THE STRUGGLE FOR LAW.*

From my early boyhood I used to see in my father's library a little book bearing the title "The Struggle for Law." I did not read it until I had finished college and law school; and then found that it was written to present a theory quite different from what I took the title to indicate. It was Rudolph von Ihering's long famous and ever deserving-to-be-famous essay of the early 70's, urging what he called "the courageous and constant exercise of the feeling of right," and the importance to society of every man's defending his rights to the last ditch.

I had supposed that the essayist would present some notion that civilization and the history of civilization prove a natural groping of mankind toward the establishment of law.

While my youthful conception was of course not entirely original, I have never seen it presented exactly as it long ago struck me. So I have taken this occasion as an opportunity to present my own implications from the English words taken as the title of that great German jurist's essay.

As I glanced over his text again before writing this out, I noted as one of the premises to his theory his logically sustained opposition to von Savigny's then unaccepted conclusion that law is due more to the outgrowth of custom and painless unnoticed growth, than to positive declaration and legislation. Ihering wrote about the time when they were beginning to consider the need of a German Code; and by him legislation both as a source and as a remedy seem to have been rather idealized. But his positions strikingly exemplify the recurrent ups and downs even of legal conceptions. Following in the wake of Pound and other new legal philosophers of today, I was glad to find myself on historic as well as modern ground when I attributed fundamental importance to the dominance of custom and social tendencies. So I proceeded to write out my theory with even more of confidence than I had before.

The exact method of mankind's emergence from savagery is necessarily a mere guess. It was many thousands of years ago, and we have no historical way of telling. But certain races have emerged more recently than others. So scholars have certain scattering data upon which to base their guesses. Relics of course tell much, and

*Address delivered by Mr. Henry Upson Sims, representing the American Bar Association, during the Thirteenth Annual Meeting of the Canadian Bar Association at Regina, August 29th, 1928.

great reliance has been placed upon the phenomena of language. But students seem to trust most to the suggestions given by traces of old customs verified as being survivals by reason of their recurring at different times and in peoples remote from each other; and they guess from these survivals how mankind probably developed order, law, and the desire for civilization.

It is almost impossible to exaggerate the importance of the force of custom. Custom probably has a more binding effect upon life than any other non-vital phenomenon. Every animal follows both racial and individual custom. Custom keeps pace with intelligence and reveals its power at every stage of development of life. The influence of custom over the actions and thought of mankind is so evident as to be almost a primary fact requiring no demonstration. Without going into the data of biology or psychology, it probably will not be denied that custom is the chief basis for racial instinct as revealed in human and animal action. It is enough to recall that custom is the basis of repeated experience, and experience is the chief basis of instinct, whatever else may be contributing factors.

Now the fundamental social instincts of mankind may be accepted as three. I am not speaking narrowly as Dr. Conway Morgan does in the British Encyclopedia in discussing instincts, so as to be required to distinguish a physical instinct like swimming from a mental instinct like fearing, and so forth. But speaking broadly the social instincts of mankind may be identified as three. Two will be admitted, the instinct for self-preservation and the instinct for reproduction. The question is as to the third. I claim it to be an instinct for development. And it does not suffice to limit it to physical development or to mental development merely. They both involve as a resultant social development.

Dr. Charles H. Judd, the psychologist, of the University of Chicago, assumes it when he says, "The anthropological and historical records of human life show that the great advances in men's knowledge and methods of dealing with the world have come through social co-operation."[1]

So Hegel, in his philosophy of History: "If we consider Spirit in this aspect—regarding its changes not merely as rejuvenescent transitions, i.e., returns to the same form, but rather as manipulations of itself, by which it multiplies the material for future endeavors—we see it exerting itself in a variety of modes and directions; developing its powers and gratifying its desires in a variety which is

[1] Mind in Evolution.

inexhaustible; because everyone of its creations, in which it has already found gratification, meets it anew as material, and is a new stimulus to plastic activity."[2]

And Herbert Spencer based his theory of universal progress on the assumption that the law of change from homogeneity to heterogeneity involves progress.

