CHAPTER I

"I have always loved liberty instinctively, and the more I reflect, the more convinced am I that neither political nor moral greatness can long subsist without it. I therefore am as tenaciously attached to liberty as to morality, and I am ready to sacrifice some of my tranquillity to obtain it.

"You think that I intend to put forward radical and even revolutionary theories. In this you are mistaken. I have shown, and shall continue to show a strong and deliberate preference for liberty, for two reasons; first, because it is my fixed opinion; and, second, because I do not choose to be confounded with those friends of order who are indifferent to freedom and justice, provided that they can sleep quietly in their beds."

—De Tocqueville.

PROPERTY

Property is a legal term. It includes whatever lawfully may be owned. Products of industry are property. Legal privileges* also are property, such as a right-of-way, a copyright, a patent, an estate in land, or other grant of authority or power from the state. Thus we have two kinds of property, wholly different in nature and origin:—products of industry and products of law.

* Privilege at law: An immunity or an exemption conferred by special grant in derogation of common right. Or, in Blackstone's phrase, "A branch of the king's prerogative subsisting in the hands of the subject."

Privileged grants vary. Some are merely honorary; others, immensely valuable, such as right-of-way and enormous land grants, on which many private monopolies are founded, seriously disturb normal economic development.

Combining products of industry with grants of legal authority under the one term "property" has caused much confusion in economic literature. For instance, Proudhon said, "Property is robbery". As he failed to distinguish between the two kinds of property, his meaning is uncertain.

Many authors of books on jurisprudence reveal similar confusion, causing a suspicion that many who condemn and many who defend the existing order are afflicted with the same blurred vision.

Like Proudhon, communists see certain evils growing out of property relations and condemn private property holding in general. On the other hand, conservatives discover many advantages in these relations and indiscriminately support such holdings.

With the advance of civilization, both the evils and the advantages of existing property relations become more conspicuous. Under the legal dispensation now prevailing, as com-

merce, knowledge, culture and refinement increase, property is ever more important and ever more highly prized.

That an increasing number view this tendency with disfavor is doubtless true, but this influence is not yet sufficiently powerful to alter emphatically the general course of events.

High regard for property*, however, is not peculiar to this generation, as will readily be appreciated by reference to Madison's Papers, or the proceedings of the constitutional convention of 1787.

On July 8, while the ratio of representation in the proposed national congress was under consideration, Gouverneur Morris, of Pennsylvania, said that he thought property should be

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* The law writer, Bishop, said in effect that a man has a right to live as long as he can without feeding on his fellows. Also that he has a right to be active, and if not consuming all of the results of his activity today may save them for the future; in other words, may accumulate property; but must so use it as to avoid trespass upon others. He then loses his connections by supposing, in illustration, holders of adjoining parcels of land. It seems not to have occurred to him that lands are not products of human activity.

In "Decline and Fall of the Roman Empire", (v. 4, p. 355, Harper) Gibbon said: "The original right of property can only be justified by the accident or merit of prior occupancy; and on this foundation it is wisely established by the philosophy of the civilians (students of Roman civil law). The savage who hollows a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes in a state of nature the just proprietor of the canoe, the bow, or the hatchet. The

taken into the estimate as well as the number of inhabitants. Life and liberty were generally said to be more valuable than property. An accurate view of the matter would, nevertheless, prove that property was the main object of society.

John Rutledge, of South Carolina, held that property was certainly the principal object of society.

Rufus King, of Massachusetts, declared that property was the primary object of society.

Pierce Butler, of South Carolina, asserted that property was the only just measure of representation. This was the great object of government; the great cause of war; the great means of carrying it on.

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materials were common to all, the new form, the produce of his time and simple industry, belong solely to himself. His hungry brethren can not, without a sense of their own injustice, extort from the hunter the game of the forest overtaken or slain by his personal strength or dexterity. If his provident care preserves and multiplies the tame animals, whose nature is tractable to the arts of education, he acquires a perpetual title to the use and service of their numerous progeny, which derives its existence from him alone. If he incloses or cultivates a field for their sustenance and his own, a barren waste is converted into a fertile soil; the seed, the manure, the labor, create a new value, and the rewards of the harvest are painfully earned by the fatigues of the revolving year. In the successive states of society, the hunter, the shepherd, the husbandman, may defend their possessions by two reasons which forcibly appeal to the feelings of the human mind: that whatever they enjoy is the result of their own in-

Others thought that property was greatest in amount and value where population was most numerous, and that representation might be determined according to population with entire safety to property. It was finally agreed that the House should represent numbers, while the Senate, which Madison thought would be noted for the respectability of its members, would particularly safeguard property.

