founded the Commons Preservation Society, which with enlarged scope continues its activities under the name of Commons and Footpaths Preservation Society. It has accomplished very remarkable results in safeguarding public rights. The story is well told in Lord Eversley's work *Commons, Forests and Footpaths*.

In the summer of 1913 the present author walked with an English farmer across the latter's fields, following the footpath, and as he observed the encroachments of the public on both sides of the proper footpath and was told that it was quite impossible to restrict the people to the legal width of the way and that it could not be accomplished without the employment of an armed force—he saw that now the pendulum has swung so far that frequently the chief difficulty is the protection of private rights.

[14] P. 355. If such a business really becomes a virtual monopoly and it proves impossible or even impracticable to restore competition, it should be declared a business affected with a public interest. On this subject, see *The Control of the Market* by Bruce Wyman, especially Chapters I and VIII. The present author, however, believes that it is feasible to retain a large field for the control of competition; but into the theoretical questions involved in this treatment, we cannot enter now and here.

[15] P. 355. As a matter of fact, thoughtful observers are apprehensive about the ultimate outcome in New Zealand. See the work by Le Rossignol and Stewart, *State Socialism in New Zealand;* also V. S. Clark's *Labour Conditions in Australia.*

CHAPTER XV

THE PRESENT AND FUTURE DEVELOPMENT OF PRIVATE PROPERTY (Continued): THE EXTENSION OF PRIVATE PROPERTY ALONG CERTAIN LINES AND THE DEVELOPMENT OF RIGHTS AKIN TO PRIVATE PROPERTY

The fourth line of development is the extension of private property and the development of rights akin to property. Now this would seem to contradict the second line of development. We noticed, first of all, the development of public property at the expense of private property, but we also noticed a new development of private property. But the apparent contradiction here is after all not a real contradiction because the development of private property to which reference is made is along new lines. There are certain cases in which at the present time the law does not secure to the toiler the full fruits of his toil, and in order to bring it about that the one who works shall receive the reward for his work, it is found necessary to develop private property still further along some new lines. One illustration of this is afforded by the oyster beds in Chesapeake Bay, where a primitive communism has long prevailed, the taking of oysters being free to all.[1] The development of private property in oyster beds is necessary, as it is only through private property that we can give encour-

agement to production, because production will not be carried on unless the producer receives a reward. We have here involved the principle of the twentieth man. Let us suppose that nineteen twentieths of the men who are engaged in catching oysters in Chesapeake Bay are perfectly honest men, upright, and well-meaning. Now if the twentieth man is dishonest and the nineteen men cultivate the oysters the twentieth man will reap the fruits of their toil, or will bring it about that nobody will receive any fruits from the efforts of cultivating the oysters. He would invade the beds on which the oysters were cultivated, and no oyster culture could take place. We must reward the one who puts forth effort and invests capital in order to produce an increase of oysters. While it is not necessary to grant a perpetual lease of oyster beds, we must give a lease long enough to encourage culture, and we have to make provision that the man who invests capital permanently or for a long time shall receive remuneration for his capital in case his lease is not continued.[2]

But we need, furthermore, a development of private property sufficiently firm and strong to protect individuals who come into conflict with private corporations. For where individuals are placed in opposition to private corporations and their interests, private property is not sufficiently developed; or if sufficiently developed, is not adequately protected. For in many cases the trouble is not found in a narrow conception of property but in inadequate machinery for the enforcement of rights. But the practical outcome is the same in both cases. Many illustrations of this could be given. The shade

trees in front of our houses in some places in the United States are not protected against the various corporations which string wires on poles in front of these trees. They mutilate our shade trees and we are helpless. That used to be the case in Baltimore when the author lived there. There may have been some theoretical defence for the private individual whose property rights were invaded, but there was no practical redress. There lies before the author a quotation,[3] giving a case which comes under this head. The case is that of a gentleman who had a summer residence in Berks County, Pennsylvania, which was separated from the public road by a growth of ornamental trees. The telegraph company ran its lines through this grove before the owner bought the property. Then the company wanted to add wires, and in the absence of the owner and against his protest, and in spite of the protest of the person left in charge of his place, the telegraph and telephone company cut down sixty or seventy trees close to the ground and injured others, thirty of these trees interfering in no way with the telegraph wires. The men were arrested, tried, convicted, and sentenced for trespass: and the case was finally decided in favour of the owner. Here there was some protection, but it was quite inadequate. If the owner had been a man of less means and force he would have fared still worse.[4]

Individuals have in the past also had quite inadequate protection in dealing with the powerful American express companies. It has frequently come to the author's knowledge that after the charges have been prepaid they have been collected again on delivery and

it has been by no means easy to recover the excess payment when it was discovered. And in how many cases has it never been discovered.[5] This is especially likely to be the case with Christmas presents and other gifts, where one does not like to ask the sender concerning prepayment; also when parcels pass through the hands of two express companies, inadequate protection to the individual is frequent in case of damaged property, each company claiming that the fault belongs to the other, and the individual suffers the loss. A recent investigation by the Interstate Commerce Commission shows that there has been systematic fraud in overcharging by express companies on many thousands of packages per week, the aggregate amounting to millions of dollars per annum. No attempt seems to have been made to punish the companies for fraud. A report recently issued by the Commission says in regard to the double collection of lawful charges:

"The express companies strenuously deny that such overcharges result from the pursuance of any policy recognized in the slightest degree by the companies themselves; but this investigation has made it clear that, whatever the policy of the companies may have been in this regard, their manner of doing business made such result inevitable, and the remarkable fact is that their machinery has not been so adapted as to cure this evil, especially in the face of the express provision of the law which makes it a penal offence for any carrier to charge, demand, collect, or receive a greater or less or different compensation for any service than that which is named in its tariffs. The complaints upon this score come from all sections of the country and are not confined to any one carrier."[6]

It is not necessary for present purposes to enter into the question of intent. The sole point under discussion is the inadequacy of the protection afforded to the ordinary man in his dealings with companies of this kind. Numerous other illustrations of virtual invasions of property rights by powerful corporations can easily be cited. One of these is through false report of earnings, thus inducing individuals to make investments, getting their money from them under false pretences. Note further the abuse of the interests of minority holders and "outside" interests. Once in, investors may have funds tied up in surplus or in wasteful purchases, and have no dividends and no chance to sell stock without loss. In such cases an adequate redress for the ordinary person is too infrequent. But in this case and others improvement is taking place, although the sufferer too often finds it irritatingly slow.[7]

Another line along which there is room for a development of private property is to be found in the protection of the property rights of those who have been the weaker members of the community; or perhaps we should rather say, the development of pecuniary rights akin to property, which are not, strictly speaking, property rights. Property is developed through legislation and judicial decision, and we know that it has no firm form and no secure existence without both. Legislation moves along various lines at various rates of speed, for legislation always represents actually existing social forces. If any section of the community does not stand for an actually existing social force, it is not represented, and cannot be represented, by legislation. In other words,

the equality of all before the law is a pure fiction, if we speak of it as something which actually exists. As an ideal towards which we are striving with varying success, the equality of all before the law is a force and a reality. Can anyone doubt this? One has only to go to Washington or to one of our State capitals when the legislature is in session and watch what actually goes forward. Every law which goes on the statute books is placed there because somebody or some dominant force is behind it. Sometimes the necessary force may be secured through humanity or altruism. Thus it is that laws which establish, develop, and regulate property are made. We have various interests which seek protection through the development of property rights or rights akin to property, and this protection is secured through legislation. Take as an illustration, literary property. Why is literary property so late in development, and why is it so imperfectly developed as compared with so many other sorts of property? Why is it that until a comparatively recent period it scarcely existed, and that only in the present generation have we had any international protection of literary property in the United States? [8] It is simply because writers of books have been a weak class in the community. As they have begun strongly to represent an actually existing social force, they have secured legislation, developing property rights in productions of the mind. If we go back to the period when a scholar and a beggar were often the same we find a very inadequate development of literary property.[9]

But the author has in mind still another matter,—

the relations existing between persons and property, which show especially the necessity of a development of personal rights with pecuniary significance. First of all, let us think of the right of a person to the protection of the valuable economic powers which he has, those powers of pecuniary significance which are wrapped up in the natural person, intellectual powers and physical powers,—the right to the strength of his arms against needless mutilation by transportation companies of all sorts, manufacturing companies, unscrupulous employers; a right finding one expression in an employer's liability to correspond with the liability of those who damage valuable material property,—that is responsibility for damages of a pecuniary significance to the person.

But this expression of the right in question is unsatisfactory, because, generally speaking, the injury is not due so much to the fault of the employer as it is to the social process of production; and the responsibility belongs to society at large and society must on the one hand bear the cost of personal accidents and injuries as one part of the costs of production; and on the other hand through appropriate measures society must bring about a diminution in these accidents and injuries. As a matter of fact, relief is coming chiefly through insurance schemes such as have found their highest development in Germany.[10]

What are some of these personal rights? Reference has been made to some, and one or two others may be mentioned. We have already cited intellectual property—property in an idea—which is being slowly de-

veloped and has now reached a relatively high degree of security.

We find also in process of evolution *the right to be well born,* to be born under favourable conditions. This is a development which is making slow progress. This is what tenement house laws mean, what sanitary laws mean,—the right to a home under sanitary conditions, the right to a development of the powers of body and mind. Such a right is secured in part by our public schools and compulsory education. It is only through public education that the rights of all in this particular can be secured, and it is a strange thing that on the grounds of freedom and liberty, anyone should have ever opposed compulsory education, thinking only of the parents and not of the children and of the children's powers for which development should be secured. Law shortening the length of the working day or week may also be regarded from the point of view of the right of children to be well born. A debilitated parent is apt to mean a debilitated child and most factory girls marry sooner or later.

The right to cleanliness, and the opportunity for cleanliness are being slowly developed. Public baths are an illustration of this. Mention has been made of the right to the powers residing in the physical person which is receiving development through protective labour legislation, tending to prevent accidents, high temperature, foul gas, etc. We have gone so far that we now have a proposal of international factory legislation and even a beginning of it through international treaties.[11] We have been so occupied in this country

with other things that we have not given such attention to this as we should. Some evils are said to be unpreventable by those who do not want their removal on account of the expense involved, but when a bad way is prohibited, some way is found for doing the work without the danger. Chimney sweeps in England afford an illustration of this, it no longer being found necessary to send little boys up the flues to clean the chimneys.

And what about *the right to an assured income?* It is certainly as important a right as could be developed; there is some movement in this direction. How far is it desirable to go in respect to this? Our thoughts in America have been too much concentrated upon political rights and not sufficiently upon economic rights and in this particular Germany is far ahead of America. England also is in advance of the United States, although on the whole behind Germany in this particular. One can decide for one's self what relative value is attached to these rights. We Americans protect in most cases a man's right to his house, but it hardly occurs to us to give a man protection in his right to a position. But in Germany we observe in the army and the civil service a movement in this direction, although even there many would say an inadequate one. A professor in the German universities, for example, cannot be deprived of his position without process of law any more than of his right to material things. This is of great importance when men are attacked for freedom of opinion.[12]

When we consider the right of an office-holder to an assured income, we must place judges first in the order of importance. It is in the public interest that they

should not be exposed to the temptations attendant upon insecurity in their tenure of office. This truth has received recognition in all civilised lands and generally subject to good behaviour, judges hold for life, or until they reach a legally determined age when they are retired on a pension. American federal judges are appointed for life, but otherwise American judges are usually elected for definite terms of office. During these terms heretofore they have had ample security of tenure but have had no certainty of reëlection. While in the older and more advanced portions of the United States, reëlection is very general, it has nowhere been a certainty even for upright and competent judges, and frequently an undignified scramble for judicial office has been seen. A justice of the Supreme Court of one of our States writes to the author as follows: "The tenure of office of judge of our supreme courts is very uncertain in the majority of states; that is to say, if they are men and are independent. The recall, too, increases the uncertainty. It is to be remembered that votes at two cents apiece in order to start a recall can be obtained by *corporations as well* as by those who may have the popular interests at heart. It costs in Wisconsin over nine thousand dollars to send but one letter to every voter. It will cost eighteen thousand dollars if there is woman's suffrage. No judge can afford very many recall campaigns."

When we look at the recall of the judges from this point of view, it seems to be a reactionary rather than a progressive measure. Nor is it clear how it is going

to attract to the Bench an abler and more independent class of men.

So far as the workingman is concerned, we are beginning to have protection through insurance. This does not give a full and complete right to a livelihood, but represents one of the most important movements in that direction in the history of the world. In Teutonic countries the right to a minimum income is guaranteed through the poor law but this is not done in the Latin countries. A minimum for subsistence is guaranteed, so that no one shall starve to death. And now the long-discussed proposal to establish a minimum wage has already resulted in action in widely separated states and nations and very generally in the United States it has become practical politics.[13]

The development of the civil service in the United States can be viewed from various standpoints. It may be considered a part of the general movement to give some guarantee of employment as a development of rights to one's personal powers in order to gain thereby an income. *This development of a right to employment* is an ideal which is floating before the people, and although it has been resisted by a great many, we are making progress in this direction. We have not yet reached our goal by any means. This is one of the demands of the socialists and also a demand of others, indeed, who are not socialists; it is in a way anti-socialistic, as an attempt to strengthen the existing order.

It seems to a great many that the man who is willing to work should have the opportunity to work. This right to demand and to receive employment finds ex-

pression in a French phrase which is almost English and is used frequently by English writers,—*droit au travail.* A great deal was said about this at the time of the Revolution of 1848 in France and a law was passed which contained a recognition of this right. It was really a proclamation of the government; but the late Professor Anton Menger, in his work called *Recht auf den vollen Arbeitsertrag,*[14] says that it became a law. He says that this proclamation contained for the first time a recognition of a fundamental economic right in the interests of the proletariat. That would make this proclamation epoch-making. The provisional government in February, 1848, issued a proclamation which recognised the right to live by work, the right of citizens to receive work. The proclamation was dated the 25th of February, 1848. It reads as follows: "Proclamation by which the provisional government undertakes to furnish work to all citizens: Paris, 25th of February, 1848."

"The provisional government of the French Republic undertakes to guarantee the existence of the workingman by work. It undertakes to guarantee work to all citizens." [15]

The socialist or labour party was overthrown in the battle on the 20th of June, 1848, and just before that battle in which the socialist party was overthrown, one of the members of the National Assembly presented for incorporation in the Constitution a bill which recognised the right to live by work and which would have afforded this right the same constitutional guarantees afforded to property.

After the socialists were overthrown, the whole matter was dropped. Those who were in power did not take the proposal seriously in any way; but there was a professed endeavour to afford opportunity for employment to any and every one.[16]

A different right is what the French call *droit du travail.* This shows a change from the time of one Revolution to the period of the other. The Revolution of 1848 is often called the workingmen's revolution, and the first phrase *droit au travail* gives the workingmen's idea. It is said that the Revolution of 1789 was the revolution of the manufacturing and trading classes, and the second phrase (*droit du travail*) gives their idea. *Droit du travail* means simply the right to work when one can find work, to use one's powers without legal obstacle,—wherever, whenever one can find the opportunity.[17] *Droit du travail* means the right to work without any let or hindrance thrown in one's way by a trade union or a gild as has often happened in past centuries as well as in our time. Now we are making some progress in the direction of *droit au travail.* Work is furnished in times of distress, to a greater or less extent, by the governments of the world. Indeed, it has been frequently proposed that certain public improvements should be deferred until private employment becomes slack in order to make the demand for labour steadier than it would otherwise be. The practical administrative difficulties are very great and one serious objection is that as a rule the unemployed are of inferior efficiency, as a result of which government must suffer, especially as compared with private work for which the

more efficient are retained. Other difficulties suggest the complexity of the problem. Should a man be given a job suitable to his strength and training, or should he be required to dig ditches and heave coal? Again, how ought the rate of pay to be regulated? Of course, if the utility of the product is less than the cost of the work, society loses. Nevertheless, some progress in this direction has already been made. In the year 1893, for example, various American cities, among them Cincinnati and Chicago being noteworthy, furnished relief through a coöperation of private and public effort. Work on the public parks in Cincinnati was provided and the money came in part from the city and in part from private individuals. Apparently German cities very generally make an effort almost as a matter of course to let one undertaking follow another in such a way as to avoid needless irregularities in employment.