I think we may safely conclude from the arguments of the philosophers and from our own reading of history that mankind, or at least those races of mankind from which we are descended, reveal and have long revealed social progress; and while it is not always easy to distinguish the field of operation of the human instinct for development from the operation of the instinct for self-preservation aided by primitive reasoning and individual experience; if we admit that there has been social development, it is unsatisfying to say that all social development has evolved by the intelligent planning of successions of generations thinking either individually or in concert. It is more satisfying to me to find an instinct. And if there is such an instinct, it probably was first manifested in some constructive customs.

The earliest governmental institution of which we have any surviving types, or even any positive historical data, is the patriarchal family. Sir Henry Maine in his "Village Communities" said it must be accepted as a primary social fact, not to be accounted for by any of the passions, habits, or tendencies of human nature.[3] It probably occurred, however, more than one stage up the ladder of civilization. It implies the recognition of joint parenthood and the identity of descent. But it was by no means limited to small family units. Indeed it was typically a group of many men, women, children, and slaves. But they represented, or claimed to represent, the descendants of one patriarch. It might break up into new units, though it did not do so by any means in each generation. It might grow even by the adoption into its circle of outsiders. There seems to have been no definite limit in either respect.

But the first characteristic principle was that it held together by recognition of the authority of the patriarch; and when he died the next oldest patriarch was chosen, if indeed his son was not chosen under the early recognized notion of hereditary rule.

The second characteristic principle was that the entire family strove, hunted, or labored collectively for the joint support of all.

[2] Philosophy of History: Introduction, 127.
[3] Village Communities, p. 16.

There was no individuality of ownership in the proceeds of the hunt or the produce of the field. It was a community in ownership as well as in association.

Sir Henry Maine also said in his lectures on the "History of Early Institutions," that whether all branches of human society did or did not develop from joint families and a patriarchal cell, we do find the family unit an institution of the Aryan or Indo-European race, from which we are all descended.[4]

It survives in India today, and it followed the migrations of that ancestral race all the way from India to Ireland, and may be traced in the community-owned villages and lands in every region of Europe.

It was once mistakenly assumed that when nomadic life gave way to localized life, joint ownership immediately gave way also. But Maine says that such was not the case. Community ownership long survived, even after diversity of occupations followed permanent settlements. And members working at different trades even returned the proceeds of their individual labor for the joint support. One of my law partners, who was an American consul for some time in Italy, tells me that certain of the Italian nobility today recognize their duty to contribute a portion of the produce of their farms for the joint support of the villagers. And scholars generally recognize that the right of common attached to farm lands in England is but a survival of the joint ownership in all the neighborhood as a village community growing out of an ancient family unit.

For those of you who have not given attention to the many phases of this early institution, I wish I could take time to trace the institution into more of its modern phases. We see it in the clans in old Scotland. We see it in the more highly developed institutions of ancient Rome. We see it in Germany. We see it in the old Russian Soviets. We see it making possible the new communistic Russia of today. How prophetically did Sir Henry Maine write in 1874, "It is one of the facts with which the Western world will some day assuredly have to reckon, that the political ideas of so large a portion of the human race, and its ideas of property also, are inextricably bound up with the notions of family interdependency, or collective ownership, and of natural subjection to patriarchal power."[5]

So much as to the ampleness of proof of the existence and of the importance of the institution of family communities and of patriar-

[4] History of Early Institutions, pp. 117-118.
[5] History of Early Institutions, p. 3.

chal authority therein. The important point for the present discussion is to note that the patriarchal authority in the early joint family communities, and the recognition of joint ownership in the present types of joint effort communities have always rested upon custom. The respect for the administration and headship of the patriarch was a custom of the race going back into the hazy past of the childhood of mankind. It would be going too far to say that obedience to the patriarch was instinctive. But it is not going too far to say that mankind in passing from the savage to the early civilized state developed the instinct for obedience to authority imposed by custom; and with the instinct for obedience came the will to obey.

