LIMITATION OF STATE FUNCTIONS IN THE ADMINISTRATION OF JUSTICE.

AMID the endless discussions that have taken place as to the sphere and duties of Government, all parties are agreed that there are two great and primary functions which every efficient Government must perform if it deserve the name: it must guard the country against the attacks of foreign enemies; and it must make such arrangements for the administration of the laws, that every man may obtain justice—as far as possible free and speedy justice—against wilful evil-doers.

The fact that there is an absolute unanimity as to these two important functions of a good government, while almost everything else that Governments do, or attempt to do, has been denounced by great thinkers as beyond their proper sphere of action, renders it probable that these are, at all events, the primary and most important functions of the State. It may not, perhaps, be easy to determine which of these two is of the greatest importance; for even admitting that conquest by a foreign foe is an evil incalculably greater than any wrong which individuals may suffer, yet the one is of so much more frequent occurrence—every member of society being daily exposed to it, while attempts at conquest occur only at distant and uncertain intervals—that repetition in the one case may make up for magnitude in the other. We are therefore pretty safe in assuming that they are of equal importance; and in affirming that

it is as much the duty of Government to protect its individual subjects from wrong to person or property committed by their fellows, as to protect the entire community from foreign enemies.

But if we look around us to see how these primary duties are performed, it becomes evident, either that existing Governments do not consider these duties as equally imperative upon them (even if they are not of absolutely equal importance), or that the former duty is a very much more difficult one than the latter. In every country we find an enormous organization for the purpose of national defence, which occupies a large portion of the wealth, the skill, and the labour of the community. No cost is too great, no preparations are too tedious, in order to deter an enemy from venturing to attack us, or to secure us the victory should he be so bold as to do so. For this end we keep thousands of young and healthy men in a state of unproductive activity, or idleness; for this we pile up mountains of debt, which continue to burthen the country for successive generations. New ships, new weapons, every invention that art or science can produce, are at once taken advantage of, while the less perfect appliances of a few years ago are thrown aside with hardly a thought of the vast sums which they represent. If we now turn to see how the other paramount duty of the State is performed, we find a very different condition of things. Here everything is antiquated, cumbrous, and inefficient. The laws are an almost unintelligible mass of patchwork which the professional study of a life is unable to master; and the mode of procedure, handed down from the dark ages, is often circuitous and ineffective, notwithstanding a number of modern improvements. It may be admitted that in criminal cases tolerably sure, if not very speedy, punishment falls on the aggressor; but the sufferer receives, in most cases, no compensation, and often incurs great expense and much trouble in the prosecution. He gets revenge, not justice. That relic of barbarism, the fixed money fine, the same for the beggar and the millionaire, though almost universally admitted to be unjust, is not yet wholly abolished. It is, however, in cases of civil wrong that individuals find the greatest difficulty (often amounting to an absolute impossibility) of obtaining justice. This arises, not only from the enormously voluminous and intricate mass of enactments and precedents, and the tedious mode of procedure, involving grievous delay and expense to every applicant for justice, but also to the vast accumulation of cases which are allowed to come before the courts, many of which are of such a complex nature as to some extent to justify the strict forms of procedure which bear so hardly on those who seek relief in much simpler cases. The result is, that it is often better for a man to put up with a palpable wrong than to endeavour to obtain redress;

and the assertion that in our happy country there is "not one law for the rich and another for the poor," though literally true, is practically the very opposite of truth, since in a large number of cases the wealthy alone can afford to pay for the means of obtaining justice.

