Chapter VI—
The Rights To The Uses Of Natural Media

Here in full is Chapter XI of *Justice*:
Chapter XI—The Rights to the use of Natural Media

§ 49. A man may be entirely uninjured in body by the actions of fellow-men, and he may be entirely unimpeded in his movements by them, and he may yet be prevented from carrying on the activities needful for maintenance of life, by traversing his relations to the physical environment on which his life depends. It is, indeed, alleged that certain of these natural agencies cannot be removed from the state of common possession. Thus we read:

"Some things are by nature itself incapable of appropriation, so that they cannot be brought under the power of any one. These got the name of *res communes* by the Roman law; and were defined, things the property of which belongs to no person, but the use to all. Thus, the light, the air, running water, etc., are so adapted to the common use of mankind, that no individual can acquire a property in them, or deprive others of their use." (*An Institute of the Law of Scotland*, by John Erskine (ed. Macallan), i., 196.)

But though light and air cannot be monopolized, the distribution of them may be interfered with by one man to the partial deprivation of another man—may be so interfered with as to inflict serious injury upon him.

No interference of this kind is possible without a breach of the law of equal freedom. The habitual interception of light by one person in such way that another person is habitually deprived of an equal share, implies disregard of the principle that the liberty of each is limited by the like liberties of all; and the like is true if free access to air is prevented.

Under the same general head there must, however, by an unusual extension of meaning, be here included something which admits of appropriation—the surface of the Earth. This as forming part of the physical environment, seems necessarily to be included among the media of which the use may be claimed under the law of equal freedom. The Earth's surface cannot be denied to any one absolutely, without rendering life-sustaining activities impracticable. In the absence of standing-ground he can do nothing; and hence it appears to be a corollary from the law of equal freedom, interpreted with strictness, that the Earth's surface may not be appropriated absolutely by individuals, but may be occupied by them only in such manner as recognizes ultimate ownership by other men; that is—by society at large.

Concerning the ethical and legal recognitions of these claims to the uses of media, not very much has to be said: only the last demands much attention. We will look at each of them in succession.

§ 50. In the earliest stages, while yet urban life had not commenced, no serious obstruction of one man's light by another man could well take place. In encampments of savages, and in the villages of agricultural tribes, no one was led, in pursuit of his ends, to overshadow the habitation of his neighbor. Indeed, the structures and relative positions of habitations made such aggressions almost impracticable.

In later times, when towns had grown up, it was unlikely that much respect would forthwith be paid by men to the claims of their neighbors in respect of light. During stages of social evolution in which the rights to life and liberty were little regarded, such comparatively trivial trespasses as were committed by those who built houses close in front of others' houses, were not likely to attract much notice, considered either as moral transgressions or legal wrongs. The narrow, dark streets of ancient continental cities, in common with the courts and alleys characterizing the older parts of our own towns imply that in the days when they were built the shutting out by one man of another man's share of sun and sky was not thought an offence. And, indeed, it may reasonably be held that recognition of such an offence was in those days impracticable; since, in walled towns, the crowding of houses became a necessity.

In modern times, however, there has arisen the perception that the natural distribution of light may not be interfered with. Though the law which forbids the building of walls, houses, or other edifices of certain heights, within prescribed distances from existing houses, does not absolutely negative the intercepting of light; yet it negatives the intercepting of it to serious degrees, and seeks to compromise the claims of adjacent owners as fairly as seems practicable.

That is to say, this corollary from the law of equal freedom, if it has not come to be overtly asserted, has come to be tacitly recognized.

§ 51. To some extent interference with the supply of light involves interference with the supply of air; and, by interdicting the one, some interdict is, by implication placed on the other. But the claim to use of the air, though it has been recognized by English law in the case of windmills, is less definitely established: probably because only small evils have been caused by obstructions.