It is also proposed that contracts for work should be annual and it has even been suggested that compulsion should be exercised in this direction. Turgot in the latter part of the eighteenth century went so far as to find in steadiness of work the solution of the labour problem, but it is not easy to see that compulsion in the labour contract can do much to bring about this desirable end, so long as we retain private property and private industrial initiative. It is evident that we are as yet very far from that point where work is furnished to everyone who needs it. We notice a social effort to furnish work and employment, but it is only in part a governmental effort; it is largely a social effort of the private sort, for example, woodyards supported by the

charitable, and as has been said, opportunities for work on the public parks and highways provided by private subscription.[18]

The right to reputation is also a right of this character and a right not well developed, although the theory of the law is that this right should be secured and we have some protection. It is difficult to secure this right without limiting free discussion and free speech. We must allow a criticism of conduct which has a public bearing, and that criticism may include the right to damage the reputation of the person criticised; that is, when the damage is incidental and not intentional. But we do not protect this right as well as some other countries do. In Germany one's feeling and one's sense of honour are better protected, for there an insult is a legal offence. We hear a great deal about *Majestätsbeleidigung* (*lèse-majesté*) which means insulting the majesty of the Emperor, and many Americans suppose this to be something entirely exceptional. The sovereign or the Emperor is indeed placed in an exceptional position, but it is an offence to insult anybody in Germany; naturally it is a more serious offence towards a sovereign than towards a private individual. The sovereign, however, is not placed in so exceptional a position as we generally imagine.[19]

But let us now ask and attempt to answer the question: Why is it that rights in things are better protected than personal rights? It is first of all because rights in things, as land, manufacturing establishments, mercantile establishments, etc., are of special significance to a few, but those few are the strong members of a com-

munity; we do not say that they are not of significance to all, but that they are of special significance to the few who have great masses of material things. And these few who have great masses of material things for which they seek protection through development of property rights, need less than others protection of the person; this is one reason why they are less anxious to have a development of personal rights with pecuniary significance. Their persons are less exposed, because their large material possessions carry with them protection to the person. It is especially the weaker members of the community who need protection of the person. The very resources of those who have large wealth afford a considerable degree of protection to the person. The dangers to little children from street cars and from unguarded railway level crossings which are a menace to life serve as illustration. People of means provide their children with nurses to care for them, but the children of the poor play in the streets of large cities and they are exposed to dangers from which the children of the rich are almost entirely exempt. But that is not all. The parts of cities and the parts of the country where the people of large means reside are those parts in which there is less exposure to dangers of the kind mentioned. The unguarded railway level crossings and railway tracks running through the streets are usually in the poorer sections of the community, thus the position which the richer members of the community occupy exempts them from danger, or minimises the risk. Industrial accidents happen usually not to the millionaire but to the workingman. The most dangerous occupation in the country and in the world is probably that of the trainmen on the American railways. The trainman on an American railway who went into the Spanish war did not increase the dangers to which he was exposed, but decreased them during the war, if we merely take into account dangers from the enemy; but if we consider all of the sickness to which he was exposed, even then the trainman who went into the war perhaps improved his chances of life. The trainmen are, comparatively speaking, the poorer class of the community. Those who have high salaries as superintendents of the company, etc., are less exposed to such dangers.[20]

Another reason why too frequently those who have large material wealth do not especially care to have rights of the kind developed is that rights of the person must be developed at the expense of the owners of things as is seen most drastically in employers' liability, imposing the burden upon the owners of things in order to secure protection of person. Most of the accidents which happen are quite preventable. Take, for instance, the level crossings in Chicago. It has been proposed to remove the present maximum penalty of $5,000 for a single accident resulting in loss of life, but the railway companies which have to pay for the loss always resist the removal of the maximum limit, for this removal, while affording increased protection of person, would do so at the expense of the owners of things and of those who are not exposed to accidents so much as the poorer members of the community.

But it must be added that one reason for delay in the development of these rights has been an inclination to

put upon the employer a responsibility which, as we have already seen, he rightly felt was not wholly his; and now that it has been demonstrated to what extent accidents are due to the nature of production, and now that in consequence we are more inclined to place the burden on society in methods already mentioned, progress is more satisfactory, especially in European countries.

But in the second place, as to causes for the slow development of personal rights of the kind under consideration, we notice in addition to the relative social weakness of the classes especially concerned, their frequent indifference, owing to their lower psychical development. Wage-earners are often indifferent to danger and care little about improved sanitary conditions. Frequently they must be almost forced to employ safety devices and to take proper precautions against danger. They need to be cultivated in foresight, and by education in forethought they must be rendered less willing to take gamblers' chances in the matter of accidents. The very fact that certain men have become capitalists and employers shows that those men have in higher degree the gifts of foresight and of self-control.

The periodical press affords abundant illustrations of the better protection of property in things than in personal rights; hence it is not necessary to take space here for quotations which the author could give.

Now it is a development of personal rights akin to property which the masses especially need. Such a development is going forward more or less slowly throughout the civilised world at the present time, but

the need of it is almost unlimited. What can be more sacred than a man's right to his power to labour? If this is a sacred property right, as Adam Smith said, then it needs protection just as much as do material things. A certain judge has said, "Why should you oppose personal rights to property rights? Rights in things are inherent in human beings. They are all personal rights." This sounds well, but what has been said shows a real distinction. To be sure, rights in things do inhere in persons, but we have to do with various economic classes in a community and those to whom the rights of material wealth are peculiarly significant are not those to whom the rights of personal strength of mind and body are of peculiar significance.

Notes and References to Chapter XV

[1] P. 361. See W. K. Brooks on *The Development and Protection of the Oyster Industry in Maryland*, in Report of the Oyster Commission of the State of Maryland, 1884; also the *Oyster* (2d and revised ed., 1905), pp. 140–141, 160–178 *et passim*.

[2] P. 362. However, this condition has been somewhat remedied by the law of 1906 (and subsequently amended), whereby a lease system was instituted for certain portions of the Bay. The following information was kindly furnished the writer by Honourable B. Howard Haman, "father" of the Haman Oyster Culture Law of Maryland, above referred to, in a communication dated July 15, 1912: In 1884 an individual living in any one of the tide-water counties was permitted to stake off from the "barren bottoms" (those parts of land beneath the Bay and its tributaries which are adapted to oyster culture, though no oysters are to be found there now) an amount of land for the purpose of "bedding oysters". No person could take more than five acres of land in this way, and in some of the counties the amount which could be appropriated was not more than two acres. The tenure of even these small tracts was vague and uncertain. It was practically a tenancy at sufferance and expired at the death of the holder. There were practically no penalties for poaching upon the land so held. Indeed the only security of the holder depended upon the grace and good will of his neighbours, or upon the deterrent force of his rifle. The law was wholly insufficient to protect him. Under this system there was an average yield from "the natural bars" within the Maryland waters of only 10,000,000 bushels annually in the years from 1880 to 1890, due also partly to the fact that the tenant was forbidden to use any improved means for gathering the oysters, and this condition practically continued until 1906 when the Haman Oyster Culture Law was passed, one object of which was to permit individuals to lease certain amounts of the "barren bottoms" for oyster culture. However, this act, as finally passed, was useful only to the men who gathered oysters from the uncultivated beds—the "natural growthers"—and of little use

to the prospective oyster culturists; but with subsequent amendments the law will have enough business done under it, Mr. Haman thinks, in the waters of three of the principal tide-water counties of Maryland to furnish a good object lesson. Under the provisions of this act a Shell Fish Commission has been created and a series of surveys of the beds made, covering a period of six years. For further information see the various *Surveys of Oyster Bars* for the counties of Maryland, issued by the U. S. Coast and Geodetic Survey; the *Reports* of the Shell Fish Commission of Maryland; and C. C. Yates's address, "The Relation of the Work of the United States Coast and Geodetic Survey to State Oyster Surveys" (*Reprint from Report of Proceedings of the Third Annual Convention of the National Association of Shellfish Commissioners.*) A communication from Mr. Haman, dated April 1, 1914, reports a retrogression in the long struggle in Maryland to abandon the primitive communism described, for the governor was said to be about to sign the so-called "Shepherd Bill" which appears to restrict the area under the waters of the Chesapeake open to oyster culturists and to endanger investments of capital: all of which is, however, denied by the Governor, Honourable Phillips Lee Goldsborough.

[3] P. 363. From the periodical *Forest Leaves*, December, 1896.

[4] P. 363. This refers to the cases of Commonwealth *v.* Clark *et al.*, 3 Penn. Sup. Ct. 141 (1896) and Marshall *v.* American Tel. & T. Co., 16 Penn. Sup. Ct. 615 (1901). The first was a criminal case brought against the agents, upon whom a penalty was imposed of fifty dollars each or fifty days in jail. The second was a civil suit for damages and four hundred dollars were recovered, a ridiculously small penalty for the wanton damage. Many States now make it a statutory offence to cut down or mutilate trees in this manner, and Pennsylvania has such a statute. See Garber *v.* Columbia Tel. Co., 20 Lanc. L. R. 378 (1903).

[5] P. 364. In one case the author received a prepaid parcel when the sender had carefully seen that it was properly marked. The original label was removed, and the "Prepaid" on the box was painted out, so that it could with difficulty be seen. At length the money was recovered, but it was not possible to induce a public authority to take up the case and have the box photographed as the author wished.

[6] P. 364. See *Report* of the Interstate Commerce Commission, No. 4198, "In the Matter of Express Rates, Practices, Accounts, and Revenues," (Opinion No. 1967), Washington, 1912, p. 389; also pp. 388 *et seqq.*

[7] P. 365. We do not need to consider the question whether or not in a technical legal sense fraud is to be regarded as an invasion of property rights. The most notable attempt to remedy this evil is found in some of the States of the American Union. Wisconsin may serve as an illustration. The "Blue Sky" Law of that State, enacted in 1913, places in the hands of the Wisconsin Railroad Commission the power of supervising investment companies. Dealers in securities must be licensed before they can offer them to the public and they must furnish to the said Commission such information as it may require.

[8] P. 366. For a discussion of this question see Mr. George Haven Putnam's work, *The Question of Copyright* (2d ed., 1896).

[9] P. 366. An interesting point in this connection is the organisation of an authors' union recently, which has as a chief purpose the protection at law of authors' rights.

[10] P. 367. Workingmen's insurance in Germany is divided into three systems: sick insurance, accident, and invalid. The last includes pensions for those seventy years old. Under these schemes the employer and employee contribute in different fixed proportions. The Government also grants a definite sum towards the pensions in the third class. The administration of the funds is managed in various ways, but the principle that representatives of employers and employees should have a voice is generally recognised. Employers have formed compulsory mutual insurance societies to meet the risks of accident insurance, and assessments vary with trade risk and rates of wages. See the new code of 1911, translated by H. J. Harris; U. S. Bureau of Labor Bulletin No. 96, Vol. XXIII, 1911, pp. 501–774. For opposite points of view as to the success of the German system, see also Dr. Ferdinand Friedensburg's *The Practical Results of Workingmen's Insurance in Germany*, tr. by L. H. Gray; and W. H. Dawson's *Social Insurance in Germany, 1883–1911*. One of the most recent and authoritative presentations of the German system is the paper presented by Dr. Friedrich Zahn, Director of the Royal Bavarian Statistical Bureau, at the meeting of the International Congress of Demography and Hygiene in Washington, D. C., September 25, 1912. It is decidedly reassuring and encouraging.

In the United States, twenty-two States have laws concerning workmen's compensation. See article on "Labor Legislation" in the *American Year Book*, 1911, and the *Digest of Workmen's Compensation and Insurance Laws in the United States*, October 1913, published by the Workmen's Compensation Publicity Bureau and the Bulletin of the U. S. Department of Labor Statistics No. 126, "Workmen's Compensation Laws of the U. S. and Foreign Countries," (1914). Also *Unemployment Insurance* by I. G. Gibbon (London, 1911) with a preface by Hobhouse which is "an impartial study of the actual operation of various schemes in foreign countries," utilising reports prepared for the Paris Conference on Unemployment.

In the United States it is probable that Wisconsin leads through the Industrial Commission of that State. See McCarthy's *The Wisconsin Idea*, pp. 162–3, and also the official publications of the Commission, to be obtained by addressing the Commission at Madison, Wisconsin.

In England the National Insurance Act, 1911, established a scheme of sickness and unemployment insurance which has been to some extent modified by the Amending Act of 1913. See *National Insurance* by A. S. Comyns Carr and others.

[11] P. 368. Ely, "Economic Theory and Labor Legislation," presidential address in 1907 before the American Association for Labor Legislation in the "Papers and Discussions of the Twentieth Annual Meeting of the American Economic Association," *Publications* of the Association, Third Series, Vol. IX, p. 124. See also Vol. I, *Publications* of the American Association for Labor Legislation and also subsequent volumes. See also *Bulletin* of the International Labour Office, Vol. I, 1906, pp. 150–2 *et passim;* also subsequent volumes.

[12] P. 369. In June, 1911, the "Jatho Case" attracted an immense amount of attention in Germany. A Protestant pastor in Cologne lost his position on account of alleged heresies. It is not at all the intention of the writer to enter into the merits of the case. A great amount of agitation resulted on the part of those who looked upon the dismissal as a dangerous invasion of the rights of free speech. But even here the pastor has a pension,—to be

sure, an inadequate protection of freedom in the eyes of his supporters.

[13] P. 371. Australia and New Zealand lead in this legislation. Victoria passed the first minimum wage law in 1896 and was the pioneer for the world. Great Britain which passed a law in 1909 has special boards for the lace-making, box-making, hammered and dollied or tommied chain-making and tailoring industries, and this will probably be extended to sugar confectionery and food preserving, shirtmaking, hollow-ware, linen and cotton embroidery, calendering and machine ironing in steam laundries. In the United States nine States have taken legislative action to secure the minimum wage, but for women and children only, foreign countries not thus limiting their minimum wage laws. Massachusetts passed a minimum wage law in 1912 and was the pioneer American State in this movement; in 1913 eight other American States followed this example. These States are California, Colorado, Massachusetts, Minnesota, Nebraska, Utah, Washington and Wisconsin. It is not necessary now and here to pass judgment on the wisdom of this and other measures mentioned. Their significance is found in the movement which they indicate. Many mistakes are bound to be made in our endeavour to reach our goal.

[14] P. 372. Translated into English as *The Right to the Whole Produce of Labour*, by M. E. Tanner (London, 1899) with an introduction by H. S. Foxwell. See p. 20.

[15] P. 372. *Op. cit.*, pp. 20–21.

[16] P. 373. See Ely, *French and German Socialism;* also Menger, *op. cit.*, pp. 20–24.

[17] P. 373. Our courts insist strenuously enough upon the *droit du travail*, and this is what to them the right to labour means. The right to labour in this sense is a property right. Mr. Justice Bradley of the United States Supreme Court says that the people's "occupation is their property", Slaughter House Cases, 16 Wall. 36 (1872) at p. 122; and Mr. Justice Swayne, in the same cases, says: "Labor is property and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity" (p. 127). See also *in re* Parrott, 1 Fed. 481 (1880); Harbison *v.* Knoxville Iron Co., 103 Tenn. 421 (1889).

This *droit du travail* was a real achievement in the eighteenth century and seemed a finality to the individualistic philosophy of that time.

[18] P. 375. Professor John R. Commons has given an interesting, and in some respects novel, treatment of some of the phases of this subject in an article entitled "The Right to Work," published in the *Arena* for February, 1899. Of special significance is his discussion of the development of human rights and the connection he shows to exist between economic evolution and the establishment of rights of an economic nature; with the growing wealth production of society new rights are developed one by one. He also makes the point that this growth is a religious process, the conversion of society from one point of view to another; that the change is not brought about merely by argumentation. Professor Commons then examines the obstacles to the right to work, found in the causes of unemployment, and discusses the appropriate remedies in arbitration, etc. He cites a very remarkable statute passed by the Massachusetts legislature in which indemnity was provided for workingmen who should lose their employment on account of a certain public improvement. The statute of the Massachusetts legislature to which reference is made is as follows:

"Section I. Any resident of the town of West Boylston, employed by any corporation, partnership or individual, at the time when the plant of said corporation, partnership, or individual, is taken, and work therein stopped, on account of a reservoir for the metropolitan water supply, and who is obliged by reason of such taking to seek employment elsewhere, shall have the right for one year from the termination of such employment as aforesaid, to file a claim for damages with the Metropolitan Water Commission, and if the same is not settled within sixty days within the filing thereof, he may bring a bill in equity in the superior court for the county of Worcester for the adjudication and collection of such damage. Any number of persons deprived of employment, as aforesaid, may unite in such bill and the withdrawal of any shall not prejudice the rights of others.

"Section II. It shall be the duty of the court to ascertain whether or not such claimants have resided, and been employed, and deprived of employment, as specified in this Act, and if so, to issue a decree in favor of each to recover the actual damage which he has

suffered by reason of such loss of employment, not, however, to exceed the sum of his wages for six months at the rate of wages paid to him for the last six months prior to such suspension of employment."

Sections III and IV protect the State against impositions. (Legislature of Massachusetts, Ch. 540, 1896).

When the Prussian private railways were purchased by the state, an indemnity of something like a million marks was provided for the railway presidents who lost their positions, as the present author pointed out in his report to the United States Department of State, published in the *Volume on Foreign Relations*, Department of State, 1880. And similar cases could be cited. But it is rare indeed to find such special provision made for wage-earners. It is also sometimes so difficult to recognise a vested interest of this sort on the part of wage-earners that Mr. and Mrs. Sidney Webb, in their remarkable book on *Industrial Democracy*, give up the claim of a vested interest which workingmen have so strenuously made, and advocate rather improved social conditions of a general nature.

Much may be done to provide continuity of work by employers, both public and private, simply by forethought and careful planning so as to make one job follow another. Germany seems to excel other countries in this particular. Our American governments are particularly negligent in this respect, frequently dismissing men in a ruthless way. An explanation and partial palliation is given in the circumstances of our new country, where it has been easy to find work.

[19] P. 375. In Germany a person has been punished for calling another a schoolmaster in such a connection as to imply a certain injurious contempt, but some think that the right involved in reputation is perhaps best protected in England. There is greater freedom of the press and of speech in England than in Germany. But the libel laws are strictly enforced by the courts. The obligation rests more upon the individual in England, and less upon the government, than in Germany.

A good example of English carefulness is found in the experience of Hilaire Belloc, the brilliant essayist, who was for five years or so an M. P., and who wrote a book in collaboration with Cecil Chesterton on *The Party System*. In it he hinted at some election irregularities, and the offended member of Parliament at once notified

him of intended prosecution. Belloc inserted an "addendum" making ample apologies. In America, probably nothing would have been done; and even if there had been prosecution, the courts would not have recognised the "imputation".

The way in which our people slander public officials is scandalous, and discourages many a good man from making public service a career. The American newspaper is not without blame in this particular.

