

SACRAMENTAL FEATURES OF ANCIENT AND MODERN LAW.

IN our own system of law we have but one sacramental observance remaining, and that is the oath. But if we look into the legal systems of the past and other parts of the world we shall find many others. By a sacramental observance I mean a ceremonial appeal to divine agency characterized ordinarily by some peculiar act or "outward and visible sign," as the catechism has it, such as kissing books, burning candles, killing animals, smearing with oil, sprinkling with water, putting on a ring, laying hands on altars or relics. Our irreverent optional oath is but the soiled remnant of a once gorgeous fabric. Imagine a jurisdiction where sacramental observances are essential to the existence of all legal rights, to the validity of marriages, and to the right to succeed to property; where promises unsanctified by such observances are not binding, and witnesses not performing them are incompetent to testify; and where questions of fact, in the absence of satisfactory evidence, are habitually referred by such observances to divine determination. It will not be difficult to find all these characteristics in actual bodies of law.

In ancient times the gods were looked to constantly in the framing of laws and administration of justice as in all other matters. The decision of a judge was the judgment of a god; a statute was a divine declaration; and obedience to law was encouraged by blessings and enforced by curses. The Mosaic law will furnish us with examples:—

"And when Moses' father-in-law saw all that he did to the people, he said, What is this thing that thou doest to the people? Why sittest thou thyself alone, and all the people stand by thee from morning unto even? And Moses said unto his father-in-law, Because the people come unto me to inquire of God: When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God and his laws."¹

"And the Lord spake unto Moses, saying, And thou shalt speak unto the children of Israel, saying, If a man die, and have no son, then shall ye cause his inheritance to pass unto his daughter. And if he have no daughter, then ye shall give his inheritance unto his brethren. And if

¹ Ex. xviii. 14 *et seq.*

he have no brethren, then ye shall give his inheritance unto his father's brethren."¹

"Thou shalt have a place also without the camp, whither thou shalt go forth abroad; and thou shalt have a paddle upon thy weapon; and it shall be when thou wilt ease thyself abroad, thou shalt dig therewith, and shalt turn back and cover that which cometh from thee; for the Lord thy God walketh in the midst of thy camp, to deliver thee, and to give up thine enemies before thee; therefore shall thy camp be holy; that he see no unclean thing in thee, and turn away from thee."²

"If ye shall diligently keep all these commandments which I command you, to do them, to love the Lord your God, to walk in all his ways, and to cleave unto him; there shall no man be able to stand before you; for the Lord your God shall lay the fear of you and the dread of you upon all the land that ye shall tread upon."³

"If ye hearken to these judgments, and keep, and do them, the Lord thy God will love thee, and bless thee, and multiply thee. Thou shalt be blessed above all people: there shall not be male or female barren among you, or among your cattle."⁴

"Moses charged the people, saying, the Levites shall speak and say unto all the men of Israel with a loud voice, Cursed be he that removeth his neighbour's landmark, and all the people shall say, Amen. . . . If thou wilt not hearken unto the voice of the Lord thy God, to observe his commandments and his statutes, all these curses shall come upon thee. . . . The Lord shall smite thee with a consumption, and with a fever, and with an inflammation, and with an extreme burning, and with the sword, and with blasting, and with mildew. . . . He shall bring the tender and delicate woman to eat her own children to satisfy her hunger. . . . In the morning thou shalt say, Would God it were even, and in the even thou shalt say, Would God it were morning."⁵

The Homeric king is also a judge, and his sentences and judgments come directly to his mind by divine dictation from on high.⁶ People possessing such beliefs as to the inspiration of judgments and laws would naturally attach importance to the invocation of divine wrath and divine assistance in the administration of justice, and such beliefs have obtained in different parts of the world and with varying degrees of intensity through long periods of time. The laws of Charlemagne provided that doubtful cases should be determined by the judgment of God.⁷ "There is no system of recorded law, literally from China to Peru," Sir Henry Maine says,

¹ Num. xxvii. 6 *et seq.*

² Deut. xxiii. 12 *et seq.*

³ Deut. xi. 22 *et seq.*

⁴ Deut. vii. 12, 13.

⁵ Deut. xxvii. and xxviii.

⁶ Maine's *Early Law and Custom*, 163.