In spite of the undoubtedly great importance of property, thus indicated, history seems to suggest that permanent social advance is usually preceded by destruction of some form of privileged property. Such destruction is illustrated by the abolition of feudal tenures at the time of the French Revolution. Also by

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dustry; and that every man who envies their felicity, may purchase similar acquisitions by the exercise of similar diligence. Such, in truth, may be the freedom and plenty of a small colony cast on a fruitful island. But the colony multiplies, while the space still continues the same; the common rights, the inheritance of mankind, are engrossed by the bold and crafty; each field and forest is circumscribed by the landmarks of a jealous master; and it is the peculiar praise of the Roman jurisprudence, that it asserts the claim of the first occupant to the wild animals of the earth, the air, and the waters. In the progress from primitive justice to final injustice, the steps are silent, the shades are almost imperceptible, and the absolute monopoly is guarded by positive laws and artificial reasons." This is an excellent description of property in products of industry; property in land (or natural resources), however, appears more often to be based on conquest than upon occupancy.

the outlawing of property in human beings during the American civil war.

Such historical records nearly convince one that property is sometimes an obstruction to progress, although it is somewhat startling to think that property and civilization are antagonistic. But at one time people were amazed to think of the earth revolving around the sun. Darwin's notion proved to be a shock to many good citizens—and still is to some.

In fact, the records show great divergence of opinion and continual confusion when the legal phases of property are under consideration. Hoping, therefore, to approach this "primary object of society" in somewhat simpler form, it is suggested that if a boy is questioned as to the ownership of a string of fish just captured, his reply, even if crude in form, will be clear and explicit and without reference to supreme court decisions.

If this boy grows to manhood and erects a building, paying architects, contractors, and others for the products of their toil, he will doubtless think that he owns the building for the same reason that as a boy he claimed ownership of the fish. He soon discovers, however, that the state each year appropriates a percentage of the value of the building by taxa-

tion. Any objection to this procedure is met with the explanation that the tax is his payment for public services rendered in the form of police protection, fire protection and other benefits.

Is this reply to the objection sound? To erect this building, he required a place, site, lot or parcel of land on which to rest it, and to get this land was obliged to pay, in purchase price or ground rent, all that its possession was worth; and found that this price or rent was the sum of the values of all of the advantages "thereunto appertaining."

Among these advantages were public fire and police protection, together with other benefits derived from public activities. It is obvious that if these were withdrawn, the parcel of land would be of much less value. Apparently, then, he paid for all of these public services when he rented or bought the place, and as the land holder collected this payment for public service, it would seem to be entirely proper for the public to call upon him for an accounting, instead of demanding taxes from him who has already paid the landlord for all benefits conferred by government.

Much uncertainty respecting these matters would be avoided if the origin of property

rights were more clearly revealed. Public action in harmony with the truths thus revealed would make for general peace and order, for no one could fairly complain of economic injustice if the rightful claims of each individual in respect to property were fully recognized and defended; and surely justice has never been found to be the source of confusion. Failure to trace property rights to their source seems to be an explanation of much economic obscurity.

Doubt and perplexity respecting the facts in this matter can only issue in confused and bewildered law, and this cannot fail to operate unjustly upon those who live under its protection. It inevitably gives advantage to some, and thereby invades the rights of others. Such confusion, if continued, culminates in disasters known to history as uprisings, rebellions and revolutions. Disasters of this character develop from unjust property relations, and much of the failure to clarify the subject must be charged to legal bewilderment. The questions involved are matters of law, not of metaphysics, tradition or "the spirit of the times."

For instance, it was legislation instituting and supporting slavery, and not its abolition, that caused confusion. The disorder incident

to that event would not have been known, had slavery not been instituted.

Since inequity and disorder grow out of law, the remedy must be found in law. Laws enacted by Roman barbarians before the time of the Caesars, coming down to us via England with feudal precedent and aristocratic interpretation, might well have ended with the American Revolution. Instead, they were reestablished on new soil, where they tend to economic chaos, sans equity or justice.

Modern civilization has need of sound law respecting property, and the justice of ownership, as revealed by the boy's reasoning already cited. The further extension of usages frankly based on special privilege can work only havoc with the body economic.

These usages grew into formal law during the long centuries of feudal rule. The American and French revolutions were revolts against the system, because it proved itself inadequate.

Experience has shown that the feudal system may be administered successfully in small communities, whose affairs may be conducted in simple ways, just as those of a small shop may be managed with but little bookkeeping. The important fact in either case is the char-

acter and ability of the "headman". "No Law but Roderick Dhu's command" is easily workable among small populations.