[20] P. 377. *Cf.* an editorial in the *Army and Navy Journal*, "The Hell of Railroading," for July 21, 1900. From a detailed study made by Dr. E. H. Downey, now Statistician of the Wisconsin Industrial Commission, it appears that the brakemen employed in Iowa during a three year period suffered 13 fatalities, and 90 serious injuries, per thousand per year. The Fourth Iowa Cavalry—one of the famous fighting regiments of the Civil War, a regiment which participated in 65 engagements—suffered a loss of 13 killed, and 40 wounded, per thousand per year. (See Downey's *History of Labor Legislation in Iowa*, p. 232, note 311).

CHAPTER XVI

THE PRESENT AND FUTURE DEVELOPMENT OF PRIVATE PROPERTY (Continued): MODIFICATIONS IN THE MODES OF ACQUISITION OF PRIVATE PROPERTY IN GENERAL. EQUALITY OF OPPORTUNITY. SURPLUS VALUE.

We take up now the fifth line of development and deal with *modifications in the modes of acquisition of private property*.

What are the modifications which are actually taking place in the modes of acquisition of property, and what are the modifications which have been proposed and are in process of discussion? We can proceed in various ways to answer these questions. One way is to take up the sources of income and of accumulated wealth and to examine these one by one, asking what modification is taking place or is proposed so far as each particular source of wealth is concerned. For example, consider labour, the exercise of one's labour power as a source of acquired wealth. Labour power yields wages. Is there any attempt to modify the acquisition of wealth through the exercise of one's labour powers? Undoubtedly there is. But this is not the place for the discussion of the earnings of labour. It is sufficient for present purposes to call attention to the pronounced self-conscious ef-

forts of civilised society to make it easier to acquire property through labour. This movement is one of the great dominant tendencies of our age, and never in earlier centuries has the world seen anything like it. Even a catalogue of existing measures would require much space. We have education in all its phases, protective labour legislation, modern industrial insurance, improved dwellings, and numerous other measures which will occur to the intelligent reader.

When we come to the matter of speculation, we find that the method we are adopting throws new light upon this entire problem. Generally, as this subject is treated, we do not get any one point of view. The notions we have in regard to speculation and public movements concerning speculative gains are more or less vague, because we wander from point to point. Let us view the subject now from this one point,—modes of income and modifications of these modes. What is the conscious social tendency with respect to speculative gains? We can see when we review the whole ground,—although it may surprise those who have not done so,—that there is a clearly marked tendency unfavourable to speculative gains including chance gains or, as they are technically called, gains of conjuncture. The question is, What manifestation have we of this social desire? We cannot well understand the laws against lotteries, when we consider them as isolated from other laws and measures, but they become clearer as part of this general movement. We must think of speculation in the widest sense, in all its forms, good and bad, from the exercise of foresight on

behalf of society, with individual profit, which is legitimate, (and has a far wider scope than is generally understood) to gambling in its various forms. In lotteries we have an extreme case of the gains in speculation, and in the United States they are forbidden and there is a strong social sentiment against them, which is, however, of comparatively recent growth. American colleges have used lotteries as a source of revenue as late as the first half of the nineteenth century. But in Continental Europe they are frequently made governmental monopolies in order, it is alleged, to control the evil and reduce it to a minimum, private lotteries being forbidden. Lotteries on behalf of benevolent objects, however, still receive special authorisation and that with apparent ease, if one may judge from the conspicuous advertisements of them which everywhere greet the traveller in a city like Munich.

To-day when one buys a share in a national bank, one has, as a rule, the means of knowing very nearly what one is doing; if there is misrepresentation on the part of the managers of the bank in order to get the money of other people into their pockets, it is punished severely. We observe an increasingly severe inspection of banking business throughout the world and it is, in part, with a view to cutting down speculative gains. Publicity of corporate accounts tends in this direction; if such accounts had been honestly kept during the last two generations and had been made public, speculative gains and losses would have been very much diminished. Speculation finds a considerable field in secrecy of accounts and in false accounts. In the accounts of monop-

olies, especially, the tendency of unregulated private management is to cut down the apparent gains.

We find a movement somewhat antagonistic to profits in the desire to restrict and regulate the amount received by capital.[1] On the whole, however, people have not yet formulated to themselves a desire to lessen the receipt of income through capital, and the movement antagonistic to profits is not a fully self-conscious one; that is to say, it is a social movement which is not self-conscious as to this end, but it is directed against pure profit in the sense of a surplus over and above interest and wages of superintendence. This happens whenever public management takes the place of private management. The tendency in the United States and in less degree elsewhere is to lessen or eliminate pure profits by reducing charges, improving service, raising wages and shortening the hours of labour. But in some cases a profit is still retained. What could we call profits in the case of the German state railways? We have wages, of course. We have salaries of a certain sort, not very high, but of moderate amount. We have interest on the railway bonds which in a case of this kind become virtually, if not nominally, government bonds. We have return for capital invested. A return from the investments of land in this case would be analogous to the returns on capital. And yet a separation is possible, as is shown in Wisconsin by the valuation of the land occupied and used by railways in the State. Here we have a tendency to distribute among the public the gains in improvements and lower charges or else better facilities for the old charges, such as fine railway stations, etc.

The entrepreneur in public enterprise is some political unit; for example a city; and cities sometimes operate water works and other utilities for profit, diminishing taxes thereby. But on the whole, the tendency of public enterprise is not to seek profits in the sense here used of a surplus above wages, interest, etc. It seems a characteristic of private enterprise rather than of public. Whatever movement may exist in the direction of substitution of public for private business, is a tendency at the same time against profits.

We find also a tendency to reduce the gains of monopolies to what are regarded by legislatures and courts as fair returns to capital and enterprise. And fair is interpreted as in the main determined by the returns, under normal competitive conditions, of undertakings which may be compared to the monopolies with respect to magnitude, risks incurred, difficulties to be overcome, demands on managerial capacity, etc. Also it is strongly insisted by the Wisconsin Railroad Commission that the returns must be adequate to produce the desired service; in other words, society must pay the necessary supply price. The specialist will do well to consult the illuminating discussions of interests and profits in the Reports of the Wisconsin Railroad Commission. Here we have space for only the following quotation, which well states a prevailing tendency in modern economic society:

"The amount which constitutes a reasonable return upon the investment may also vary with both local and general conditions. In a general way the reasonable return may be said to be that rate of return at which capital and business ability can be had for development. Theoretically it can not be lower than this, for in that case no capital would enter the field. Under free competition it could not, in the long run, be higher than this figure, for if it was, the supply of capital for these purposes would be increased, and this increase, in turn, would tend to reduce the rate of profits and interest. But free competition is out of the question in the case of such utilities, for they are monopolistic in their nature. It is for this reason that in the case of such monopolies the term 'reasonable' has been substituted for the conditions otherwise brought about through competition. Since competition did not exist, it could not regulate, hence some other regulating force had to be resorted to. This force is implied in regulation through absolute legislation, and this regulation is guided by what is reasonable under the circumstances. To determine what is reasonable in any given case is a matter of investigation and judgment. . . . The reasonable rate of interest and profit can, perhaps, be said to be a rate that closely approximates the returns that are received upon capital invested in other undertakings where the risks involved and other conditions are similar." [2]

If we know exactly where a railway stands and exactly what its prospects are for the coming year, we have little opportunity for what might be called speculative gain. The telegraph does something to lessen speculative gains, through improved means of transportation and communication, and higher education makes it less easy to prey upon the public. We have, indeed, under the head of the movements which seek to cut off speculative gains, a direct abolition of speculative gains, even on behalf of worthy objects. This explains the movement against lotteries and everything of that sort, including contrivances to get money for churches which partake of a lottery character.

Finally, we have efforts to cut down the private receipts of the rent of land. Apart from the agitation of opponents of landed property, we have a pronounced movement in favour of the public ownership of natural treasures and water power. We have in our modern system of taxation a manifestation of this tendency. Some European countries have the increment taxes, which in the case of sales take a part of the increased value of land; but no country in the world imposes so heavy burdens on the land owner as the United States, where the people in their collective capacity take so much of the annual value of the land in taxes based on its selling value and in special assessments, as to make themselves virtual owners of a part of the land which is large in proportion to the entire value. Urban land is especially affected by this movement. We notice also throughout the world an effort for improved dwellings, which on the whole is a manifestation of the tendency to cut down speculative gains.[3]

We come next to *modifications in the treatment of gifts and inheritances*. This is one of the great world movements of the age, which attracts inadequate attention at the present time. We not only have the taxation of gifts and inheritances, but we have a regulation apart from taxation. This is the most important of all the modifications in the modes of acquisition of wealth, provided we take into account positively existing forces rather than wishes and aspirations manifested in the various agitations going forward in our day. If we take these into account, we should find that more important forces are suggested; but when we consider those

actually in operation, we cannot find any of them more important than this, and it is curious that there is so little discussion of it, especially as there is a great deal of action in the matter.[4]

We find revealed in these movements concerning the acquisition and development of private property two tendencies which are not quite the same. We have:

First, a general tendency to reduce or cut off the private receipt of most kinds of surplus value, while a strong special tendency may be discovered to increase the surplus value going to labour.

Second, the tendency to reduce to lower terms individually unearned incomes.

By surplus value the author means, briefly, the surplus over and above what we may call normal returns to those who supply capital and labour and to enterprise,—or to express it differently, a surplus beyond the returns necessary to secure the coöperation of the persons furnishing the factors or requisites of production. Economic surplus as here employed may be formally defined as follows:

By an economic surplus, as here used, may be understood a gain over and above such a return to the owners of the factors of production as will induce them to do their part in the work of production. Their part in the work means that they must take up the work and continue it. A certain return to the owners of each requisite in production is required in order to induce them to continue their part. For example: Let us suppose that we pay labour five cents a day wages; this will not induce labour to play its part in production, for the

simple reason that labour cannot continue its part; this would mean death. Let us suppose that we pay highly qualified labour a dollar a day; that will not induce highly qualified labour to do its part, because it is impossible for it to do its part for a dollar a day; it will cease to exist. Such a remuneration is not enough to make it possible for men to produce the qualifications. In order to secure talent, capital, and land,[5] we must have a certain return to offer, but over and above the return necessary to secure the coöperation of the requisites of production, we frequently find a surplus, and there is a general tendency to cut off the private receipt of this surplus value.

Let us take as a further illustration of surplus value the financial distribution of a certain city passenger railway company at one time. The stock of the company was then paying about 25% upon actual investment. This was after defraying the expenses of labour and paying salaries and fixed charges. At the same time the bonds which bore 5% were at a considerable premium, the writer remembering one quotation of 111. Of course the returns to stocks should be higher than the returns to bonds, inasmuch as interest on bonds must be paid first; but even making allowance for this, we find a considerable surplus value over and above the returns which were necessary to secure the coöperation of all the factors participating in the industry.[6] This is adduced simply as an illustration of surplus value. But another matter is still to be considered,—the initial risk. Perhaps the 25% involves no surplus in the sense in which the term has here been

used; *possibly* it was necessary at the start to make such terms to secure the coöperation of all the factors, to get the capital; the risk may have been great.

The second tendency is to reduce to lower terms individually unearned incomes. In the author's earlier notes he used the expression "a tendency to eliminate" unearned income, but this implied too much. While there is no tendency in that direction, there is a tendency to reduce it to lower terms; to eliminate unearned income might often mean to abolish inheritance, for inheritance frequently means an unearned income. But there unquestionably exists a tendency to decrease individually unearned incomes.

One or two other illustrations emphasise the idea of surplus value more clearly. Chautauqua, New York, the gathering place of the Chautauqua Assembly, illustrates admirably what is being attempted throughout the civilised world in this respect. The Chautauqua management attempts to cut off the private receipt of surplus value by an ingenious sort of taxation. It goes under the name not of taxation but of payment for privileges. If anyone does any business within the enclosure at Chautauqua he is obliged to pay to the Chautauqua management for the privilege of doing business in this summer city a sum which it is supposed leaves him returns for labour and capital and enterprise but nothing more. The intention is to give to each factor of production upon the grounds simply enough to induce it to continue its part in production. The butcher, for example, will be paid enough to induce him to continue his services; anything over and above that he

will have to pay to the Chautauqua Assembly. It is attempted to ascertain this amount by asking, What will you do for it? If one having the privilege is apparently paying too little, an attempt will be made to induce somebody else to take the privilege and pay more for it, and if no one else will take it, the refusal tends to show that the charge is adequate. Generally the dealers are shrewd enough not to make the mistake of paying too much. Although more or less complaint is heard, the dealers continue to do the work, thus showing that the amount which they receive is a sufficient inducement. The surplus value flowing into the Chautauqua treasury is used for general educational work and accrues to the benefit of society.

At the World's Fair at Chicago in 1893 a large income was derived from the concessions, so-called. But the whole aim of the management, expressed scientifically, was simply to cut off the private receipt of surplus value, exactly what is being done on the grounds of Chautauqua.[7] This description simply shows how the management pared off for themselves every time a surplus over and above such return to the factors in production as would induce them to continue their part in production.[8]

This cutting off of the private receipt of surplus value and reducing to lower terms private receipt of unearned income are parts of a still larger movement which has been at work for centuries, namely, the equalisation of opportunities. But this is something very different from the movement toward economic equality. We have been moving toward equality of opportunity;

we have not reached it, but we are approaching it. And this thought was very dear to the founders of the American Republic, especially to men of the Jefferson type. This is why they wanted to abolish monopolies of the old sort which were granted by sovereigns to favourites. The sources of inequality of opportunity, as the Fathers of this Republic saw them, were largely political, and as a matter of fact in those days they were indeed largely political. Political inequalities were the most obvious inequalities, so political inequalities were abolished. But since that time conditions of industrial development have changed, and those who are working in the same spirit to-day are turning their attention to inequalities in economic opportunity. These are the most serious at the present time. Consider the steps taken since our Republic was established. Political inequalities have been abolished, but that was not enough. Then our forefathers opened up the land to all and we had free land. It seemed for a time as if that must afford an approximation towards an equality of opportunity. But further measures were still needed. It became apparent that intellectual training carried with it power and that the one who lacked intellectual training lacked opportunity. So we established our free schools, abolishing tuition, in many States a still further step was taken in providing free textbooks, and now it is proposed that free lunches should be provided for those who need them because it is seen that some of the poorer children are so ill nourished that they cannot improve the opportunities afforded by public schools. That is combatted, just as the earlier idea of free schools

was combatted. But whatever may be said about it, whether it is desirable or undesirable, it is simply in line with this general movement. Thus besides the tendency to cut off the private receipt of surplus value, the efforts being made along so many lines are simply part and parcel of that movement which tends toward equalisation of opportunity.

The economic theories of surplus value have the closest connection with the struggle for equality of opportunity, and illustrate the general relation between life and all philosophical theories which have vitality. Produced by life, they react on life. The thinkers who have developed theories of surplus value have themselves used these theories in their struggles to secure equality of opportunity, as understood by them, even if mistakenly understood; or if they themselves have not tried to apply their theories to actual life others have arisen to make such a use of these theories. The general aim has been to reduce at least to lower terms individually unearned incomes or those conceived to be individually unearned, and thus to bring about a nearer approximation to equality of opportunity. The history of theories of surplus value is a long one, never yet satisfactorily written, and this is not the place to attempt anything at all exhaustive.

Let us, however, at this point take the briefest possible review of the thought of surplus value among the economists, for the idea itself, under different names, is as old as the science of economics, but has undergone change and development.

First of all, we must distinguish between different

ideas of surplus. We notice here four different ideas of surplus. We have surplus as defined, which we will call *the economic surplus in the narrower sense of the term, by which we mean an excess over and above what is required to secure the application of the requisites of production.*

Second, there is a larger sense in which we use the term. It may be used to mean a surplus over and above something received by a non-privileged class, even if we do not attach any idea of disapprobation to the existence of a privileged class. And this need not mean the same thing as the surplus in the narrower and stricter sense of the word. We might have this surplus and yet it might not be over and above what is necessary to secure the coöperation of the requisites of production, or of one or more of the requisites. In this sense we would say that interest is a surplus over and above what is received by the non-interest receiving class, and yet it may be true that interest is necessary to secure the requisite accumulation and use of capital.

Third, when we discuss the wealth of society at large, or of a particular portion thereof, we sometimes consider surplus to mean a surplus over and above general subsistence, if we may use such a term; for example, the surplus of the community; but this use has not led to any special theory of surplus value.

Fourth, we have the idea of surplus value, advanced by Karl Marx and entertained by many socialists, which is still somewhat different. By surplus value Karl Marx means the surplus produced by the worker over and above what he receives. Karl Marx claims that the production of value is due to labour, but that

the labourer does not receive the full product of his work, and that over and above what he receives there is a surplus enjoyed by other classes of society.

The first idea here given of a surplus, that in the narrower sense, is what we must regard as the idea of surplus value in the strict sense of the word, and it is that to which we will give special attention.

But let us now observe the growth of the idea of surplus in this narrow and strict sense of the term. This idea of the surplus in the narrower sense was introduced into economic literature by the Physiocrats.[9] They regarded rent as a surplus in this narrow sense. It was, they thought, a surplus accruing to the individual; not something that could be abolished socially, for it came as a necessary result of the characteristics of land. But the private receipt of rent, even if desirable, was held to be needless; in other words a surplus. Rent would also be a surplus in the larger sense,—a surplus enjoyed by a privileged class, an excess over what was enjoyed by the non-privileged class. This idea of rent as a surplus was also entertained by the followers of the Physiocrats, by Adam Smith and the classical economists and, generally speaking, by the socialists. But Adam Smith enlarged the idea of a surplus, by the inclusion of interest in surplus. In one place he speaks of profits (undifferentiated from interest) as surplus, as something abstracted from the products of labour. He says that in the natural state of society, preceding the appropriation of land and the accumulation of capital, the entire production of labour belonged to labour, and that if this natural condition had continued,

it would not have been necessary for labour to share its earning with land owners and capitalists. In this way, therefore, we might call rent and profits a surplus over and above what accrues to labour, a surplus somewhat in the sense in which Karl Marx uses the term, although Adam Smith does not necessarily attach disapprobation to the idea of surplus, and certainly not when it means profits. And it must be remembered that Adam Smith's theoretical ideas are not to be gathered from what he says about an imaginary natural condition of society. It is to be noticed further that in the discussion of taxation Adam Smith differentiates interest and profits, and says that the former, *viz.*, interest, is a non-get-at-able surplus.[10] But he would call rent a get-at-able surplus, and he does by implication attach a certain disapprobation to the receipt of rent because he says the landlords, like other men, love to reap where they have never sown, and to have a return without any exertion.