⁷ Lea's *Superstition and Force*, 202.

“which when it first emerges into notice is not seen to be entangled with religious ritual and observances.”¹

In our courts to-day as difficult a problem as any may be the decision of a question of fact. But according to Sir Henry Maine, in mediæval times questions of fact were regarded as the simplest of all questions. All difficulties were avoided by referring them directly to the Lord.² They were so referred by performance of the sacramental rites known as Ordeal, Compurgation, and Wager of Battle, of which no doubt we all have some idea. Twelve men, more or less, sometimes called *sacramentales*, appeared in a church and swore upon the altar that the accused was innocent. That was compurgation.³ The compurgators did not swear to knowledge of facts. “If the accused is guilty may we be punished as if our oaths were his.” That was the invocation. And the idea appears to have been that no twelve men would take such a risk of the divine wrath in a case where punishment was merited. The ordeal was the culminating feature of an elaborate religious ceremonial. The boiling water ordeal, for instance. The accused, after a period of fasting and prayer, was brought to church and partook of the sacrament; mass was celebrated, the boiling water was exorcised,—adjured by the ever-living God to manifest the truth, and, finally, the hand was plunged in.⁴ So in the case of the appeal to arms. The selected champions before the combat swore on the gospels or on relics to the justice of their respective causes, and defeat meant conviction of perjury as well as an adverse judgment.⁵ In the Middle Ages the laws regulating these tests of truth were as important a part of the *corpus juris* as the law of evidence is to-day. The Mosaic law provides for their application, and they persisted as part of the common law of England until the time of Blackstone. In 1661 a continental law student selected the cold water ordeal for witches as the subject of his thesis.⁶ The Pentateuch prescribes compurgations and ordeals. The “trial of jealousy” provided for in Numbers was an ordeal. When the wife is suspected of adultery and there are no witnesses obtainable, the husband shall bring her to the priest. Certain ceremonies shall be performed and the woman shall be compelled to drink holy water mingled with dust from the floor of the tabernacle. Finally, as the upshot of it all, we are told that if the woman is guilty her belly shall swell and her thigh shall rot.⁷ In England, as late as

¹ Maine's Early Law and Custom, 5.

² Maine's Early History of Institutions, 48.

³ Lea's Superstition and Force, 28.

⁶ Ib. 259.

⁴ Ib. 223.

⁵ Ib. 128.

⁷ Num. v.

the reign of King John, the bishops and clergy were empowered to use the ordeals of fire, hot iron, and boiling water.¹ Benefit of clergy, or the right to an acquittal by compurgation in the ecclesiastical courts, continued as an actual right until the reign of Queen Elizabeth.² And up to 1833 a creditor who brought an "action of debt," so-called, could be defeated by the oaths of compurgators, although he could avoid this defence by selecting another form of action.³ In the time of Blackstone either plaintiff or defendant, in an action to try title to land based upon the writ called a writ of right, was entitled to a trial by wager of battle. The court was to sit by sunrise, and if the defendant's champion could defend himself till the stars appeared judgment was given against the plaintiff. Otherwise the plaintiff won.⁴ The writ of right was originally, I believe, the only resource of a claimant of land, and originally, according to Blackstone, wager of battle was the only method of trying the issues joined upon such a writ. In so simple a fashion did our ancestors cut the Gordian knots of the law of real property. As late as 1638 issue was joined in an action of this kind and both sides produced champions, but the judges, by inventing reasons for delay, succeeded in preventing an actual fight.⁵ In case of acquittal of murder the widow and next of kin of the murdered man had the right to summon the accused to a new trial, and the parties to such an action had the right to refer the issues to judicial combat.⁶ In 1818, in the celebrated case of *Ashford v. Thornton*, the brother of the murdered man resorted to this proceeding, and the accused offered wager of battle and so forced the brother to withdraw.⁶

In ancient times a sacramental ritual was an essential part of the law of obligations. A man was bound not by his promises but by his vows. Sir Henry Maine says, "Some archaic codes do not mention contract at all, while others significantly attest the immaturity of the moral notions on which contract depends by supplying its place with an elaborate jurisprudence of oaths."⁷ The law of Moses was a code of the latter sort.