There is nothing unorthodox in the position that the respect for the authority of early law was largely voluntary. In ancient India and in ancient Ireland the authority of the respected head or legal arbiter was never supported by power. Sir Henry Maine in all his collections of lectures pointed that fact out with many illustrations. The influence of the judge was to produce voluntary surrender on the part of the one guilty of trespass or default.[6] It was in Rome that the power of government was behind judicial decrees. Such was the social development there; but not so necessarily in all early communities. Custom, habitual respect, an unexplainable conception of order, was the source of authority and law in many places until supplanted by changing governments and the rivalries for power incident to more complex stages of society.

It was in a much later period that John Austin's conception that all law is a command, could be posited. Until supplanted, or enforced by English courts, Maine says Indian law was immemorial custom, not a command in any sense.[7]

Let us now consider the next step in social order. Following upon the settlement upon land, and the diversification of occupations, the demands of society as developed by our ancestors passed beyond the limits of ancient customs. Diversification of interests destroyed simplicity of authority and overthrew the established order. With individual ownership of land came war for conquest of land rather than personal war. In Northern Europe this produced the feudal system, which attained its highest development in England. Nowhere else in Europe did so complete a working out of the theory of the feud obtain. The village community land became the feudal

[6] History of Early Institutions, pp. 39, 43.
[7] Village Communities, p. 72.

manor; the community head became the baron. The baronial court declared the customs of the manor.

The analogy to the patriarchal system was practically complete, although I have hastened along without tracing all the analogies which you may find in the lectures of Sir Henry Maine on the development of the feud.

But again the important point is that the sense of order was always in the social mind as a constructive factor. God forbid that I should be willing to twist the facts of history like Buckle in his "History of Civilization" to support his collateral theories. Of course the feudal system was partly the product as well as the cause of wars of conquest. But they were the occasion, the staging, if you will. For wars of conquest often occurred before that time without producing a feudal system in their wake.

Charles Eliot Norton used to say in his lectures to the boys at Harvard in my day, that the Church of Rome was the one light in the darkness of the Middle Ages. I am bold enough to say that he was wrong. The feudal system was another bright light guiding to civilization and order. Cruel as it was, without it the Church could have maintained no order but the temporary order of an able soldier king. It developed the recognition of rights all through the body politic. It permeated society from the highest noble to the lowest churl. In England from the Norman Conquest through the Wars of the Roses it laid the basis for the modern nation. It made the English nation possible.

And yet it was born in the mind of no one man nor group of men. It did not spring from a Moses or a Mahomet, nor did it spring from legal scientists like the Roman law-givers. It was not the development of praetorian edicts. It sprang from the customs of the past and the instinct for order of the mind of the race. It was but another exemplification of the struggle for law.

Call me fanciful if you will. Nevertheless the fact stands out that the feudal system kept society together at a time when nothing else was doing so.

And now we come to the modern period. The feudal system wore out. The era of the Renaissance had begun. Society had become divided into classes. Diversity of occupation found its protection in trade associations instead of in clans. Commerce asserted itself, and the guilds took the place of the family units. By the way, in England even the newly born class of lawyers formed guilds; for the origin of the Inns of Court was nothing else.

But the guilds were only another manifestation of the social sense of order. Internally they governed themselves as little republics in a sense. But externally they represented the struggle of a class of society for the privilege of earning their livelihood peaceably and reasonably, and for having their right to do so recognized.

From their period the breaking up of society into divergent interests was rapid. The appreciation of individualism had begun. The authority of courts had begun to be recognized. The function of true judicial decision was beginning to operate in England. Society began to be upheld by real effort to discover rights judicially. For a long time it was nothing more than the application of customs. But they were applied judicially, and the effect was the recognition of the institution of law. When customs conflicted the decision of the court involved the determination of rights under the whole body of customs; and the authority of the government, whatever it was, was behind it. In England this soon grew to asserting the law of the land even against the king. There had developed what Dean Pound calls the sense of the supremacy of law. The reign of law had begun.