We may say that Ricardo somewhat enlarged the idea of a surplus. It would appear that profits, according to Ricardo, could be regarded to some considerable extent as a surplus. Ricardo's idea of interest includes a surplus over and above what is necessary to induce capital to continue its work. This is shown quite clearly in that chapter in Ricardo's treatise, *Principles of Political Economy and Taxation*, in which he discusses "Gross and Net Revenue" (Chap. XXVI). He recognised there that sometimes even the wages of labour may contain a surplus, but generally, he says, the wages of labour are necessary to induce labour to continue

its work in production. This is his idea of normal wages. Now it is not necessary that there should be any private receipt of rent, because the work of production goes on on the margin, so that without the private receipt of rent, the work of production would still go on. Nor would it seem to be necessary that there should be any definite return to the owner of capital. Capital will take what it can get, and that is determined by the margin of production. All that is produced on this margin must of necessity be divided between labour and capital. What labour receives, according to the Ricardian law, is a fixed sum, and what capital receives is the difference between what labour receives and what is produced on the margin. So that according to Ricardo a very considerable part, if not almost the whole, of profits would be surplus. He seems to imply that a certain amount of profits must be placed among costs. Rent and profit constitute net revenue and a nation's power "of supporting fleets and armies, and all species of unproductive labour must be in proportion to its net, and not in proportion to its gross income," "the power of paying taxes is in proportion to the net, and not in proportion to the gross revenue."[11] We must say, therefore, that Ricardo had much the same idea of a surplus that Adam Smith had, enlarging it only slightly; but he especially contributed to the growth of the socialistic idea of surplus by the logical method of his reasoning.

After the Physiocrats, however, the man who contributed most to the idea of a surplus was, perhaps, Nassau Senior. He looked upon rent as individual surplus, but he enlarged very greatly the idea of rent

and he included under rent the income yielded by inherited wealth, considering this income to be a part of surplus. All income which is not a return for effort and sacrifice Senior regards as surplus. Wages are a return for sacrifice, and, according to Senior, profits are a return for sacrifice. The sacrifice of the capitalist is abstinence, and for this sacrifice he receives a return called profits (interest). Consequently, in the strict and narrow sense of the term, according to Senior, interest should not be regarded as a surplus, but as a return for a peculiar sacrifice which he designates as abstinence. Senior defines rent as "the revenue spontaneously offered by nature or accident." And he says, "If wages and profits are to be considered as the rewards of peculiar sacrifices, the former, the remuneration for labour, and the latter for abstinence from immediate enjoyment, it is clear that under the term rent must be included all that is obtained without any sacrifice; or, which is the same thing, beyond the remuneration for that sacrifice; all that nature or fortune bestows, either without any exertion on the part of the recipient, or, in addition to the average remuneration for the exercise of industry or the employment of capital."[12]

We notice that he says that under the term rent must be included all that is obtained without any sacrifice, or beyond the remuneration for that sacrifice,—what we might call a normal return for sacrifice. He does not express the idea very clearly, but what he describes is what we call surplus value. What he calls rent is something over and above what is necessary to induce

the factors of production to continue their part in the work of production. The revenue from a dock or wharf, for example, Senior calls profit, when in the hands of the original constructor, because it, with wages, is necessary to induce the factors of production to construct the docks and wharf, and he calls part wages and part profits. But when the dock or wharf passes over to the heirs of the constructor, then it has all the attributes of rent, because the income which it brings in to the heir is not a return for sacrifice. The original constructor has received his reward. To the heir it is the gift of fortune, not the reward of sacrifice. It is in this way that Senior on the one hand cuts down the idea of surplus value, removing interest in the case of the saver, but on the other hand enlarges very greatly the idea of rent or surplus value by adding inherited wealth, or any profits which would be in excess of the "average return".[13] He also includes any surplus earnings due to extraordinary talent and the returns due to fortune or chance, or what we would technically call the gains of conjuncture. These are his words: "Such are the fortuitous profits of the holders of warlike stores on the breaking out of unexpected hostilities; or, of the holders of black cloth on the sudden death of one of the royal family. Such would be the additional revenue of an Anglesea miner, if, instead of copper, he should come on an equally fertile vein of silver. The silver would, without doubt, be obtained by means of labour and abstinence; but they would have been repaid by an equal amount of copper. The extra value of the silver would be the gift of nature, and therefore rent."[14]

Tracing this idea of a surplus along the current of economic thought, we come to John Stuart Mill, who, although he dwelt upon the idea of a surplus, contracted it somewhat as compared with Ricardo and Senior. For John Stuart Mill introduced the idea of minimum profits. Ricardo did not clearly express the idea of a certain minimum necessary in order to secure the application of capital to industry. It would seem, according to Ricardo, that there was scarcely any limit to the possible fall in profits, but John Stuart Mill said that there was a certain minimum, because if we go below that, the reward to capital would not be sufficient to maintain the existing amount of capital; but, on the contrary, if we go below that minimum, then the amount of capital will decrease. Thus in this way the idea of a surplus was narrowed. According to this idea, any return upon capital in excess of the minimum would have to be looked upon as a possible surplus, not necessarily a surplus at a given time and place.

We then return to the idea of an economic surplus in the narrow sense. This economic surplus may be divided into four parts. The surplus is a return over and above normal wages and profits (including interest), consisting of

I. Rent.
II. Interest (in part).
III. Gains of monopoly.
IV. The surplus gains of conjuncture.
V. Personal surplus.[15]

It is impossible here and now to treat these economic categories, for that belongs elsewhere in the distribution

of wealth, and we must assume some familiarity with the elements of economics. By rent, it may be said, we here mean primarily land rent, as used by the classical economists, including the rents for natural powers associated with land. The interest rate is high enough to afford a recompense for marginal waiting; in other words the waiting that would not take place were the rate of interest lower than it is. But for other waiting there is a surplus beyond what is necessary to secure the inducement. With a lower rate, there are, indeed, many who would save even more than they do, because a larger amount of capital would be required to provide an income which is regarded by them as essential. It is plain then, that in interest paid, there is often an individual surplus, and in income taxes a part of this is regularly taken.[16]

Monopoly gains as here understood are a surplus due to the absence of competition and are over and above the current rate of competitive profits.[17] They cannot be discussed further in this place.

The surplus of conjuncture is a somewhat less familiar term and may require a word or two. We mean the gains of fortune, not to be foreseen, which bring to the individual income from changes beyond his control. Drought or flood may cause abnormally high prices, bringing great gain to those not afflicted thereby.

The demand for crêpe and mourning material generally, in the case of the sudden death of a sovereign in a monarchical country, is a typical illustration, already mentioned in the quotation from Nassau Senior.

Closely connected with the foregoing, would be the gains due to unforeseen fluctuations in fashions.[18] Other kinds of conjunctural gains will occur to the reader as a result of reflection and observation.

Personal surplus signifies unusual returns due to superior ability, and a part of this is taken for public purposes where an income tax exists in addition to what is taken in taxation by indirect processes. Not all of the earnings of those who receive incomes above the average or even far above the average may be regarded as surplus. We have to consider the costs of production in many cases, the expensive training of a highly skilled physician, for example; and also we must remember that in so far as higher earnings are necessary to produce the supply, they are also a part of the costs of production. Here as elsewhere a difference is also found between what can be taken through taxation by a particular locality, a state, a nation, and by the world at large. If talent is encouraged in one place and discouraged in another, the first place is likely to attract it and the second to lose it. But we cannot enter into many refinements here.

We have also here as elsewhere to distinguish between the individual point of view and the social point of view. To the individual who pays for land, that payment or the interest on it constitutes a cost of production, and the rental value of the land cannot be taken from him without depriving him of his property. A discrimination would be exercised against him in confiscation, the nature of which will be later considered. At the same time, from the point of view of

society, the rental value of land which has cost nothing is a surplus to the individual who receives it.

Now various classes of reformers have their own particular methods of dealing with surplus value in their efforts to secure equality of opportunity. The socialists, generally speaking, would use all surplus gains for general public purposes, especially for the increase of wages, to them the greatest of public purposes. The single taxers would take all the pure rent of land for public purposes, and thus abolish private property in land, for this would no longer exist in any true sense after the value had been absorbed in taxation.

Civilised society at large, as seen in the movements of progressive governments, is reducing to lower terms surplus value in what we term its narrow or scientific meaning. Private monopoly in particular is being either abolished or so regulated as to remove the privileged position of the monopolists. The land owner in America, in particular, is already bearing the lion's share of public burdens [19] of all the governments except the federal, and we observe a clear inclination to scrutinise more and more closely all his gains. Many cities in Europe are imposing increment taxes and taking a portion of the increases in land values when sales are made. We thus notice a world-wide movement in the direction of equality of opportunity with respect to property and income which finds expression in one mode or another of dealing with surplus value.[20]

But one thing is clear: Up to the present time the movement for equality of opportunity finds its sharp limitations in property, contract, inheritance, and vested

rights. Society shows no inclination to consent to the abolition of these fundamental institutions. It holds to the view that general loss and not gain would result therefrom. There might be a nearer approach to equality, but it is held that this equality would be on a far lower plane of economic well-being than that which now exists.

Notes and References to Chapter XVI

[1] P. 391. As an illustration of cutting down profits we may again mention the regulation of public utilities by the Wisconsin Railroad Commission. Of course the common law rule that rates must be reasonable has always applied. However, it was not until commissions were created to enforce this rule that it was really made effective.

[2] P. 393. Wisconsin Railroad Commission *Reports*, Vol. III, pp. 778, 793, Menominee and Marinette Light and Traction Company; see also reference to the same case in Howard T. Lewis's art. on "Interest and Profits in Rate Regulation," *Political Science Quarterly*, Vol. XXVII, No. 2, pp. 253, 254.

[3] P. 394. It is the author's intention to treat this subject more fully in his work on *Landed Property and the Rent of Land.*

[4] P. 395. Early in the nineteenth century we had a large amount of discussion but comparatively little action. It is suggested that this is what often happens. At first we have a great deal of discussion of a subject but no action; and then when the discussion has subsided men begin to act. This is the case with regard to inheritance at any rate. The subject was much discussed, especially by the socialists, before it apparently produced any effect. Saint-Simon, a French socialist, who lived in the first part of the nineteenth century, according to Professor Lorenz von Stein, made the question a thoroughly live one. Von Stein makes this assertion concerning the activity of Saint-Simon in this direction: "He first brought forward the question of inheritance, the question upon the discussion of which the entire future of the social form of Europe will rest during the next two generations." (L. von Stein, *Geschichte der sozialen Bewegung in Frankreich*, Vol. II, pp. 226–7. Quoted in Ely's *French and German Socialism*, p. 80). Von Stein said this in about 1850. The movement, however, has not gone so rapidly as he thought it would go.

[5] P. 396. In the case of land, the institution of private property in land is taken for granted in this place. As things stand he who wants land must pay for it, just as he must pay for machinery.

[6] P. 396. It cannot be said offhand how great is the surplus value in a case of this kind. Necessary supply costs must include a return for risks incurred, and sometimes a high return is simply a promised reward for apparently great risks. However, we know that in many cases society has made bad bargains, resulting in the private receipt of large amounts of surplus value.

[7] P. 398. There lies before the writer a copy of a quotation from the *Chicago Tribune* in which this process of granting concessions is described. The headings are as follows:

ECONOMIC SURPLUS

OUT OF CONCESSIONS

Big Income to the World's Fair from this Source

SOME ABLE FINANCIERING

THE WAYS AND MEANS COMMITTEE MAKE A GOOD RECORD

THEY KNOW HOW TO BARGAIN

CONCESSIONAIRES MADE TO PAY FOR WHAT WHEY GET

(Editorial sheet, *Chicago Daily Tribune*, January 14, 1893.)
Then follows a detailed and interesting description of estimated receipts.

[8] P. 398. For a treatment of equalisation of opportunities, *cf.* chapter on "Rivalry and Success in Economic Life" in the author's work *The Evolution of Industrial Society*, Part II, Chap. II.

[9] P. 402. For a discussion of the Physiocrats see Haney's *History of Economic Thought*, Chap. IX.

[10] P. 403. *Wealth of Nations*, Book V, Chap. II, Pt. II, Art. II, p. 332, ed. Cannan.

[11] P. 404. Ricardo, *Principles of Political Economy and Taxation*, ed. Gonner, pp. 336, 337.

[12] P. 405. Senior, *Political Economy*, pp. 128, 91–2.

[13] P. 406. This is not accurate, for "average" returns would include Senior's surplus. He really means normal marginal returns.

[14] P. 406. *Op. cit.*, p. 129.

[15] P. 407. Mr. J. A. Hobson, in his book *Economics of Distribution*, and elsewhere, elaborates the idea of a surplus in bargaining. The

present writer is unable to look upon this as a separate and distinct sort of surplus. It seems rather to be the channel through which various kinds of surplus find expression; for example, the gains of the monopolist, the rent of the land owner, at times even the wages of labour. Superior economic strength manifests itself in the bargain; but the bargain is not the chief cause of the superiority. Naturally it would take us too far afield to give further reasons for this view.

[16] P. 408. Ely's *Outlines of Economics*, revised ed., Chap. XXIV, "Interest," especially pp. 416–422.

[17] P. 408. See the author's *Monopolies and Trusts* and his *Outlines of Economics* if a further treatment of his views is desired.

[18] P. 409. Louise of Tuscany, former Crown Princess of Saxony, tells us in her memoirs that she once wore at the opera a dress somewhat out of the ordinary, which so pleased the public that almost immediately the entire supply of the material in Dresden was exhausted.

[19] P. 410. See Ely before the *Verein fur Sozialpolitik*, Nuremberg meeting, October, 1911.

[20] P. 410. This is only one of the numerous places referred to in the Preface where the author has been obliged to cut severely this manuscript and exercise great self-restraint to avoid an undue expansion of the present volume.

CHAPTER XVII

THE PRESENT AND FUTURE DEVELOPMENT OF PRIVATE PROPERTY (Continued): THE REGULATION OF INHERITANCE

As already remarked, we use inheritance in the large sense, including bequests. We mean simply the transmission of property from generation to generation. Once in a generation the bulk of property changes hands by death, and admittedly it may be regulated by legislation without limit. By legislation in a country like the United States, we mean constitutional provisions as well as ordinary statute law.

First of all let us notice a distinction made by Blackstone, and recognised by our courts, between private property and inheritance. We have here to do with two distinct rights and not with one right. There is an inclination to put the two together, but we cannot do that. Private property means the right to exclusive control, and inheritance determines how this right shall pass from generation to generation. Blackstone says: "Naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and

inconvenient. All property must therefore cease upon death, considering men *as absolute individuals*, and unconnected with civil society. . . . Wills, therefore, and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having distinct ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments." [1]

Quite in line with this we find an utterance of the late Sir William Harcourt, when he introduced the new "Death Duties" into the English Parliament in 1894, as follows, "Nature gives a man no power over his earthly goods beyond the term of his life; what power he possesses to prolong his will beyond his life—the right of a dead hand to dispose of property—is a pure creation of the law, and the State has the right to prescribe the conditions and the limitations under which that power shall be exercised." [2]

This is also the view of the Supreme Court of the United States, according to which the state can tax inheritances and otherwise regulate them as it sees fit. In the well-known case of Magoun *v.* Illinois Trust and Savings Bank (1897) Mr. Justice McKenna, speaking for the court, used these words:

"An inheritance tax is not one on property, but one on the succession. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation." [3]

Quite as emphatic utterances are the following from the State courts of Virginia and North Carolina. In the case of Eyre *v.* Jakob, 14 Grat. 422 (1858), p. 430, Mr. Justice Lee, of Virginia, declared:

"It (the legislature) may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses."

And Mr. Justice Rodman, of North Carolina, in Pullen *v.* Commissioners, 66 N. C. 368 (1872), p. 363 laid down the following:

"Property itself as well as the succession to it is the creature of positive law. . . . The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully impair."

