R. W. PECKHAM

CYCLOPEDIA OF LAW

HOW TO STUDY LAW

CONTAINING

PRACTICAL SUGGESTIONS TO STUDENTS, BUSINESS MEN, WOMEN AND ALL OTHERS WHO DESIRE A KNOWLEDGE OF THE ELEMENTARY PRINCIPLES OF LAW, INCLUDING A CLEAR PRESENTATION OF THE ELEMENTS OF

Blackstone's Commentaries

VOL. I

EDITOR IN CHIEF

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AUTHOR'S PREFACE.

"How to Study Law" is a question of importance to an ever increasing number of persons who desire a practical and inexpensive method of fitting themselves for the legal profession. The same question is also suggesting itself to persons who are, or expect to be, established in other callings, who wish to understand their privileges and responsibilities under the law, and the legal ties that regulate their varied business and social relations. This book—introducing the Cyclopedia of Law—seeks to answer this question in a manner at once practical and satisfactory to students in every sphere and condition of life. The Series, it is hoped, will aid the law office student and the law school student, as well as that great class of persons who are unable to have the advantages of either school or office instruction.

The time has arrived in America in which a person who wishes to succeed must be able to think as well as act. The law offers a large and expanding field for the development of character and personality, and a knowledge of it is as beneficial from the standpoint of a liberal education as from that of a life calling.

Blackstone claimed for his lectures that they

were "as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities" and that it was not his business "to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet." He believed that the student's attention should be engaged "in tracing out the originals, and as it were, the elements of the law," and cited Justinian to the effect that if "the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies or will carry him heavily through them, with much labor, delay and despondence." Intro. Bl. Com. p. 36.

The Cyclopedia of Law aims to perform the same office for the American student as the Commentaries did for the English student of law. It will be the fixed and general principles of law and practice that will be chiefly dealt with; and these will be laid before the student in a plain and simplified manner. The minute provisions of statutory law will be indicated and the students prepared for their interpretation and application. The same author quoted above has said that a plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions, and that, an attention not

greater than is usually bestowed in mastering the rudiments of other sciences, or in pursuing a favorite recreation or exercise, will be sufficient to encompass in this manner the principles and grounds of the law.

Law is the garnered wisdom of ages of political development and the true conservator of civilization. It nominates the duties of the citizen and sanctifies the rights of the individual. These rights and duties must be known and fulfilled if our nation is to exist for any extended period and answer the high purposes for which it was established. We trust that the method herein presented of encouraging a knowledge of the laws and institutions of our advanced civilization will meet with the approval of the general public, and be a help and a benefit to those who desire this knowledge.

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PART II

HOW TO STUDY LAW.

CHAPTER I.

General Suggestions.

Section 1. THE CHIEF DIFFICULTY OF THE STUDENT.—Aside from the general difficulties of time, money, and previous educational advantages, the student, young or old, in the office or in the law school, who is earnestly in quest of legal knowledge, finds his enthusiasm checked and his ardor cooled by discovering that there is no key to the varied stores of legal lore which exist, and which he is only too eager to make his own. To one who has traversed the rough road heretofore followed by every student of the law, it is palpably apparent that much valuable time is lost, and the keen edge of the student's appetite for the science unnecessarily blunted because he is left to delve too deeply, uncomprehendingly, in some branch of the law before he has taken a general and elementary view of the entire science.

The different branches of the law, like the divisions of other sciences, are correlated, and each branch assists the student in the comprehension of every other.

Sec. 2. THIS DIFFICULTY AVOIDED.—By the series of comprehensive and explanatory treatises contemplated by the Home Law School Series the student will be enabled to take up in succession the various branches of the science, master the fundamentals of each, and then be prepared for a more careful and exhaustive study of the history and spirit of the law as well as to reason concerning the natural foundations of justice. The divisions which are to be followed were suggested by the arrangement of subjects made by the examiners appointed by the Supreme Court of Ohio to conduct the examination of candidates seeking admission to the bar. The examination covered twenty branches and these in turn exhausted the field of American law. It is the aim of the author of this series to present one or more of these branches in each number of the Home Law School Series. These books will enable any person to study law with satisfaction and profit, and not only to become familiar with the rights and duties of an American citizen, but also, if desired, to pass the hardest possible bar examination and embark with credit and adequate preparation in the legal profession.

A general summary of the principles of law as they stand to-day is sought to be spread out before the student in an interesting way, not too learnedly, not too carelessly, for the lawyer must never be careless, and in the study of the law we cannot discard a certain degree of technicality.

We take no credit to ourselves in recognizing the need of the student in this regard; one would not set a child to learn music by giving him the inspirations of the great masters; these are the last stages in the acquirement of the art and must be preceded by careful but simplified teaching in the elements of music. So with law, its fundamental tenets must be grasped by the student before those more intricate problems will be clear to him; and if the basis of his legal education is sufficiently broad and firm there is no limit which he may not reach, and no problems which he may not solve. If we can but lessen the labors of the student at the outset, and give him such a view and grounding as will permit him from the inception to perceive the order and spirit of the law, and thus be inspired and not discouraged we shall be more than compensated for our undertaking.

Sec. 3. HOW THE LAW WAS STUDIED PRIOR TO 1765.—That the student may appreciate what the Home Law School Series has undertaken to do for him we restate here Lord Chief Justice Reeve's direction to those about to begin the study of legal science. He said: "Read Wood's Institutes cursorily, and for an explanation of the same, Jacob's Law Dictionary. Next strike out what lights you can from Bohun's Institutio Legalis, and Jacob's Practising Attorney's Companion, and the like, helping yourself by indexes. Then read and consider Littleton's

Tenures without notes, and abridge it. Then venture upon Coke's Commentaries. After reading it once, read it again, for it will require many readings. Abridge it; commonplace it; make it your own; apply to it all the faculties of your mind. Then read Sergeant Hawkins to throw light upon Lord Coke. Then read Wood again to throw light on Sergeant Hawkins. And then read the Statutes at Large to throw light on Wood."

If these were the trials of the English student in the early days of the law, what shall we say as to those of the American student of to-day? The law—both common and statute law—has become infinitely more complex. The student is supposed to begin at the foundation not only of the English Common Law but in many cases to delve into the half-forgotten lore of the Civil or Roman law. Thousands of text-writers now compete for the mastery in stating with voluminous detail the ever expanding subtilities of the law; volumes have been written upon subjects as copyright, patents, commercial law, etc., mentioned in a few lines by Blackstone, if, indeed, they were reached at all by that exhaustive commentator; the diverse statutes and precedents in the different States add to the beginner's confusion, while the extreme particularity and detail with which every personal and property right of the individual is guarded by statute makes the task of the law student seem well-nigh endless.

Sec. 4. HOW LAW HAS BEEN STUDIED SINCE BLACKSTONE'S TIME.—Blackstone's Commentaries on the Laws of England were first published in 1765, and since that time almost every student of the law has made extensive use of this valuable work from the inception of his studies. While this famous work is now largely of historical value only, it is still the beginner's fate to be asked to partake of it in large doses. Prof. Walker has stated the true reason, we believe, for the continued popularity of Blackstone. He says: "There is no work on American law at all suitable for a first book; and we are compelled, for want of such a work, to commence with Blackstone's Commentaries on English Law, to learn the rudiments of American law." Walk. Am. Law. 4.

We now have, it is true, Walker's work, and Kent's Commentaries, which are valuable to the American student and much more practical than Blackstone, yet these, too, have been largely outgrown by the rapid changes in the American legal systems. And our most successful law schools make use of them simply as reference books, and acquaint their students with the history of the common law by means of abridged oral lessons upon the leading subjets. The student is then occupied with principles, leading cases, and statutes, with some attention to details of practical procedure. The student who undertakes to master the science without any assist-

ance from those who have already gone over the ground has a difficult task, and one which he will never accomplish without a world of pluck and perseverance.

Sec. 5. ADVANTAGES OF THE CYCLOPEDIA OF LAW.—The important assistance which the law student needs is, first, to be enabled to read the fundamentals of the science unnderstandingly; second, to have furnished to him or designated what he should read; and, third, to have such reading collected into reasonable compass. All this is done by the Cyclopedia of Law.

First. The student is enabled to read law understandingly by this system, since the whole aim and scope of the school is directed to instruct the novice and gradually and systematically add to his present knowledge an accurate legal education. Most text-books upon legal subjects are for the benefit of trained men—professionals—and hence little care is taken to simplify the rules laid down. This school is for beginners, for students just setting out upon an unknown road, and every precaution will be taken to make each step clear and smooth.

Second. The school furnishes in the first instance just what is to be read, and then designates, by way of supplemental readings, such other and further sources of knowledge as will be most convenient and beneficial to the student.

Third. This information is collected into the

briefest possible form, with all unnecessary and antiquated details lopped off, though the references are sufficiently varied as to permit the student with a great amount of leisure to investigate in detail any important or special subject.

Sec. 6. THE NECESSITY OF LEGAL KNOWLEDGE.—To speak of the necessity of some knowledge of the law to one who intends making the law his profession is doubtless unnecessary. Yet we occasionally hear of persons in those States where a good moral character is sufficient to gain admission to the bar, who are absolutely deficient in the very rudiments of the profession which they are legally entitled to follow. The results of admitting incompetent persons to practice are, a lowering of the standard of the profession, and a jeopardizing of the interests of the client often amounting to a denial of right.