Our system of law is, in great part, the product of times when the security of property was held to be of more importance than protection to the person. The legislators being almost always the great landowners, a large part of the law was adapted to secure them the power of dealing with the land (the most important of all property) in any imaginable way; and in their bungling attempts to do this, they have produced a system of law of real estate of almost unimaginable intricacy. To interpret and carry out this and other branches of the law of property, occupies a large and influential portion of the legal profession. Lawyers exist upon the complexity of the law. It is not to their interest that we should be able to obtain cheap and speedy justice; nor is it their interest to reduce the number of suitors at the courts. We cannot reasonably expect them to do either of these things, which are yet of vital importance to us who are not lawyers. They may, indeed, so modify, and to some extent simplify, procedure as to take away a portion of the terrors of "going to law" in the estimation of aggrieved parties, and so induce a larger number than before to seek their aid against oppression and wrong;—but they will never make any radical reform, or attempt to do what every intelligent suitor knows might be done. Our interests are directly opposed to theirs, and it is mere madness to expect any thorough simplification of the law from lawyers. Such a reform requires the common sense of minds untrammeled by legal technicalities or legal interests. The people must be shown that such a reform is possible—nay, easy—and they will then demand that this matter shall be taken altogether out of the hands of lawyers. It is in the hope of showing how one great branch of this much-needed reform may be made, that the present writer ventures to attack a problem generally considered far beyond the reach of laymen.

A first step, and a very important one, towards rendering cheap and speedy justice possible for every man is, so to simplify the law of property as to free the courts from a large proportion (perhaps one-half, perhaps much more than one-half) of the cases which now occupy them. This would not only render it far easier to dispose promptly of the much simpler cases—which, however, are those which are often of more real importance to the parties affected—but it would allow of the whole method of procedure being altered to suit those simpler cases which would then form the bulk of the business of the

courts. Now, this great diminution of cases can be effected without denying redress for any grievance, or a remedy for any wrong, by simply putting out of court a host of matters which ought never to have been taken cognizance of by the law. Here, as in so many other instances, it will be found that reform must begin by a "limitation of State functions;" and that it is because Governments have undertaken to do much that is unnecessary and even injurious, that they are not able to fulfil one of their first and plainest duties—that of giving free, speedy, and substantial justice to the weakest and most indigent, as well as to the most powerful and most wealthy, of their subjects.

The first, and perhaps the largest, group of cases which ought to be taken out of the cognizance of our courts of law, are those which may be comprised under the general term of "trusts." At present any one may place property in the hands of another, either during his own life or to take effect after his death, for certain specified purposes, and if these purposes are neither illegal nor positively immoral, the law will compel the trustee to carry out these purposes to the very letter. They may be trivial, or absurd, or even injurious, but the man who once gets a trustee to accept a trust (and even this is not necessary when it is created by a will) becomes thereby an absolute potentate, who has at his command the whole power of a great State employed to see that his most minute directions are carried out. The number of cases of this kind is enormous, including all those which involve the interpretation and carrying into effect of the provisions of trust-deeds, settlements, and wills; so that a considerable portion of our machinery for administering justice is devoted to ascertaining and giving effect to the whims of individuals for years, and often for scores of years, after they are dead. Under the same general head may be included the power of determining by deed or will the contingent succession to property, and of creating any number and kinds of disqualifications with regard to it. The supposed necessity for providing for every imaginable exercise of this power, has led to such endless complications in the law relating to the transfer of land in all its forms and modes, that years of study are required to comprehend them. They furnish the materials for perhaps the majority of the cases that come before our civil courts, and give occupation to a very large section of the legal profession.

But in the whole group of cases here referred to there is no question of administering justice. For a Government not to carry out a man's wishes after his death is not a wrong, but quite the reverse, since it may with much reason be maintained that, for any Government to occupy itself with carrying out the whims of every man (whether he be sage or fool) who may wish to make his relations

or successors subject to his orders in the application of property no longer his, is a positive wrong to the community, inasmuch as it is incompatible with the performance of duties of a paramount nature. What the law should do, and all that it should do, is, to recognize and enforce gifts or transfers of property of all kinds, to living individuals, absolutely. It should utterly refuse to recognize any desires, whims, or fancies of individuals as to the applications of the property, or any limitation to the future owner's absolute possession of it. It should not even recognize any alternative applications of the property in the case of the death of the legatee before that of the testator, who could in that case have altered his will, and if he has not done so the legacy should pass to the legal representatives of the legatee. Property should always be considered by the law to be in the possession of some person absolutely, who can transfer it to another person absolutely, but cannot enforce any stipulations whatever as to the use of it on the next owner. Life interests in landed and other property, with all their attendant evils, would thus never exist.