There has, however, risen into definite recognition the claim to unpolluted air. Though acts of one man which may diminish the supply of air to another man, have not come to be distinctly classed as wrong; yet acts which vitiate the quality of his air are in modern times regarded as offences—offences for which there are in some cases moral reprobations only, and in other cases legal penalties. In some measure all are severally obliged, by their own respiration, to vitiate the air respired by others, where they are in proximity. It needs but to walk a little distance behind one who is smok-

ing, to perceive how widely diffused are the exhalations from each person's lungs; and to what an extent, therefore, those who are adjacent, especially indoors, are compelled to breathe the air that has already been taken in and sent out time after time. But since this vitiation of air is mutual, it cannot constitute aggression. Aggression occurs only when vitiation by one, or some, has to be borne by others who do not take like shares in the vitiation; as often happens in railway carriages, where men who think themselves gentlemen smoke in other places than those provided for smokers: perhaps getting from fellowpassengers a nominal, though not a real, consent, and careless of the permanent nuisance entailed on those who afterwards travel in compartments reeking with stale tobacco-smoke. Beyond the recognition of this by right-thinking persons as morally improper, it is forbidden as improper by railway regulations; and, in virtue of by-laws, may bring punishment by fine.

Passing from instances of this kind to instances of a graver kind, we have to note the interdicts against various nuisances—stenches resulting from certain businesses carried on near at hand, injurious fumes such as those from chemical works, and smoke proceeding from large chimneys. Legislation which forbids the acts causing such nuisances, implies the right of each citizen to unpolluted air.

Under this same head we may conveniently include another kind of trespass to which the surrounding medium is instrumental. I refer to the production of sounds of a disturbing kind. There are small and large trespasses of this class. For one who, at a table d'h6te, speaks so loudly as to interfere with the conversation of others, and for those who, during the performance at a theatre or concert, persist in distracting the attention of auditors around by talking, there is reprobation, if nothing more: their acts are condemned as contrary to good manners, that is, good morals, for the one is a part of the other. And then when inflictions of this kind are public, or continuous, or both—as in the case of street-music and especially bad street-music, or as in the case of loud noises proceeding from factories, or as in the case of church bells rung at early hours, the aggression has come to be legally recognized as such and forbidden under penalty: not as yet sufficiently recognized, however, as is shown in the case of railway whistles at central stations, which are allowed superfluously to disturb tens of thousands of people all through the night, and often to do serious injury to invalids.

Thus in respect of the uses of the atmosphere, the liberty of each limited only by the like liberties of all, though not overtly asserted, has come to be tacitly asserted; in large measure ethically, and in a considerable degree legally.

§ 52. The state of things brought about by civilization does not hinder ready acceptance of the corollaries thus far drawn; but rather clears the way

for acceptance of them. Though in the days when cannibalism was common and victims were frequently sacrificed to the gods, assertion of the right to life might have been received with demur, yet the ideas and practices of those days have left no such results as stand in the way of unbiased judgments. Though during times when slavery and serfdom wore deeply organized in the social fabric an assertion of the right to liberty would have roused violent opposition, yet at the present time, among ourselves at least, there exists no idea, sentiment, or usage, at variance with the conclusion that each man is free to use his limbs and move about where he pleases. And similarly with respect to the environment. Such small interferences with others' supplies of light and air as have been bequeathed in the structures of old towns and such others as smoking fires entail, do not appreciably hinder acceptance of the proposition that men have equal claims to uses of the media in which all are immersed. But the proposition that men have equal claims to the use of that remaining portion of the environment—hardly to be called a medium—on which all stand and by the products of which all live, is antagonized by ideas and arrangements descending to us from the past. These ideas and arrangements arose when considerations of equity did not affect land tenure any more than they affected the tenure of men as slaves or serfs; and they now make acceptance of the proposition difficult. If, while possessing those ethical sentiments which social discipline has now produced, men stood in possession of a territory not yet individually portioned out, they would no more hesitate to assert equality of their claims to the land than they would hesitate to assert equality of their claims to light and air. But now that long-standing appropriation, continued culture, as well as sales and purchases, have complicated matters, the dictum of absolute ethics, incongruous with the state of things produced, is apt to be denied altogether. Before asking how, under these circumstances, we must decide, let us glance at some past phases of land tenure.

