STUDIES IN THE EARLY HISTORY OF INSTITUTIONS. THE THEORY OF VILLAGE COMMUNITIES. VOL. I-II

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BY

DENMAN W. ROSS.

I.

THE THEORY OF VILLAGE COMMUNITIES.

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THE THEORY OF VILLAGE COMMUNITIES.

The idea prevails that the earliest form of ownership in land was corporate, collective, or joint ownership; that separate ownership arose in consequence of the disentanglement of individual from collective rights; of the rights of the family from those of the tribe; of the rights of the individual from those of the family. The theory of village communities is based upon this idea. It is now universally accepted.

The theory has arisen in somewhat the following manner. Certain passages of Cæsar's Commentarii De Bello Gallico and the twenty-sixth chapter of Tacitus' Germania were read. The institution of joint tenure in the land communities of the middle ages was studied. It was then assumed that Cæsar and Tacitus describe joint ownership of land; and the problem arose, how was joint ownership changed to joint tenure. This problem, now of many years' standing, has not been solved. Its conditions, however, are accepted without hesitation or doubt. Men were free in the time of Cæsar and Tacitus, and held land in joint ownership. The same men were unfree in the tenth century and held land in joint tenure. How, therefore, was joint ownership changed to joint tenure?

Then there was a discovery in the East, in India, of free village communities like those of the West among the Germans in Tacitus' time. To be sure the land of the Indian villages is not held in joint-ownership, but in ancestral shares. In early times, however, it must have been held in joint ownership; for what was an institution among the Germans in Tacitus' time must have been an institution among their kindred in India. So it has been argued;

and who can deny the force of the argument of evolution as applied to the growth of institutions?

Then there was a discovery in the West. There were village communities in Ireland in early times. They are described in early laws and other records. To be sure the land in these communities was held in ancestral shares. In so far as it was held in ownership at all, it was held in absolute and separate ownership. But what was an institution among the Germans in Tacitus' time, what was an institution not long ago among Aryan peoples in India, must have been an institution among the ancient Irish, their kindred. So it has been argued.

Then was discovered at last the very thing itself, the real village community, the community of Tacitus' Germany, of *pre-present* India, of prehistoric Ireland; a village community in which the land is periodically redistributed among the members, — the Russian *mir*. To be sure all the historians agree that the *mir* is an institution dating from the end of the sixteenth century (1592); that it was in its origin a community of tenants, *adscripti glebæ*, not a community of owners. But is not the argument of evolution as applied to the growth of institutions strong enough to contradict and silence the historians of Russia, the students of a few and doubtful facts? When the general truth has been ascertained, particulars of truths may be disregarded. So it has been argued.

Then followed a general and conclusive consideration. The cultivation and use of land in open fields upon co-operative principles is a fact sufficient in itself to show that land was held in joint ownership in early times; for now in the nineteenth century men are not educated up to the point of understanding and forbearance which is a condition of successful co-operation with absolute property. Can we believe for a moment that the archaic intellect was capable of seeing the advantages and understanding the principles of co-operation which have been discovered and laid down by modern economists with so much wisdom and learning? So it has been argued, and the force of the argument has not been denied.

However, there is that primary assumption that Cæsar and Tacitus describe joint ownership of land: and there are those facts; 1, that the land of the Indian villages is held in ancestral shares; 2, that the land of the ancient Irish communities was held in ances-

tral shares; 3, that the origin of the Russian *mir* has been placed by competent historians in the sixteenth century of our era. The force and significance of these facts has not been denied, except by the argument of evolution as applied to the growth of institutions; which argument, in this case, is based upon the above primary assumption that Cæsar and Tacitus describe joint ownership of land.

The following argument is calculated to show: 1, that joint ownership of land was unknown among the Germans in the fifth and following centuries; 2, that it must have been unknown in the time of Cæsar and Tacitus; that it is not described by them; 3, that the law of allodial inheritance, equal division of land among sons, is common to all branches of the Teutonic race; 4, that it must have been the law of that race before it was separated into branches; 5, that the law of equal division of land among sons contradicts the theory of village communities with joint ownership of land. The argument will consist of extracts from and references to the original sources, early laws, formulæ, and documents; interspersed with such brief comment or explanation as seems needed.

The law of allodial inheritance among the Salian Franks.

1. Lex Salica. LIX. 5. De terra vero nulla in muliere hereditas non pertinebit sed ad virilem sexum qui fratres fuerint, tota terra perteneat.

Division among brothers and co-heirs.

2. Formula (Rosière, CXXVI). Pactum divisiones inter fratres, id sunt illi et illi, heredes illui et illei quondam, qualiter se de alote eorum dividere vel exequare deberent, quod ita et fecerunt. . . . .

3. Formula (Rosière, CXXV). In Dei nomen. placuit adque convenit inter illus et illus germanus ut inter se de res eorum dividere debuerunt, quod ita et fecerunt. Accipit illi, hoc est casa cum omni circumcincto illa, seu et mancipia, vel mobile et inmobile quem in ipsa casa esse viditur, vel vinias, silvas et prata quantumcumque in ipsa casa aspicere viditur, totum et ad integrum. Et in contra accipit germanus suos illi alio locello illo cum omne rem ad se pertinentis . . . et hec paccio divisionis omni tempore firma permaneat.