"When thou shalt vow a vow unto the Lord thy God, thou shalt not slack to pay it; for the Lord thy God will surely require it of thee; and it would be sin in thee. But if thou shalt forbear to vow it shall be no sin in thee."⁸

¹ 4 Blackstone, 344.

⁴ *Ib.* 337.

⁶ *Ib.* 194.

⁸ Deut. xxiii. 21 and 23.

² *Ib.* 365.

⁵ Lea's *Superstition and Force*, 194.

⁷ Maine's *Ancient Law*, 357.

³ 3 Blackstone, 346.

And Robertson Smith says the very phrase in Hebrew for making a covenant points to the sacrificial observances that accompanied such an act.¹

The Romans had a religious form of marriage,² but it was reserved for Christianity, I believe, to make a sacramental ceremony essential to the existence of the marriage state. Long before the close of the Middle Ages this had been accomplished in all Christian countries.³ A marriage unconsecrated by the sacrament of the Church was no marriage at all. This is the historical reason why for so long a time in England the ecclesiastical courts had exclusive jurisdiction of matrimonial causes.⁴ In Protestant Sweden, as late as 1873, no one not confirmed in the Lutheran faith could be legally married.⁵ In Roman Catholic countries, as we all know, the influence of the priesthood is strongly directed towards the universal use of the ceremonial of the Church, but I am not aware that it is in any country nowadays an essential to the creation of the legal status, although there are still many people, I presume, who would wish this to be the case. Only last spring a Dr. White, writing to the *New York Evening World*, subscribed his name to this assertion: "I do not believe there should be civil marriages of any kind. They should all be solemnized in church."⁶

The most interesting and important sacramental observances from the legal, and in fact any point of view, may be classed as brotherhood rites. The primitive nation was a group of men who believed themselves to be related to one another. Christians of the present day speak of themselves as brothers in a metaphorical sense. But in ancient times men of the same nationality believed themselves to be actually of the same blood. The Jews, for instance, were the seed of Abraham:—

"And he brought him (Abraham) forth abroad and said, Look now toward heaven and tell the stars, if thou be able to number them; and he said unto him, So shall thy seed be. . . . I will make thee exceedingly fruitful, and I will make nations of thee, and kings shall come out of thee. . . . I will give thy seed the land of Canaan. . . . And they blessed Rebekah and said unto her, Thou art our sister; be thou the mother of thousands of millions, and let thy seed possess the gate of those that hate thee."⁷

¹ Old Testament in the Jewish Church, 235.

² Maine's Ancient Law, 149.

³ Maine's Early History of Institutions, 60.

⁴ 3 Blackstone, 92.

⁵ Appleton's Encyclopædia, "Sweden."

⁶ N. Y. Evening World of April 20, 1900.

⁷ Gen. xv. 5, xvii. 6 *et seq.*, xxiv. 60.

Something more than mere consanguinity, however, was necessary to citizenship. The association was consecrated by common rites and sacrifices, and non-conformists were, as the Pentateuch has it, "cut off from the people," only to regain their original status by purifications and expiations.¹ It is declared in Exodus, for instance, that in the time of the Passover "whosoever eateth leavened bread from the first day until the seventh day, that soul shall be cut off from Israel."²

This belief in actual consanguinity coexisted with the practice of admitting strangers in blood to the national communion. But strangers, after due performance of the ceremonials of admission and adoption and participation in the common sacrifices, were regarded as sharing in the common lineage,³ and the institution of adoption did not prevent belief in universal kinship as a fact.⁴ Such a belief might be accepted by the mass of the people unthinkingly. And those who reflected might have found the religious ceremonial in some way mysteriously efficacious to create actual kinship; just as many people believe to-day that the eucharistic ritual operates to create the real presence. St. Paul, perhaps, will furnish us with an illustration of this mode of reasoning, for it is evident that he made use of the primitive idea of national kinship in framing his theory of the Christian communion. He says, "The bread which we break, is it not the communion of the body of Christ? For we being many are one bread and one body; for we are all partakers of that one bread."⁵ Another analogy may be found in the doctrine of spiritual relationship, not yet wholly obsolete, I believe, in the Roman Catholic Church, which forbade the intermarriage of sponsor and godchild, treating the relation between the two as identical with that of actual parentage.⁶ The Mosaic law provides for the adoption and amalgamation of strangers.