Partly because in early stages of agriculture, land, soon exhausted, soon ceases to be worth occupying, it has been the custom with little-civilized and semi-civilized peoples, for individuals to abandon after a time the tracts they have cleared, and to clear others. Causes aside, however, the fact is that in early stages private ownership of land is unknown: only the usufruct belongs to the cultivator, while the land itself is tacitly regarded as the property of the tribe. It is thus now with the Sumatrans and others, and it was thus with our own ancestors: the members of the Mark, while they severally owned the products of the areas they respectively cultivated, did not own the areas themselves. Though it may be said that at first they were members of the same family, gens, or clan, and that the ownership of each tract was private ownership in so far as the tract belonged to a cluster of relations; yet since the same kind of tenure continued after the population of the Mark had come

to include men who were unrelated to the rest, ownership of the tract by the community and not by individuals became an established arrangement. This primitive condition will be clearly understood after contemplating the case of the Russians, among whom it has but partially passed away.

"The village lands were held in common by all the members of the association [mir]; the individual only possessed his harvest, and the *dvor* or inclosure immediately surrounding his house. This primitive condition of property, existing in Russia up to the present day, was once common to all European peoples." (The History of Russia, A. Rambaud, trans. by Lang, vol. i., p. 45.)

With this let me join a number of extracts from Wallace's Russia, telling us of the original state of things and of the subsequent states. After noting the fact that while the Don Cossacks were purely nomadic—"agriculture was prohibited on pain of death," apparently because it interfered with hunting and cattle-breeding, he says:—

"Each Cossack who wished to raise a crop ploughed and sowed wherever he thought fit, and retained as long as he chose the land thus appropriated; and when the soil began to show signs of exhaustion, he abandoned his plot and ploughed elsewhere. As the number of agriculturists increased, quarrels frequently arose. Still worse evils appeared when markets were created in the vicinity. In some stanitzas [Cossack villages] the richer families appropriated enormous quantities of the common land by using several teams of oxen, or by hiring peasants in the nearest villages to come and plough for them; and instead of abandoning the land after raising two or three crops they retained possession of it. Thus the whole of the arable land, or at least the best parts of it, became actually, if not legally, the private property of a few families." (Ib. ii. 86.)

Then he explains that as a consequence of something like a revolution:

"In accordance with their [the landless members of the community's] demands the appropriated land was confiscated by the Commune and the system of periodical distributions … was introduced. By this system each male adult possesses a share of the land." (Ib. ii. 87.)

On the Steppes "a plot of land is commonly cultivated for only three or four years in succession. It is then abandoned for at least double that period, and the cultivators remove to some other portion of the communal territory. … Under such circumstances the principle of private property in the land is not likely to strike root; each family insists on possessing a certain quantity rather than a certain plot of land, and contents itself with a right of usufruct, whilst the right of property remains in the hands of the Commune." (Ib. ii. 91.)

But in the central and more advanced districts this early practice has become modified, though without destroying the essential character of the tenure.

"According to this system [the three-field system] the cultivators do not migrate periodically from one part of the communal territory to another, but till always the same fields and are obliged to manure the plots which they occupy. … Though the three-field system has been in use for many generations in the central provinces, the communal principle, with its periodical reallotment of the land, still remains intact." (Ib. ii. 92.)

Such facts, and numerous other such facts, put beyond question the conclusion that before the progress of social organization changed the relations of individuals to the soil, that relation was one of joint ownership and not one of individual ownership.

How was this relation changed? How only could it be changed? Certainly not by unforced consent. It cannot be supposed that all, or some, of the members of the community willingly surrendered their respective claims. Crime now and again caused loss of an individual's share in the joint ownership; but this must have left the relations of the rest to the soil unchanged. A kindred result might have been entailed by debt, were it not that debt implies a creditor; and while it is scarcely supposable that the creditor could be the community as a whole, indebtedness to any individual of it would not empower the debtor to transfer in payment something of which he was not individually possessed, and which could not be individually received. Probably elsewhere there came into play the cause described as having operated in Russia, where some, cultivating larger areas than others, accumulated wealth and consequent power, and extra possessions; but, as is implied by the fact that in Russia this led to a revolution and reinstitution of the original state, the process was evidently there, and probably elsewhere, regarded as aggressive. Obviously the chief cause must have been the exercise of direct or indirect force: sometimes internal but chiefly external. Disputes and fights within the community, leading to predominance (achieved in some cases by possession of fortified houses), prepared the way for partial usurpations. When, as among the Suanetians, we have a still extant case in which every family in a village has its tower of defence, we may well understand how the intestine feuds in early communities commonly brought about individual supremacies, and how these ended in the establishment of special claims upon the land subordinating the general claims.