To the average student intending to become a lawyer, we need say no more in regard to the necessity of his understanding the science or profession he wishes to make his life's calling. But there is a pressing necessity for every man and every woman to understand at least the rudiments of the law. By a rule of law, as ancient as the law itself, every one is conclusively presumed to know the rights and duties which it confers or compels. That this is a violent presumption no one will question, for we believe there is none that has ever been made that varies so generally from the truth. Still the rule re-

mains, and in general all sane adults, ignorant or wise, are responsible civilly or criminally for any and all transgressions of the fixed rules of the State or nation which we call laws. They are likewise dependent upon these rules for the enforcement of their rights, and if they know not their rights under the law how can they enforce them? Laws, too, are not always in conformity to what natural reason would lead one to infer the law ought to be, and so there may easily be an honest infringement of the strict letter of the law, which will, nevertheless, subject the offender to the prescribed penalty. The law, as we shall see, in providing what is right, and forbidding what is wrong, acts arbitrarily, and recognizes no absolute rule save the intent and will of the lawmakers.

It is apparent that every man, high and low, should have some general knowledge of the laws under which he lives. Without such knowledge he is in continual dread of some coercive and irresistible power, which he may ignorantly offend at any moment; or his dearest rights may be infringed upon by others and though redress be within reach he does not know that there is redress for him. Surely, these reasons would suffice to encourage every person to familiarize himself with the general principles of the laws to which he is subject.

But there are other and higher motives which should induce each citizen to acquaint himself

with the laws of our land—a land, "perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution." Ours is a popular government. Each man in casting a vote is, in respect to that vote, a law-maker. To cast his vote judiciously he should have some knowledge of what law is, and the ends it is expected to conserve. In England, the filii nobilium—sons of noblemen—were instructed in the laws that they might protect and guard their estates and privileges. In America, by grace of God, all men are filii nobilium, and if they would retain this priceless heritage bestowed by the fathers they must acquire a knowledge of, and a love for "those equitable rules of action by which the meanest individual is protected from the insults and oppression of the greatest."

Sec. 7. BENEFITS OF LEGAL EDUCATION.—"I think it an undeniable position," said Blackstone, in the introduction to his series of law lectures, "that a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar; a highly useful—I had almost said essential—part of liberal and polite education." But the average American of to-day desires further benefits, and is prone to ask after the practical advantages of legal study, and in this case he can be fully satisfied, since in no branch of education are the benefits so varied and extensive as in that of the law.

From birth until death the interests, not to say destiny, of each individual is indissolubly connected with the law of the land; every incident of his career, every personal and property right, every domestic, social, and business relation is regulated or defined by it. It may not be possible or practicable for every man to be his own lawyer, but it is possible and important for a freeman to be familiar with the rudiments of the science which guards his liberties, and to be cognizant of the general principles which govern his every day business affairs. This information should be taught in the public schools, and is, in our opinion, far more important than some of the things which are taught there at present.

It is astonishing that in a progressive age, and in a land literally dotted with free schools, the great mass of citizens should be utterly unacquainted with the laws regulating contracts, the acquiring and disposing of real and personal property, and the fiduciary relations; or with commercial usages and the statutory provisions governing the civil and criminal liability of individuals. We believe that the time has come to dispel the ignorance of the masses in regard to the laws of the land, and for a general study of that science "which distinguishes the criterions of right and wrong; which teaches to establish the one and prevent, punish, or redress the other; which employs in its theories the noblest faculties of the soul, and exerts in its practice the car-

dinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community."

Sec. 8. WHAT PREVIOUS EDUCATION THE LAW STUDENT SHOULD HAVE.—Every particle of education one can possess along any and all lines will be of help in the study of the law. Even technical or professional training in the allied sciences would be advantageous, so no student of the law need fear that he may know too much. But the important question is, how much should the student know? Shall we look to the past method of legal education, or to the law schools of to-day to determine this question? In either event we shall find a great variety of answers. In the multitudinous examples of eminent lawyers we might cite, some were fully and carefully trained in the highest seats of learning, while others were without any of the advantages of the so-called higher education. Among the law schools and universities of to-day we find various standards; some requiring a collegiate education, including an extended course in the dead languages and a term of years spent in perusing the theories and sophisms of the latest expounder of "isms" and "ologies," and others that leave their doors open to all who have a fair understanding of the English language and the ordinary branches taught in the common schools. In the universities and colleges the tendency is

to raise the standard, and within the past few years the standard in some schools has risen from the lowest to the highest requirements. It is not our purpose to decry this raising of the standard of admission to law schools, though we may be pardoned for sympathizing with and repeating the conclusion of another writer who has canvassed these two methods of dealing with prospective students: "One shows the selfish side of learning, and the other the more liberal and praiseworthy. The former would deny entrance to the ranks of the profession to the ambitious poor man, while the latter would open the doors wide enough to take in any one who has ambition and energy enough to pursue the study."

Should the schools carry their advance standard to the extent of asking that these requirements be made part of the qualifications necessary for the admission to the bar, we should most seriously object. The ancient languages, and the varied store of ornamental education which go to make up university training should not be forced upon every youth who desires to set up as an expounder and practitioner of the plain and exact rules of justice and rights which make up our legal system. In America, we have had, and I trust may ever have, two sorts of lawyers and judges, equally capable, honest, and beneficial. One sort came from the colleges, the other from the farms and workshops direct; one skilled in all the flowery

phrases of antiquity, and overflowing with historical disquisitions upon legal theories; the other with the metal of their brain and heart robust and free and prepared to ring out loud and clear when struck by the unanswerable logic of progress, or wrung by the pleadings of oppressed humanity. "Men have worn the judicial gown who have never seen the inside of a Latin grammar, and they were none the less able judges, despite the fact." Andrew Jackson and Daniel Webster were equally necessary to mold and develop our civilization, though the former was but the rough, untutored frontiersman and the other the college-bred student. At the bar they were equally serviceable; and in the gravest affairs of state who shall say that the honest determination and direct Americanism of the staunch "Old Hickory" was not as much needed as the careful and profound declamations of Webster? Abraham Lincoln and William H. Seward again illustrate the two types of American lawyers. The former was home-made, his ideas of right and wrong were God-given and unbiased by the subtle theories of the past of human institutions; the latter was coached and crammed in the institutions of learning and was disposed to look askance at his more humble brother from the plains. Both were led to espouse the cause of the enslaved negro, and to do their utmost to vindicate his right to liberty and equality under the law. We are permitted to judge whose in-

fluence was the greater, whose words were the more potent to bring about a general recognition of a principle which is now fundamental. When we have decided whether the sublime yet unostentatious words of Lincoln or the pompous declamations of Seward were the more efficacious; and whether the uncouth but true-hearted executive, or his cultured and self-important secretary were more serviceable to the nation in its darkest hour, we shall have decided the controversy between the college-trained and the home-trained lawyer.

One of the prerequisite attainments of the student of law suggested by Blackstone is, that he be able to reason with precision, and separate argument from fallacy, by the clear, simple rules of pure unsophisticated logic; to fix his attention, and to steadily pursue truth through the most intricate deductions by plain mathematical demonstrations. This, we think, touches the keynote of the student's qualifications to begin the study of the law. There is no absolute need of his having a collegiate education; a fair grounding in the ordinary common school branches, supplemented by home readings on the History of the English and American people and the development of our social and political institutions will enable him to pursue the study of the law with the highest credit and advantage.

The languages, as Latin, Greek, French, would not assist the student as much as many suppose.

True, the language of the law was at one time a compound and barbarous jargon; from the conquest of England in 1066 until 1363, legal proceedings were conducted in Norman French. In 1363 the statutes required the proceedings to be conducted in English and enrolled in Latin, and this was the general rule until 1730, when an act of Parliament required the records to be made in English. (Walker's Am. Law, 2.)

Some of the terms used in these early proceedings at law have remained, and have come to possess a definite technical meaning, but the student learns the meaning of these terms as he does the principles of the law, and thus comes to use them as clearly and correctly as though familiar with the language of which they formed a part. While a number of these technical law terms must be mastered, they are not favored in modern practice and many of them are becoming obsolete, and where suitable modern terms can be used they are to be preferred. Thus a fair knowledge of the English language is all that the student need have, and in the course of his study the terms derived from the older languages, as "bailment," "trover," "tort," etc., will become as familiar to him as the technical expressions, "hearsay," "rule in Shelley's case," etc., which are used by the profession. Our position is, that these terms must be analyzed and learned by the student; no one can comprehend them spontaneously, since they have come to have a set,

technical application which cannot be varied and which no other expression will convey.

A laughable incident is reported about a student who relied on his general information to answer the question: "What is the rule of law in Shelley's case?" his answer was: "The rule in Mr. Shelley's case is the same as in any other man's case; the law being no respecter of persons." Another student taking the bar examination in Ohio in March, 1897, answered the question, "What is hearsay? Give five exceptions to the general rule in regard to hearsay," as follows: "It is natural for a man to here all he can if he has good hearing; this is a natural instinkt for humanity, and there is no exceptions." Students who make such answers are generally set down as being incapable of learning law at all, yet we believe their chief difficulty lay in not having access to comprehensive treatises upon the subjects constituting the examination. Important branches of the law may be thoroughly mastered by the office student, and he may be ever so capable, and yet likely to make mistakes upon subjects not covered by his readings. But in the latter case the composition and spelling indicate such a lack of the fundamentals of education, as, if not corrected, will prove a bar to success in any calling.