"When a stranger shall sojourn with thee, and will keep the passover to the Lord, let all his males be circumcised, and then let him come near and keep it; and he shall be as one born in the land: for no uncircumcised person shall eat thereof."⁷

"No brotherhood was recognized by our savage forefathers," says Sir Henry Maine, "except actual consanguinity regarded as a fact: If a man was not of kin to another there was nothing between them. He was an enemy to be slain, spoiled, or hated as much as the wild beasts upon which the tribe made war, as belonging

¹ Maine's Ancient Law, 6.

² Ex. xii. 15.

³ Maine's Ancient Law, 126.

⁴ Maine's Early History of Institutions, 65.

⁵ 1 Cor. x.

⁶ Maine's Early History of Institutions, 239.

⁷ Ex. xii. 48.

indeed to the craftiest and cruellest order of wild animals." ¹ The gods of such a nation were their aiders and abettors in an exterminating warfare upon all outsiders. The Jews, as exhibited in the Old Testament, were such a nation, and their God was such a god.

"And they warred against the Midianites as the Lord commanded Moses, and they slew all the males. And the children of Israel took all the women of Midian captive and their little ones. . . . And Moses said unto them, Have ye saved all the women alive? . . . Now therefore kill every male among the little ones, and kill every woman that hath known man by lying with him. But all the women children that have not known a man by lying with him, keep alive for yourselves." ²

"When thou comest nigh a city to fight against it, then proclaim peace unto it, and if it make thee answer peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it. And when the Lord God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of thy sword: But the women and the little ones, and the cattle and all that is within the city, even all the spoil thereof, shalt thou take unto thyself.

"Thou shalt thou do to the cities which are very far off from thee, which are not of the cities of these nations. But of the cities of these people which the Lord thy God doth give thee for an inheritance, *thou shalt save alive nothing that breatheth.*" ³

"If thou shalt say in thy breast these nations are more than I, how can I dispossess them? Thou shalt not be afraid of them; but shalt well remember what the Lord God did unto Pharaoh and unto all Egypt. . . . So shalt the Lord thy God do unto all the people of whom thou art afraid. . . . The Lord thy God shall deliver them unto thee and shall destroy them with a mighty destruction until they be destroyed." ⁴

"When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many nations before thee, . . . and when the Lord thy God shall deliver them before thee, thou shalt smite them and utterly destroy them, thou shalt make no covenant with them, nor show mercy unto them." ⁵

The eucharist appears to owe its position as a Christian sacrament to the existence of the ancient kinship sacrifices. St. Paul treats it as analogous to them and as a substitute for them. Christians, he says, have received the adoption of sons and have been made heirs of God.⁶ Being Christ's they are Abraham's seed,

¹ Maine's Early History of Institutions, 65.

² Ex. xxxi. . . .

³ Deut. xx. 10 *et seq.*

⁴ Deut. vii. 17, 18.

⁵ Deut. vii. 1. *et seq.*

⁶ Gal. iv. 1-7.

and heirs according to the promise.¹ The Gentiles shall be fellow-heirs and of the same body.² And to the existence of this state of affairs he declares the communion ceremonial essential.

“The cup of blessing which we have, is it not the communion of the blood of Christ? The bread which we break, is it not the communion of the body of Christ? For we being many are one bread and one body; for we are all partakers of that one bread. Behold Israel after the flesh. Are not they which eat of the sacrifices partakers of the altar?”³

The blood-shedding, beast-slaughtering observances, by which the members of a savage tribe consecrated their union for purposes of robbery and murder, transformed into the bond of union of the religion of peace and good-will! There is, perhaps, nothing very strange about this. The symbolism of war and bloodshed is adopted very naturally by humanity in all its activities, and has furnished the Salvation Army with almost an entire vocabulary for its work in propagating the gospel of Christ. The attitude of Christianity, moreover, towards the outer world has too often closely resembled that of our savage forefathers as depicted by Sir Henry Maine. “We are enjoined to smite the ungodly though he be our neighbor,” says Balfour of Burley in *Old Mortality*, and the command has been obeyed almost as conscientiously since the year one as before it.

