INTRODUCTION.

WHOEVER has glanced through the pages of any text-book on Mercantile Law will hardly deny that Contract is the handmaid if not actually the child of Trade. Merchants and bankers must have what soldiers and farmers seldom need, the means of making and enforcing various agreements with ease and certainty. Thus, turning to the special case before us, we should expect to find that when Rome was in her infancy and when her free inhabitants busied themselves chiefly with tillage and with petty warfare, their rules of sale, loan, suretyship, were few and clumsy. Villages do not contain lawyers, and even in towns hucksters do not employ them. Poverty of Contract was in fact a striking feature of the early Roman Law, and can be readily understood in the light of the rule just stated. The explanation given by Sir Henry Maine is doubtless true, but does not seem altogether adequate. He points out[1] that the Roman household consisted of many families under the rule of a

[1] *Ancient Law*, p. 312.

paternal autocrat, so that few freemen had what we should call legal capacity, and consequently there arose few occasions for Contract. This may indeed account for the non-existence of Agency, but not for that of all other contractual forms. For if the households had been trading instead of farming corporations, they must necessarily have been more richly provided in this respect. The fact that their commerce was trivial, if it existed at all, alone accounts completely for the insignificance of Contract in their early Law.

The origin of Contract as a feature of social life was therefore simultaneous with the birth of Trade and requires no further explanation. It is with the origin and history of its individual forms that the following pages have to deal. As Roman civilization progresses we find Commerce extending and Contract growing steadily to be more complex and more flexible. Before the end of the Roman Republic the rudimentary modes of agreement which sufficed for the requirements of a semi-barbarous people have been almost wholly transformed into the elaborate system of Contract preserved for us in the fragments of the Antonine jurists.

CHAPTER I.

THE REGAL PERIOD: EARLY AGREEMENTS.

At the most remote period concerning which statements of reasonable accuracy can be made, and which for convenience we may call the Regal Period, we can distinguish three ways of securing the fulfilment of a promise. The promise could be enforced either (1) by the person interested, or (2) by the gods, or (3) by the community. When however we speak of enforcement, we must not think of what is now called specific performance, a conception unknown to primitive Law. The only kind of enforcement then possible was to make punishment the alternative of performance.

I. Self-help, the most obvious method of redress in a society just emerging from barbarism, was doubtless the most ancient protection to promises, since we find it to have been not only the mode by which the anger of the individual was expressed, but also one of the authorised means employed by the gods or the community to signify their displeasure. This rough form of justice fell within the domain of Law in the sense that the law allowed it, and even

encouraged men to punish the delinquent, whenever religion or custom had been violated. But as people grew more civilized and the nation larger, self-help must have proved a difficult and therefore inadequate remedy. Accordingly its scope was by degrees narrowed, and at last with the introduction of surer methods it became wholly obsolete.

II. Religious Law, as administered by the priests, the representatives of the gods, was another powerful agency for the support of promises. A violation of *Fides*, the sacred bond formed between the parties to an agreement, was an act of impiety which laid a burden on the conscience of the delinquent and may even have entailed religious disabilities. *Fides* was of the essence of every compact, but there were certain cases in which its violation was punished with exceptional severity. If an agreement had been solemnly made in the presence of the gods, its breach was punishable as an act of gross sacrilege.

III. The third agency for the protection of promises was legal in our sense of the word. It consisted of penalties imposed upon bad faith by the laws of the nation, the rules of the *gens*, or the by-laws of the guild to which the delinquent belonged. What the sanction was in each case we are left to conjecture. It may have been public disgrace, or exclusion from the guild, or the paying of a fine. And as some promises might be strengthened by an appeal to the gods, so might others by an invocation of the people as witnesses.

Agreements then might be of three kinds corre-

sponding to the three kinds of sanction. They might consist of (1) an entirely formless compact, (2) a solemn appeal to the gods, or (3) a solemn appeal to the people.

I. A formless compact is called *pactum* in the language of the twelve Tables. It was merely a distinct understanding between parties who trusted to each other's word, and in the infancy of Law it must have been the kind of agreement most generally used in the ordinary business of life. Such agreements are doubtless the oldest of all, since it is almost impossible to conceive of a time when men did not barter acts and promises as freely as they bartered goods and without the accompaniment of any ceremony. Compacts of this sort were protected by the universal respect for *Fides*, and their violation may perhaps have been visited with penalties by the guild or by the *gens*. But intensely religious as the early Romans were, there must have been cases in which conscience was too weak a barrier against fraud, and slight penalties were ineffectual. Fear of the gods had to be reinforced by the fear of man, and self-help was the remedy which naturally suggested itself. In the twelve Tables *pactum* appears in a negative shape, as a compact by performing which retaliation or a law-suit could be avoided[1]. If this compact was broken the offended party pursued his remedy. Similarly where a positive *pactum* was violated, the injured person must have had the option of chastising

[1] Gell. xx. 1. 14. Auct. ad Her. II. 13. 20.

the delinquent. His revenge might take the form of personal violence, seizure of the other's goods, or the retention of a pawn already in his possession. He could choose his own mode of punishment, but if his adversary proved too strong for him, he doubtless had to go unavenged; whereas if the broken agreement belonged to either of the other classes, the injured party had the whole support of the priesthood or the community at his back, and thus was certain of obtaining satisfaction. It is therefore plain that though formless agreements contained the germ of Contract, they could not have produced a true law of Contract, because by their very nature they lacked binding force. Their sanction depended on the caprice of individuals, whereas the essence of Contract is that the breach of an agreement is punishable in a particular way. A further element was needed, and this was supplied by the invocation of higher powers.

II. At what period the fashion was introduced of confirming promises by an appeal to the gods it would be idle to guess. Originally, it seems, the plain meaning of such appeals was alone considered, and their form was of no importance. But under the influence of custom or of the priesthood, they assumed by degrees a formal character, and it is thus that we find them in our earliest authorities.

Since Religion and Law were both at first the monopoly of the priestly order, and since the religious forms of promise have their counterpart in the customs of Greece and other primitive peoples,

whereas the secular forms are peculiarly Roman[1], the religious forms are evidently the older, and formal contract has therefore had a religious origin. *Fides* being a divine thing, the most natural means of confirming a promise was to place it under divine protection. This could be accomplished in two ways, by *iusiurandum* or by *sponsio*, each of which was a solemn declaration placing the promise or agreement under the guardianship of the gods. Each of these forms has a curious history, and as they are the earliest specimens of true Contract, we may discuss them in the next chapter.

III. Another method, and one peculiar to the Romans, which naturally suggested itself for the protection of agreements, was to perform the whole transaction in view of the people. Publicity ensured the fairness of the agreement, and placed its existence beyond dispute. If the transaction was essentially a public matter, such as the official sale of public lands, or the giving out of public contracts, no formality seems ever to have been required, so that even a formless agreement was in that case binding. The same validity could be secured for private contracts by having them publicly witnessed, and the *nexum* was but one application of this principle. In testamentary Law it seems probable that the public will *in comitiis calatis* was also formless, whereas in private the testator could only give effect to his will by formally saying to his fellow-citizens "*testimonium mihi perhibetote.*"

Thus the two elements which turned a bare

[1] See p. 22.

agreement into a contract were religion and publicity. The naked agreements (*pacta*) need not concern us, since their validity as contracts never received complete recognition. But it will be the object of the following pages to show how agreements grew into contracts by being invested with a religious or public dignity, and to trace the subsequent process by which this outward clothing was slowly cast off. Formalism was the only means by which Contract could have risen to an established position, but when that position was fully attained we shall find Contract discarding forms and returning to the state of bare agreement from which it had sprung.