We would advise the student, if such there be, who cannot master the common branches, as spelling, reading, writing, grammar, etc.,

not to take up the law as a profession, merely because he has a gift of "gab." This latter qualification is coming to be less and less in demand. And while we may deprecate the spirit of the times that does not make orators, we can but commend the quiet and orderly bearing of most counselors in the conduct of a case. No bellowing, no contortions, no dramatic poses; simply a natural and manly presentation of the client's cause, in the clearest and most concise language the advocate can command. There may be some advocates who yet shed the "crocodile tear" in pleading for their client, but for every timid soul so won we believe the disgust of other honest and manly jurors is aroused by such practices of counsel who thereby brings defeat to the cause of his client. It may not be amiss to mention here a part of Judge Story's sage advice to young lawyers:

"When'er you speak, remember every cause
Stands not on eloquence, but stands on laws;

* * * * * * * * *

"Loose declamation may deceive the crowd,
And seem more striking as it grows more loud;
But sober sense rejects it with disdain,
As naught but empty noise, and weak as vain."

In conclusion, we would say that any American youth who really desires to follow the law as a profession, and all citizens anxious to become familiar with the principles affecting their person and property, need not hesitate to begin the

study of law if they are able to read and retain thoughts and precepts, and to make deductions therefrom and to apply them to the questions that daily arise. With such qualifications any person can, by industry and application become proficient in the law. Our authority for this statement is the fact that thousands of eminent persons—attorneys and judges—began with no further qualifications.

Sec. 9. THE TIME REQUIRED TO LEARN LAW.—The time which the student will require to learn law will vary with the student and the method by which he seeks to acquire his knowledge. That a long term of years entirely devoted to legal study is necessary we do not believe. Neither do we believe that any one, however great his genius, can master the legal science in a few weeks or months' study. The method of study is important if the time is to be reduced to the smallest possible limit. A student may read for years among the law books and reports and not come to as full a knowledge of the law as by a single year's methodical study under a competent instructor or with the assistance of a condensed and capable series of guide lessons. Upon this subject another writer has said:

"In the first place, then, it may be stated that in no study is a capable guide more necessary than in the study of the law. It may as well be determined in the beginning that unless one can

have capable direction in his study he may as well turn his attention to other fields of effort. The field of law is so broad, so compassed about by jungles of difficulties, almost interminable, even to the experienced student, so cut up by intersecting paths that confuse and tend to lead the student astray, so uninviting in some directions, which, though uninviting are important, that the student who proceeds to explore it without a chart or compass will find himself lost ere he is fairly started upon his journey. * * * The one matter of choice of books alone will present a difficulty that cannot be solved by the student without aid. It has been said that if a man should calculate on living to the age of sixty years, and should devote, with great industry, forty of these years to the study of books, the most that he could accomplish in that time would be the perusal of about 1,600 octavo volumes of 500 pages each. One could live a life time, spending his entire time in the reading of the law and not read a single book twice. It is important, therefore, that the choice should be judicious, and after it is made, the whole should be studied with method."

The student who has the advantages of the Home Law School Series, as well as students attending a college of law, are so aided and guided that the actual amount of time required to gain a thorough knowledge of the principles of law is not great. Some years ago the University of

Michigan had what was called a one year course, for students who had some previous knowledge of the law, while the regular course of study embraced two years of nine months each. The course has now been enlarged to cover another year. As a matter of fact, there was little perceptible difference as regards attainment between the "one year" men, as they were called, and the full-course students. And we venture to say that the students finishing the course in two years made as good lawyers, and were as capable as the students now taking the three years' course will be. What does this statement signify? Not that the less time spent as a student of law the better will be the chances of success, but simply that student life is but the securing of the indexes to more thorough and advanced work, and should not be permitted to occupy too much of one's life. This idea is well stated by Blackstone, who quotes Sir John Fortescue as saying: "For, though such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet, with a genius of tolerable perspicacity, that knowledge which is fit for a person of birth or condition may be learned in a single year, without neglecting his other improvements."

Another eminent authority has said: "If one shall enter upon the study of the law under the impression that the extent of his advancement must necessarily bear some relation to the num-

ber of hours consumed in reading, and the number of pages devoured, and shall, in consequence of that mistaken impression, hurry over ground where he should proceed slowly, cautiously, and with much pains-taking, he must be brought at last face to face with the fact that he is reading to little purpose, and catching but surface views. For it is as true with the mental as it is with the physical life, that, to nourish and strengthen the powers, there must be time and opportunity for digestion; and this process demands consideration, reflection, and patient and laborious thought. * * * The study of the law must be with active mind and receptive understanding." Cooley's Introd. to Bl., p. xi.

Sec. 10. SHOULD ALL THE STUDENT'S TIME BE DEVOTED TO STUDY?—The question whether the student should forsake all else, including manual labor and other mental work, to take up the study of the law is easily answered. The answer being that there is no necessity for so doing, and the results attained by the student will be better if the separation is not made. Blackstone says: "Sciences are of a social disposition, and flourish best in the neighborhood of each other; nor is there any branch of learning but may be helped and improved by assistance drawn from other arts." So it is plain that other studies may be pursued simultaneously with that of the law and be of increased benefit to the student. But thousands

of persons desire to know if they can continue in their ordinary daily avocations and at the same time study law in the leisure hours their present calling allows them? We answer this query in the affirmative, and give as our reason for so doing the fact that thousands have already done so. Scores of teachers, stenographers, telegraph operators, commercial travelers, clerks of all descriptions, farmers, blacksmiths, artisans, etc., have studied law while holding their positions and have come to be creditable and capable attorneys. It must follow that any person, young or old, working for himself or for others, may, if he is energetic, find sufficient leisure time to read as much law each day as would be covered by an ordinary lecture in a law school. These homeopathic doses of law will prove entertaining as well as instructive, and if kept up for a period covering several years, as is contemplated by the Home Law School Series will familiarize one with the essentials of a legal education. We insert here some remarks by an attorney who favors this method of study. He says:

"I would have you emulate the example of persons whose time is methodically divided. Some men may not be able to give but thirty minutes a day to the study of the law, and some may be able to give their entire time. The one who can give but thirty minutes need not be discouraged because he cannot give more. * * * It is not how much we read, nor how long we

are in reading it, but how we read it. A student who has but thirty minutes is much more liable to accomplish what he undertakes in the way in which it should be done, digesting it small portions at a time, than is the man whose whole time is at his disposal, and who reads law as if it were necessary and possible to take it all in at one sitting. * * * One of the most frequent complaints I hear is: 'I have no time.' I have little patience with excuses of this character, since I know that in nine cases out of ten the excuse is one which is not based on facts. Time to pursue any line of study does not mean that one must of necessity devote several hours of each day to its pursuit. * * * A few moments each day, if given to the study at regular intervals, will be sufficent to accomplish wonders in the end, and the end need not be so very far distant. I have in mind a student who has but thirty minutes in the day that he can call his own, and that thirty minutes is the thirty minutes before breakfast. His plan is to read thoroughly and attentively during the thirty minutes, with pencil in hand, jotting down the main points as he passes over them. The memorandum thus made he carries with him through the day, and at odd intervals in his work refers to it, thus thinking it over and unconsciously digesting it. His work is of more benefit to him than were he to spend three or four hours each day in cramming his head with a vast amount of reading, little of which he is able to

retain, and much less of which can he understand or make part of his working knowledge." Thus is the question of time for the diligent person entirely removed.

But while we thus designate how the person employed in other work may study law, we do not wish to slight the fact that this putting to use hours of leisure is a task that only men of great personal control and indomitable energy can compass. Study, to many persons is a bugaboo only to be tolerated in the school-room. We all observe and credit the Franklins and Greeleys, but are slow to put in practice the rules of life which insured their ultimate greatness. Franklin's motto was: "Leisure is time for doing something useful," and the "something useful" was the development of his mind for the responsibilities of life. The student who, like Franklin, will separate himself from his companions and pursue steadily a course in law should have the additional credit of having mastered present selfish considerations for his ultimate good—a feat which only great and noble souls have ever undertaken.

We recall a gentleman who, though possessing a fair education, began to apply himself during leisure hours to the study of law. He subsequently secured a position in a law school, where he continued to make the best possible use of his spare moments, and so highly did he prize them and fear that they might not be usefully em-

ployed that he had framed and hung directly over his desk the following motto:

LOST,
TWO GOLDEN HOURS,
Somewhere between
Sunrise and Sunset.
No Reward Is Offered. They
Are Gone Forever.

The gentleman is now a well-known lecturer and expounder of the law, his careful and assiduous use of leisure time have brought him both credit and success.

Great deeds, great triumphs, great men, have their beginnings in small things—a resolve made, a habit formed, a temptation resisted, or a leisure hour well spent may have been the first cause—the igniting spark, of a fire which should glow undimmed until the end of time. Just as the little brook carves its way through the mountain which rises athwart its path and goes steadily onward, gathering volume and strength by the wayside, until at last as a mighty river it joins the ocean—the mother of waters—have the great lawyers, judges and statesmen—the Storys, Kents, Cooleys, Lincolns—by unrelaxed efforts covering many years, grown stronger day by day, until at last they loom up as the giant heroes of their profession and age. Reader and student, so may you ascend, not swiftly as on the

eagle's wing, but slowly, surely, if it may be said of you, as of the other heroes—

"While others slept,
He toiled upward in the night."