In ancient times, therefore, participation in sacramental rites was essential to citizenship. Strangers dwelling in the community might be tolerated or protected, but they had no political rights. The central principle of a system under which political rights were obtainable on no terms whatever except connection in blood, real or artificial, was sternly maintained, Sir Henry Maine says, by the ancient states.⁴ Outsiders, moreover, had, in the earliest times at least, no legal rights. The Mosaic law says, to be sure: “If a stranger sojourn with thee in your land, ye shall not vex him, but the stranger that dwelleth with you shall be unto you as one born among you and thou shalt love him as thyself; for ye were strangers in the land of Egypt.”⁵ Nevertheless, according to Robertson Smith, the stranger had no legal status, and, in early times at least, the person referred to in the above passage was a stranger in process of conversion into an Israelite.⁶ So, in the early Roman Republic, Sir Henry Maine says, the principle of the absolute ex-

¹ Gal. iii. 27, 29.

² Eph. iii. 6.

³ 1 Cor. x. 16 *et seq.*

⁴ Maine's *Ancient Law*, 127.

⁵ Lev. xix. 34.

⁶ *Old Testament in the Jewish Church*, 337, and note.

clusion of foreigners pervaded the civil law no less than the constitution,¹ and such remained the case until the extension of foreign trade and the increased number of alien residents compelled amendment.

Much could be told, no doubt, by one better informed than myself, of the inferior position of non-communicants before the law since the beginning of the Christian era. But without attempting to go into that subject at length, Massachusetts and Sweden, neither of which would ordinarily be classed as a non-progressive community, may be referred to as furnishing instances of rigid applications of the ancient rule in modern times. The scholars of Johns Hopkins have found in New England interesting reversions to primeval types, and have written essays upon the Germanic Origin of New England Towns and the Village Communities of Cape Ann and Salem. Our Puritan forefathers, in framing their system of government, certainly received with great favor the doctrines of the Old Testament dispensation as to cutting off the ungodly from the people. A non-communicant could not vote.² In 1689 two ministers complained to the magistrates that a militia officer was unfit for his position because corrupt in his judgment with reference to the Lord's Supper.³ And a man was excluded from the communion for denying baptism to his infant child, and afterwards convicted of the same offence in a legal prosecution before the County Court.⁴ In Sweden it has been the law until within a few years, if it is not still the law, that every Swede who does not claim to belong to one of the dissenting sects must be confirmed at the age of fifteen and partake of the sacraments.⁵

Excommunication is a judgment excluding from sacramental rites, and when it not only purports to place the culprit in peril of eternal damnation, but does in fact deprive him of every earthly right and make him an outlaw against whom no one is bound to stay his hand, it is a most terrible sentence. Such a sentence is the natural weapon of priests, and in early times the judge was a priest. Just as the Jewish people not only made Moses their temporal and spiritual leader, but also came to him to inquire of God for the purpose of settling their disputes, so in most ancient communities, according to Sir Henry Maine, the priest was also king and judge.⁶ The Druids, according to Cæsar, were supreme judges in all public

¹ Maine's *Ancient Law*, 46.

² Brooks Adams's *Emancipation of Massachusetts*, 26. ³ *Ib.* 81. ⁴ *Ib.* 119.

⁵ Appleton's *Encyclopædia*, Sweden.

⁶ Maine's *Early Law and Custom*, 160.

and private suits.¹ In Sweden to this day the clergy in country parishes are often magistrates as well as pastors.² In the days of this priestly supremacy no assistance from a temporal arm was needed. If a Celt or Gaul refused to abide by a Druid judgment he was excommunicated, and that was the heaviest of penalties.³ Cæsar says that those whom the Druids exclude from their sacrifices "are deemed impious and accursed. Every one avoids them, shuns their approach, and avoids speech with them, lest they receive some inconvenience from contact with them. Neither is justice vouchsafed on their petition, or any honor conferred upon them."⁴