But the conflict of interests in society required the continuous restatement of law, and that led to the era of legislation. When the interests of society had become so conflicting that it was no longer possible to determine all the conflicts that arise by administrative application of custom or judicial determination between litigants, it was natural for the governing power to resort to generalizations which were to be applied either administratively or judicially in causes which might arise in the future. By this means when the pronouncement is authoritatively declared, and can be clearly understood, civilized society is willing to apply it for itself, without appealing to arbiters for a decision. In England this came very slowly, but in other parts of Europe it came much earlier in point of time—probably because civilization proceeded much faster on the continent of Europe than with our British ancestors. Naturally I have drawn my line of reasoning more from the history of English society than from elsewhere. But that is because we can follow the steps more clearly in England.

The history of Roman society was old before the data of Roman history we have had begun. Mommsen says that Roman Law had passed far beyond the archaic period before history became acquainted with it. It was in the legislative period when we begin to study it. And yet scholars say that the law of the Twelve Tables of 450 B.C.

contained very little more than customs. It was however promulged as abstract law applicable to everybody in general. And so the era of legislation was thoroughly begun.

Now we see that the struggle for law manifests itself, after the coming of the period of legislation, in the effort of the different interests in society, whether classified according to position or according to occupation, to gain peaceable recognition by the law-making authority in the institution of laws favorable to the particular interest or class of society seeking the enactment. The struggle is not for the enactment merely, but for an enactment which will be recognized by the other classes of society. It is for recognition by consent of society in general as expressed in a tolerated law.

Of course we have now passed away beyond the operation of mere instinct into the range of social reason. Perhaps it is the old instinct for social development educated and cultivated by several centuries of civilization. But with nations successful in government like those of British origin, it always reveals the conservative characteristic of a pure instinct not to attempt as a rule more than can be successfully carried out by the institutions recognized by the forces of society as authoritative. Otherwise it will produce revolution instead of recognition, subverting rather than accomplishing the advantage aimed at.

By the era of legislation I don't mean necessarily the era when legislation by congress of law-makers first began, but rather the era when law first began to be expressed in abstract declaratory form, whether in edicts by the Roman praetors declaring what they would hold in future cases, or laws by the Roman Senate, or Codes, however declared, or The Great Charter, or The Statute of Quia Emptores in England.

In Rome it had become established almost by the opening of authentic history. In England it was not thoroughly established until about the reign of Henry the Eighth. On the continent of Europe, with the exception of the extreme northern countries, Holland, and to a certain extent in Spain, where the Siete Partidas were law, autocratic power kept it even longer in abeyance than in England.

Hence on the continent, the sense of order and the struggle for law developed in a new direction. Philosophical individuals took up the work by the development of an attack upon arbitrary power. A sort of inspiration seems to have been derived by some of them from Ulpian's notion of the law of nature in man and the lower

animals. Grotius and the French essayists in the century preceding the French Revolution adopted the theory that man naturally had a sense of law, and that legal rights were born with us. Thence followed the conception of the equality of man before the law, and the crystalization of a philosophical demand for the equal protection of mankind by the laws. English philosophers too appeared, like Hobbes and Locke, who while opposed to each other in their ideas of actual government, were not opposed in their recognition that the good of all the citizenry was the object of all government and laws.

Some ill-conceived notions, like the social contract theory, appeared. But those are unimportant, in so far as they were errors. They all represented the conception that all men have the right to be governed equally and justly, and that law and government must be directed to that end.

Out of the Struggle in France came the French Revolution, and out of the chaos produced by the French Revolution came the Code Napoleon. The theories of the French philosophers and essayists produced the American Revolution; and out of the American Revolution emerged the first written constitution, the Constitution of the United States.

But the philosophy of it all, the basis of the work of the philosophers both on the continent and in England, and that of the Constitution of the United States, is that the greatest good for the greatest number is the chief object of government; and that as that good is discovered it should be declared and enacted into law.