Sec. 11. THE COST OF A LEGAL EDUCATION.—An important question to many persons wishing to study law is, How much will it cost? And we are sorry to say that many persons in the past have been deterred from attempting the study because of the large expense necessitated. The expense of a law school education ranges from $500 to $1,000, an amount that may well deter many persons who have to depend upon their own earnings, and who also may have upon them the care and support of others, from seeking the same. The method pursued by some of studying in a law office is less expensive, but also has numerous objections. The student may have the use of books, but very seldom has that definite direction and assistance which is so important to the beginner. Then, too, much valuable time of the student is required by the office duties, and his attention is frequently diverted, and his work liable to cover only those practical details of the ordinary practitioner's cases, instead of embracing the general principles of the science. The law office has, however, offered to many needy students an opportunity to enter a profession that otherwise would have been sealed to them. At present there are

more persons applying than the law offices can accommodate. What shall be done with the surplus? And what can be done to aid the thousands of students in the offices who are in need of more careful direction and assistance than can be vouchsafed them by the busy office lawyer? The Home Law School Series answers these questions. By its assistance the law school is duplicated in every home of the land where a bright intellect desires to expand; it offers the advantages of a skilled instructor to every one; it places, at slight expense, in the hands of its students the best and most condensed legal literature, obviating the need of numerous and expensive books. All this the Home Law School Series does at trivial, nominal, cost to the student; the entire field of jurisprudence will be covered in twenty pamphlets, and these can be secured singly by the student at a cost so slight as to be within the reach of all. Thus at the expense of a few dollars in money, and the employment of leisure moments for a period not longer than required to complete a law school course, a student may by this method come to a knowledge of the law.

Are you willing to embrace this opportunity? It may seem too practicable and easy to be real and genuine; or it may appear to you to be too prosaic a method to win fame and fortune at the home fireside by the careful, conscientious perusal of the matter furnished you by the Home Law School Series. You may think that the his-

toric halls of some famed institution are needed to inspire the muse which guides and directs your destiny; but remember, please, that others have preceded you and can testify to the efficacy of similar methods. A lawyer who has traversed the path the student must follow, says: "I have found that the best way to succeed is to do the best one can in the situation in which one finds one's self placed day by day, without looking further than is actually necessary. One day's work well done is sure to have its influence upon the future, and no amount of complaining or fault-finding with present conditions or future prospects will bring a man an inch nearer to success. All that a man has is the past and present. If he has done the best that he could in the time that he has had to use, and is doing the best that he can in the present, the difficulties of the future will vanish as they are approached. Many of us think too much of the future and too little of the past and present. A man who has spent a year at employment which leaves him none the better off at the end of the year, so far as his knowledge and position in life are concerned, need find no fault if the future does not treat him well. It is a trite saying that every man is the architect of his own fortune. The man who starts in early to build and builds every day, will rear a more beautiful and more enduring structure than he who begins late to build, and who has injured his powers for good by neglect in the past. Much

depends upon one's surroundings, much more depends upon one's self. The American youth has ever before him the examples of Abraham Lincoln, James A. Garfield, and hosts of other men who have been born amid circumstances and surroundings, in comparison with which no man can claim to occupy a less favorable position. No American boy can read the life of Abraham Lincoln without feeling that everything is possible in this country to a man who goes about seeking it in the right way." We know some will say that there were greater chances of success in former times; that the times have changed and the brilliant opportunities for individual success are all passed. Not so; Lincoln's opportunity was to assist in stamping out an injustice, others injustices remain, and will remain until there comes another great, true-hearted hero from the ranks of the people to awaken mankind to the new forms of oppression. Opportunities are never wanting, but sometimes the man is looked for long.

Sec. 12. AT WHAT AGE SHOULD THE STUDENT TAKE UP LAW?—Many persons ask, What is the proper age to begin the study of the law? In general we would say that a person is never too old or too young to study law if they have the requirements heretofore mentioned of a mind capable of retaining the thoughts gleaned from the printed page. We know there is a prevailing impression in the wor[illegible]

at large that when one has attained the age of majority he is a graduate from all schools of a primary sort, regardless of the preparation actually made for the struggles of life; and that after the age of thirty most persons consider it too late in life to think of changing the calling they have been following, however dissatisfied they may be with their condition. We take it that no extended argument is necessary to show the fallacy as well as danger of such conclusions. One's early advantages may have been such as to have precluded him from getting the most rudimentary education, yet his life should not be suffered to be dwarfed when a slight effort may remedy this defect. Men who were unable to take up the study of law at twenty or thirty should not hesitate to begin at forty or even fifty. It is never too late to add to one's knowledge. Life is a school, and those who willingly prepare the varied lessons assigned will draw the prizes of position, wealth, happiness, which are freely offered to all, while those evading and skulking their duties in this school, must yet continue the course to the end, but without hope of securing any of the special prizes awarded to the meritorious.

As the requirements for admission to the bar quite generally demand that the person be of age, there is no special benefit for a student to begin the law too early in life. But on the other side there is no possible objection to persons, how-

ever old, taking up the study of law. The duties of citizenship and the responsibilities of being financial, executive, legislative, and judicial head of a family increase with one's years, and it is only right and proper that one's abilities should develop apace with these demands.

Sec. 13. WOMEN SHOULD STUDY LAW.—It has not been many years since women were practically excluded from the learned professions, and indeed, from all work not directly connected with the home. We have not space nor inclination to here argue the question of woman's proper sphere. Suffice it to say that woman has demanded and secured the right to train for and follow the professions. Most law schools now welcome women students, and a number of women lawyers have gained success at the bar. Aside from the question of following the law as a means of gaining a livelihood, which is no doubt an important one to many women in our day and age, is the equally important one of a knowledge of the law as a branch of a liberal education. Women may now contract, enter into business, and control their separate property as fully and freely as men, and the same reasons which require the male citizen to have an adequate knowledge of the law apply with added force to women. We are pleased to note that a number of women have already grasped the situation and have entered the law schools to prepare themselves for the duties and responsibilities of

managing their estates. Prominent among these women is the spirited and noble-minded Miss Helen Gould, now a student of Columbia Law School, whose inherited wealth is so great as to remove, we should think, all fears of having to make her livelihood by the practice of this or any other profession.

This is a practical age, and woman is a practical helpmeet. She wishes to do all she can in every possible sphere. Who will say her nay? The woman stenographer, the woman in business, and the wife of the lawyer have special reasons for possessing a knowledge of law. The stenographer, since she may at any time be called upon to draft legal papers, briefs, contracts, etc.; the woman in business, since she has all the responsibilities of a man and must be as wary and careful as he; and the lawyer's wife, since she should be able to appreciate her husband's triumphs in the "nice, sharp quillets of the law," and not be completely isolated from his intellectual existence.

Some women will ask, Will it be a difficult undertaking, this study of the law? We reply, Not more so than many things woman has already attempted and accomplished. Not nearly so hard as numerous things which are set down as being within her sphere by men of the old school. We have known girls, of ordinary capacity and training, to take up the study of law along with a class of several hundred boys, and without ap-

parent effort outstrip all but a few of their male competitors. The Cyclopedia of Law offers exceptional advantages to women students, as it permits the work to be done within the family circle, and does not necessitate breaking home ties, removing to a distance to take up a course of study where most of the students are men, as is the case in attending the ordinary law school. We believe that many women have been deterred from studying law because of the radically different circumstances in which they would be placed while pursuing their studies. In conclusion, we would say that we deem a knowledge of the law equally important to women as to other citizens of a free country, and that in the preceding paragraphs, while we have used the masculine gender only, we wish it understood that both men and women were intended.

Sec. 14. TO THOSE WHO MAY DESIRE TO USE THE CYCLOPEDIA OF LAW.—We realize that persons from various conditions and callings will ask themselves the question, Shall I take up the work of the Cyclopedia of Law? While we can only know generally as to your position we yet believe you can arrange to devote some time each day or week to the law if you really desire to study it. You may be a farmer's son living on the farm. If so, you are honest, strong, hardy, ambitious, and are in possession of every attribute and requisite necessary for making a success of the law. All

you need is the opportunity to study, and this the Home Law School Series affords you. In the summer months your work is hard and covers long hours, and you will have little if any time to spare for study, but in the winter months you have a greater amount of leisure time than others, and can make up what you have neglected during the summer. Pure air, good health, and absence of the many things that serve to distract the attention of the city man, will materially aid you. Or you may be a clerk in a store, or an office, or a bank, and have considerable leisure time and only need the requisite mental determination to use it profitably. We advise you to begin the study of law and you will find that though it may appear as drudgery at first the time will soon come when you will take a delight in your self-appointed task. You may be employed as a traveling salesman, in which case you will have the choice of using your leisure time in one of two ways; first, in pursuing some helpful branch as the law, which may materially brighten your prospect of future success, or you can devote it to so-called pleasurable pursuits, which, far from benefiting you, will in time destroy your capacity for doing any honest work. It is difficult for a person to profitably use time which is so cut up as that of the traveling salesman. The Home Law School Series, however, is portable, and being of use in various ways, would be a valuable companion for any salesman. Idle hours will

be found when its presence will be a pleasure as well as a benefit. Try it.

