The Story of the Law by John Maxcy Zane, 1927

Chapter 3 - The Aryan Law

It is a commonplace among ethnologists that they can discern three primary races, the Negro, the Mongolian, and the Caucasic. This may be proven by cross sections of human hair, if in no other way. There was a Nilotic race, so called because in its original form it is still found along the Nile and because it came probably from that region. This undifferentiated race many ages ago furnished probably the basis for the Caucasic races. Its main developments correspond to the descendants of the three sons of Noah, the Hamites, the Semites, and the sons of Japhet. The ethnologist of Genesis was sound on the main fact of the single origin of the Caucasic races, even if the exploits of the temporary mariner Noah strain our credulity. There seems no reason to doubt that the original Nilotic race was approximately as dark as were the ancient Egyptians and Berbers. A great mass of this race passed to the north, and in the lapse of ages for apparent reasons became bleached into whiteness and in the farther north into blondness.

One great spreading migration of this race peopled the shores of the Mediterranean. It is called the Mediterranean race. A part of the ancient inhabitants of Italy, Greece, France, Spain, and the British Isles belonged to this race. They found as their northern neighbors another Caucasic white race who are called the Alpines, and with them the northern portions of the Mediterranean race became mixed. The Alpines may have been tinged with Mongolian blood. Almost all of western Asia belonged to the Semitic portion of this Caucasic race.

Still farther to the north dwelt the part of the Caucasics that was afterwards to figure in ethnology as the Indo-European, or Aryan race, and this became probably the most mixed of all the races. The blond portion of this race has in late years been called the Nordics. Their descendants or supposed descendants have considered these Nordics a superior race, but this is a delusion of vanity and selfsatisfaction. The mixed so-called Aryan race by migrations was to occupy Persia, northern India, as well as almost the whole of Europe. Some may differ from these classifications. Regardless of other considerations, the fact that this Caucasic race and the Aryan and Semitic portions of it are the only peoples of importance in the development of law among civilized men cannot be controverted. The migrations of the Aryan began apparently before those of the Semite, but the Semite earliest flowered, along with the Egyptian Hamite, into a very high civilization, while the Aryan was yet a wandering savage. The Aryan probably owed the civilization which he afterwards obtained to the Semite and to the Mediterranean race. In historical times we know that the so-called Nordics were civilized through their contacts with the Mediterranean race. It may seem strange that omission is made of the Egyptians. The fact is that they, with all their talent, do not belong in the line of development. Nor can any sound idea of their law be obtained, until they passed under the Macedonian sway and borrowed much from the Greek law. But they had a very fine sense of justice and a powerful rhetorical appeal to justice, if we may trust the literature. A curious instance of a demand for legal redress against a grafting official remains to prove it. A peasant going from his oasis with his donkeys laden with produce is robbed by an official. He appeals for justice to a superior officer, who reports the matter to the king. The latter is so impressed by the peasant's eloquence that he prolongs the case until the peasant has made nine different speeches upon the high standard of even-handed justice. The king was evidently entranced with the peasant's eloquent eulogy. The translation given runs like this: "For thou art the father of the orphan, the husband of the widow, the brother of the forsaken maid, the apron of the motherless. Grant that I may set thy name in this land higher than all good laws, thou leader free from covetousness, great one free from pettiness, who bringest to naught the lie and causest right to be." He reaches still higher in this strain: "Thou rudder of heaven, thou prop of earth, thou measuring tape! Rudder, fail not. Prop,

fall not. Measuring tape, make no error." He certainly deserved to win, as he did. His suit was granted, and the official punished.