This priestly jurisdiction was perpetuated in the Middle Ages, and for long after, by the ecclesiastical courts, which dealt with many of the matters of which our lay judges now take cognizance. Our Surrogate's Courts, and the special courts of Probate and Divorce, which may still be found in certain jurisdictions, are all derived from the old ecclesiastical courts, which took exclusive charge of matrimonial matters and the settlement of estates. And the ordinary sentence of these courts and their ordinary process for enforcing their judgments, even in Protestant England, was excommunication.⁵ The statute law of the Middle Ages also prescribed this punishment, and several of the laws of Charlemagne denounced the penalty of excommunication against deserters from the army.⁶ In the time of Blackstone the lesser excommunication excluded from the sacraments, the greater from the company of all Christians. Deprivation of legal rights also followed; for the lay courts recognized the sentence and denied to the excommunicated the right to sue, to serve on a jury, or to testify as a witness. He was, moreover, subject to arrest and imprisonment until such time as he should make his peace with the Church.⁷

Excommunication is a natural resource of a judge without executive power, and the earliest courts were mere courts of arbitration enforcing their judgments by sentences of excommunication and outlawry.⁸ In England, with the growth of a well-organized executive, the ecclesiastical courts, like other tribunals, came to place their chief reliance on fines and imprisonments, and excommunications were probably decreed very much as oaths are administered now,

¹ Maine's Early History of Institutions, 31.

² Appleton's Encyclopædia, "Sweden."

³ Maine's Early History of Institutions, 39.

⁴ 3 Blackstone, 102.

⁶ Hallam's Middle Ages.

⁵ *Ib.* 101.

⁷ 3 Blackstone, 101.

⁸ Robertson Smith's Old Testament in the Jewish Church, 337; and Maine's Early Law and Custom, 170.

with a great deal of indifference to their significance on the part of all concerned. Dickens, in *Sketches by Boz*, has a humorous account of a trial at Doctors' Commons of a man for the crime of "brawling" within the precincts of a church, — getting into an altercation at a vestry meeting and threatening violence. Sentence was imposed of excommunication for a fortnight and payment of costs. Whereupon the accused addressed the court, and said: "If they 'd be good enough to take off the costs and excommunicate him for the term of his natural life instead, it would be much more convenient for him, for he never went to church at all."¹

Such were the latter days of excommunication in Great Britain. The full majesty of its power had been displayed eight hundred years before, when a Pope, of comparatively insignificant temporal power, by his judgment of excommunication deprived the greatest monarch of Europe of his supporters and his throne and brought him, a humble pilgrim, across the Alps to sue for absolution.

While we are on the subject of excommunication reference may be made to another substitute for ordinary legal process, which, like excommunication, operates by exciting a fear of supernatural punishment. The ancient Irish law told you to "fast upon a man" if desirous of compelling him to discharge a legal claim, that is to say, sit down at your debtor's door and starve yourself till he paid.² The English found this custom firmly established in India, and, according to Sir Henry Maine, it is diffused over the whole East.³ This practice comes within my definition of a sacramental observance, for it is supposed to insure to your debtor a supernatural penalty if he does not put an end to the starving process by paying up. A Hindoo commonly hires a Brahmin to fast for him. This saves him discomfort, and is moreover the best way, for the future life of a man who has caused the death of a Brahmin is peculiarly unpleasant.⁴ Fasting on a man is still common in the native Indian states and is almost always successful. It is preëminently a remedy of soldiers, resorted to to obtain arrears of pay.⁵ Sir Henry Maine suggests that the practice may be an outgrowth from the very first step towards a legal procedure, that is to say, the *pause* made by the primeval creditor for the purpose of giving his debtor an opportunity to settle before attacking him with force and arms.⁶ Sir Henry Maine is informed that a Kaffir lawsuit still begins with a warlike expedition of the plaintiff and his friends to

¹ *Sketches by Boz* — Doctors' Commons.

² Maine's *Early History of Institutions*, 39.

³ *Ib.* 297.

⁴ *Ib.* 39.

⁵ *Ib.* 297, 304.