Sec. 15. SAME SUBJECT — TEACHERS AND COLLEGE STUDENTS.—Another class of persons who can profitably and easily pursue the study of law in the Cyclopedia of Law, are school teachers and persons attending college. Teachers, whether in the common, grammar, or high schools of the country, are ever desirous of becoming better prepared to fill their present positions, as well as fit to occupy the higher places to which they aspire. Innumerable persons of small means are using the position of teacher as a stepping stone to something higher. They aspire to enter a profession—the law, medicine, or ministry. Which shall it be? It is not our duty or privilege to decide for you. But should your decision be in favor of law, we can aid you in your pursuit of it. The Cyclopedia of Law will furnish just the aid that the teacher needs, and will come to his assistance at so slight a cost that his savings may be retained to furnish his office or to take a finishing year at some regular school. Again, if you are a teacher you may find it to your advantage to accept a higher position and accept teaching as your life calling. Will a knowledge of the law be of benefit to you in this case? Yes, it will be one of the best and most useful branches with which you could equip yourself. The reasons for our conclusion here have been so thoroughly

presented in the preceding paragraphs that they need not be repeated. College students, not fitting themselves for any particular calling, can well use some of their leisure hours in following the course in law as conducted in the Cyclopedia of Law. When they have finished their literary education they will also have a knowledge of a profession which can at once be put to practical use, and which in its acquirement will have assisted them in their other studies. Many college students now read Blackstone or Kent for the purpose of getting advanced standing in a law school when they are ready to seek admittance. The Cyclopedia of Law aims not only to give them this instruction, but also the complete course as given by the law schools.

Sec. 16. CLUBS OF STUDENTS.—The chief advantages of the regular law schools are those resulting from isolation of the student from the every-day cares of life, and associating him with others who are pursuing the same science, thus creating a special atmosphere, as it were, in which the student may imbibe law from the very air. "Moot Courts, Quiz Clubs, Recitations," these are advantages of the school away from home. Most of these advantages are afforded by the Cyclopedia of Law, and without some of the serious objections which can be raised to the so-called advantages of the other schools. We acknowledge the great benefits to be derived from association, but also have to admit that there are also some great evils that may result as

well. Association may have an influence in other things than the study of the law, as is sometimes shown. The publishers of the Cyclopedia of Law desire that each student taking up the study of the law associate with himself others in his community desirous of similar instruction and establish a Home Club of law students, whose habits, morals and ability is known and acceptable one to another. In this way all the advantages of the courts, recitations and clubs of the regular law school can be had without any of the dangers. While we advise the formation of these local clubs we wish it understood that they are not absolutely essential. It is the individual student that must do the most work, and this work no club nor association can do for him. No student can be educated by proxy, he must "grind," and grind alone, if he is to become the able and proficient adviser.

In concluding these suggestions, meager as they are, we cannot help but think that they will prove sufficient as an introduction to the Cyclopedia of Law, and the course of study contemplated by it. Americans are too keen-sighted to have to be carefully instructed how to secure their own best and highest welfare. We have left more unsaid than we have said, but we rest easy in the confidence that the bright minds that shall peruse these pages will be able to add many more convincing arguments why each should have a knowledge of the law which this series aims to furnish.

CHAPTER II.

Definitions and Divisions.

Sec. 17. THE TERM LAW DEFINED.—Law, as the term is used by the legal profession, and will be used in the Cyclopedia of Law, is defined to be, "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

The above is Blackstone's celebrated definition of municipal law, the word "municipal" being used by him with reference to the laws of a state or nation, and to distinguish this meaning of the word law from that broader and indiscriminate use of the term in which it signifies a rule of action, whether animate or inanimate, and whether set by a human or superhuman authority. I. Bl. Com. 44.

A more concise definition of law, as the term is used by the courts and in the science of jurisprudence, is that given by Prof. Holland, who defines law to be "a general rule of external human action, enforced by a sovereign political authority." Holland's Jurisprudence, Chapter III.

Sec. 18. ANALYSIS OF BLACKSTONE'S DEFINITION OF LAW.—The definition of municipal law is thus analyzed and justified by its author:

1. Law is "a rule," as it is something perman-

ent, uniform, and universal, and not a mere transient sudden order from a superior to or concerning a particular person. It is also a "rule" in the sense that it is an injunction and not advice or counsel, it must be followed at all events, willingly or unwillingly. The obligation is the result of a command and not of an agreement.

2. It is a rule "of civil conduct," since it refers only to the duties owing by the citizen to the political society in which he lives, and not to moral duties which are the obligations of natural or revealed law.

3. It is a rule "prescribed," that is, published and promulgated, and not a mere secret resolution of the legislator. It is requisite that every law be notified to the people who are to obey it. But the manner of the notification may be varied. Thus it may be notified by tradition and long practice, which supposes a previous publication, as in the case of the common law; by being read in public assemblages; and by being written or printed, as is now the general method. It is this requirement of notification which makes ex post facto, or laws having a retroactive effect, so decidedly unpopular, as in this case there could be no possibility of previous notice of the law. Hence all laws should be made to take effect only after their passage and publication.

4. It is prescribed "by the supreme power in a state" for the act of legislating, or prescribing the rule, is the greatest act of superiority that can

be exercised by one being over another. "Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other." It is the very essence of a law that it be made by the supreme power.

5. It is a rule "commanding what is right and prohibiting what is wrong," for by the law are the boundaries of right and wrong established and ascertained. When the law forbids any action it becomes by reason of this inhibition wrong for the subject to do the thing forbidden, and if the law does not forbid the act, it is legally right to do that act, and this regardless of moral sanction.

In commanding the right and prohibiting the wrong every law may be said to consist of several parts, which are: (a) The declaratory part, by which the rights to be observed and the wrongs to be avoided are clearly stated; (b) the directory part, which orders the subject to observe the rights and abstain from the commission of the wrongs stated in the declaratory part; (c) the remedial part, in which a method is pointed out to enforce rights or redress wrongs; and (d) the sanction or vindicatory branch of the law, which designates the evil or penalty to be incurred by such as commit any public wrong, and neglect their duty. I. Bl. Com. 44-54.

Sec. 19. COMPREHENSIVE MEANING OF THE WORD LAW.—In its most comprehensive sense, the term law has been applied to

designate the rules of external nature, and its meaning has been rendered ambiguous, because it is used indifferently to describe the order which pervades the universe, the observed regular phenomena of nature, the intangible moral restraints upon human conduct, as well as those definite rules of human action prescribed by some political superior. But to the jurisprudent the term has come to have only this latter and limited sense, when used without a qualifying or explanatory word.

The older writers, as Blackstone, were prone to find a higher sanction for laws than that of their being prescribed by the sovereign political authority. They regarded man as a creature, and hence subject to the laws of his Creator. Man's free will being restrained and modified by the "immutable laws of human nature," and by his reason rendered capable of discovering the purport of those laws. Thus were the laws established by man for his social regulation, sought to be connected with the "eternal and immutable laws of good and evil, to which the Creator himself in all his dispensations conforms." Human reason, rightly exerted, discovers the laws which the Creator has set, as the principles, "that we should live honestly, should hurt nobody, and should render to every one his due," the fundamental precepts of the law laid down by Justinian. Again, according to these writers, the Creator in his infinite goodness has so regulated his crea-

ture, man, "that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action," and the rule of obedience is reduced to the one paternal precept, "that man should pursue his own true and substantial happiness." In addition to the laws discovered by reason, are those revealed directly by the Creator, and to be "found only in the holy scriptures."

"Upon these two foundations," says Blackstone, "the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." Thus, according to Blackstone, human laws, except in a number of indifferent points in which the divine and natural law leave man at his own liberty, are "only declaratory of, and act in subordination to, the former." And he concludes, "No human laws are of any validity, if contrary to this natural law, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." This conclusion, as will be seen, is not in accord with his definition of municipal law, save on the supposition that all legislation is sanctioned by natural law.

Sec. 20. SAME SUBJECT — A LATER VIEW.—A later school of jurisprudents separate positive or municipal law entirely from the so-called natural or revealed law. Their reasoning is, that while man is a mystery to himself, ex-

ternal nature is a greater one, and he seeks to explain the more, by the less obscure. "As he governs his flocks and his family, so he supposes that unseen beings govern the waters and the winds. The greater the regularity in nature, the fewer such beings does he suppose to be at work in her; till at length he rises to the conception of one great being whose laws are obeyed by the whole universe, or having gotten the idea of the universe he holds that and not a supreme ruler and law-giver." Man believes himself acquainted either by experience or revelation with certain rules intended for his guidance, and hence the terms, laws of Nature, of God, of beauty, of morality, etc., which he applies to observed relations and arrangements of external objects. So in the theoretical sciences; the term law denotes the abstract idea of the causes of phenomena; in the physical sciences law denotes the method of the phenomena of the universe; and in the practical sciences it signifies a rule of human action which is its usual and proper meaning. The practical sciences are divided into (1) Ethic, which is the science of conformity of human character to a type, and looks to duties binding on the conscience for which external legislation is impossible; and (2) Nomology, the science of the conformity of human actions to rules, which looks to the rights which are the elements of social life.

Another definition of Nomology is "the science of the totality of the laws for which external leg-

islation is possible." Nomological sciences are divided into (1) those whose rules are enforced by an indeterminate authority, as so-called moral laws, laws of fashion, chivalry, etiquette, and all conventional laws, and (2) those whose rules are enforced by a determinate authority, as all statute laws, and other regulations of a political sovereign. It is these latter laws which are the sole concern of the jurist.

"The jurist is not obliged to decide as to the essential quality of virtue in itself, or whether it be conducive to utility, or is in accordance with nature; nor need he profess belief or disbelief, either in an innate moral sense or in a categorical imperative of the practical reason. The business of the jurist is, first, to accept as an undoubted fact the existence of moral principles in the world, differing in many particulars in different nations and at different epochs, but having certain broad resemblances; second, to observe the sort of sanction by which these principles are made effective." Holland's Jurisprudence, Chapters II. and III.