A large population, however, like a large business enterprise, requires a more scientific system. When a nation becomes great in numbers and extent the character of its laws is of much more importance than that of its headman. This truth, no doubt, gave rise to the aphorism, "This shall be a government of laws, and not of men."

This more elaborate system needed by advanced nations demands far greater care than is needed for primitive methods, both in construction and in operation, just as a high-class automobile requires more care than a farm wagon; and greater care is well recompensed by increased efficiency.

Meanwhile serious defects in a governmental system must inevitably lead to injustice and confusion. Confusion, in turn, leads many citizens to neglect the system and give their support to the best man, not realizing that by such action they are reverting to primitive or barbarian methods.

If, then, a large population shall establish and maintain a system of defective laws, confusion will necessarily ensue and give advan-

tage to some individuals. Such advantage may be given directly, as was often the case under the feudal system, or it may indirectly be involved in methods of property administration inherited from feudalism.

In the degree that such legal advantage obtains, either directly or indirectly, aristocracy is recognized. "Aristocracy" here means a greater or less control of public power by private parties. In our day such power usually appears as private property. Holdings of this character, quite naturally, cause their possessors to be looked upon as "important" persons. On the other hand, a system of laws that gives no one advantage, but treats everyone according to the dictates of natural justice, is a democracy. "Democracy" here means public control of public power and avoidance of sumptuary and special privilege laws that invade private rights.

Obviously, then, democracy requires equal political status on the part of all citizens, and "equal political status" means equal opportunity to enjoy the benefits arising from the exercise of political power. It is equally obvious that aristocracy requires either direct or indirect invasion of equal political status.

Holding public powers not enjoyed by all others, aristocrats thus form a favored class that excites envy and many other malign passions. Graft and crime are thereby developed through efforts to secure the object of aristocratic endeavor, namely, privilege or "unearned property". Graft and crime in turn lead to regulative ordinances and statutes that become more and more annoying, and make public administration more and more costly. Taxes mount and politics become disreputable.

Democracy, on the other hand, affords to no one a superior political status. No act of such a state gives advantage to any one. Private monopoly is impossible in a genuinely democratic state. Its laws do not stimulate graft or crime, and sumptuary laws are needless. Therefore, artificial crimes are unknown, and the formula, "the common law speaks only in damages", is perceived to be in harmony with "each may do as he will, if he does not invade the equal freedom of another". What invasion of rights occurs through the conduct of a market? Yet a license is required and a fine imposed if it is not secured. The sale of defective meat is properly prohibited, but why accompany such prohibition with a tax on all markets, good and bad alike?

Nearly all forms of proper and desirable activities are hampered by similar unnecessary and absurd legal interference. Failure to comply with such regulations involves expense and sometimes imprisonment, while to active minds the method often suggests the possibility of making private arrangements with executive officers.

The usual illustration advanced in support of such public regulation of private activity is to suppose a man alone on a desert island, where he may discharge his rifle as he pleases, and then to suppose him to be in a populous city, where he is not permitted to discharge it in any direction. In the city his personal rights are said to be limited for the common good, although it is thought to be desirable to restrain him as little as may be. The simple truth is that he never had any right to endanger others on the island, in the city or anywhere else. As soon as he did so he violated the equal freedom of another. Preventing him from discharging his rifle in the city did not limit his rights in the least. He was merely prevented from limiting the freedom of others. Nevertheless, on the argument for restraint, backed by many precedents from aristocratic laws, it is assumed that the state may regulate private life.

Meanwhile, history records no instance of the establishment of a genuine or complete democratic state, although so-called democracies have come into being through resistance to aristocratic oppression and tyranny. In every instance, however, the change to democratic methods has been incomplete. Consequently some aristocratic usages have been carried over into the new structure and the ill effects of these are charged to democracy. For instance, the United States outlawed the king but retained more or less of his craft, despite the principles affirmed in the Declaration of Independence.

Partial establishment of democratic government occurred also in Great Britain and in Rome. In a sense the history of the latter state is the history of civilization until relatively recent times, although the early years of the Roman republic may hardly be called civilized. The tribes of Rome struggled for existence and for conquest against other tribes as deadly and as barbarous as themselves. They did not subdue the Mediterranean world with gentle words.