The only difference then between the early English legislators who drew the Statute of Quia Emptores, the Statute de Donis, and the Statute of Uses, on the one hand, and the modern American legislature which drew the Constitution of the United States on the other hand, is one of attitude. The former considered the customs of the past, and merely corrected subversions of them. The latter gave rein to their imaginations and made law for the future out of whole cloth. Even the cloth was spun largely out of imagination. But they were both waging intensely The Struggle for Law.

It is unnecessary to go further. I have either supported my theory or I have failed. If I have failed, I hope some of you will take the trouble on another occasion to destroy me by proving that there is no instinct for law in mankind, and that we have always lived in an age of reason, and that the individual man working on his own experience and what has been told him by those in whose lives he has lived, is all in all.

But before closing I shall endeavor to point out the relation of what I have sought to discover to us lawyers, and what appears to me a justification for choosing this subject.

The conception of the duty of a lawyer has been greatly twisted by time since the patricians of ancient Rome defended their clients from a sense of the duty to see justice done rather than from a professional obligation for pay. And when the Cincian law was passed in 204 B.C. preventing patrons from taking gifts from their clients, it revealed a conception of social order in the golden age of Roman Law which no one would think of trying to maintain in the administration of justice today.

The evolution of the honorarium and the modern conception of the lawyer's right to a fee are the natural result of the development of courts of justice and the need of society, and its product commerce, for a permanently occupied class to present the subject matter of litigation to the courts. But the maintenance of a class of advocates, and the relation of that profession to the courts are matters for separate consideration. Because the client has paid his lawyer for his advocacy does not mean that the client is entitled to any further advocacy on the part of the lawyer than in the days when the Roman patrician acted from a sense of duty alone. The organized bar cannot condemn too severely the conception of many powerful clients that they have bought and own their lawyers body and soul.

The first duty of the lawyer is to the public, to aid the courts before which he appears to discover and administer justice in every cause. And that lawyer betrays his oath who knowingly and intentionally procures for his client more than justice, whether at the expense of the opposing litigant or of the State, just as the lawyer who suborns to perjury to bring about a false conclusion upon the facts of a cause.

The advocate has done all his client can expect, and has well earned his fee who presents his client's cause in the best light within the law which the field of unsettled principles requires. Rarely can any of us honestly say that we have accomplished so much. Further we have no right to go, or we shall lose the confidence of the court, and in time even the confidence of our clients; for the lawyer who will deceive the court for gain, will in time find an occasion when he will try to deceive his client for gain. And worse than all, he will lose faith in his profession of the practice of the law.

The lawyer's highest duty then is to be an aid to justice in the struggle for law. And unless he so conceives his duty, whether he

so realizes or not, he is an enemy to civilization and the establishment of the moral standards of mankind.

Again, I am not a visionary. Any of the systems of ethics and moral philosophy will prove me to be sound.

Was it not faith in his calling as an advocate that enabled Demosthenes to argue against the receipt of the crown? and that made Socrates decline to avoid his condemnation to death by accepting from his friends the offer of escape?

Was it not faith in his calling that enabled Cicero to attack Verres and to defend the poet Archias? By faith in their calling Edmund Burke prosecuted Warren Hastings, and Fox and Sheridan defended him. By faith in their calling Edmund Randolph and Luther Martin defended Aaron Burr before John Marshall against the charge of treason. By faith in his calling Russell defended Parnell against charges of complicity in the Phoenix Park murders. And what shall I more say? for the time would fail me to tell of Coke and of Curran and of Erskine and of Cockburn, of Patrick Henry also and of John Marshall and of the prophets: "Who through faith subdued kingdoms, wrought righteousness, obtained promises, stopped the mouths of lions, quenched the violence of fire, escaped the edge of the sword, out of weakness were made strong." And these all having "obtained a good report through faith" have passed on, leaving their professional lives to us as beacons to guide our efforts to live like them as life long toilers in the struggle for law.