But conquest from without has everywhere been chiefly instrumental in superseding communal proprietorship by individual proprietorship. It is not to be supposed that in times when captive men were made slaves and women appropriated as spoils of war, much respect was paid to pre-existing ownership of the soil. The old English buccaneers who, in their descents on

the coast, slew priests at the altars, set fire to churches, and massacred the people who had taken refuge in them, would have been very incomprehensible beings had they recognized the landownership of such as survived. When the pirate Danes, who in later days ascended the rivers, had burned the homesteads they came upon, slaughtered the men, violated the women, tossed children on pikes or sold them in the market-place, they must have undergone a miraculous transformation had they thereafter inquired to whom the Marks belonged and admitted the titles of their victims to them. And similarly when, two centuries later, after constant internal wars had already produced military rulers maintaining quasi-feudal claims over occupiers of lands, there came the invading Normans, the right of conquest once more over-rode such kinds of possession as had grown up, and still further merged communal proprietorship in that kind of individual proprietorship which characterized feudalism. Victory, which gives unqualified power over the defeated and their belongings, is followed, according to the nature of the race, by the assertion of universal ownership, more or less qualified according to the dictates of policy. While in some cases, as in Dahomey, there results absolute monopoly by the king, not only of the land but of everything else, there results in other cases, as there resulted in England, supreme ownership by the king with recognized sub-ownerships and sub-sub-ownerships of nobles and their vassals holding the land one under another, on condition of military service. supreme ownership being by implication vested in the crown.

Both the original state and the subsequent states have left their traces in existing land laws. There are many local rights which date from a time when "private property in land, as we now understand it, was a struggling novelty."[18]

"The people who exercise rights of common exercise them by a title which, if we could trace it all the way back, is far more ancient than the lord's. Their rights are those which belonged to the members of the village community long before manors and lords of the manor were heard of."[19]

And any one who observes what small tenderness for the rights of commoners is shown in the obtainment of Inclosure Acts, even in our own day, will be credulous indeed if he thinks that in ruder times the lapse of communal right into private rights was equitably effected. The private ownership, however, was habitually incomplete; since it was subject to the claims of the overlord, and through him, again, to those of the over-overlord: the implication being that the ownership was subordinate to that of the head of the community.

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[18] The Land Laws, by Sir Fredk. Pollock, Bart., p. 2.
[19] Ibid, p. 6.

"No absolute ownership of land is recognized by our law books except in the Crown. All lands are supposed to be held immediately, or mediately, of the Crown, though no rent or services may be payable, and no grant from the Crown on record."[20]

And that this conception of landownership survives, alike in theory and in practice, to the present time is illustrated by the fact that year by year State authority is given for appropriating land for public purposes, after making due compensation to existing holders. Though it may be replied that this claim of the State to supreme landownership is but a part of its claim to supreme ownership in general, since it assumes the right to take anything on giving compensation; yet the first is an habitually enforced claim, while the other is but a nominal claim not enforced; as we see in the purchase of pictures for the nation, to effect which the State enters into competition with private buyers, and may or may not succeed.

It remains only to point out that the political changes which have slowly replaced the supreme power of the monarch by the supreme power of the people, have, by implication, replaced the monarch's supreme ownership of the land by the people's supreme ownership of the land. If the representative body has practically inherited the governmental powers which in past times vested in the king, it has at the same time inherited that ultimate proprietorship of the soil which in past times vested in him. And since the representative body is but the agent of the community, this ultimate proprietorship now vests in the community. Nor is this denied by landowners themselves. The report issued in December, 1889, by the council of "The Liberty and Property Defence League," on which sit several Peers and two judges, yields proof. After saying that the essential principle of their organization, "based upon recorded experience," is a distrust of "officialism, imperial or municipal," the council go on to say that:—

"This principle applied to the case of land clearly points to individual ownership, qualified by State suzerainty. … The land can of course be 'resumed' on payment of full compensation and managed by the 'people,' if they so will it."