Of the races in the true line of legal development we will notice the Aryans first, because the Semites at this same point of time represent a much higher culture. This Aryan race had the patriarchal household estate belonging to the family, the sacred fire and the worship of their ancestors in the male or agnatic line, and the forms of legal customs that go with such a development. At the same time, the aged and decrepit parents were thrust aside. Aryans had yet to learn a lesson in that respect from their Semitic relations. The power of the male head of the family over the family estate and over the conduct and the lives of those of the family was practically absolute. This was necessary in order to keep the family property together and in order to answer for the members of the family. It was a fairly reasonable rule for the condition of human life. The marriage custom was settled and the mass of people was monogamous. The chiefs and the rich, however, customarily had more than one wife. It has been said that monogamy was an evidence of the higher culture of the Aryans, and eulogies of their ancestors on this point have been offered by English and Germans; but the origin of monogamy was probably due wholly to economic factors. The prosaic consideration that Aryans were constantly sending off migratory bands makes it likely that they acted precisely as the beaver acts. When beavers migrate from their fixed home to establish a new one, it is always a pair that departs, and for the same reasons human beings were likely to enter upon their migrations in numbers of pairs. We may safely assume that the primitive man had as much social sense as the beaver. Instances like that of Abraham or the colonizing of the Greeks could be quoted to prove it.

These Aryans had developed, from their living in a constant state of movement, an unequal condition, due to the necessity for leaders and a crude sort of military discipline. The priestly function was well developed and they were ancestor worshipers. Among some of them the head of the family embodied this worship and was a priest as to its rites. They had also developed a system of serfdom or slavery. But it seems true that the Aryans were not cultivators of the soil.

The slaves and serfs represented generally captives in war or a conquered race. Whenever the rapacious Aryans came upon tribes cultivating the soil, serfdom took the form of a conquered race bound to the soil, rendering labor and services and grain or some kind of live stock to the master: but the slaves, at least, migrated with the tribe. Generally these serfs bound to the soil lived in a village community which represented, no doubt, the assembled dwellings of a kindred or large family of a subject tribe. This first form of slavery was not an oppressive system. The slaves belonged to the familia or household. The fact that the slaves or serfs were of the same race and color made ancient slavery a very different institution from the modern negro slavery. The institution was suited to the Aryan primitive cultivation. Social arrangements were simple. There was practically no division of labor, and of necessity the dependent classes were used as cultivators of the soil. The simple fact was that slave labor was unpaid labor. Payment for labor when no means of payment exist is legally unthinkable. Industrial organization of this kind can be traced in England from the Briton to the Anglo-Saxon and on to the English manor. Its development is no less clear in France.

It has been noted that slavery was a natural development among men just as it was among ants. This fact renders absurd the contention between two men considered jurists, Kohler and Stammler, as to whether slavery was right. We may as well ask, is slavery among the ants right? It is idle to put the question as to primitive men, because they had no doubts on the subject. To them it was natural. Even to Plato or Aristotle it had no moral aspect. It took long ages to develop among men any conception of the rightfulness or wrongfulness of slavery. The

fallacy of ascribing to primitive men our ideas of right and wrong ought to be apparent to any thinking man.

The joint family property still continued among these Aryans. The same form of patriarchal family or household is found among the Semites, the Indian Aryans, the Slavonic tribes, the Celts, and the Germans. It received its highest development among the Romans. Yet each male member of the family could for himself attain property of his own, except possibly among the early Latins. This family estate in land at first was inalienable by the head of the family, and upon his death it still remained to the family. It was considered as granted by the tribe to each family. The personal estate also was not alienable, but upon the death of the head of the family one-third was reserved to the family and one-third went to the deceased's funeral equipment, while the other third was spent in carousing when the corpse was cremated. It is needless to say that in later times the reservation of a third to the dead man went to the church. This early distinction between the inalienable land property and the personal property was of immense influence in later law. It led directly to the substitution of the eldest son for the father as inheriting the family estate in land, with the duty of providing the common home and endowing the daughters, who were excluded from succession to any interest in the landed property. The making of a will was, of course, unknown, for it could not be conceived of until language came to be written. But this supposed necessity and the custom of preserving the family property led to various legal rules that were later developed. There remain various collections of law of different Aryan tribes after the great Aryan migrations, which are not yet properly classified and arranged. Developments, hundreds—it may be thousands—of years apart, are found side by side. Primitive collections of such laws are the Hindu collections in their sacred writings, and the Brehon law of the Celts, and the Germanic laws that are in some respects more primitive. The Teutonic customs will be reserved for the story of English law, in order to show its beginnings with the Anglo-Saxon customs grafted on the Briton or Celtic older organization of the conquered Celtic tribes. Although these Hindu and Brehon laws of certain Aryan tribes are in point of time later than the Babylonian law, we can use them here as illustrating the more primitive condition out of which the civilized systems of law arose. The Hindu laws are called the Laws of Manu. While the collection of these laws is, historically speaking, late, they embody much information on the ancient primitive customs of the Aryan race. The religious and legal customs are all grouped together, just as we find them in the laws of the Hebrews. Many customs appear to be obsolete, but the customary law is older than the sacred law. All the laws are given a divine origin and are not subject to change. The caste of the religious men, the priests, as the highest, next the caste of the warriors, next those of commerce and agriculture, are plain, while the servile classes, at least, represent the subdued and subject race. The patriarchal system, with the power of the head of the family, is well developed and the joint family property is in the family ownership. It is a sort of corporate ownership. There is the family home where all the agnates (relatives in the male line) and the unmarried females are entitled to a home. This is generally a collection of houses. This home and property is enjoyed in common and no account is kept of expenditures for each of the family, although the expenditures are by no means equal. The duty is added to discharge the debts of the dead, for the dead man with debts unpaid will suffer tortures and the duty is recognized to deliver him from torture, much as in later times the ignorant belief of belated primitives was and is that the soul of the deceased must by pious offices be ransomed from purgatory. This family system of owning property, with the added provision of the right of any male member of the family to acquire property for himself, provided he made no use of the family property, is recognized. The presumption is, however, that all acquisitions by members of the family are family property until they are shown to be otherwise. At the time of the Laws of Manu and ever since, a partition can be required by any of the agnate (male) members of the family clan, but this, of course, is a comparatively late development.