The wishes of the donor or testator of property, although not a proper subject for the interference of the law, could be in many cases carried out by means of what may be termed a voluntary and amicable trust. The trustee (who would be really the legatee) would be chosen on account of friendship, integrity, and sympathy with the objects and desires of the testator, and he would give just so much effect to those desires as his reason and his conscience impelled him to give. The law would consider him only as the owner of the property, and would in no way interfere with the manner in which he thought proper to interpret the wishes of his friend. To provide for children and minors, property might be either left absolutely to their nearest relative or friend to stand to them *in loco parentis*, or it might be left to themselves, in which case an officer of the court would be their official trustee, and would prevent any misappropriation of their property by relations or guardians till they came of age. We should in this way greatly simplify wills, and almost abolish will-cases, while the courts would be relieved from that great mass of causes of the most tedious kind, in which trust-deeds, settlements, legal estates, shifting uses, entails, and trustees bear a prominent part.

It has been so long and so universally the practice in civilized countries for the law to recognize and enforce the wishes of individuals as to applications of their property other than the simple transfer of it to individuals, that to many, perhaps to most persons, it will at first seem to be a positive injustice to take away from them the power to do so. Yet the law itself recognizes that the practice is beset with evils, and from a very early period legislative restrictions have been applied to it. Hence the laws of mortmain,

and the long series of amendments, relaxations, or restrictions of those laws; as well as the limitation of the power of entailing estates for any longer period than a life in being and twenty-one years afterwards. These restrictions prove that the unlimited power of disposition of property has been held to be a law-given custom, not an inherent right; for if the latter, every restriction of its exercise must be a wrong to the parties restricted, which it has never been held to be. The whole question is, however, so very important, and has so many and such wide applications, that it deserves a somewhat fuller discussion.

The establishment of the Endowed Schools Commission has struck the first real blow at the system of a perpetual and blind submission to the wills of dead men; but the new principle, even in its limited application to endowed schools and charities, often excites much opposition. Many liberal and intelligent men still look upon the "intentions" of those who in past ages endowed churches, schools, hospitals, almshouses, and other institutions, as something sacred, which it is almost impious to ignore, and which it is our plainest duty to carry out with only such slight modifications as the changed conditions of society absolutely necessitate. But it is here contended that this notion is not founded on any true conception, either of what is just or what is politic, but that it is, on the contrary, altogether erroneous in principle and mischievous in practice; whence it follows that the sooner it can be got rid of the better for society.

Let us, then, seriously ask, what sufficient reason can be adduced why the State should interfere to carry into effect the desires, whims, or superstitious fancies of any man, for generations or perhaps for centuries after his death? Why should the more enlightened future be bound by the behests of the less enlightened past? Why should we allow, and even encourage, men to hold and administer property after they are dead? For it really comes to that. A man may, justly and usefully, be allowed full liberty (within the bounds of law and order) to use his property as he pleases *during his life;* but why should we go out of our way and make complex arrangements enabling him to continue to do the same after he is dead? During a man's lifetime he can *give* property to whom he thinks fit, or he can apply it to any purpose that he has at heart, without the State's interference; but he absolutely requires the State's assistance in order that his property may continue to be applied precisely in accordance with his ideas of what is best, after his death. The question is, *why* the State should take any cognizance of the matter? It is here contended that this is one of those things quite beyond the proper functions of a Government, and that it has produced, as such

excess of authority always does produce, a vast amount of evil. When a man dies he generally has what may be termed natural heirs, that is, children or relatives dependent upon him for a provision in life. For these he is first morally bound to provide, and any surplus beyond their needs, and beyond what the law may give to the State, he may rightly claim the power of bequeathing to any living individuals; and the State on its part is bound to exercise that minimum of interference necessary to secure the property to the respective persons indicated by him. But on what grounds can the testator claim the interference of the State for the purpose of compelling the recipients of the property to do with it what *he* pleases? claim—that is—that *he* shall still be considered to be the real owner of the property *after he is dead?* The thing is so intrinsically absurd, and perhaps even immoral, that nothing but long and universal custom could blind us to the absurdity of it.