When the more or less legendary kingship of that stubborn group gave way to the republic, a few leading families were recognized as

rulers. These families were known as patricians, and in time their methods aroused resistance on the part of the common people, who were known as plebeians. This struggle was long and fluctuating, the plebeians winning their way to equality by gradually being admitted to the exercise of public authority. The record reads somewhat as follows:

494 B. C.	Tribune named with power to veto law.
471	Tribune elected by plebeians.
445	Marriage permitted between plebeians and patricians.
444	Military Tribunes and Censors instituted.
409	Plebeians admitted to Quaestership.
384	Capitolinus, ambitious to be king, executed.
367	Agrarian relief laws. One Consul assigned to plebeians.
356	First plebeian Dictator.
351	First plebeian Censor.
337	First plebeian Praetor.
300	Plebeians admitted to priestly offices.
286	Plebeian decrees made absolute.

In 266 Rome completed the conquest of Italy south of the Po and two years later began the first war with Carthage, ending in 241. In 216 Hannibal crossed the Alps and for years overran Italy. He was expelled in 206, although the war continued until the battle of Zama in 202.

In 149 B. C. the third war with Carthage began, ending in 146 with the destruction of the African city. In the same year Corinth, in

Greece, was reduced and Macedonia became a Roman province. Republican Rome then stood master of the Mediterranean world, with her own aristocrats subject to plebeian decrees.

During the next century the republic crumbled and died, making way for the grandeur, tyranny and ultimate collapse of imperial power. Why should thus fail a great people who were able successfully to withstand all foreign foes and to overcome the authority of domestic tyrants? They did not know that when republican states become great in population or extent some form of representation is essential to further progress. Lacking knowledge of this truth, they tried to rule the world with the legal machinery of a single city. Under republican forms, privilege developed in all directions. Nevertheless, the Romans evolved much correct legal method, but not enough to overcome the prevailing aristocratic usages and primitive customs. The plebeians secured supreme power, but like ourselves lacked knowledge of its proper use.

A similar lengthy struggle occurred in Great Britain, also eventuating in favor of the masses. Here the representative system, greatly aided by the Earl of Montfort, gradually grew into workable form. The United States,

in its turn, began with an assertion of human equality and at once utilized representation.

All of these states greatly improved the law that they received from their ancestors, but none proved their ability to apply sound democratic doctrine to economic matters. Even our people appear to have forgotten that "a frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty". Hence the astonishing mass of confused legislation with which we are afflicted. And hence, also, the recurring interruptions of economic activity that are known as depressions and panics. Surely it should be known of all men that nothing save sovereign power has sufficient energy so seriously to disturb industrial life.

Correct solution of these political and economic questions can be found only in guarding public power and individual freedom with equal jealousy. For the individual rights of men can be secured only by fully maintaining their collective rights. In these conditions only are the freedom of individuals and the continued advance of civilization assured. Such solution must be discovered and applied, or the consequences of neglect will be met as heretofore in the concrete development of events.

As Louis F. Post very truly said: "The economic struggle taints our politics with corruption, rests our morals on the shifting sands of utilitarianism, degrades our art to the commonplace or the sensational, and turns the high ideals of our religion into empty metaphors . . . so long as economic necessities are forced into the foreground, higher ideals will be driven into the background".

Meanwhile, the hesitating steps toward real democracy, evidenced by the laws of many modern states, have allowed great development. Great Britain could thrive under the expansion permitted by the policy of free trade, but advancing ground rent has offset these gains. America also could flourish while free fertile lands offered relief from economic pressure, but the fertile lands are no longer free. They are inclosed. Nevertheless achievement has been such as to justify full faith in democracy. Continued advance, however, involves elimination of private monopoly, placing all citizens upon a level of equal political status, and leaving all private relations respecting economic matters open to free contract, unhampered by legal restrictions.

Such results can be attained through a clear understanding and proper use of fundamental

public powers. This is the only possible basis of sound and permanent government, and sound and permanent government is the only foundation upon which may be reared a structure capable of complete defense of personal freedom, private property and proper public authority.

Properly, of course, governments are organized to administer public business, and to this end should control public officials, all legal privileges and criminals. They are not organized to direct, control or regulate private life in time of peace, nor should invasive practices by government that are tolerated in time of war, and that war conditions may justify, be permitted to continue when peace is once more established. Such continued invasion is obviously without the remotest justification, but aristocracy has always seized upon the opportunities offered by such occasions to augment and cement its power.

Even though the functions of government are clearly apprehended, an obstruction to correct administration may easily evolve from the manner in which courts exercise the commonly accepted notion that their function is to interpret and declare, not to make, law. If the law is wrong, courts are presumed in no wise to be

responsible. They are helpless, even when handing down decisions that are known to be evasions of justice. Their hands are tied by precedent. Stare decisis (stand by the decision) is a deity before whom all must bow in humble submission. As it has been done "time out of mind", so must we continue to do "time out of mind".