The Hindu system of law is of no particular value in an account of legal development, beyond the fact that it represents the stage of tribal organization suited to a conquering race which the Aryans developed. The priestly caste is exceedingly powerful. The patriarchal family with great power in the head of the family and with property segregated to the family is apparent. The exigencies of war had developed a warrior caste, held next in honor to the priestly class. The conquered community living in its small tribe village communities is a prominent feature of Indo-Aryan life. These Aryans came into India from the Persian uplands, whence, in after ages, other conquering hordes were to come and to reduce the Hindu Aryans to a servile condition in many parts of India. At some time these Aryans, however, developed the idea of individual responsibility, for in the Institutes of Manu is the deduction as a theory of human life, which is a great advance upon the primitive non-recognition of individual responsibility: “Singly each man cometh into the world, singly he departeth, singly he receiveth the reward of his good deeds, singly the punishment of his evil deeds.” But this idea was not carried into the law of property.

Another migrating Aryan horde, called the Celts, moved in successive waves westward through Europe from some center whose location is hotly disputed. In their conquering career, they overran most of France, Spain, northern Italy, and the British Isles. They found a race, probably Alpine, in possession and subjugated and reduced it to a condition of serfdom, and in some instances amalgamated with it. It must be kept in mind that the conquering Celts were at a much lower stage of civilization than the dwellers in France and the British Isles whom they conquered. The subject race, as is usual, gradually civilized the conquerors. A collection of Celtic laws remains, but they are a mosaic of laws, centuries apart; some very archaic and others much later. Many of these laws are decisions of judges called Brehons. These laws have not been edited with sufficient discrimination to enable absolutely certain conclusions to be made, and in some instances it is difficult to determine whether we are dealing with fiction or fact. Perhaps there was imported into these laws some remnants of the Roman occupation of Britain.

These Celts had the regular Aryan tribal or clan organization, divided into patriarchal families, but they had developed a confederation of tribes, each clan claiming to be descended from a common ancestor; but in its later form, a clan could open to let in others not descended from the ancestor. The families were patriarchal and the family owned personal property at least. The older laws seem to come from the nomad stage. The son succeeded the father as head of the family, but the family was becoming more fluid in that the older sons separated themselves from the family estate, taking some part of the property, while the youngest son stayed at home and succeeded to the estate that remained. In later English law this rule was called Borough English. This feature of the younger taking the hearth was the mark of the Kentish estate of gavelkind, and it was recognized in the English law as a customary local rule of law. The real property was considered as belonging to the clan. At the head of the confederated tribes, the chief had become a king, and under him were tribal kings. Below them were the heads of the clans. The priestly class was called the Druids and, like the Brahmins, they had no little power. It is now fairly well determined that the Druid priests were not Celtic in origin but belonged to the older Alpine conquered race.