What a man may do, and ought to be enabled to do, either during his life or at his death, is to *give* property, and *recommend* (not command) what use he wishes to be made of it. If his morals and his intellect are both good and his judgment sound, his chosen legatees will, at their discretion, carry out his wishes. But to compel them to do so absolutely is monstrous. It implies that the *right* to property continues after death, and that when a man can no longer use it himself he *ought* to be enabled to restrict the freedom of others in the use of it. It implies also that a man with much property to leave is necessarily wise, so wise as to know what will be best for people years after his death. A living agent can modify or supplement his plans as occasions arise or as circumstances require, and he generally does see reason to modify them after a few years' experience. Even acts of parliament, the concentrated essence of the nation's wisdom and foresight one year, often require alteration in the next. But that every man who chooses to do so should be encouraged to make his little "act" before he dies, minutely directing what shall be done with his property for years after his death, and that this "act" should be held to be a fixed law, against which there can be no appeal, all changes of circumstances notwithstanding, and should be enforced by the whole power and authority of the State, is a circumstance which will one day be looked back upon as an amazing anachronism, since it would seem only fitted to exist in a country where the established religion was the worship of ancestors.

We English are wisely jealous of too much government interference in the details of our social life; yet our rulers are living men, imbued with all the ideas and habits and feelings and passions of the age, and are often men of high intellectual attainments, and

far in advance of the average of the community. Such a government interferes, at all events, with full command of the most recent knowledge, and with open eyes; yet we will not submit to such interference. But, strange to say, we do submit, and almost pride ourselves in submitting, to have various important social matters determined for us by self-chosen dead men, who are therefore necessarily *behind the age*, and who were sometimes too ignorant, conceited, or superstitious to be up to the intellectual level even of the age in which they lived. It is by such blind guides that we to this day submit to be, in great part, governed in the all-important matters of religion, education, and the administration of charity; and in submission to the immutable laws of these dead rulers we have allowed vast wealth to be misemployed or wasted in the hands of irresponsible and antiquated corporations, which, well bestowed, might have enlightened our people or beautified our land. Who can doubt that the nation would have greatly benefited had our churches and colleges, our schools and charities, our guilds and companies, been free to develop, from age to age, in accordance with the wants and feelings of the living, untrammelled by any slavish adherence to the expressed or implied wishes of the dead?

From the considerations now adduced, it will be evident that the cessation of State interference in the way here objected to, would produce other beneficial results besides that of facilitating the administration of justice. These may be briefly summarized as follows:—

It would take away one of the existing inducements to a life-long devotion to the pursuit of wealth, for if a man could neither make use of it himself nor enjoy the sense of power felt in directing absolutely how it should be employed by others, he would pause in his career of accumulation, and perhaps endeavour to do something useful with it during his own lifetime rather than run the risk of having it all go entirely beyond his control.

It would have the effect of inducing many who now leave their wealth for charitable and philanthropic purposes at their death, to found such institutions as they wished to have established, during their own lifetime, in order to see the working of them, and so adapt them to the fulfilment of an admitted good end as to ensure that they would be preserved by future generations. This active charity or philanthropy would have a most beneficial effect on character, and would undoubtedly lead to more good results than the mere passive bequeathing of money to be employed in some fixed, but often ill-considered and comparatively inefficient manner.