⁶ *Ib.* 297.

the defendant's village. On arriving there they sit down quietly and await the result of their presence. And a law of King Alfred appears to require nothing more than such a pause of the seeker after justice. It says:—

“Let the man who knows his foe to be home-setting fight not before he have demanded justice of him. If he have power to beset his foe and besiege him in his house, let him keep him there for seven days but not attack him if he will remain indoors.”¹

I have said that laws may be found making sacramental observances essential to the right to succeed to property. Such is the law of India to-day, recognized by the English government and administered by English judges. The Hindoo customary law, Sir Henry Maine says, makes all the rules of succession hinge on the due solemnization of fixed ceremonials at the dead man's funeral.² The sacred water and the sacred cake must be offered up. Brahmans must be feasted and presents must be made them. The laws determine which of the kindred are privileged to perform these ceremonies and by due performance they perfect their right to share in the property of the decedent. Strange as such a condition of the law seems, certain ordinary religious beliefs lead naturally enough to its existence. The dead are supposed to need in the next world the companionship, food, clothing, weapons, etc., they have enjoyed in this. The funeral sacrifices are supposed to supply these necessities. Offerings of food consumed by the priests supply in some way the ghost of the deceased with nourishment. His widow consumed upon the funeral pile passes to the next world to become again his consort. When a king of Dahomey dies large numbers of his warriors are slaughtered to provide him with a following worthy of his importance in the land beyond the grave. There is a story that one of these warriors saved himself from impending immolation by threatening to forswear all allegiance to his king when he reached the undiscovered country and make himself extremely unpleasant. In the Homeric poems are described bloody funeral rites of a similar character.³ Compassion, fear (for as we all know a dissatisfied ghost can make his presence very unwelcome to the living), respect, and honor all lead to the offering of such oblations. Then again there are gods to be propitiated who, unless

¹ Maine's *Early History of Institutions*, 297.

² Maine's *Ancient Law*, 6; *Early Law and Custom*, 71 *et seq.*; *Early History of Institutions*, 331.

³ Maine's *Early Law and Custom*, 68.

appeared, will torment the decedent, as by imprisonment in hell. Nothing is more natural, therefore, than that enjoyment of the goods of the decedent should be conditioned upon due provision for his eternal welfare. The Hindoo religious books declare the necessity of these observances, and the Hindoo law of inheritance insures their performance. "As long as relatives remain impure," says Vishnu, "the departed spirit finds no rest and returns to visit his relatives whose duty it is to offer up to him the funeral ball of rice and the water libation. Till the Sapindikirana has been performed, the dead man remains a disembodied spirit and suffers both hunger and thirst."¹ And, according to Sir Henry Maine, the English judges in the High Court of Calcutta may be seen to-day weighing the exact amount of spiritual benefit derived by the deceased Hindoo from the sacrifices of a descendant or collateral and the exact degree of blessing reflected on the kinsman who has offered the sacred water and the sacred cake.²

All this is not so wholly foreign to European jurisprudence as might be supposed. In England in former times all the personal property of a decedent became the property of the Church, which devoted a sufficient portion of it to the performance of masses for the repose of his soul before allowing any of it to pass to the next of kin.³ Hence the testamentary and intestate jurisdiction of the modern ecclesiastical courts. What creditors and the next of kin should receive appears to have been at first in the discretion of the Church. Edward I., according to Blackstone, placed some limits to this discretion and obliged the bishop to pay the debts of the deceased.⁴

In China, according to Sir Henry Maine, fully \$150,000,000 per year is spent in quieting the spirits of the dead,⁵ but I am not informed as to how Chinese law is affected by this practice. It is, however, according to the same authority, well established that in many ancient countries sacrifice was a condition of succession.⁶ The Greek orator frequently speaks of sacrifice and succession as inseparable.⁷ Religious ceremonies were necessary to the validity of Roman wills and in the time of Cicero the fees to priests for performance of these "*sacra*" had become an intolerable burden on inheritances.⁸ Naturally in ordering these observances the material well-being of the priests is not overlooked. In India the sacrificial

¹ Maine's Early Law and Custom, 71.

² *Ib.* 56.

³ *Ib.* 79.

⁴ Blackstone, 425.

⁵ Maine's Early Law and Custom, 80.

⁶ *Ib.* 53.

⁷ *Ib.* 78.

⁸ Maine's Ancient Law, 185.

offering must be consumed by Brahmins. "The food eaten at a sacrifice by persons related to the giver," says the law, "is a gift offered to goblins. It reaches neither the Manes nor the Gods."¹ One fact appears to be certain, — that the expensive funeral is not a modern institution.