In this view of the subject it appears that instead of human laws being derived from and based upon divine or natural law, it was by the gradual expansion of municipal and positive law that man has come to his present high conception of moral and natural law. The question raised by these two views—Is, or is not, law an inborn conception, drawn by the process of reasoning

from the immutable and eternal reservoir of divine justice?—cannot be settled here. There are two schools of thought on this question, and it is the student's privilege to choose his side. The question is not of such importance as to demand immediate solution. Whatever may be the true theory it still remains that municipal law is prescribed by the supreme power in a state, and its rules are enforced by the same power.

"Rights are and can be real, only as they are established in the civil and political organization. They are slowly and only with toil and endeavor enacted in laws and molded in institutions. It is only with care and steadiness and tenacity of purpose that those guaranties are forged which are the securance of freedom, and they are to be clinched and riveted to be strong for defense and against assault. The rhetoric which holds the loftier abstract conception avails nothing, until in the constructive grasp and tentative skill of those who apprehend the conditions of positive rights, it is shaped and formed in the process of the state." E. Mulford, "The Nation," p. 83.

Sec. 21. WHAT LAWS WE ARE TO CONSIDER.—It is only the laws for the control of human action, set by a definite human authority, which must be a sovereign authority, that we are to consider. So that a law to the jurisprudent is a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is that

which is paramount in a political society. Holland's Jurisprudence, Ch. IV.

Thus we exclude from consideration the principles or sentiments of right and justice which are termed laws of Nature, and which have been designated as "The unwritten and steadfast customs of the gods." "In their widest sense," says Prof. Holland, "the law of Nature includes animal instincts, regulating the care of the young and the union of sexes; in their narrower sense they are the Ius Gentium of the Romans, that is, a body of principles found in all nations which point to the similiarity of needs and ideas of all peoples." It is evident that these indefinite and general ideas, deep-rooted as they are, cannot be termed laws in the same sense as those positive directions of the sovereign power of a state.

We also exclude from our consideration all those rules of indeterminate and indefinite authority, as moral rules, rules of fashion, etiquette, etc., which, though binding in some instances, are not enforced by a determinate superior; and also those rules enforced by a determinate authority, if the authority is superhuman or politically subordinate. Hence we have left the field of positive or municipal law—being those general rules of external human action enforced by the sovereign political authority in a state.

Sec. 22. INFLUENCE OF THE LAW OF NATURE.—The influence of the so-called law of Nature is such that where the positive law has

made no provision the natural ideas of justice, equity and good conscience are used to determine the question in dispute. Thus the law of nature is the scaffolding upon which Gentilus and Grotius built up the science of International Law, or the usages which regulate the intercourse of nations. And this law of nature or natural equity has been called in to help modify the rigor of the common law, and established what we now term Equity. Holland's Jur., Ch. III.

The law of nature, or the divine law, is also responsible for the division made by Blackstone of mala in se, and mala prohibita. Crimes and misdemeanors forbidden by the natural or divine law, as well as positive law, are termed mala in se (evils in themselves), while things not forbidden by divine law and yet proscribed by positive law are called mala prohibita (evils prohibited).

So far we have made use of the word "positive" or "municipal" to distinguish law as a rule of civil conduct from its more general uses; hereafter we shall drop these words and use simply the term law, with the same meaning.

Sec. 23. POLITICAL ORGANIZATION PRECEDES LAW.—"Morality may precede, but law must follow, the organization of a political society." Holland's Jur., Ch. IV.

The student who has followed the foregoing reasoning, which separates law from the metaphysical rules to which it has been inacurately applied, and sees that it is only to the decrees of

a sovereign political authority that the term applies, will also see that there can be no law in this sense without previous political organization. There may have been principles of right more or less authoritative, but they are not laws until so declared by a law-making power.

Here again there is a division of opinion among jurisprudents, the German or Historical school, of which Savigny is a leading light, regards the political organization or state as the highest stage in the procreation of law, while the Austinian school, followed by Prof. Holland, regards the formation of the state as the incipiency of law.

SEC. 24. DEVELOPMENT OF THE LAW. —While the term law, always means an established rule, it does not follow that these rules are fixed and immutable. In fact one of the difficulties encountered in the study of the law, and one which arises from its very nature, is that the law is continually changing; adapting itself to the needs and situations of the people and things which it regulates. Thus, as we have heard Prof. Bigelow remark, the continued relations of things will create a custom, and the custom will come to be enacted into a law and in turn regulate the relations which brought it into existence. But law only relates to binding rules. A thing which morally should be, and in time may be, is not a law until it is recognized and enforced. "Conscience might inform you what the moral

law is, and what the municipal law ought to be; but it might greatly mislead you as to what the municipal law actually is." Walker's Am. Law. 5.

When the question arises what is the law in a matter, we cannot reason it out abstractly; we have to ascertain who has the law-making power in such a matter, and what that power has ordained in reference thereto. To determine this the lawyer must search the records of the statute law, or if a question of construction, the precedents, or authoritative decisions.

While law is thus arbitrary it is yet progressive and deserves those high encomiums which from the first have been lavished upon it by its most careful students. Edmund Burke called it "the pride of the human intellect, and the collected wisdom of ages; combining the principles of original justice with the boundless variety of human concerns." We have already seen Sec. 7, with what high favor Blackstone regards the science, while Professor Walker terms it "the grand regulator of human affairs." Without law there would be a constant chaos in human society, which is best described by the fearful name, anarchy. We believe all the encomiums conferred upon the law as a science are just and appropriate. The law is progressive; it loses nothing helpful; it seeks to retain nothing hurtful; it extends in an unbroken, expanding chain from the remotest antiquity to the present mo-

ment, governing the momentous affairs of nations and the trifling details of every-day life among individuals with equal exactitude and wisdom; it indicates as well as preserves the development of the past, and points out the path of our future progress.

Sec. 25. POLITICAL ORGANIZATIONS DESCRIBED.—We have seen that law results from the action of a political sovereignty or the supreme power in a state. How have these political organizations come to exist? From the earliest recorded history we learn that mankind was divided into groups or tribes possessing a common language, common customs and characteristics. We know that these groups expanded, developed, and colonized until they came to occupy a great extent of territory. That in some instances a group would establish a government within itself, and thus the political unit would be composed of a single people who would also be united by the ties of ancestry, language and customs. In other instances several groups would unite in the establishment of a common government, or by conquest one group would acquire the right to govern other groups, in which cases several tribes or peoples, differing greatly, might be subject to the same political authority.

Sec. 26. SAME SUBJECT—A PEOPLE DEFINED.—A people is defined to be a large number of human beings united by a common

language, and by similar customs and opinions, resulting usually from common ancestry, religion and historical circumstances. Holland's Jur., Ch. IV.

Sec. 27. SAME SUBJECT—A STATE DEFINED.—A state is the whole people of one body politic, and has been defined by the United States Supreme Court to be "a body of free persons, united together for the common benefit, to enjoy peaceably what is their own, and to do justice to others." Chisholm v. Georgia, 2 Dall. 456.

Prof. Woolsey's definition is, "A state is a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice by self-imposed law. Woolsey, Introd. to Inter. Law, Sec. 36.

A band of robbers or pirates, though inhabiting fixed territory and permanently organized, would not constitute a state within either of these definitions.

In the organic state there are two parts, one of which is sovereign and the other subject; the will of the majority, or of an ascertained class in a state, prevailing against any of their number who oppose it, constitutes the sovereign authority, while the persons subject to this power when exercised, including the majority, or the persons whose will constitute the sovereignty, are the subject part.

Sec. 28. ORIGIN OF STATES.—The Greeks supposed state to be of superhuman origin. From Grotius and Rousseau, writers of the seventeenth and eighteenth centuries, came the idea of the Social Compact or Contract, by which people were regarded as having met and voluntarily formed their political organization. Hobbes, a writer of the seventeenth century, called a "City" one person, whose will, by the compact of many men, is to be received for the will of them all. Herbert Spencer finds the state to be a mere growth, the same as organisms have developed from lower to higher species. The formation of the United States into a Federal State was certainly by means of a compact agreed upon by the delegates of the people. Blackstone points out that "The only true and natural foundations of society are the wants and fears of individuals." And while he makes light of the Social Contract theory, by which men, actuated by a sense of their weaknesses, met and established governments for their protection, he accepts the family as the first political unit, and acknowledges it to have been held together by man's sense of weakness, and developed and expanded from the necessity of union. "And this," says Blackstone, "is what we mean by the original contract of society, which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood

and implied in the very act of associating together, namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual, and that in return for this protection each individual should submit to the laws of the community, without which submission of all it was impossible that protection could be certainly extended to any." I. Bl. Com. 47, 48.

Families, or groups of persons once formed for mutual benefit and protection, have at the same time constituted a political organization or government and nominated expressly or impliedly some supreme authority whose rules all are to obey. This supreme authority is necessary to all forms of government and is called sovereignty.

Sec. 29. KINDS OF GOVERNMENTS.—By Government is meant the system of polity or body of principles and rules by which the affairs of a state are conducted. Governments are almost as numerous in variety as there are states to have governments. The chief distinctions relate to the residence of the sovereign power, and in this regard the older writers have divided them into three divisions which are mentioned by Blackstone. These are:

First. A Monarchy, in which the sovereignty resides in a single person.

Second. An Aristocracy, where the sovereign

power is lodged in the hands of a select body of persons or council.

Third. A Democracy, where the sovereignty is exercised in an aggregate assembly consisting of all the citizens of a community.