But Wisconsin appears to be almost alone among the leading States in the attitude that its Supreme Court takes towards limitation of legislative control of successions. First it holds that the rule of equality demands that the rate of progression on the taxation of inheritances shall be based on the shares of an estate received, and not on the estate as a whole; for example, an estate of a million dollars going to one son must be

taxed at a higher rate than an estate of a million dollars going to ten sons. In the latter case the tax must be at the rate established for one hundred thousand dollars.[4] The result of this application of the rule of uniformity appears to be fortunate in its effect upon the distribution of wealth; but in the same case, in a separate opinion, Mr. Justice Marshall voiced a view of natural rights which is hardly consistent with the progressive attitude of this court in recent years. In this separate opinion he uses these words:

"My conclusions are that the species of legislation under discussion (inheritance taxes) cannot be justified upon the ground that there is no natural right whatever to transmit property by inheritance; that the ownership of property does not in any sense rest on a conditional bestowal thereof in the first instance by sovereign authority, subject to the sovereign resumption of ownership upon the death of the owner thereof if the sovereign so wills; that a succeeding private owner of property by inheritance does not come to the possession of the same in any sense as a beneficiary of a sovereign head. The absolute title of the constitution must necessarily be considered, I think, as a title by right absolute, as absolute as any right which is subject, as all are, to reasonable regulations, or having, as incidental thereto, not the mere privilege, but the right in some way to have the property pass to a private successor in case of the death of the owner and the right of kindred to have it so pass. We repeat what has been said: that is one of the prime essentials of the pursuit of happiness declared in the constitution to be an inherent possession of all men. Who could define the constitutional meaning of that term and leave out any of those things universally supposed to be necessary accompaniments of civilized society? The social instinct suggests at once that it must include, as incidental

to the right to dwell together in the family relation, the right, not only to acquire and enjoy property in the physical sense, but to have the mental enjoyment of transmitting it to others in the family relation under such reasonable regulations as legislative wisdom may see fit to impose." [5]

This decision, from which the foregoing extracts are taken, was rendered in 1902. In 1906 the inheritance tax law was held constitutional, Mr. Justice Winslow using these words: "That the right to take property by inheritance or by will is a natural right protected by the constitution, which cannot be wholly taken away or substantially impaired by the legislature." The court agreed with this utterance, although recognising that the weight of opinion, together with the United States court, was against it. It declared that it believed the right to will property exists inherently, referring to the Declaration of Independence which in turn is copied substantially by every State Constitution. "Inherent rights" and "pursuit of happiness", it said, include the right to devise for children or dependents.[6] In 1909, in another case, the inheritance tax law was again held constitutional, Mr. Justice Winslow using these words:

"The right to receive property by inheritance or will is an inherent right, subject to reasonable regulation and taxation, but not abrogation by the legislature." [7]

The court thus took the position of Mr. Justice Marshall in the earlier case, Black *v.* The State; but the *Cyclopædia of Law and Procedure* quotes the United States Supreme Court and fourteen jurisdictions against Wisconsin.[8]

The importance of the subject justifies these long quotations showing the dominant view and an isolated dissenting view of a court which nevertheless upheld the constitutionality of one of the best inheritance tax laws in the United States.

As a matter of fact, laws and customs have regulated inheritance in divers ways, and there is no uniformity. What seems natural is, in a large degree, the result of laws and customs. One may say a certain thing is "natural" with respect to inheritance. But what one says is natural is that to which one has become accustomed. In Virginia in the eighteenth century the oldest son has had what was looked upon as a "natural right" to a double share, and it seemed like a violation of that natural right that the children should inherit equally. As a matter of fact, the power to make a will and testament is one which has not been generally recognised, taking the world's history as a whole, but the right to make a testament, or the claim to such a right, would have seemed to the majority of human beings a very great presumption. Sir Henry Sumner Maine says, "The power of free testamentary disposition implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual." [9] Then we have along the same line a legal maxim in the old Teutonic law which says, "God, not man, makes heirs."

Professor von Scheel, in his article on the law of inheritance,[10] mentions four different points of view, according to which property may be distributed as it passes from generation to generation. First, it may be

distributed in accordance with blood relationship, with more or less consideration for the widow; this is the dominant idea. The German law places the widow on about the same footing as the nearest relative. In France the widow is not so favoured. In the United States she is more favoured than a blood relative, where the general rule is that she shall receive one-third, absolutely, of personalty, and life interest in one-third of realty; that is to say, she receives more than each child if there are more than two children; and it is to be noted further that she cannot be disinherited.[11] This blood relationship is the principle generally followed. It was the principle of the Roman law and it has passed over to us. It is easy of application and, as Von Scheel says, it rarely fails. It is to be noticed in this connection that relationship may be traced differently. There are two main ways of tracing relationship,—one is according to lines [12] and another is according to degree of relationship.[13] If we take certain lines, favouring each line equally at the start, and let the property keep within that line, we have the system which is followed in Austria, the so-called parentelic system. Thus we have the first point of view according to which property can be distributed, as follows:

I. Blood relationship.
   1. According to lines.
   2. According to degree of relationship.

II. The second point of view is according to the social connections of the heirs with the deceased; that is, the social bond or ties binding the heirs to the deceased. Here the natural heirs are first of all the wife

and next the children. The distant relatives would not inherit, unless they have lived with the deceased or have had some kind of an economic connection with him, as they have no real social tie otherwise; but the children have such a tie, and so does the wife. When we have this system, there is no "laughing heir", as he is called; *der lachende Erbe* being the German term for the distant relative who laughs when he gets the inheritance. Nowadays the social connection resting upon the basis of blood is narrowly limited. As a rule it does not carry the relationship very far. Professor von Scheel says it does not go beyond parents and grandparents and children of brothers and sisters; for he does not admit that anyone more distantly related than first cousins can inherit if we have inheritance according to social connection with the deceased. Provision can be made by will for more distant relatives when there is a real ground therefor.

While it is difficult to apply this point of view, Professor von Scheel regards it as superior to the first.

III. The third point of view is inheritance in accordance with services or participation of some sort in the creation of wealth. Take the case of the wife: It has been argued that she took part in the creation of the wealth if the deceased was led to acquire it for her even without direct economic contribution on her part because, it is urged, she was present in the thought of the one who created the wealth and thus she participated in it. We have, on the other hand, a more obvious participation when we have a direct economic participation in the wealth-creation as when, for instance, the wife of

a grocer helps to wait on the customers. If it is not the wife it is one of the nearest relatives, as a rule, who in this way shares in the wealth-production and who is one of the chief heirs if the property is divided in accordance with participation in its creation.

We have to consider in this case the claims of political units, of the state and of local political units. The society in which we live participates in the creation of wealth, for unless we have such society, there would be no considerable creation of wealth.

Under this head there is participation through affection and regard. For example, let us ask the question, Which stands nearer to us, the town in which we have grown up and in which we have many friends, or a third cousin whom we have never seen? Most people would feel that the town stood much nearer to them than a relative whom they never saw, who never saw them and who has no regard for them whatever, and would not do so much for them as for some one in the town with whom they had no ties of blood. Most people would much rather, in the case of absence of will, that their property should go to the town than that it should go to a third cousin. So if we take the standpoint of the wishes of the deceased, we have no right to think that we are carrying out his wishes in giving his property to a distant cousin who cared nothing for him, rather than to the town or city in which he lived.

IV. According to the fourth point of view, distribution will be made among those who will make the best use of the property; that is, the best use for society, and this means chiefly those who will employ the property

most productively. This was the scheme of Bazard, one of the followers of the French socialist, Saint-Simon. He proposed that property should be taken by the state from the descendants, and given to those who would make the best use of it. He held that the ownership of property was like a political office; as the idea of society is to convey office to the one who will use it as a trust for society, so the state should take property as it passes from generation to generation and put it into the hands of those who will make the best use of it. This plan would give the land to those who had special capacities for cultivating land, etc., but the Saint-Simonians themselves modified the scheme.[14]

There are various aims which we may have in view to be accomplished in the distribution of wealth. Professor von Scheel has another article on inheritance in Hirth's *Annalen des Deutschen Reiches*, in the issue for 1877,[15] called the "Taxation of Inheritance." He mentions in this article three aims to be sought by inheritance laws in general, as follows:

"In general," he says, "the property which becomes free through death should be distributed anew in a manner which corresponds with the views, the conditions, the needs of the culture-period, which, in a given nation, has been reached at the given time. The law must be such as to bring about the distribution of the property which corresponds with that stage of development which has been reached, and each stage of development carries with it certain views, and conditions, and needs. It has to correspond with the needs of a given degree of culture."[16] The old meaning of inheritance laws has

disappeared. Times have changed and old laws mean something different on account of changes in circumstances and needs. The laws must be such as to assist us in meeting the needs of the present. The three aims to be sought in these laws, as stated by him, are as follows:

1. Provision for the family, for wife and children.
2. The preservation of small properties; laws which will prevent the destruction of small properties through excessive subdivision. Small properties may disappear, because too much subdivided, or they may come to have a different character.
3. Economic justice. There should be no inheritance without an economic motive.

We have considered inheritance chiefly as determined by law, and have mentioned only incidentally inheritance as determined by last will and testament. That will presently receive further consideration.

The present author holds that four aims are to be kept before us in the distribution of wealth through the laws of inheritance:

I. The continuation of the régime of private property as dominant in the social order.
II. The wishes of the individual.
III. The well-being of the family.
IV. The well-being of society.

In regard to the first object, little needs to be said. The question is simply this,—Do we decide on the whole in favour of socialism, or in favour of the present social order? If the latter, then we want a kind of regulation of inheritance which will preserve private property.

We wish to bring it about that when an owner of property dies, some private individual shall succeed him and carry on his economic activity in the use of his property. If we want socialism, there is probably no easier way to get it than to change the order of the inheritance of property, because through changes in inheritance of property we could bring about collectivity of property, making society the owner of it all in a comparatively short period. But if we say that we want to continue the present régime we must interpret exactly what we mean by the present régime. When we say that we desire the present régime as opposed to socialism, we do not mean that we wish to keep things exactly as they are, but simply that private property should, on the whole, be dominant. The writer, for example, is quite willing to see an expansion of public property along certain lines, but he is not willing to give adhesion to anything which would make collective public property in capital and land dominant.

In the second place, we should consider the wishes of the individual, that is, his wishes before his death. We must regard his wishes as subordinate, however, because the earth belongs to the living and not to the dead. Anything that looks like a claim of the dead is in reality the claim of some living person. It may add to a person's happiness to look forward to what shall be after he is dead and gone. We decide, therefore, that so far as no one is injured thereby, let the individual make a will and let the will prevail. That gives us a guiding point. We do not allow the wishes of the dead to prevail in other respects, why should they in respect to

property? And we must also say this, that to a certain extent the power of making a will injures the individual himself. It gathers flatterers and sycophants about him. This is something which is a matter of familiar knowledge. It is admirably described by Plato, by Juvenal and the Roman satirists and by countless others since their day.

But we pass on to the third point of view—the welfare of the family. F. H. Geffcken says that the law of inheritance "in its foundation and purpose is the material continuity and safety of the family." [17] The German philosopher, Trendelenburg, in his work on *Natural Law*, says that the right of inheritance exists first of all for the preservation of the family, and that the wishes and purposes of the decedent come second in order of importance. This view limits very materially the right of making a will.[18] The family as a social institution has in recent years been neglected, although more attention has been given to this subject within the past fifteen or twenty years than previously in the most modern times. But we have to ask who it is that constitutes the family. This question has already been answered. In case of intestacy, the present legal view would in some places include nearly all relatives who could trace any blood ties. But this is a survival of an older time. Miaskowski,[19] says that inheritance in the case of intestacy should cease with that degree of relationship with which, as a rule, the feeling or consciousness of relationship ceases.[20] That would give us a different degree according to the country and the age which we are considering. At one time the feeling or consciousness of relationship goes

further than at another time, and further in one part of the world than in another. It goes further in Virginia than in Wisconsin, for example, so that it would perhaps be the same thing to cut off inheritance with the third cousin in Virginia as with the second cousin in Wisconsin, roughly and generally speaking.

We have seen already how we treat the family in case of intestacy. But in the case of a will and testament we, in America, do not give any recognition to the family beyond the claims of the wife, that is, recognition in opposition to the will and testament. The wife is the only one who in the United States has a share even against the will and testament. In an article entitled "About Wills and Testaments," Judge A. E. Thomas,[21] says, "A general statute providing that, except for special reasons, each child shall receive share and share alike, would not only appear to be the most equitable in by far the majority of instances, but would promote family concord and happiness and would diminish family feuds and litigations to a remarkable extent." Judge Thomas would provide for the widow first; in case of no descendants he would allow greater latitude than otherwise.

Now in other countries outside of England and the United States it is a rule that children cannot be disinherited. This was certainly the case with the Roman law in its highest form and development. It gives a certain share to each child, what is called a *legitima portio*.[22] And in Germany we find a similar arrangement under the designation of *Pflichtteil,* or duty part. This is especially instructive to Americans and Englishmen

who have not adequately preserved the idea of the family in the laws governing the inheritance of property. This matter is now regulated for the whole of Germany by the new civil code (*Das Bürgerliche Gesetzbuch*).

Briefly outlined we find the following provisions in Germany in regard to the "duty parts". Anyone may dispose of his property by will and may leave it to others than those who have claims to "duty" shares, but in that case those entitled to portions may demand their portions from the person or persons to whom the property has been left, and the duty part is equal to one-half the part that would be received in case no will had been made. If in absence of a will, for example, a child is entitled to one-third, his duty part is one-half of one-third, that is to say, one-sixth. Those who are entitled to shares are (1) husband and wife; (2) descendants; (3) parents. Husband and wife and children have always claims. Descendants more remote than children (grandchildren, great grand-children, etc.) and parents have duty parts when they are not excluded by nearer relatives—for example, the grandchildren of living parents would be excluded. Those who are entitled to duty parts can be excluded by will and testament only for certain causes which must be explicitly stated in that will and testament. Descendants and parents may be excluded from inheritance if they have made an attempt on the life of the decedent, or of his wife (or husband as the case may be) or his other descendants: when they have been guilty of a criminal offence against the decedent or the husband or wife of the decedent; if they have neglected their duty to support the decedent in

need; if children have been guilty of grossly immoral and disgraceful conduct. A husband or wife may be excluded if guilty of conduct which would be ground for divorce. But the ground for disinheritance must be expressly stated in the will and testament and the statement must be true.[23]

It is difficult to say how much shall be left to each child when we depart from equal distribution. It must be remembered, however, that a father may well have excellent grounds for preferring one child, as, for example, preferring an invalid child when the others are strong and vigorous; or an unmarried daughter when the sons are already started in life. But it may be provided, that if one child is preferred, the grounds for preferring this child should be expressly stated; especially should this be so if one is left without any share, as in the case of small property. We cannot go into all the details of this now. It is suggested as one way to strengthen the idea of the family and as promotive of family feeling, that it would be desirable to encourage small bequests to servants who have served long in the family, making them free from an inheritance tax. The tendency would be to help to bind together the household.

Another thought is this: To make duty go as far as rights. Perhaps this can be carried out so as to extend the duty of support. Why should anyone have a claim in the absence of a will if he is under no obligation? We do not extend obligations sufficiently; in some places a father has no legal claim upon a son even if the son has a large property, and yet the son would think himself unfairly treated if he did not inherit his father's property. But within these various limitations suggested by the interests of the family and the well-being of society, the right of a last will and testament is to be preserved.

We take up next the well-being of society. What does that demand? We have already seen that the well-being of society demands that the family be considered; the family is the social unit. So in providing for the family, for the unity and security of the family, we are promoting the interests of society. In this connection also we have to consider the distribution of property in the interests of production, handing property over to the wise and provident, so far as may be. In case a father were obliged in his will to give grounds for discrimination among the various members of his family, we might have as a ground for allowing certain inequalities, the prudence and wisdom of some above that of others. The question then would be whether he had done all he could to educate each one of his children. We have to consider also the holdings of land, whether they are too small or not. If they are too small, they will injure production. It might be said here that we desire the wide-spread diffusion of competence as better calculated to bring about the well-being of society than colossal fortunes.

Thus under the head of the well-being of society we notice these reasons for allowing a certain latitude in the testamentary disposition of property:

1. The wise use of property, which use it is hoped may be thereby promoted. The prevention of the undue cutting up of individual properties.

2. The incentive thereby secured for the accumulation of property.

3. The provision for the needy and meritorious and for public needs.

Another thing remains to be considered in connection with the well-being of society, and that is that society now, to some extent, takes the place of the family in earlier days. Obligations which rested upon the family in earlier days when it included the most distant relatives, now rest upon society, and the claims which the individual has upon society give society a counter claim which justifies the taxation of inheritance as a correlative right. The duty of support, which once rested upon distant relatives, has now passed over to society and is incorporated in the state; and as society has taken some of the obligations, it is only proper for society to claim some of the rights which formerly belonged to the family.

The rights of society are also promoted and protected by the taxation of inheritance. There are various views that we may take concerning this. We may look upon the state as a co-heir and claim that the state has participated in production.

According to Dr. Max West, eight different views have been advanced to justify the taxation of inheritance.[24] As they are theories to justify inheritance taxation in the interest of society, they could all be placed under our fourth head. We will now present, with comments, Dr. West's eight theories:

I. The limitation of inheritance and the extension of escheat. This was Jeremy Bentham's view.

II. The effect on the diffusion of wealth.

III. Taxation a return for government services in general (co-heir).

IV. A return for special government services connected with inheritance and bequest. The government does render special service at such a time. The heir and legatees may be far away and the property left without a guardian; the state steps in and protects the property at such a time. It renders peculiar service of pecuniary value.

V. Defraying the costs of probate court.

VI. Payment of back taxes. This is a view which can be advanced especially in regard to large estates which very frequently do not pay the taxes to which the state has a rightful claim. Very large properties are undertaxed as a rule, and inheritance taxation can be looked upon as payment, to a certain extent, of back taxes. In Maryland, for example, if a rich man dies, it frequently happens that the estate has been undertaxed, and the county officers send in a claim for back taxes for three or four years. Then the executors or administrators object to the claim and say that they will fight the case in the courts; but evidently both parties are afraid to bring the case into the courts and so it happens that the State, through the county officers, lays claim to perhaps $100,000. The executors and administrators will perhaps offer to pay $10,000, which is not accepted; then both parties claim that they will bring it into the courts, which they do not do and there always follows some kind of compromise; rather a peculiar arrangement. Under the name of back taxes,

Maryland has long collected on large estates what really amounts to a sort of inheritance tax.