One of the seven sacraments of the Roman Catholic Church is the sacrament of penance. Penance is an observance for the benefit of the performer, "*pro salute animæ*," as the saying is, for the good of his soul after death, and naturally has its place in a priestly system of law. The offender is enjoined to punish himself voluntarily during life lest a worse thing befall him hereafter, and, incidentally, as in the case of masses and funeral sacrifices, performance often profits the priesthood. The Hindoo law-givers prescribed penances of the most frightful character. In case of a certain crime, for instance, the offender is commanded to enter a hollow iron image and burn himself to death by lighting a fire on both sides.² Penances were regularly imposed by the ecclesiastical courts of the Middle Ages, and by the English ecclesiastical courts as late as the time of Blackstone,³ although they were then in reality nothing but fines of money.

A notable feature of ancient life was the worship of ancestors by sacrificial rites. The Hindoo funeral rites exhibit this worship. Oblations are offered not only to the father just deceased, but to the grandfather and great-grandfather.⁴ So of the sacrifices referred to as conditions of succession in ancient times. They were exhibitions of ancestor worship.⁵ In ancient times, according to Sir Henry Maine, ancestor worship mixed itself most intimately with all family relations.⁶ Speaking of Rome, he says, "they" (the gods of the nation) "lived far away in their own Olympus, and the really effective worship of the Roman was to the Lares and Penates" (ancestors). "Their clay or metal images stood in the Lararium or Penetralia, in the innermost recesses of the house, and represented forefathers who in the earliest days had actually been buried in it before the hearth." Laban's images which Rebecca stole when she fled with Jacob are believed, I am told, to have been the images of ancestors. The dead paterfamilias was the person to receive this worship, a worship begun by those over whom he had in his life exercised paternal power and continued by remoter descendants.⁷ Such a worship his awful authority during life would tend to establish. According to some philosophers

¹ Maine's Early Law and Custom, 81.

² *Ib.* 36.

³ 4 Blackstone, 275.

⁴ Maine's Early Law and Custom, 55.

⁵ *Ib.* 53.

⁶ *Ib.* 58.

⁷ *Ib.* 76.

belief in a future life is derived from the phenomena of sleep and unconsciousness.¹ The primitive man knew that often when he was sleeping, unconscious, lying as if dead, his mind was wandering in a land of dreams. He concluded, therefore, that when a man was dead, *his* mind was consciously existing in a similar domain. This belief of the living person would be fortified by the fact that he often met deceased persons in his visits to the mysterious dream country. The belief in the operation of sacrificial offerings to which I have referred would naturally follow. For if a man could be transported by death to a land beyond the grave, it seemed to follow, that companions, food, arms, tools, ornaments, and other articles of utility or luxury could also be sent over by destruction of *their* material portion. Now, a person imbued with this belief, and meeting his awful parent in the land of dreams, armed with the paternal power and threatening visitations of his terrible wrath, would be very much disposed to do what he could to please him.

Herbert Spencer derives ancestor worship as follows: First, belief in ghosts; next, ghost propitiation at funerals and on other occasions; and finally persistent ancestor worship. Such may have been the beginning of sacrifice, and as Darwin traced our descent from monkeys, so in the future some learned man may derive the whole fabric of sacramental observance from the burnt or buried offerings of some prehistoric savage, terrified by the ghostly visitation of a dreaded parent.

In England and in most if not all our states modern legislation has made an affirmation tantamount to an oath for all purposes. But it is not many years since I listened to an address suggested by the fact that some state court had just shut out the testimony of a witness on the ground of lack of religious belief. When Bradlaugh was elected to the House of Commons all requirements as to oaths had been abolished except in the case of Peers and Members of Parliament. Bradlaugh appeared in the House of Commons and took the oath, but at the same time declared it had no binding effect upon his conscience. On appeal to the courts it was held that a man to whom an oath was a mere form could not make oath as required by law,² but, at the instance of Bradlaugh, a law was soon enacted making an affirmation the equivalent of an oath for *all* purposes.³ So disappeared sacramental observance as a requirement of the law of England.

¹ Maine's Early Law and Custom, 68.

² Atty.-General *v.* Bradlaugh, 14 Q. B. D. 667.

³ Oaths Act, 1888.

The optional oath, administered as it is at the present day, may seem a trifling, irreverent, and unworthy ceremonial, but considered as the last stone of the temple in which law was for many ages administered, it is at least an observance of the most impressive historical significance.

Albert S. Thayer.