The Druids seem to have been originally the judges of the laws, but they had been succeeded by a class of professional judges called Brehons. Each king had his advisers who may be called statesmen, and there was a well developed class of nobles, originally leaders in war, who became statesmen, and their sons, with the king’s advisers and the Brehons, were considered the nobles. The clan property was set apart, so much of it to the head of the clan or sub-king, so much to the warriors, and to the advisers, and to the Brehons. Below the nobles was the large

class of free clansmen, and below them was the servile class. The public organization seems about that which would be developed by any Aryan race engaged in fighting and overrunning territory under some sort of discipline.

A tendency to further differentiation requiring further laws was the land organization. The lands were parceled out to be occupied by individuals or by families and were inalienable, but lands that were occupied in this way were leased. There were two kinds of occupation under the possessors of land. The occupation by free farmers was by those who hired cattle to be run on a rental of one in seven. These contracts were solemnly and publicly made. This legal development belongs clearly to the pastoral stage. There was also the occupation of lands which the unfree were allowed to occupy, for which they made payments in produce. There was, of course, little law as to contracts. Trade was carried on by way of barter and payments were made in kind. Great stress was laid upon written contracts, but this must have been very late in Celtic law, and after they had gained a written language.

These tribes showed a distinct advance in some respects, although this condition did not exist until they had long been settled. Public assemblies of the tribe are ordinary among the Aryans. Among the Celts this custom developed until regular assemblies were periodically held. These assemblies had possibly been originally religious, or rather they were held on occasions of religious festivals. They were composed of the king and sub-kings, the heads of the clans, Brehons, other distinguished men, and the bards. At these assemblies the laws were recited. Some of the laws were in rhythmical form, showing extreme antiquity. No doubt such laws had been long in use. At the great assemblies modifications of the laws could be proclaimed, a new law announced by the king, with the approval and assent of those attending the assembly, which is the exact form of legislation in use under the early Norman kings in England. How far back in Aryan history this power of initiating legislation goes, there seems to be no means of ascertaining, but it certainly means that these Aryans had ceased to regard their laws as of divine origin, and it probably was the result of the laws ceasing to be in the custody of the priests.

The means by which disputes were determined present a unique development. These social aggregates called clans were attempting to develop customs that would cope with the disintegrating effects resulting from quarreling, fighting, injuries, and killings within the clan. It has already been explained that there were no tribunals, officers, prisons, or means of giving judgments or of executing them. The only method of redress for violations of the customary laws resulting in injury to others was self-help, backed by public opinion, and by making the kindred of the injurer responsible as a whole to the kindred of the injured. The individual in such a situation was helpless and the primitive mind did not comprehend the conception of an individual. In such a condition where self-help was necessary, private war would certainly result. Curiously enough, in Chicago to-day we see this same principle at work in a reversion to the savage state. By law the trade in intoxicating liquors is put beyond the pale of the law. The traders in intoxicants, called bootleggers, treating this lawless occupation as an open field for profitable exploiting, seize upon a certain district as their own, either by a right of occupancy or by the strong hand. This district is invaded by other purveyors of unlawful goods. The occupants respond with self-help in the form of killing the invaders and retaliatory killings go on. The result is private war in a community supposed to be fully policed. In other places the police, being engaged in the unlawful traffic, can preserve peace.

Among savage men where the feeling of kindred was strongly developed, the natural result of an injury would be that the kinsmen of the injured would seek redress and would immediately harry the kindred of the injurer. Probably the first appeal by the injured would be made to the

whole clan. If the fact were plain, the public opinion of the assembly of the tribe might be enough to afford peaceable giving of redress, but since the only redress for a death was another death, it was certain that some other method of compensation would be sought; so there grew up a compensation system or tariffs for injuries, where the kindred of the injurer became bound to pay the compensation to the kindred of the injured. It must be noted that these injuries to person or property are merely private injuries. There was no law of crimes. This development seems to have been common to all the Caucasic tribes. There being no way of making new law, except as it should grow up in the customary way, it must be apparent that many ages of arbitrations and peaceful settlements were required to produce a set of customs upon this subject of compensation in property. Money was a late invention, and the tariffs were originally in some other kind and gradually became changed into money. But it is fairly certain that this sort of peaceful settlement, if the facts were in dispute, would not be acquiesced in. There was no way of making the settlement compulsory. Before the assembly of the tribe some kind of proceeding would take place to ascertain what the facts were. When the town meeting decided what the matter was, the injured could exert the right of self-help.