Like tenacious adherence to established custom held barbarian minds in subjection for many centuries. Our proud record of invention springs from a different source, and our courts do in fact change the law, but insist that such change must not invade the sacred (legal) rights of any vested interest. Our aristocrats would surely hold an invasion of this character to be even more deplorable than a violation of precedent.

Sir Henry Maine was rather more frank. Describing a British custom that is possibly forty-eight times as extensive in the United States, he said (Ancient Law 30):

> *"We in England are well accustomed to the extension, modification and improvement of law by machinery, which, in theory, is incapable of altering one jot or line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in*

> *law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long been allowed. It is taken absolutely for granted that there is somewhere a rule of known law, which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen, is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language or a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use a very inaccurate expression sometimes employed, become more elastic. In fact they have been changed".*

Maine called this procedure a "Fiction" of the law. In any event, it is an assertion of authority on the part of courts that apparently is without any sort of constitutional warrant in the United States.

If it shall be urged that courts could not proceed otherwise, then let it be understood that parties in court are dependent upon the ability and character of judges, not upon laws, and that the aphorism, "This shall be a government of laws, and not of men", is empty, with one more American ideal destroyed.

That such procedure is not only "virtual legislation", but is so in reality, is clear. That it

is accomplished by the use of a "double language" and an "inconsistent set of ideas" is also clear. It is equally clear that Maine softened the effect of his frank disclosure by referring to the process as "the extension, modification and improvement of law".

It may be all of this, to be sure, and doubtless would be if the court held the freedom of the citizen, rather than property, to be its chiefest care. But suppose the change thus injected into the laws of the land is not an improvement. Suppose it to be the reverse. What then? Appeal to the legislature may be made, but statutes, particularly lengthy statutes, are usually susceptible of more than one interpretation, as was indicated by the final disposition of Judge Landis' celebrated Standard Oil fine of twenty-nine million dollars, and the "reasonable" interpretation of the anti-trust act, from which Justice Harlan so vigorously dissented.

It should be apparent, then, even to a careless citizen, that the first duty of the law is to protect human freedom. Vested interests should be given second place. When these receive first considertion "wealth accumulates and men decay". Even Webster stated that liberty could not long survive in a country

whose laws tend to concentrate wealth in the hands of the few. It may be added, also, that Gouverneur Morris and others were mistaken in relegating life and liberty to a position inferior to property, although their attitude in this respect was natural, in view of their lifelong experience with property laws that were essentially feudal in character.

When considering these questions of fundamental law, the opinions of noted men respecting them and the action of courts under them, it is always to be remembered that decisions by the supreme court, especially constitutional decisions, have a far reaching influence; an influence quite apart from the particular matters definitely before the court. Lower courts are bound by such decisions, and business contracts and deals are made in view of law as interpreted by judges. In short, business activities are limited by court decisions.

The serious danger in supreme court decisions is further attested by the following from Lincoln's inaugural address, in 1861:

> *"A majority held in restraint by constitutional checks and limitations, always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. At the same time, the candid citizen must confess that if the policy of the gov-*

> *ernment, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal".*

Lincoln uttered these words a little more than seventy years after Washington's first inauguration. Another like period has now elapsed. With this march of time, the economic struggle has grown more intense. A vast increase in productive power, due to invention and improved management, has not removed industrial pressure. Nor were our regulative laws of apparent aid when the recent depression was encountered. That the situation at least suggests error in our legal foundation cannot fairly be denied. At any rate, our legal foundation cannot be examined too frequently or too carefully, and if it is found that the feudal system from which our state emerged still hampers our growth, such hindrance must be removed.

Feudalism depends upon the men who administer its affairs, and the history of a thousand years amply proves that a society thus dependent occupies a precarious position. Democracy, on the other hand, depends upon sound

law. It cannot continue to flourish under a system of laws that contain a large admixture of feudal paternalism. Such condition is analogous to poison in an otherwise healthy organism.

This mixture we inherited. It is still with us. The struggle between aristocratic feudalism and democratic freedom was not finished by the American revolution, nor by the adoption of the constitution, nor yet by the abolition of chattel slavery. These events were evidence of great democratic progress, but aristocracy is still with us and it is very much alive.

Great Britain, engaged in the same kind of struggle against aristocracy, learned that control of the purse is the great defense against governmental aggression. The same power is at our disposal, and if rightly used will be found to be the determining factor. Public revenue, especially the method of its collection, is so intimately connected with property that it finally determines whether a people shall grow in democratic freedom, or, like Roman clients, continue to exist as dependents of a group of useless aristocrats, whose power is based on legal customs and practices that violate the principles of democracy and justice.