An inheritance tax, even with that name, may sometimes be regarded as a "back tax", and cases have occurred in which it was even a very inadequate back tax. Newspapers have given us an account of an estate valued at $70,000,000 the owner of which, it was alleged, paid taxes on only $500,000. An inheritance tax of 1 per cent. on the value was less than the usual yearly tax rate on many small estates. While it should, however, always be remembered in the case of a great estate, that much of the property consists of shares in private corporations which may be heavily taxed, an inheritance tax of one per cent. is a very small burden. For even with all due allowances for taxes paid that do not appear under the owner's name, the very rich appear frequently in America and elsewhere to pay less than their due proportion of taxes. But after all, this is a weak theory of inheritance taxation, for it deliberately assumes past injustice to be atoned for by a sort of taxation which must in the main be governed by different aims and never could be in proportion to past injustice. The man who conscientiously paid full taxes would have an estate to be taxed by the same rules which would apply to the conscienceless tax dodger.

VII. A property tax paid in a lump sum once in a lifetime. Strong grounds might be advanced for taking this position, for a special inheritance tax in lieu of the tax on miscellaneous personal property which should then be exempted from other taxation. This is in part the view which prevailed in New York State, when a one per

cent. tax on inherited personal property was imposed, although the tax on miscellaneous forms of personal property in New York State was not abolished. But if we have an exemption of miscellaneous forms of personal property and in lieu thereof put a special tax on estates, in so far as they consist of personal property; this should be in addition to any general inheritance tax. Suppose we had a general tax of 5 per cent. whether real estate or personal, and suppose we had exempted personal property from taxation and in lieu thereof we put a tax upon inherited personal property, because we can best reach it when it comes before the probate court, we would then have to put a special inheritance tax on personal property in addition to the general inheritance taxes, so as to equalise the total taxes in both kinds of property.

VIII. A tax on a particular form of accidental income without any special counter-service.

We are unable to adopt this view without many qualifications. It is not a correct view in cases in which the wife and children work with the husband and father. The property they inherit is then a joint product to which all have contributed. If the head of the family has been by far the largest contributor, there may be a large surplus over and above that part of the inheritance which is to be imputed to the efforts of the surviving members. This surplus might be an income without any special service on the part of the recipients, but even then could hardly be regarded as an accidental income.

When it comes to taxation of an inheritance in such

cases as this, the size of the property inherited has to be considered. Frequently the family group will not be in so strong a financial position as heretofore, and will be less able to pay taxes. Where the wealth is very great, the probability of a commensurate service on the part of the heirs becomes smaller, and the propriety of taxation increases. When, however, we come to heirs outside the immediate family, and especially to those who are remote, the "laughing heirs" (*die lachenden Erben*), this view has special force.

Each of these theories has elements of truth, to be considered in any exhaustive discussion; and we cannot draw up inheritance laws for all times and places, but we must provide as best we can for particular times and places. There are some general principles which we may notice.

First, the exemption of a minimum. The principal of this exemption is a sum which would yield, when safely invested, an income which would reasonably be exempted from an income tax. We do not go far enough in this exemption. There seems to be a good deal of misapprehension upon the part of the courts concerning this minimum. In Ohio an exemption of a reasonable minimum was made one of the grounds for declaring the law unconstitutional.[25] We must consider the loss to a family in the case of the death of the head of the family. If the property is small, it has probably depended mainly on his earnings. The family is less able to pay taxes than before. This deserves some consideration. And we must take into account the number of children, etc. In Ohio it was thought that $20,000

was a very large sum and involved a real inequality in taxation, and a discrimination against the rich. This view cannot be maintained. We have a clear principle to guide us in the exemption of a minimum, and that has already been mentioned. Everywhere a certain sum is exempted from income taxation, and the exempted inheritance should yield that income. Nobody would claim that in the United States it would be altogether unreasonable to exempt $1000 from an income tax; consequently we may with equal propriety exempt from an inheritance tax a sum which will yield $1,000 or $20,000; in this case, therefore, the exemption is not high at all, but moderate, and it involves no discrimination against the rich. It is altogether different from an exemption of $4,000 from an income tax. That would more nearly correspond to an exemption of $80,000 from an inheritance tax, and could with propriety be viewed as a discrimination against the rich.

We must, as has been said, consider the loss of the family in the case of death, and we must take into account also the number of children. We might have a minimum of exemption from an income tax of $600 a year for the widow, and $200 a year for each child up to the age of twenty-one years, or to whatever age is adopted. Let us suppose there is a child five years old. A certain sum which would be the equivalent of $200 a year for that child up to the age of twenty-one might be exempted from inheritance taxation. But the minimum should be exempted, however large the estate. In this way we treat everybody equally. Even in the

case of an estate of $1,000,000 a sum of from $12,000 to $20,000 should be exempt from taxation.

The second general principle is to increase the tax according to two principles:

1. According to degree of relationship, making it higher as relationship becomes more distant.
2. According to the amount inherited.

This would be following the actual tendency throughout the world.

Then there is the further question,—Shall we treat the estate as a whole, or consider the share of each one in determining the rate of tax? In Illinois and Wisconsin, the share of each one is considered. This is the case also in some places in Switzerland and in South Australia.[26]

Shall we make a distinction between testate and intestate property, as Mill suggests? There has been no movement for such a radical distinction as he makes; and it is difficult to see why we should make any such distinction. Mill adopts a false principle,[27] when he makes a radical distinction between children turn on testacy or intestacy. If a father wills to a child any amount, however great, it would seem that the child might take it; but if the father does not make any will, then the child inherits nothing, according to Mill. This is unsound, and in our actual laws no tendency to make that distinction can be discerned.

It has already been mentioned that Bazard, a follower of Saint-Simon, wished to introduce inheritance according to economic merit instead of according to relationship, the property falling into the hands of the state and

being then distributed according to merit and being placed in the hands of those who would use the property best. He says that in other important social relations inheritance has been abolished, for example, offices and occupations are no longer transmitted by inheritance. Why should property be so transmitted? No one has taken up this idea seriously.[28] The Saint-Simonians themselves did not accept this proposal without important modifications. They advocated high progressive taxation and abolition of collateral inheritance of distant relatives; "abolition in those degrees," says von Scheel, "in which their economic justification ceases."

We have a clear social aim in the taxation of inheritance, and it makes no difference whether it is avowed or not. Perhaps no one in favour of inheritance taxation would wish to avow a social aim in an argument to be presented to an American court; but this aim must be there and the social aim is generally an approximation to equality of opportunity.

One question suggests itself in this connection,—whether the children of the well-to-do do not enjoy an advantage over others, even apart from inheritance, an advantage for which they have rendered no service, such as connections, manners, culture, expensive training, etc. But to cut them off from any inheritance of property is contrary to the idea of the family and opposed to that continuity in economic life which is a condition of satisfactory economic progress. Also, acquired habits have to be considered, and the possibilities of the transmission of culture which may work downward from the richer to the poor. But we may go so

far as to urge a regulation of taxation in inheritance in behalf of the children of the rich. The disadvantage, on the whole, of the inheritance of great wealth is admitted by nearly every thoughtful person. Those who discuss the education and cultivation of the young feel very generally that it is a disadvantage for most young men or women to have a vast amount of property. Speaking of endowments, etc., a writer in Palgrave's *Dictionary of Political Economy*,[29] says that, on the whole, the present tendency is to distribute endowments by competition, making ability and not poverty the test. This tends to raise the whole level of the competition and so to benefit the poor, because "the spur of poverty is sufficient to secure industry, and the temptations to idleness which go with wealth are, in the great majority of cases, strong enough to prevent members of the wealthy class from competing successfully." It used often to be the rule in distributing university scholarships that poverty and not merit should be the basis of award. Now the tendency is to make ability and not poverty the test. And in most of our institutions in these days the man who gets a fellowship or a scholarship may be a millionaire, but "the temptations to idleness which go with wealth are in the great majority of cases strong enough to prevent members of the wealthy class from competing successfully." Thus although the scholarships are really given on the basis of capacity, yet they do as a fact go chiefly to the poor. This is evidence that it is a disadvantage for a young man to have a great deal of money; and yet, on the other hand, those who have large inherited wealth and who fully improve its opportunities, as some do, have marked advantages which may benefit society. On the whole, however, we certainly can strongly urge the regulation of taxation of inheritance from the standpoint of the wealthy, not merely from the standpoint of equality of opportunity for the poor. The extremes of wealth cut off from equality of opportunity the very poor and the very rich.

Another thought is suggested by an observation in the *Fabian Essays* that under different property laws, with perpetual copyright, we might have had a great family of Dukes of Shakespeare in England. "If the Whig landlords who are responsible for most of the details of our glorious constitution had been also authors and inventors for profit, we should probably have had the strictest rights of perpetual property or even of entail in ideas; and there would now have been a Duke of Shakespeare to whom we should have had to pay two or three pounds for the privilege of reading his ancestor's works, provided that we returned the copy uninjured at the end of a fortnight."[30]

Just a word about the effects of inheritance laws on national wealth. The older economists were inclined to say that such taxation was unthrifty, that it tended to diminish capital and thus to the impoverishment of the country. Economists do not urge that objection at the present time. Mill made a strong point against this view when he said, If we have a national debt we can at least use the money derived from taxation of estates to pay off the national debt. This is very true. Thus the capital of the country is not at all diminished, because those who are paid use the money as capital.

That is, if a man had £1,000 in Consols (and out of the proceeds of the English death duties this bond is paid off) he would have to use that money so received as capital; otherwise his estate would be diminished. This is sufficiently obvious. Or the proceeds of inheritance taxation could be used for educational purposes, the improvement of roads, etc., which are indirectly productive. It is also possible that a wider diffusion of wealth would give new hope and stimulus to the community. It is likewise apt to have a wholesome influence upon those who would otherwise inherit large sums of money, leading to waste along various lines. Moreover, if the tax is not very heavy, it may be paid out of current income, just as are other taxes. The long and short of it is that of itself taxes do not directly diminish aggregate wealth; but from one point of view they may be looked upon as simply redistributing it. And there is no reason why an inheritance tax should diminish the national wealth. It tends rather to a distribution of the burden of taxation, a distribution of wealth, and may often lead to an accumulation of national capital, if the law is wise in its details. But if inheritance taxation is heavy it may be unthrifty taxation, unless special care is exercised in the use made of it. It is becoming now a serious matter. Special uses for inheritances are to be recommended, so as to prevent wealth diminution. When, as in some cases nowadays, we have inheritance taxes of 15 per cent., manifestly they cannot be paid out of current income; and if the proceeds are used for the regularly recurring expenditure of government, we do incur the danger of a diminution

of national wealth. It is now time that our legislative bodies should devise methods for the expenditure which will improve, as it were, the national plant. Either the land should be improved, better roads constructed, the material equipment enriched, or personal efficiency should be increased by educational measures directed to this end.[31]

Notes and References to Chapter XVII

[1] P. 416. Blackstone, *Commentaries*, Bk. II, Chap. I, pp. 10, 12–13 (Cooley ed.).

[2] P. 416. Quoted from Smart's *Studies in Economics*, pp. 295–6.

[3] P. 417. 170 U. S. 283 (1897), p. 288. The above was reiterated and quoted with approval in Plummer *v.* Coler, 178 U. S. 115 (1900), p. 133.

[4] P. 418. Mr. Justice Winslow gave the following opinion in the case of Black *v.* The State, 113 Wis. 205 (1902):

"Under the foregoing constitutional limitations, while classification is proper, *there must be uniformity within the class*; and the provisions of Ch. 355, Laws of 1899 (authorizing an inheritance tax where the whole estate is $10,000 in value, or over, but not authorizing such tax where the estate is less than $10,000 in value, or over, the beneficiaries being of the same class, and the tax being levied without regard to the amount received by the individual beneficiary), are held *unconstitutional*, as being an arbitrary and unlawful discrimination between beneficiaries of the same class." (p. 205, headnote 5.)

[5] P. 419. Black *v.* The State, p. 232.

[6] P. 419. Nunnemacher *v.* The State, 129 Wis. 190 (1906), p. 197.

[7] P. 419. Beals *v.* The State, 139 Wis. 544 (1909), p. 556.

The theory that the tax on inheritance is regulated by State law and that it is not a tax on property, but a tax on the privilege of acquiring property by succession, is stated by Mr. Justice Brown in United States *v.* Perkins, 163 U. S. 625 (1895), when he says: "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creation of statute and within legislative control." . "The act we are now considering (the New York Act) plainly intended to require that a person taking the benefit

of a civil right, secured to him under our laws, should pay a certain premium for its enjoyment. . . . This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated, to be transferred by will or by descent or distribution." See also Plummer *v.* Coler, 178 U. S. 115 (1900); Scholey *v.* Rew, 23 Wall. 331 (1874); *In re* Mackey Estate, 46 Col. 79 (1909); Hopkins Appeal, 77 Conn. 644 (1905); State *v.* Guilbert, 70 O. S. 229 (1904); *In re* Fox's Estate, 154 Mich. 5 (1908).

The courts have therefore held that franchises, stocks, and all manner of property can be reached by the inheritance tax, even United States bonds, ordinarily exempt from taxation: Plummer *v.* Coler, 178 U. S. 115 (1900); The Succession of Levy, 115 La. 377 (1905); *In re* Whiting, 150 N. Y. 27 (1896). The inheritance tax laws have generally been held not to come under the customary constitutional provisions which provide that laws imposing taxes shall distinctly declare the tax and the objects to which it is to be applied. Nor do inheritance tax laws come under the ordinary constitutional provisions which declare that tax laws shall have a uniformity and equality of operation. Union Trust Co. *v.* Wayne Probate Judge, 125 Mich. 487 (1901); *In re* McPherson, 104 N. Y. 306 (1887); Chambe *v.* Judge of Probate, 100 Mich. 112 (1894); Thompson *v.* Kidder, 74 N. H. 89 (1906); *In re* Fox's Estate, 154 Mich. 5 (1908); Estate of Campbell, 143 Cal. 623 (1904); *In re* Estate of Speed, 216 Ill. 23 (1905); State *v.* Vinsonhaler, 74 Neb. 675 (1905); Tyson *v.* State, 28 Md. 577 (1868); Minot *v.* Winthrop, 162 Mass. 113 (1894).

The laws are thus allowed a wide range of operation. They can fix a minimum below which the tax is not operative, although some of the courts have required this minimum to be "reasonable". In Massachusetts $10,000 has been declared reasonable [Minot *v.* Winthrop, 162 Mass. 113 (1894)], while in Ohio an exemption of $20,000 has been declared unreasonable and unconstitutional [State *v.* Ferris, 53 O. S. 314 (1895)].

The laws may discriminate between direct and collateral heirs [Minot *v.* Winthrop, 162 Mass. 113; Beals *v.* State, 139 Wis. 544 (1909); *In re* Keeney, 194 N. Y. 281 (1909)]. And while the courts construe such legislation strictly, against the government and in favour of the taxpayer, they have gone so far as to declare the re-

troactive clauses in some of the statutes as valid. Matter of Delano, 176 N. Y. 486 (1903); Matter of Kidd, 188 N. Y. 274 (1907).

The principle of taxing inheritance is extended, in some States, to gifts intended to take effect upon the death of the donor. (One way of evading the tax.) Emmons *v.* Shaw, 171 Mass. 410 (1904); *In re* Miller, 77 N. Y. App. Div. 473 (1902); State *v.* Pabst, 139 Wis. 561 (1909); *In re* Edwards, 85 Hun. (N. Y.) 436 (1895).

[8] P. 419. Vol. XXXVII, p. 1553.

[9] P. 420. *Village Communities*, p. 42.

[10] P. 420. In *Handwörterbuch der Staatswissenschaften*, (1892), art. "Erbrecht."

[11] P. 421. In some States a widow can relinquish her "dower" and take a child's share, if she finds it more advantageous. It would be so if, for example, there is only one child. Furthermore this gives her more than a life estate. Also, it may be noticed that a widower has a curtesy in the estate of his deceased wife. But the reader will not expect the author to enter into all the complex details of the concrete laws of inheritance, for these in themselves could fill a volume. The purpose here is simply to indicate guiding principles.

[12] P. 421. There are various methods whereby this system may be carried out. One may take (a) the children and then let children's children inherit in place of a deceased son or daughter. This is legally called "representation". The result may be great inequalities among cousins, etc. One may take lines beginning (b) with the parents and their descendants and allow "representation" (c) with the grandparents. Then the closest line excludes the others entirely.

[13] P. 421. First, parents and children, then brothers and sisters, then children of brothers and sisters. "Representation" is thus strictly excluded; brother's children would not inherit if a brother were still living. This is called "gradual system". Austria is regarded as a pure type of the first or parentelic system; most countries have a mixture of 1 and 2.

[14] P. 424. See Ely's *French and German Socialism*, Chap. IV, "Saint-Simon"; also the art. on "Erbrecht" by Professor von Scheel, already cited.

[15] P. 424. Pp. 97–108.

[16] P. 424. P. 99.

[17] P. 427. "In erster Linie ist sein Grund und Zweck die materielle Kontinuität und Sicherstellung der Familie." From art. "Erbrecht und Erbschaftssteuer" in Schmoller's *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft*, 5ter Jahrgang, 1tes Heft, 1881, p. 192.

[18] P. 427. See Adolf Trendelenburg, *Naturrecht auf dem Grunde der Ethik* (2d ed., Leipzig, 1868), where "Erbrecht" is treated under "Recht der Familie," §§ 141–149, especially § 141.

[19] P. 427. As quoted by Wagner, *Finanzwissenschaft* (2d ed.), Vol. II, p. 569.

[20] P. 427. In the United States we still have the absurd anachronism that in cases of intestacy a relative may inherit the property of a decedent, no matter how distant the relationship. The following is quoted from the *American and English Encyclopædia of Law* (2d ed., Vol. 11, p. 320 note):

"The dying intestate without heirs is now practically the only ground of escheat which is worth considering; for relations succeed, however distant, provided only they give evidence of their propinquity." 3 Washburn on *Real Property* (5th ed.) * 444.