And the badness of the required system of administration is the only reason urged for maintaining the existing system of landholding: the supreme ownership of the community being avowedly recognized. So that whereas, in early stages, along with the freedom of each man, there went joint ownership of the soil by the body of men; and whereas, during the long periods of that militant activity by which small communities were consolidated into great ones, there simultaneously resulted loss of individual freedom and loss of participation in landownership; there has, with the decline

[20] Ibid, p. 12.

of militancy and the growth of industrialism, been a reacquirement of individual freedom and a reacquirement of such participation in landownership as is implied by a share in appointing the body by which the land is now held. And the implication is that the members of the community, habitually exercising as they do, through their representatives, the power of alienating and using as they think well, any portion of the land, may equitably appropriate and use, if they think fit, all portions of the land. But since equity and daily custom alike imply that existing holders of particular portions of land may not be dispossessed without giving them in return its fairly estimated value, it is also implied that the wholesale resumption of the land by the community can be justly effected only by wholesale purchase of it. Were the direct exercise of ownership to be resumed by the community without purchase, the community would take, along with something which is its own, an immensely greater amount of something which is not its own. Even if we ignore those multitudinous complications which, in the course of century after century, have inextricably entangled men's claims, theoretically considered—even if we reduce the case to its simplest theoretical form; we must admit that all which can be claimed for the community is the surface of the country in its original unsubdued state. To all that value given to it by clearing, breaking-up, prolonged culture, fencing, draining, making roads, farm-buildings, etc., constituting nearly all its value, the community has no claim. This value has been given either by personal labor, or by labor paid for, or by ancestral labor; or else the ve-lue given to it in such ways has been purchased by legitimately earned money. All this value artificially given vests in existing owners, and cannot without a gigantic robbery be taken from them. If, during the many transactions which have brought about existing landownership, there have been much violence and much fraud, these have been small compared with the violence and the fraud which the community would be guilty of did it take possession, without paying for it, of that artificial value, which the labor of nearly two thousand years has given to the land.

§53. Reverting to the general topic of the chapter-the rights to the uses of natural media—it chiefly concerns us here to note the way in which these rights have gradually acquired legislative sanctions as societies have advanced to higher types.

At the beginning of the chapter we saw that in modern times there have arisen legal assertions of men's equal rights to the uses of light and air: no forms of social organization or class interests having appreciably hindered recognition of these corollaries from the law of equal freedom. And we have just seen that by implication, if not in any overt or conscious way, there have in our days been recognized the equal rights of all electors to supreme ownership of the inhabited area-rights which, though latent, are asserted by

every Act of Parliament which alienates land. Though this right to the use of the Earth, possessed by each citizen, is traversed by established arrangements to so great an extent as to be practically suspended; yet its existence as an equitable claim cannot be denied without affirming that expropriation by State decree is inequitable. The right of an existing holder of land can be equitably superseded, only if there exists a prior right of the community at large; and this prior right of the community at large consists of the sum of the individual rights of its members.

NOTE. Various considerations touching this vexed question of landownership, which would occupy too much space if included here, I have included in Appendix B.

Let us take breath and gather our wits. It is like going through a St Gothard tunnel. Here we are on the other side, sure enough! But how did we get there?

Mr. Spencer brought us in, asserting the law of equal freedom as "an ultimate ethical principle, having an authority transcending every other"; declaring that "rights truly so called are corollaries from the law of equal freedom, and what are falsely called rights are not deducible from it."

He brings us out, with a confused but unmistakable assertion that the freedom to use land belongs only to the small class of landlords; with an assertion of the strongest kind of their right to deprive all other men of freedom to use the earth until they are paid for it.

How has he got there?

Has he shown that the law of equal freedom gives freedom to the use of land only to a few men and denies it to all other men? Has he shown that the right so called of the small class of landowners to the exclusive use of land is a true right and not a false right, by deducing it from the law of equal freedom? Has he met one of the conditions called for by his elaborate derivation and formula of justice in the preceding chapters of this very book? Has he shown the invalidity of a single one of the deductions by which he proved in *Social Statics* that justice does not permit private property in land?

It is worth while to examine this chapter in detail. Its argument is divisible into two parts—(1) as to the right to the use of light, air, etc., and (2) as to the right to the use of land. Let us consider the one part before passing to the other.