4. Formula (Rosière, CXXVII). Dum et divisio vel exsequatio

inter illum et illum seu consortes eorum de alode lui aut de agro illo cælebrare debetur . . .

The inheritance consists of *villas* or portions of *villas*.

5. Formula (Rosière, CCXII). . . . . villam juris mei nuncupantem illam, sitam in pago illo, in condita illa, cum terris, ædificiis, accolabus, mancipiis, libertis, viniis, silvis, pratis, pascuis, aquis aquarumve decursibus, mobilibus et inmobilibus, cum omnibus appendicuis suisque adiecentiis, sicut a me præsenti tempore videtur esse possessum.

6. Formula (Rosière, CCXIII). . . . portionem meam in villa nuncupante illa in pago illo, quicquid ibidem ad præsens tam de alode parentum vel de qualibet adtractu possidere videor, totum et ad integrum . . . .

7. Formula (Rosière, CCIII). . . . porciones meas in loco nuncupantes illo, sitas in pago illo, que mihi tam de alode quam de conparato vel de quacumquelibet adtracto advenit vel advenire potest legibus in supra memorata loca, tam terris, domibus, edificiis, mancipiis, libertis, acolabus, merita acolanorum, vineis, silvis, pratis, pascuis, campis, cultis et incultis, aquis aquarumve decursibus, movilibus et immovilibus, cum omnis adgecentiis et adpendiciis vel colonicis ad se pertinentibus, cum omni integritate vel superposito, quicquid dici aut nominare potest, in supra memoratus pagos vel ubiquæ de supradictas porcionibus tenere visus sum, totum et ad integrum. . . . .

These *villas* are manors under allodial lordship, subject to division and subdivision according to the law of allodial inheritance.

8. Lex Salica. XLII. 5. . . . villam alienam.

9. Lex Salica. Capitula VII. 9. . . . villam alterius.

10. Lex Salica. XXVII. 6. . . . orto alieno. . . . 8. . . . campo alieno. . . . 10. . . . . prato alieno. . . . 18. . . . silva aliena. . . .

Documents describing allodial property.

11. Guérard. Cartulaire de St. Bertin. III. . . . dono vobis omnem rem portionis hereditatis meæ in pago Toroanense . . . villam proprietatis meæ nuncupante Sitdiu, supra fluvium Agniona, cum omni merito suo, vel adjacentiis seu aspicientiis ipsius villæ. Hæc sunt: villa Magnigeleca, Wiciaco, Tatinga villa, Amneio, Masto, Fabricinio, Losantanas, et Ad Fundenis seu Malros, Alciaco, Laudardiaca villa, Franciliaco, cum omni merito

eorum ; cum domibus, ædificiis, terris cultis et incultis ; mansiones cum silvis, pratis, pascuis, aquis aquarumve decursibus. . . . XIV. . . . villas ipsius monasterii quicquid præsenti tempore possidebant, aut adhuc inantea, ex munere regum, vel collato populi [note collato populi]. . . . XVIII. . . . Constat me non imaginario jure, sed plenissima voluntate, vobis vendidisse, et ita vendidi, tradidisse, et ita tradidi, de præsente, hoc est omnem rem portionis meæ in loco nuncupante Rumliaco, in pago Taruanense, quam de parte filii mei Chardeberti quondam, ex luctuosa hereditate mihi obvenit: id est cum terris, domibus, edificiis, mancipiis, silvis, pratis, pascuis, aquis aquarumve decursibus. . . .

The theory of joint ownership of land is not consistent with the law of allodial inheritance, because joint ownership involves periodic or occasional redistribution, and every redistribution would involve a breach of the law. For example, if two brothers had three sons, the inheritance of one of them would be double that of either of the other two. By redistribution, the larger inheritance would be diminished, and the law of inheritance by which it was acquired would be broken.

If it had been the custom in prehistoric time to redistribute the land of the *villa* once in ten, twenty, or thirty years, or even within the period of a lifetime; how could the law of allodial inheritance, which we find in the earliest records, have arisen?

Right of the allodial proprietor to remove himself from his kindred, taking his allodial property with him ; so that his kindred have no further right of inheritance from him nor he from them.

12. Lex Salica. LX. De eum qui se de parentilla tollere vult. 1. In mallo ante thunginum ambulare debet et ibi tres fustis alninus super caput suum frangere debet. Et illos per quattuor partes in malo jactare debet et ibi dicere debet, quod juramento et de hereditatem et totam rationem illorum se tollat. 2. Et sic postea aliquis de suis parentibus aut occidatur aut moriatur, nulla ad eum nec hereditas nec compositio perteneat sed hereditatem ipsius fiscus adquirat.

13. The Laws of Athelstan. 8. . . . If any landless man should become a follower in another shire and again seek his kinsfolk, they may harbor him if they will be responsible for him.

In the Lex Salica it is assumed that he who withdraws from his kinsfolk has land, *hereditas*. But compare