Then, as now, difficult cases would be the ones that would arise. Special knowledge of the customs would be required to decide them. Either the priests or the older and wiser men would be called upon to say what the laws were. Among the Celtic tribes the Druids were originally the custodians of the laws, but the Irish laws show that the Druids had been supplanted by a trained body of men called the Brehons, or judges. The haphazard legal knowledge of the priests was insufficient.

The Brehons were originally any of the learned men, and such a Brehon was attached to the court of every king or sub-king. If this be not romance, the Brehons did not hold a judicial office, but like the Roman jurisconsult belonged to a profession. They came to be legally trained men who had long studied the laws, but they had no compulsory jurisdiction. All their judgments were given in cases where the parties submitted a controversy to a particular Brehon. The party complaining could select any Brehon he pleased, and there seem to have been at last developed regular sittings of Brehons in courts. The Brehon received a customary fee of onetwelfth of the matter in dispute.

All acts against the person or the property were private injuries, and the redress was sought by the injured, if he was living, or by his family. The Brehon selected considered the case, but he seemingly did not settle the facts. They were settled by some local assembly in the regular Aryan public fashion. This settlement of facts having been submitted to the Brehon, he made his judgment and declared the compensation. This compensation was based upon rank. Where the injured was subjected to disgracing or humiliating acts, the compensation was increased, or, as we say, punitive damages were given. For the taking of human life, the compensation was the regular fixed price by law, if the killing was unintentional. If premeditated, the compensation was doubled. It was still heavier, according to the wealth of the injurer. This is the simon-pure law of punitive damages, at the common law, for a wilful injury. The damages for death went to the kindred. If the redress were for an injury to property, the restitution was in kind, double the amount of the injury. Here appears the lex talionis with a penalty added.

The Brehon procedure was made as compulsory as possible by the customs of distraining and of fasting. In the custom of fasting appears the old primitive idea of a violator of the custom being put to shame. The creditor whose debt was unpaid proceeded to the door of the debtor, just as in India the creditor is now accustomed to do, and at the door the creditor sat fasting. If the debtor submitted to the fasting, he was considered guilty of a most disgraceful act. He could stop the fasting by an offer to pay, or, as we say, by a tender of the debt. Fasting also could be

stopped by the supposed debtor demanding a hearing before a Brehon. The claimant could proceed in the first instance by a distress, by seizing the property of the obligee by way of self-help, just as the landlord could distress at common law upon his demand for rent. The defendant in the distress could stop the distress by an offer to submit the case to a Brehon, just as the distress at the common law was stopped by a replevin, which was in fact the invoking of the judgment of a court as to the lawfulness of the distress. When the Brehon had given his judgment, a distress or distraint could be used to enforce it, and if there were no property, the person of the debtor could be seized.

This development in the Brehon laws is important as showing among primitive Aryans an attempt to reach an agreed tribunal, whose judgment could be enforced. It is characteristic of every primitive system, that before a tribunal can possess a power of decision in a controversy, or as we say, jurisdiction to decide it, the power or jurisdiction must be given by agreement of the parties to the dispute. It is also of importance because it is recognized that the tribunal must be endowed with special and expert knowledge of the laws. This means in modern phrase that lawyers are a necessity. The sequel in the history of law will show that the main difficulty in the law has not been in the law itself, or what the rule of law is, but rather, first, in devising an adequate tribunal to decide fairly the controversy in accordance with law, so that a rule of law applicable to all alike may be applied to all alike, and secondly, in so ordering procedure in applying the law that a right given by the law may always meet with proper redress. No little part of the difficulty has arisen in keeping the learned class of lawyers capable.