The *Cyclopædia of Law and Procedure* has the following statement:

"In Maryland, by an early statute, the personal estate of persons dying intestate, without any relations within the fifth degree of consanguinity, were distributed to certain schools or colleges of the county in which the deceased resided." Thomas *v.* Frederick County School, 7 Gill & Johnson, 369 (Vol. 14, p. 37 note).

In the above mentioned case, Thomas *v.* Frederick School (1837), it was stated:

"By an act passed in 1729, Ch. 24, Sec. 17, the administrators of persons having no representatives within the limited degrees, were directed to pay the balance of the estate in their hands to the visitors of the public schools." (7 Gill & Johnson, 369, p. 381.)

"The personal estates of persons dying intestate without any relations within the fifth degree of consanguinity or affinity are distributed to the free schools, or to such schools of the county to which the public aid had been by law extended, in case there should be no college or free school in the county." (*Op. cit.*, p. 369, headnote.)

This policy was based on an early desire of the colonial legislature to establish schools. The statutes of Maryland to-day show no

such thing as escheat where there are any heirs. In fact, the above instances, limiting the degrees of intestate inheritance, appear to be quite exceptional. The Wisconsin Constitution, Art. IX, Sec. 3, has this provision concerning escheat:

"The people of the state, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people."

[21] P. 428. See *The Forum* for December, 1886.

[22] P. 428. The Roman law provided as follows:

"A will is void if the parents or children, or in certain cases, the brothers and sisters, of the testator are disinherited." *Institutes Justinian*, 2, 18, pr. Quoted in Hunter, *Roman Law*, p. 780.

"The amount, after the analogy of the lex Falcidia, is one quarter of the amount the complainant would have obtained had the deceased died without making a will." *Institutes Justinian* 2, 18, 6; Hunter, *op. cit.*, 782.

"As the duty of the testator was based on a moral claim, it ceased to exist if there was grave misconduct on the part of the persons entitled. For a long time there was no definite standard by which the delinquencies of children should be judged, as there was at first no definite share of the inheritance they could claim. Justinian settled the grounds definitely. See *Novels*, 115, 3. Hunter, *op. cit.*, p. 783.

The grounds for disinheriting a child were as follows:

1. Assaulting parent.
2. Other serious and disgraceful injury.
3. Accusing parent of any crime, except treason.
4. Associating with dabblers in witchcraft.
5. Attempting parents' life.
6 Adultery with father's wife or concubine.
7. Informing against parent, and putting him to great costs.
8. Refusing to become surety for parent to procure release from prison.
9. Successfully frustrating attempt of parent to make a will, parent later making one.
10. Following profession of comic actor or gladiator, unless parent did so.
11. Daughter prostituting herself, or marrying without parents' consent, but excused if dowry not provided before she was twenty-three.
12. Neglecting to take charge of insane parent.
13. Neglecting, although able, to redeem parent from captivity.
14. Heterodoxy of the child (*Novels*, 115, 3, 4).

In turn the grounds for disinheriting parents (*Novels*, 115, 4) were largely reciprocal of the above provisions, and those for disinheriting brothers and sisters (*Novels*, 22, 47 pr.) were, (1) attempts on the life of the testator; (2) accusation of capital offence; (3) endeavouring to deprive him of property. Hunter, *Roman Law*, p. 783.

It is interesting to compare the Roman law with the German law. The Roman law makes a will void if certain near relatives are disinherited. The German law lets the will stand, but allows each one to recover his "duty part". Similarly it is interesting to compare the grounds permitting disinheritance in both legal systems. The underlying ideas seem to be similar.

[23] P. 430. See art. "Erbrecht" (Erbrecht als Rechtsinstitut) by Bernhöft, Conrad's *Handwörterbuch der Staatswissenchaften*, 3d ed., p. 1023 *et seqq.*, and also *Das deutsche Erbschaftsrecht* by Max Hallbauer, 2d ed., pp. 95–127.

[24] P. 432. *The Inheritance Tax* (Columbia University Studies in History, Economics, and Public Law, Vol. IV, No. 2), pp. 114–118.

[25] P. 436. This is the case of State of Ohio *ex rel.* 1. *v.* Ferris, 53 O. S. 314 (1895). The case is an entertaining one. The court admits the right of the State to tax property and to pass laws taxing inheritance, but it says this particular law is in conflict with the bill of rights: "All political power is inherent in the people. Government is instituted for their equal protection and benefit." This statute exempted $20,000, and the court declared that this contravened the equality clause.

[26] P. 438. See art. in *The Review of Reviews*, September, 1894, by Honourable F. W. Holder, which speaks of this practice in South Australia.

[27] P. 438. *Principles of Political Economy*, Bk. II, Chap. II, §§ 3–4.

[28] P. 439. The late Professor J. C. Bluntschli, of Heidelberg, has some interesting suggestions concerning inheritance, which the author has briefly described in the *North American Review* for July,

1891. See also Bluntschli's *Gesammelte Kleine Schriften*, Vol. I, No. IX, "Das Erbrecht und die Reform des Erbrechts."

[29] P. 440. Rev. L. R. Phelps.

[30] P. 441. "Property under Socialism," by Graham Wallas, in *Fabian Essays in Socialism*, pp. 145–146. This is in harmony with the general thought of many that income should in some way be commensurate with social services.

[31] P. 443. Detailed statements about the present status of inheritance taxation do not belong here. They could well make a volume of themselves. The author's views find further elucidation in his book *The Evolution of Industrial Society*, Pt. II, Chap. VII, and some references to literature will be found there. The reader should especially consult Dr. Max West's monograph already cited, and Dos Passos, *The Law of Collateral and Direct Inheritance, Legacy and Succession Taxes* (St. Paul, 1895); also for recent legislation and decisions see Ross on *Inheritance Taxation* (San Francisco, 1912).

CHAPTER XVIII

THE PRESENT AND FUTURE DEVELOPMENT OF PRIVATE PROPERTY (Continued): THE FLUIDITY OF PROPERTY [1]

It was stated in a preceding chapter that by death the great bulk of property changes hands once in a generation, and that the manner of its transmission from generation to generation may be regulated indefinitely with corresponding effects on the distribution of wealth. But this presupposes that property is mostly in the hands of private individuals and that its use and flow have not been definitely fixed by former generations; in other words, we have taken the fluidity of property for granted. This expression "the fluidity of property" is one which was coined for the present purpose, and the author hopes that it is felicitous, as it seems to define what is meant when property changes hands once in a generation through death and the manner of its transmission is regulated by statute law, when the regulation is indefinite, almost unlimited; and this regulation of the flow of property produces a corresponding effect upon the distribution of wealth. But all this presupposes that property is in private hands. In other words, we take the fluidity of property for granted.

As a matter of fact, an examination of economic history, even if very cursory, shows us that the nature of man and of human society sets in operation forces which tend to check the free and easy flow of property both from the living to the living and from the dead to the living. In other words, the nature of man and of human society sets in operation forces which tend to produce, and will produce unless measures are taken to prevent it, what we may call the ossification of property. Consequently, the fluidity of property, rendering it amenable to social control for social purposes, cannot be maintained without social effort.

When it is said that property changes hands once in a generation, it at once suggests itself that this is not true of public property, because public property belongs to an organised society which is conceived of as having perpetual existence. So we have to exempt public property from that which changes hands once in a generation, for public libraries, school houses, water works, etc., do not make this change. But when the property itself is public, the social control for social ends is not in its nature difficult. Public property carries with it social control. That is the very idea of public property. Public property, therefore, whether it is large or small in amount, does not present any difficulty so far as the fluidity of property is concerned, being in its very nature amenable to social control. It is only in an inefficient or corrupt commonwealth that difficulties of this sort would arise. Thus we must ask simply, How far is it desirable to extend the limits of public property? This is the only necessary question

so far as public property is concerned; and if we have too much public property, it is not difficult to get rid of it. The greater difficulty for the public as well as for the individual is to acquire property.

But it is not alone the state that lacks the attribute of mortality. It is the case with corporations generally, but it is especially the case with ecclesiastical corporations of various sorts, including religious houses which have so tied up property as to check effectually its free flow. This was especially true in past ages. Whether these ecclesiastical corporations are regarded as public or private bodies, the property which is made over to them or which is acquired by them in any way, is under their control for their purposes. Their acquisition of property is promoted, first, by the piety and the fears of man, especially in view of approaching death with all the uncertainties of the future; second, by their perpetual life and vigour; and third, by their total or partial exemption from taxation.

Productive property is now usually taxed even if it does belong to ecclesiastical bodies; nevertheless a point here requires consideration. The nature of man is very much the same everywhere, and under the head of non-productive property, property is often included which sooner or later is destined to become productive property, and which is steadily gaining in value. The author observed this abuse when he was a member of the Maryland Tax Commission in 1888. He found that people were including in property belonging to a parsonage or church a great deal of land which was held for speculative purposes and which, under the claim

that it was used for religious purposes, was exempt from taxation. To prevent this abuse the Maryland Tax Commission in 1888 unanimously recommended the taxation of parsonages and all church property except the house of worship and the ground necessary for its uses, which was limited to ten feet on either side of the building. But it was quite useless to make such a recommendation. The religious bodies were opposed at once, and the recommendation was not even considered by the legislature. This shows how difficult it is to remedy such an abuse. And a curious part of it is that this abuse which attracted attention in Maryland in 1888 existed in England five hundred years ago. One device after another was resorted to for including under the head of property used for religious purposes, property which was really used for other purposes, in order to acquire and hold it and to claim for it exemption from public obligations resting on other property. It appears from Blackstone that in England the Statute of 15 Richard II, ch. 5, sought to remedy this abuse,—"And whereas the Statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them in the name of church-yards, such subtile imagination is also declared to be within the compass of the Statutes of Mortmain." [2] As what they desired was to avoid these Statutes of Mortmain, the churches acquired large tracts of land and consecrated them under the name of churchyards. The consequence is that at various times in its history the Church has acquired large fractional parts of the land and wealth of nations, and this property has thus ceased to be fluid.[3] This

has happened in England, Spain, and France, and generally throughout the civilised world we have had legislation designed to prevent this concentration of property without fluidity. Some people fear only the concentration, but it is the concentration without fluidity, without being amenable to control, which is a large part of the evil. If property passes into different hands from one generation to another we can easily direct it and make it conform to the ideas of the time; but if it is tied up in corporations it is not so easily controlled. Property in such a case is said to belong to the "dead hand", or to be in mortmain (*mortua manu*), for it belongs to ecclesiastical bodies the members of which were regarded as dead (being professed, meaning monks and nuns, according to Sir Edward Coke's conjecture, which seemed to Blackstone the most plausible).

In England we have then the Statutes of Mortmain, beginning in 1225, designed to prevent this concentration or ossification of property, by subjecting the power of corporations "to acquire lands to the discretion of the crown or parliament as to the grant of a license." [4] We have also the Mortmain Act of 9 George 11, Ch. 36 (1736), which sought to prevent gifts from being made in the name of charity by persons evidently approaching death. In the State of Ohio people were struggling with this same matter a few years ago, namely, with the dangers resulting from playing upon the fears of men at such a time. According to the Ohio statutes gifts must be made a year before death.[5] According to the Mortmain Act, save "the two Universities, their colleges,

and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster," all alienation of lands for charitable purposes (except *bona fide* sales) was forbidden "unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of Chancery within six months after its execution (except stocks in the public funds, which may be transferred six months previous to the donor's death), and unless such gift be made to take effect immediately, and be without a power of revocation."[6] Bouvier's *Law Dictionary* adds after the word revocation, "or reservation, etc., except as to a nominal rent, mines and minerals, or easements, building contract, or the like, or, in case of *bona fide* sales," etc. The property must be transferred in such a way that the gift is to take effect at once and not after the death of the donor, the one making it reserving for himself some benefit from the property. If land was to be alienated for charitable purposes it must be in some prescribed form before death and must not be made over to take effect after death. This was done to avoid the concentration and ossification of property.

The struggle was a perpetual one in England. It began "above sixty years before the Conquest" (Blackstone). Under feudal tenure, the king as overlord claimed that it was necessary to secure a license from him to make it possible to acquire lands in mortmain, because then he lost dues, chances of escheat, and the possibilities of attainder. Evasions began at once. The loop-holes and ingenious modes of evasion were endless.

When religious houses could not acquire property, bishops and other sole corporations discovered that they were not included under the head of religious houses. Property passes from bishop to bishop, thus passing to a corporation which is perpetual although it represents but one person. When religious corporations could not hold property it was found that others could hold property for these religious corporations. It was also found that evasions could be secured through actions to recover land to which they laid claim by fictitious titles, provided the owner "by fraud and collusion" made no defence. (Blackstone).

This is mentioned to show how difficult it has been in times past to keep land from falling into this "dead hand". Chase, in his edition of Blackstone (p. 428), says the Statutes of Mortmain are not in force in the United States except in Pennsylvania, where they exist in modified form. But statutes having similar intent appear to be common. Special acts are required, in Maryland, for example, to enable churches to receive land devised to them. We may see here and there a slight tendency on the part of churches in this country to acquire large property. Trinity Church in New York City is one of the largest land owners in the United States. Comparatively few American churches have, to be sure, a great deal of property, but we notice that a considerable number (absolutely) have property, and we must also observe tendencies.

We have also libraries, schools, colleges, and educational institutions generally, and in this particular the possibilities of endowment require special considera-

tion. Let us look ahead two hundred years and ask ourselves what is going to be the outcome if the inclination to endow such institutions continues? Everything favours the acquisition of property by libraries, schools, and colleges. Some of our universities have vast acquisitions and are favoured by being exempt from taxation. Will they in perhaps two hundred years from now have acquired such landed property as will be injurious? Probably up to the present time they have made an excellent use of their property. Adam Smith thought, however, that endowments were detrimental to educational institutions, making them careless and indifferent to the life of their times; but the English universities which he especially criticised have, since his time, shown great vigour and have come increasingly into touch with the movements of the day.

Benevolent institutions also must be considered. What is going to be the outcome of the acquisition of property by such institutions? Take, for example, the Sailor's Snug Harbor, a retreat for sailors, which owns an enormous amount of property on Staten Island; it is said to be almost as great a landlord as Trinity Church and somewhat similar complaints have been raised against the management of the property. The author does not pretend to criticise these institutions or to say that the alleged abuses really exist, but simply calls attention to them as illustrations of possibilities and dangers. He also admits that, in his opinion, we do not at present have reason to apprehend this danger from educational institutions, because adequate social control is possible and appears to him altogether probable.[7]

A word must be added about entailments and their substitutes. Property is entailed when in advance of death the manner of its descent is settled for several generations by some head of a house, and when the provision is continued in such a manner that generally no one of the living generation has full control. Suppose at any given moment the line of descent is provided for three generations in advance, and as each generation appears it provides for another generation, so that the living generation never has control. Various substitutes for entailment are found in the United States and they are increasing rapidly because by marriage and family settlements, creations of trusts, etc., similar objects are attained though we do not in general have entailment, technically speaking. Property is made a trust for the family for a certain length of time; this amounts to the same thing as entailment. Attention has of late been called to the amount of property in this country which belongs to families and not to individuals. We often hear it said, "This property belongs to such an *estate*." This means that it belongs to a trust managed in the interests of the family. We have similar arrangements in other lands.[8] In Germany entailments are called *Fideikommisse*, and there appear to be but slight restraints upon their creation.[9]

In connection with the fluidity of property we have considered ecclesiastical, educational, religious, and charitable corporations which as a rule have no share-capital. What shall we say concerning private, commercial, or industrial corporations? When we come to these we have artificial persons of a different sort. They

are organised on a different basis and for a different purpose. The property which they represent is divided into shares, or probably more correctly speaking, the shares represent the property. These shares are owned by individuals and pass from generation to generation as the individuals die. In some particulars, at any rate, we may thus say that the property of these corporations has a fluidity like other property, for the laws of inheritance govern the diffusion of these shares. But so far as the corporations themselves are concerned it is not so easy to change their nature, because they are very apt to be actually, if not nominally, perpetual. One reason that this is so is because the charters are apt to be regarded as contracts which, under the Constitution of the United States, cannot be changed. So corporations of this kind have a privileged position unlike that of natural persons, because natural persons do not enjoy reserved property rights, rights of peculiar significance, as do corporations, inasmuch as natural persons do not come into existence through contract giving them reserved privileges. It is true that the Dartmouth College decision to some extent hardens or ossifies this class of property considered as belonging to a person, but so far as the shares are concerned, to a very large extent, the distribution of property remains fluid. The Baltimore and Ohio railway corporation, for instance, cannot very easily be changed in its nature. It is perpetually exempt from taxation under the charter principle, and that principle is somewhat hardened in the Dartmouth College decision; and so far as the shares are concerned which represent the existence of this property,

they pass according to the ordinary laws of inheritance from one generation to another.

The latest tendency is to regard charters as permits rather than as contracts. States nowadays do not give away an unlimited charter. The Constitutions of most States forbid it and charters are now regulated by law, even to the extent of fixing the price of the commodity.[10] Also we admit that the exemption from taxation mentioned, namely that of the Baltimore and Ohio Railway, is uncommon. Such cases occurred during days when people were eager for railways; they could not now easily recur under modern constitutional limitations. Also the tendency of courts is to work away from the spirit of the Dartmouth College case even if not to reverse it.[11] Also, the exemption from taxation is simply a gift and the exemption once made should be repurchasable. Nevertheless, we have the old survivals and tendencies towards ossification under our constitutional decisions; and unless we are on our guard we may slip back into bad conditions as our ancestors did in England. Perpetual vigilance here as elsewhere is the price of economic liberty.