These three forms are said to cover all the other forms of government, which are either corruptions of or reducible to these. I. Bl. Com. 49.

Sec. 30. SAME SUBJECT — REPUBLICAN GOVERNMENT.—A Republic differs from each of the governments above described in theory, though it resembles an aristocracy in practice. A republic was defined by James Madison to be "A government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist, No. 39. The sovereignty, in a republic, resides in the whole body of the citizens, and in this it resembles a democracy, but instead of being exercised by the people directly it is delegated to certain persons selected by the majority of the citizens entitled to vote.

A republic is sometimes called a constitutional democracy, in distinction from a pure democracy. The constitution directing the manner in which the people shall proceed to exercise their sovereignty. Calhoun's Works, I., 185.

A republican government, and especially our own, can lay claim to being a sort of a mixed

government, and partaking of the best features of the other three. This is the sort of government extolled by Blackstone when he commends the English system of king, lords, and commons as being the best form of government. Our own republican government was modeled after that of England; we have the single executive, but elective instead of hereditary; the legislative power is intrusted to two houses, the one more numerous and nearer to the people than the other; and we have added the judicial to balance the other two. Thus we have, as Blackstone claims for the English system, by a single executive, the strength and dispatch found in the most absolute monarchy; in the Senate we are supposed to have an assembly of persons selected for their wealth, influence, wisdom, etc., and constituting an eminently aristocratic body; while the lower house of Congress are "freely chosen by the people from among themselves," which makes it democratic in nature. I. Bl. Com., 50, 51.

Sec. 31. WHAT IS THE BEST FORM OF GOVERNMENT?—We should not, perhaps, at this time raise the question, What is the best form of government? We aim at present simply to give a brief outline of political history to enable the student to understand our own institutions and laws, which are to be taken up more fully under the subject, Constitutional Law, in the next number of the Home Law School

Series. But the question is so important to us in America, as we claim to be making an experiment in government, that we will not pass the opportunity. Blackstone, who was called to expound the English laws, found in the course of his study that the limited monarchy of England was the best government. Many American writers, emulating Blackstone's example, have in writing of our laws claimed our government to be the best possible. We fully appreciate the merits of our American government. But as a student of the law we should regard all governments not as the best, but rather as progressive experiments, tending to approach the highest ideals of the members of the body politic. Our government has many advantages over all that have preceded it, and our people have many political ideals unknown to the peoples of the past. These ideals of our people are constantly expanding and developing and it is the province of the "best government" to constantly approach and realize these political aspirations of mankind.

The best government should, like the bark that surrounds the growing tree, expand and grow as the tree grows, then it will not be cracked or burst asunder by the force which it seeks to enclose and regulate. A government which does not grow, and cannot be overthrown by the people, will dwarf and blast the races that have the misfortune to be subject thereto.

We are safe in saying that no existing govern-

ment answers the definition given for either a Monarchy, an Aristocracy, or a Democracy. All are now mixed governments, each seeking to partake of the features best suited to its citizens. The English government, from which ours is largely derived, began as an absolute monarchy, but from its earliest dawn it had to combat the rising spirit of democracy. The spirit grew and monarchy yielded; in fact, the whole course of English history is marked by the concessions granted democracy. This change was slow; monarchy resisted, was overthrown, and re-established with more concessions. Growing democracy was transplanted to America, and soon blossomed and bore fruit. The fruit was the Declaration of Independence, and a government in which the people were recognized and declared to be the possessors of the political sovereignty. Has democracy finished? and should it go no further? No; democracy, we believe, to be the most permanent factor in civilization and the strongest force of our time. The untrammeled sway of the people is now the master force of the world, and as the years proceed this power must overthrow all tyranny, all despotism, and all monopoly of social, industrial and political functions.

It is not practicable for the people of a great and populous state to meet in assemblages and enact measures for their common good; neither is it practicable for a monarch to exercise all the

power necessary to govern such a state; but it is possible and practicable for intelligent citizens of the greatest of nations to meet at stated intervals and vote by the referendum and initiative upon the laws they deem necessary for their welfare, and it is also possible for a monarch or an aristocratic class to enact measures that will tyrannize and despoil the masses of the greatest nation. Hence we conclude the best government is that which conforms most nearly to the requirements of a progressive and aspiring people.

Sec. 32. SOURCES OF THE LAW.—By sources of the law we do not wish to be understood as meaning the depositories in which the law is recorded, as the statutes, reports and treatises; nor do we mean the authority which gives them the sanction of law, but we mean to discuss the channels through which principles have come which are now recognized and enforced by a sovereign political authority. It is to be understood that these principles and rules are not laws in their earliest stages, any more than is the brook, which is the source of the river, entitled to be called a river until it has reached a certain definite stage of growth and recognition.

1. Custom as a Source of Law. A custom may result from the moral sense of mankind or from mere convenience. It develops as a path is formed across a common; one person passes across, others follow, and gradually a regular pathway is formed, which is easier to be followed

than avoided. These customs may be quite general in extent or confined to locally limited communities. When they have become fixed and notorious the sovereignty in the state may see fit to recognize them, and they are thus raised to the dignity of laws. The courts sometimes give validity retrospectively to good customs, and the historical school of the origin of law claims this as an example where law arises from the intelligence of the people without an arbitrary political authority. But it is clear that the custom is only a law when passed upon by the sovereignty, and if this action is given a retrospective effect we do not see that it changes the conclusion. Holland's Jur., Ch. V.

2. Religion, or the Revealed Law. It was formerly supposed that Christianity was a part of the law of England. This is now questioned. In America Christianity has never been claimed to be a part of the law of the land. We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance simply because it is religious. Of course, it is no objection, but, on the contrary, it is a high recommendation to a legislative enactment, based upon justice or public policy, that it is found to coincide with the precepts of a pure religion; nevertheless, the power to make the law rests in the legislative control over things temporal and not over things spiritual. Bloom v. Richards, 2 Ohio St. 387.

Thus religion may influence and assist in the development of the law, but the dogmas of religion are in no sense laws which will be enforced. This is well stated by the court in Bloom v. Richards, just cited, where it is said, "The statute prohibiting common labor on the Sabbath could not stand for a moment as the law of Ohio, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty. It is to be regarded as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day."*

*Lest some might through mistaken zeal misunderstand the true reason for the separation of law from religion, we append the following clear reasoning from Professor Walker: "They commit an egregious error who consider jurisprudence as looking forward into eternity. It begins and ends with this world. It regards men only as members of civil society. It assists to conduct them from the cradle to the grave, as social beings; and there it leaves them to their final Judge. I would that this attribute of the law were more generally appreciated. * * * Religion and morality embrace both time and eternity in their mighty grasp; but human laws reach not beyond the boundaries of time. As immortal beings they leave men to their conscience and their God. And though this consideration may seem, at first view, to detract from their dignity, I rejoice at it as a consequence of our absolute moral freedom. I rejoice that in this country at least government dares not interfere between man and his Creator. I know no higher subject of congratulation than the fact that we have confined our legislatures to their proper sphere;

3. Adjudication as a Source of Law. Adjudication, or so-called judge-made law, arises from the fact that courts have the power to interpret and apply the law to the cases which come before them. In Europe the decisions of the court in applying the law to the facts are not binding or used as authorities in subsequent cases, other than as mere helps. But in the United States and England decisions of the courts are regarded as precedents, with considerable, though not conclusive, authority in subsequent cases. Thus by adjudication the law may be expanded and made to have a more far-reaching effect. Unless these decisions are expressly repudiated by the law-making power they become laws as of the express or implied intent of that power. I. Law Quart. Rev. 313.

4. Science. The scientifical and learned discourses and treaties of men who have made a life-long study of laws have weight in determining what the law is and ascertaining its proper application. In the Roman or civil law the "Responsa Prudentium," or decisions of the sages of the law, were given a recognized place in the laws. While the opinions of law writers are not now accepted as law, we can say that the monumental works of Coke, Hale, Lyttleton, Blackstone, Story, Cooley, Mechem, etc., are accepted

which is, to provide for our social welfare here on earth, and leave each to select his own pathway to immortality." Walker's Am. Law, 10, 11.

sometimes as the best evidence of what the law was and is.

5. Equity as a Source of Law. Equity or the natural justice of men expanding with civilization made changes in the rigorous and comprehensive precepts of the law necessary. In Rome the Praetor had power to modify by an edict the strict letter of the law to suit the particular cases that came before him. These edicts, being preserved and followed by others, came to be regarded as laws. In England, the chancellor, a sort of clerk to the king, was delegated to dispense justice in cases where the common law of the realm was deficient, but to prevent this justice from becoming, as Selden thought, "a roguish thing," and as varying as the length of the different chancellors' noses, rules were established to regulate the chancellor's equitable jurisdiction, and these rules, together with the decisions of the chancery courts, are laws and shall be studied under the head of "Equity of Chancery Law."

A sixth source of law as given by Holland is legislation. This, he says, is the chief source of law. Hol. Jur., Ch. 5. We prefer to regard legislation not as a source of law, such as we have already described, but rather as the process by which rules of civil conduct, from whatever source, are, by the sanction of the supreme political authority of a state, changed into laws.

Sec. 33. LEGISLATION, OR LAW-MAKING.—Legislation is the process of law-making; the exercising of the power of sovereignty, and may be expressed or implied. The results of legislation are laws. These laws are either (1) written or (2) unwritten.

Sec. 34. WRITTEN LAWS.—The written law in the United States consists of constitutions, treaties and statutes.