Before passing from this law of the Irish Celts, it may be said that substantially the same general organization of clan property existed among the Scottish clans in the Highlands, and this clan system of property passed on for many centuries until the exigencies of supposed statesmanship required the reduction of the clans to the sway of orderly English government. The legislators, being totally ignorant, apparently, of the kind of ownership of real property in the clans, and having no apparent knowledge of the fact that a part of the land of the clans belonged to each member of the clan, vested the whole real property of the clan in the chief. Ownership that had existed for many ages was ruthlessly destroyed in this way. Very few of the chiefs were worthy of such a responsibility, or were enlightened enough to deal fairly with their kinsmen in the clans. The consequences were no less deplorable in Scotland than in Ireland. The great body of each clan became mere renters, cotters, and tenants at will. The time came when it suited the chief to dispossess the helpless occupants whose titles ran back over thousands of years. The remorseless evictions were, as a matter of fact, based upon later laws which, let us hope unwittingly, simply confiscated rights in property that had been accepted and recognized for ages.

Before leaving the subject of Aryan laws, it will be proper to make some general observations on the Celts. If we may accept the Brehon law, the Celts in Ireland were further advanced in many ways than the Celtic tribes on the continent. The general organization on the continent was the same as that indicated in the Brehon law. The clan was divided into families, and the clans formed a tribe, and several tribes coalesced into a nation. Over each tribe was a chief and the chiefs of the clans made a sort of nobility. The Romans called, after their own analogy, these nobles the Senate. There had been in Gaul a king of federated tribes but those kings had been abolished, and there had been substituted an elective vergobret who had kingly functions. These human societies were in many respects feudal, made up of patrons and clients, to use the Roman terms. Below these classes were the serfs and slaves. In many places the lord lived in his larger timber mansion with the houses of his dependents surrounding.

When Caesar came into Gaul in 59 B. C. he found the Druids a powerful class. They were still in the old savage way performing human sacrifices. Either the Druids or the chiefs dispensed justice, settling disputes not only between individuals, but between the tribes. There was a peculiar anticipation of Romanism. If obedience was refused to the edicts of the Druids, the disobedient were excommunicated and denied religious observances, nor could they ask for justice before the tribunals.

These Celts were exceedingly advanced in certain ways just as were the Britons in England an advanced race at that time. The Gauls carried on commerce by means of their two-wheeled carts, so common in rural France to-day. They had manufactures of iron and pottery. One-half of the black and red ware in museums to-day that passes for Greek, came out of the great pottery factories in the Auvergne. They were experienced miners and they had among them large amounts of gold and silver. As cultivators of the soil they had taken on the skill of the Iberians submerged among them. They used a coultered plough and a reaper for wheat which Pliny the Elder asserts was a trough with dented edges made into teeth. It was mounted on two wheels drawn by two horses and the ears of wheat were cut off by the teeth and fell into the trough.

In southern Gaul the Greek city of Marseilles antedated the Gallic coming into Gaul. The Greeks there had introduced the olive and the vine and the cultivation of the vine had covered southern France and penetrated to Alsace. The Gallic methods of cultivation were superior to those of the early Romans. Italian Gaul was highly cultivated. When Hannibal's soldiers from the top of the Alps looked down into the valley of the Po, they thought they had found the garden of the world. These Gauls knew the use of fertilizers and produced very superior wheat, or as they called it, corn. The cattle, horses and swine were noted and superior to anything in Italy. When Caesar conquered Gaul, he found so much wealth that he paid immense debts and became the richest man in Rome and had the means of rewarding all of his followers. These people wore trousers with a sort of smock coat and a cloak with a hood. Their taste for bright colors converted the Italians from the sober togas which they wore to the bright colors that are characteristic of Italy to-day. Thus early the French began to set the fashions for the world. Yet, so far as legal institutions were concerned, the Gauls were living on the plane of the barbarous customs of the Aryans. A comparison with what is told of the Germans at that time shows that the Germans as yet had not reached even the plane of cultivators of the soil.

The Roman conquest of Gaul was followed by a few abortive rebellions. Then the Gauls settled down to take on the culture of the Romans. Their acquisition was rapid. In a comparatively short time, fine cities, splendid mansions, great estates, productive factories of pottery and arms, made Gaul a very rich province. The Germans across the Rhine looked with wolfish eyes on this wealthy province. At last they gradually edged their way into Gaul and rapidly destroyed the greater part of its civilization. The situation that then arose will be portrayed in the chapter on medieval law.