We may roughly call the dead hand any perpetual artificial person, and when we say any perpetual artificial person we have in mind any person actually perpetual even if not theoretically so. Our constitutional provisions are such as sometimes to make a corporation actually perpetual even if not theoretically perpetual. Constitutional provisions sometimes contradict each other, and go sometimes in one direction and sometimes in another; but the tendency is for the decisions of

the court to make corporations actually perpetual even when they are not nominally perpetual. The court's decision in the Broadway Surface Railway case is of special importance; in this case a corporation was dissolved under the reserved power of the legislature, but the arrangement was such that the corporation really to all intents and purposes actually existed; one corporation simply took the place of another, to use and manage the franchise and other property in the interests of the shareholders and the bondholders.[12]

But especially do we have in mind, in the dead hand, charitable, educational, and religious corporations. The property of this kind of corporation loses its fluidity and its social adaptability in part by provisions of donors, which have continuous effect even to defeating the purposes which the testator had at heart or to carrying out baleful purposes, such as spite, etc.

Discussions concerning endowment, in the eighteenth century, are of importance to us, if we wish to look at the matter fairly and not merely with reference to temporary conditions. Adam Smith opposed educational endowments, scholarships, professorships, etc., because he said that they increased indolence, and he pointed to Oxford as confirmation, though possibly he considered this indolence as a temporary condition. He attributed the conditions at Oxford, with which he was personally familiar, to its endowments. He said also that scholarships extended and increased competition and lowered remuneration, and pointed to preachers, writers, and teachers receiving such small salaries because scholarships and endowments made it so easy to enter these occupations that the remuneration became small.[13]

Perhaps still more important is Turgot's discussion. He was very strongly opposed to endowments. He said that the vanity of the founder was very frequently the sole true motive, and that worship and public utility were but a veil. The reasons for his opposition were somewhat as follows, "A founder is a man who desires to eternalise the effect of his wishes," but his faculties are limited; in desiring to do good, he may do evil. He says that men have founded houses of refuge for fallen women, and have provided that they must offer evidence of their fall before admission, which provision is calculated to do harm rather than good. In regard to asylums and charities, he says that they do not effect the end in view, but increase rather than lessen misery. Then secondly, he says, even if these institutions perform a useful function at the start, it is impossible to maintain permanently the spirit of the founder when they pass into new hands for administration. Gradually the zeal and the good will lessen and formalism enters to take the place of the spirit which animated the founder. Thirdly, times change and new needs arise. The wars of Palestine during the Crusades have given rise to numberless foundations, and these continue though the wars ceased long ago. In the fourth place, he points to the extravagant edifices built by foundations, edifices which are wasteful and which involve waste. And fifthly, he says that it is better to satisfy the needs arising from calamities such as floods, etc., at the time they arise, than to make provisions for them by foundations.

It is on this account that he applauds the royal edict of 1769 which places restrictions on the creation of new foundations. He claims that the right of government is incontestable "to dispose of ancient foundations, to direct their funds to new objects, or better still to suppress them entirely. Public utility is the supreme law, and should be balanced neither by a superstitious respect for what one calls the intention of the founders—as if individuals, ignorant and limited, had the right to impose their capricious desires on unborn generations; nor by the fear of wounding pretended rights of certain bodies, as if these private bodies (*corps particuliers*) had any rights in opposition to the state! Citizens have rights, but these bodies exist only for society and ought to cease to exist the moment they cease to be useful." He goes on to say, in conclusion, that the work of man is not made for immortality and that the foundations multiplied by vanity will in time absorb all the land and all the property of individuals, and that it must be right to destroy them in order to prevent this consummation.[14]

It is really strange that anyone should think that the dead have a right to impose their wishes and desires upon unborn generations, and yet some do think that there is a right of that kind. It is something which is to the writer almost incomprehensible, and it cannot by any possibility stand the test of any critical examination. What does it mean to say that we keep faith with the dead? We in the United States at least are not generally inclined to give excessive reverence to the dead. It would perhaps be well if in many particulars

we honoured them more than we do and gave more heed to the views expressed by them when alive. This might help us in putting a firmer foundation under the family as an institution. At the same time, the earth belongs to the living, and we cannot be enslaved by the dead, who, if they have immortal souls still contemplating mundane affairs, we may assume would have new wisdom and would wish changes in their bequests to carry out their purposes.[15]

The conclusions which follow suggest themselves. Certain measures are needed to preserve the fluidity of property. It seems to be necessary to place some restrictions upon the acquisition of property by the dead hand. We need to go back to a more conservative policy. We also need a reversal of the Dartmouth College decision; and in fact new decisions, as already indicated, are lessening its force. We may need an amendment to the Constitution of the United States. We need to lift the control of the dead from the property of the living, or at least to restrict it greatly. So much has been accomplished in England that conditions of bequests can now be changed, and the effects are said to be beneficial.[16]

We are to understand, of course, that bequests should not be changed without a cause. It would always be necessary to show cause for a change before a court of some kind. John Stuart Mill has some discussion of this subject.[17] He would not allow testators to prescribe what opinion might be taught, because that would interfere with freedom of thought.

Attention may be called especially to a letter written

by Thomas Jefferson to Thomas Earle of Worcester, Massachusetts, dated Monticello, September 24, 1823.[18] It reads as follows:

"That our Creator made the earth for the use of the living, and not of the dead; that those who exist not can have no use nor right in it, no authority or power over it; that one generation of men cannot foreclose or burden its use to another, which comes to it in its own right and by the same divine beneficence; that a preceding generation cannot bind a succeeding one by its laws or contracts, these deriving their obligations from the will of the existing majority, and that majority being removed by death, another comes in its place, with a will equally free to make its own laws and contracts; these are axioms so self-evident that no explanation can make them plainer; for he is not to be reasoned with who says that non-existence can control existence, or that nothing can move something. They are axioms also pregnant with salutary consequences. The laws of civil society, indeed, for the encouragement of industry, give the property of the parent to his family on his death, and in most civilized countries permit him even to give it, by testament, to whom he pleases. And it is also found more convenient to suffer the laws of our predecessors to stand on our implied assent as if positively re-enacted, until the existing majority positively repeals them. But this does not lessen the right of that majority to repeal, when ever a change of circumstances or of will calls for it. Habit alone confounds what is civil practice with natural right."

The provisions in the American Constitutions and Statutes concerning perpetuities seem for the most part to apply to natural persons rather than to corporations; as a general rule they limit the tying up of property to lives in being and to twenty-one years, and period of gestation. The following are the provisions of some of the Constitutions:

"Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed." North Carolina, 1776, (the first place where it occurred) 23rd Sect. of the Declaration of Rights; from North Carolina it passed to other States.

"Perpetuities and monopolies are contrary to the genius of a free state and shall never be allowed." Texas, 1876.

"Perpetuities and monopolies are contrary to the genius of a republic and shall not be allowed." Arkansas, 1874.

"Perpetuities and monopolies are contrary to the genius of a free state." Tennessee, 1870.[19]

It has been held, says Professor Gray in his work on Perpetuities, apparently referring to North Carolina, that this applied only to estates entailed and has not been considered to affect gifts to charities. It has also been so held in Tennessee. The Florida Constitution of 1838 and also that of 1865 have the North Carolina provision, but the Constitution of 1868 dropped it. "These provisions," says Gray, "seem to be simply pieces of declamation without juristic value, at least on any question of remoteness." Even if it is true that from the strictly legal point of view they are "simply pieces of declamation without juristic value," in the author's opinion they indicate nevertheless the ideals of the Fathers of the American Republic. They may have been lost sight of and have not been carried out, but they show what the ideals were. The courts have possibly

not appreciated their importance, and so far as they have been brought before the courts the decisions have been of such a kind as to remove any significance from them. If one looks at it fairly and squarely one must see that what these general provisions mean will depend upon the economic and social philosophy of the courts as well as upon laws passed by the legislature. There are many ways in which we can interpret these statements. Their interpretation will depend upon our economic philosophy and the philosophy of our courts and our legislatures has been such that they have not attached any importance to these provisions which consequently have had no value, although they might have value under a different kind of legislation and judicial interpretation.

The Constitution of California in 1849 says, "No perpetuities shall be allowed except for eleemosynary purposes." In California private colleges and religious bodies were taxed until recently, showing that the people in California had an idea of living up to these provisions of the Constitution, because taxation would bring these institutions to that extent under control.[20]

The Pennsylvania Constitution of 1776 and the Vermont Constitution of 1793 provide that "the legislature shall regulate entails in such manner as to prevent perpetuities." Later Constitutions of Pennsylvania have no such provision, and it seems to have had no effect either upon the law in Vermont.

Georgia, Iowa, and Kentucky have statutes on this subject. These limit perpetuities generally to lives in being and twenty-one years. Mississippi, California,

Michigan, Wisconsin, Minnesota, Maryland, Connecticut, Alabama, Indiana, and New York have statutes on the subject, so we see that they are common. The intentions in all these constitutional provisions and statutes are, first, to preserve equality of opportunities and, secondly, to preserve the fluidity of property. In Indiana it is said in the statute that "the absolute power of aliening lands shall not be suspended by any limitation or condition whatever . . . for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed . . . with the exception that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age."[21] The idea is to keep the property fluid. That seems to be the idea with all of these provisions so far as the general principle is concerned.[22]

Notes and References to Chapter XVIII

[1] P. 451. The literature on this subject in its general aspects is scanty indeed, but we have a great deal on special phases of it. A book devoted to one of the most important aspects of the subject is entitled *The Dead Hand*, by Sir Arthur Hobhouse; we have Blackstone on Mortmain, *Commentaries*, Bk. II, Chap. XVIII (Cooley's ed., pp. 267–286); there is also an article on "The Dead Hand" by Rev. H. L. Wayland, published in the *Journal of Social Science*, No. 26, pp. 79–90 (The American Social Science Association, February, 1890); Washburn on *Real Property* (4th ed.) Vol. I, p. 76, Vol. II, pp. 385–7, may be mentioned but it gives very little on the subject. Then we may mention an American law book on the subject entitled *Rule Against Perpetuities*, by Professor John Chipman Gray, Royal Professor of Law in Harvard University. Professor Gray says that the rule against perpetuities should have been called rule against remoteness. This is a very valuable work, with references to American Constitutions and statutes: but it does not cover, of course, the whole of our field. Gray's "Rule against Perpetuities," in the *Harvard Law Review* for January, 1907, may also be mentioned.

[2] P. 454. Blackstone, *Commentaries*, Bk. II, Chap. XVIII, p. 272.

[3] P. 454. The reader is referred to a pamphlet on "The Dead Hand" by the late historian, Henry Charles Lea, published in 1900, for a discussion of the acquisition of property by the Church in all countries and of the acts passed everywhere against willing or selling property to the Church. However, the land seems to have been accumulated gradually and steadily. The following excerpts are taken from the above-mentioned work:

"The control which the Church exercises over the hopes and fears of the sinner, especially on the death-bed, and the teaching, amply warranted by Scripture, that well-directed almsgiving is the best antidote for sin, has given it in all ages an unequalled opportunity for acquisition. Moreover, whatever it acquired, it retained. It held in mortmain—in the Dead Hand—and its possessions were

inalienable. Pope Symmachus declared that even the pope could not sell the property of the Church. . . .

"The exemption from public burdens claimed for Church lands stimulated their acquisition, for it enabled churchmen to lay up surplus revenues for fresh investments, and for these they could afford to pay more—estimated at one-third—than lay purchasers, as land being untaxable in their hands brought them in larger returns. . . .

"The *Schwabenspiegel*, which was in force in the southern and western regions, as might be expected in the land of the great prince bishops, shows much greater trace of clerical influence. It imposes no restrictions on mortmain and stimulates liberality to the Church. The result of this was that at the outbreak of the Reformation one-half of the land in Germany is estimated to have belonged to the Church."

Land was given to the Church for acts of great piety, and against these donations for "pious uses" much of the legislation against mortmain is aimed.

"This various legislation to a common end throughout the lands of the Roman Obedience is of interest rather as showing the unanimous conviction of European Statesmen during five or six centuries as to the evils of accumulation in mortmain than as exhibiting their power to curb the acquisitiveness of the Church. The constant iteration of legislation demonstrates its ineffectiveness. By one means or another the Church baffled the law givers, heedless of the temptations which it was offering and of the risk which it might run whenever circumstances should weaken its awful authority over the minds of princes and peoples. It did not anticipate that the time would come when those who might shrink from spoliation would reconcile their consciences to the euphemisms of 'secularisation.' "

On October 30, 1781, Emperor Joseph II suppressed all contemplative orders in his kingdom, involving nearly two-fifths of all religious houses in his dominions, and their possessions were turned into a fund for education and improvement of benefices. A *Reichsrezess* of February 25, 1803, secularised Mayence, Treves, Cologne and Salzburg and eighteen bishoprics with their possessions valued at 420,000,000 Rhenish gulden. This Church territory had 3,161,776 inhabitants and revenues of

21,000,000 florins. The money was used for state finances, in religion, education, and pensioning of clerics. (pp. 1, 6, 7, 10, 11, 12.)

[4] P. 455. Bouvier's *Law Dictionary*.

[5] P. 455. The Ohio Statute is Section 10,504, General Code of Ohio. This is not an uncommon provision.

[6] P. 456. Blackstone, *op. cit.*, Bk. II, Chap. XVIII, pp. 273–4.

[7] P. 458. We also have the history of educational institutions for centuries, and though this history has its dark periods, no other chapter in human history is so bright. Perhaps some will say this is all "*pro domo sua*" and to this no reply is here attempted.

[8] P. 459. Nearly every State has abolished entailments, or has so modified them that they are virtually abolished. Pollock *v.* Speidel, 17 Ohio St. 439 (1867); Sutton *v.* Miles, 10 R. I. 348 (1872); St. John *v.* Dann, 66 Conn. 401 (1895); Duffy *v.* Jarvis, 84 Fed. 731 (1898); Clarke *v.* Smith, 49 Md. 106 (1878); Nellis *v.* Nellis, 99 N. Y. 505 (1885).

Our courts are inclined to scrutinise "trusts" with great jealousy, and endeavour to scrutinise strictly "substitutes for entailment". But it is hard to provide against the ingenuity of those who desire to perpetuate the control of vast wealth in one line of descent.

[9] P. 459. See on this subject the brochure by Professor Lujo Brentano, entitled *Familienfideikommisse und ihre Wirkungen*. The subject of entails is discussed at considerable length by J. R. McCulloch in his *Succession of Property* in Chap. III. He argues in their favour for the nobility in countries with a legally recognised aristocracy.

[10] P. 461. See list of cases on Police Power, in Appendix IV, pp. 869–881.

[11] P. 461. For a partial reversal of the Dartmouth College Case, see notes on Dartmouth College Case, Appendix IV, pp. 884–886.

[12] P. 462. People *v.* O'Brien, 111 N. Y. 1 (1888).

[13] P. 463. See *The Wealth of Nations*, Bk. I, Chap. X, Pt. II, where this subject is briefly discussed. Then also in the same work see Bk. V, Chap. I, Pt. VII, Art. 2, where he discusses the expenses of institutions for the education of youth. In this last part of the book the subject is discussed at length.

[14] P. 464. See article on "Fondation," *Oeuvres de Turgot*, Vol. I, pp. 299–309. *Cf.* art. "Endowments" in Palgrave's *Dictionary of Political Economy*, by Rev. L. R. Phelps.

[15] P. 465. See especially Hobhouse, *The Dead Hand;* also H. L. Wayland, "The Dead Hand," published in *The Independent*, and reprinted in the *Journal of Social Sciences*, No. XXVI, February, 1890. These authors give numerous illustrations not only of the absurdity, but of the bad consequences in many cases of attempting to carry out provisions of testators long ago dead.

[16] P. 465. An interesting address was delivered on Endowments by Sir Joshua Fitch, Inspector of Training Schools in England, before the Association of Colleges of the Middle States at the University of Pennsylvania (1888). Sir Joshua Fitch said in this address that this control which Parliament had assumed to exercise over foundations did not decrease bequests at all. He had asked a man if he did not feel less inclined than formerly to leave money for educational purposes; but the man had replied, No, that he was glad, because he knew that if he made a mistake the spirit of his bequest would be carried out even if the letter had to be violated.

[17] P. 465. *Principles of Political Economy*, Bk. II, Chap. II, § 4.

[18] P. 466. It may be found in the printed Journal of the Social Science Association, following the record of the meeting at which Dr. Wayland's paper was read, No. 26, already referred to, and also in the *Works* of Thomas Jefferson, Vol. VII, pp. 310–1.

[19] P. 467. Gray's work on *Rule Against Perpetuities;* concerning the provisions of the American Constitution and statutes. §§ 728–752.

[20] P. 468. The author does not mean necessarily to approve the earlier Californian practice. He himself has in a particular case argued for an exemption from taxation of property used for educational purposes. He is simply arguing for the possibility of social control.

[21] P. 469. Burns's *Annotated Indiana Statutes* (revision of 1908), Vol. II, § 3998 (3382), Power of Alienation, 40.

[22] P. 469. This is another chapter which requires a very large volume for adequate treatment. The author has endeavoured to restrict this topic to its due proportions among many other topics of weight, so as to bring this volume within the desired limits.

It has been suggested that the failure of the provisions of early Constitutions against perpetuities and monopolies to attain real significance has not been due to the individualism of the courts, but

to the purely general character of these provisions. Doubtless it has not been altogether easy to apply them, but many general phrases have received astounding developments by judicial decision. But the courts have not been peculiar in their attitude. American legislatures have not given much attention to these provisions.