It would prevent the establishment of institutions not adapted to the requirements of the age, and would thus abolish a great bar to

mental and moral progress. For the notion of "sacredness" attached to the wishes and commands of the founders of religious, educational, and charitable institutions has done a vast amount of evil, in confusing our notions of what is right and what is useful, and in keeping up the obsolete ideas and practices of a bygone age, long after they have become out of harmony with a more advanced state of society.

There is no fear, as some may imagine, that under the modification of the law here suggested, such institutions would want stability and would be subject to constant fundamental changes in accordance with the ideas of each successive body of governors, for the conservative tendencies of mankind in general, and especially of all governing bodies, are very strong, and customs or practices, even when pernicious or absurd, seldom get changed till long after their hurtfulness or foolishness are universally acknowledged. In proof of this we may adduce the case of our own representative government, which attaches no idea of sacredness to old aws, and is subject to the powerful influence of public opinion; yet we do not find any dangerous instability in our legislation, but rather a slow, many think far too slow, march onward in a tolerably well-defined course of reform.

The change here advocated would also be beneficial, by helping to rid us of the notion that a man can infallibly prescribe what is good for his successors, or that even if he could, he ought to be allowed so to prescribe; for the next generation will be quite as well able to attend to its own affairs as the last was, and will certainly not be benefited by being debarred from the freest action. Once this notion is abolished, our truest philanthropists would be more willing than heretofore to devote their wealth to public purposes, because they would feel confident of its being permanently useful. They would know that each succeeding generation would watch its application critically, and insist that no obsolete customs or erroneous teachings should be perpetuated by means of it,—that it should never become a drag on the wheels of progress, as has been the case with many such institutions, but rather resemble a powerful engine capable of helping on the necessarily slow march of society towards a higher civilization.

If the main principle here advocated—namely, that it is intrinsically absurd and morally wrong that a dead man's will or intention should have power to determine the mode of application of property no longer his—be a sound one, it will have a most important bearing on a question that is now much discussed, as to how far endowments of the National Church by private individuals may be properly claimed by the State. Even writers of very liberal views see in this a stumbling-block to the complete disendowment of the Church of England, because they cannot get rid of the notion that it is some-

thing like a robbery to take property given for one purpose and apply it to any other purpose. It is, therefore, a maxim with them, that when any change in the application of such a fund is demanded by public policy, it should still be kept as near as possible to the intentions of the original donor. It is, however, to be remarked, that when the property in question has already been forcibly applied to other uses than those originally intended, the most scrupulous do not propose that it should be brought back to its ancient use; and this seems to imply a doubt of the soundness of their principle. A large part of the existing endowments of the Church of England, for example, were certainly intended to maintain the teaching and services of the Roman Catholic religion. If the donor's intentions are "sacred," these should be given back to the Roman Catholic Church. If it be said that the intention was to maintain the religion of the country, whatever that might be, then the revenues should be fairly divided among all existing sects for the time being,—but that is "concurrent endowment," and is almost universally repudiated. The only consistent, and it is maintained the only true, view, is, that dead men should have no influence (beyond their personal influence on their friends) other than what is due to the intrinsic value of their opinions; and that property cannot be left in trust to carry out dead men's wishes, on the common-sense ground, that the living know better what is good for themselves than the dead can do, and that the latter have no just or reasonable claim to coerce a society to which they no longer belong. To hold the contrary view is, practically, to allow men to continue to be the possessors of property after they are dead, and to give more weight to the injunctions of those who had no possible means of knowing what is best for us now, than we give to the deliberate convictions of men who still live among us and who have made our welfare their life-long study.

The dead are not truly honoured by sacrificing the interests of the living to their old-world schemes; and if, as we may reasonably suppose, the future state is one of progress, at least as rapid as that which obtains on earth, it may be that they are afflicted with unavailing regrets at our blindness, in insisting on being guided by the feeble and uncertain light which they once had the presumption to imagine would for ever be sufficient to illuminate the world.

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