(a) Constitutions. In America a constitution is a solemn written declaration of the people, and declared to be the fundamental law of the land. The United States Constitution is the supreme law and unites the people for all national purposes into a single Federal State. The State Constitutions are supreme within a State and unite the people for municipal purposes. Walker's Am. Law, 50, 51.

(b) Treaties. A treaty is a written compact entered into between two or more politically independent nations regulating their intercourse. These treaties are by the Constitution of the United States declared to be a part of the supreme law of the land. Art. VI., cl. 2, U. S. Const.

(c) Statutes. These include all laws duly enacted by the law-making authority and written down as a perpetual memorial of what the law really is. Statutes are either (1) Public, or (2) Private. Public statutes are those whose provisions are designed to regulate the entire community. Private statutes apply only to certain

specified individuals or associations. Walker's Am. Law, 51.

Sec. 35. THE UNWRITTEN LAW.—The unwritten law literally means statutes that have never been recorded, or whose formal records have been lost. But as a matter of fact these statutes were never in existence, and the legislative sanction is implied rather than expressed. The unwritten law consists of the so-called common law, and equity or chancery law.

Sec. 36. THE COMMON LAW.—"The common law is said to be unwritten, because there is no record of its formal enactment. It is sometimes pretended that it consists of statutes worn out by time, their records having been lost. It is called a collection of customs and traditions, commencing in immemorial times, acquiesced in by successive generations, and gradually enlarged and modified in the process of civilization. The true account, however, is that it is the stupendous work of judicial legislation. Theorize as we may, it has been made from first to last by judges; and the only records it ever had are the reports of their decisions, and the essays, commentaries, and digests founded thereon. To explain its formation, we may suppose a question to have arisen in England centuries ago, respecting which the written law contained no provision. Upon presenting this question to the judge, he must either let a wrong go unredressed or make

a law to meet the exigency. He chose the latter alternative; and in making up his decision, sought light from every available source. If a case exactly similar had before been decided, he would naturally adopt the decision then made. (The doctrine of Stare Decisis.) Or if an analogous case could be found, he would adopt its principles so far as they would apply. If neither of these he would consult public policy and the abstract principles of natural justice. He would moreover be assisted by the arguments of the opposing counsel, who would present the case in all its bearings. With these aids, and in this manner, he would take up his decision; and if no sinister motive operated, the presumption is that it would be on the side of abstract right. Such briefly is the process by which the vast fabric of the common law has been reared. A succession of judges, during a long lapse of years, have contributed the results of their reason and learning to elaborate and perfect it. In its theory, each successive adjudication has become a precedent for all similar cases involving the same principle; and it is obvious that just in proportion as precedents are multiplied, the number of unprecedented cases must be diminished. Legislation, moreover, has been constantly supplying deficiences. It follows, therefore, that the field of judicial discretion, almost boundless at first, has been gradually but steadily narrowing. Still, however, admitting precedents to be abso-

lutely binding, which is not the fact, though it is the theory, judges even at this day exercise a far wider discretion under the common law than it is usually supposed by those not conversant with the subject. And to this extent there is not that complete separation between the legislative and judicial power, which the theory of our government supposes." Walker's Am. Law, 53.

"Of the United States as a nation, there is no common law. 'The Federal government is composed of sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption.'" Cooley's Bl., p. 69 n.; Wheaton v. Peters, 8 Pet., 658.

Sec. 37. EQUITY OR CHANCERY LAW. —In its literal acceptation, equity is nearly synonymous with justice, but in its technical sense it means chancery law, or that system of rules by which courts of chancery are governed in the administration of justice. This, like the common law, consists of precedents running through nearly the same lapse of time. Walker's Am. Law, 55.

Sec. 38. DEPOSITORIES OF THE LAW. —Where the law is to be found, or the legitimate depositories of the law, is an important point to the student.

The written law, embracing constitutions, treaties and statutes is to be found in the authorized public records. Both the National and State constitutions and statutes are published in authenticated editions, and these have been compiled and digested for the convenience of the profession.

The unwritten law, comprising the common law, and equity or chancery law, is not so easily located.

The common law, as we have seen, Sec. 36, consists of a vast mass of decisions supposedly resting upon former statutes. The record of these decisions is the only authoritative depository of the common law. Legal experts and text-writers have written commentaries and books upon these decisions, which are also used to determine what the common law is.

These judicial precedents date back to the very beginning of English history. They accumulated in England and at the time of colonizing this country they were brought over the ocean as the heritage of the English settlers, where they have continued to accumulate up to the present moment. They are to be found in hundreds of volumes of reports, embracing the decisions of the various English and American courts, and the digested and abridged commentaries thereon. Walker's Am. Law, 7.

Equity or chancery law consists also of judicial precedents to a large extent and is to be found

in the reports of the courts of chancery. The number of books containing these precedents of common and chancery law are estimated to be 1,500. Walker's Am. Law, 7.

Sec. 39. CODIFICATION OF LAWS.—The codification or systematic classification of statutory laws was early rendered necessary in the various States of the Union. The express regulations and enactments necessitated to establish local self-government, and to inaugurate a political and civil system under such novel circumstances as prevailed in America were soon so numerous that their revision, simplification and abridgment became necessary. This work of codification began as early as the beginning of the present century and has been found so efficacious as to commend itself to all classes of citizens, and has led to the adoption by a number of States of a complete statutory, or code system of laws, designed to supersede the cumbrous and undigested mass of precedents which contain the common and chancery law. The States adopting these statutory codes are called code States, as distinguished from those in which the common law is still relied upon to a great extent.

The State Codes. The first attempt to codify the laws of any State were regarded as visionary schemes. A few clear-headed men believed that through statutes and classification it would be possible to get rid of the numerous distinct actions of the common law and to establish a

uniform and comprehensive mode of proceeding without reference to any distinction between law and equity. The State of New York was the first to adopt such a comprehensive code in 1850. Other States have followed the example of New York, and it is possible that in time all the States will simplify their legal system. The codes as adopted by these States embrace four parts—Political, Civil, Remedial, Penal—and are intended to set forth in generalized and systematic form the principles of the entire law, whether written or unwritten, positive or customary, derived from enactments or from precedents, and within their scope to supersede all other laws. Abbott's Law Dict. "Code."

While the adoption of a code of laws has in some States superseded much of the common law, as well as common law terms and actions, it is still desirable for the student of law in a code State to be more or less familiar with the law as it stood prior to the adoption of the new system. A knowledge of the forms that were superseded is frequently necessary to understand those that now exist, while most of the principles of the common law are either expressly or impliedly a constituent part of the code law.

"Nor are the works on common law pleading superseded by the new codes which have been introduced in many of the States. A careful study of those works is the very best preparation for the pleader, as well where a code is in force as

where the old common law forms are still adhered to. Any expectation which may have existed, that the code was to banish technicality and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code which will stand the test on demurrer than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately as to leave his rights in doubt on his own showing. Let the common law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the new practice by the old road." Cooley's Introd. to Bl. Com., p. xxvii.

Sec. 40. DIVISIONS OR BRANCHES OF THE LAW.—Scientific divisions of the law, ac-

cording to meaning and application, have been attempted by various writers, but inasmuch as their efforts in this line have produced no uniform classification we are led to assume that all such divisions must be rather for convenience of study than for scientific accuracy. We reproduce for convenience the most general classification as given by Blackstone and Walker.

Sec. 41. PUBLIC INTERNATIONAL LAW.—By Public International Law, or the law of nations, we mean those equitable precepts which have on grounds of general convenience come to govern the intercourse between distinct nations or sovereign peoples. These rules, beginning in mere customs or usages, have come at the present time to have certain well-defined sanctions which cannot be easily disregarded. In some portions the international code has been enacted as a part of the municipal law of our country.

Sec. 42. PRIVATE INTERNATIONAL LAW.—Private International Law, or conflict of Laws, as it is also termed, arises from the fact that the internal laws of the various nations differ widely, and when a citizen of one nation comes into the jurisdiction of another there is a conflict of laws, from which conflict has arisen rules of comity and practice which, as precedents, constitute Private International Law. So that "when citizens of one nation remove to or

travel in another, and make contracts, acquire property, marry or die there, it is no longer a matter of doubt by which law their rights will be determined." Walker's Am. Law, 13.

Sec. 43. CONSTITUTIONAL LAW.—Having seen what it is that regulates the relations between nation and nation, we next come to the domestic laws of a nation regulating its own internal affairs. Every people in the course of their associated life have formulated certain fundamental provisions regarding the nature of their political organization, and limiting, as it were, the extent to which the individual is responsible to the collective whole. These principles circumscribing the powers of the political entity form the constitution of a nation. Whether these principles exist as mere unwritten usages and precedents, subject to the omnipotent will of parliament and capable of being overturned by an ordinary statute, as is the case in England, or consist of carefully formulated precepts of government, written out and adopted by the people as the supreme law of the land, they are equally designated as constitutions.

In the United States we have National and State Constitutions as a result of our dual form of government. The States, on gaining their independence, were distinct sovereignties; but "to promote the general welfare," the sovereign people of the various States united in establishing a national sovereignty supreme in all matters dele-

gated to it, while the individual states retained the sovereignty not delegated. The United States Constitution fixes the sphere of the national government; and the State Constitutions regulate the exercise of State sovereignty, thereby creating Federal and State Constitutional Law.

Sec. 44. LAW PERTAINING TO PERSONS.—By law pertaining to persons we mean statute and precedent law regulating the relations which members of political society can sustain towards each other; whether as male or females, infants or adults, masters or servants, or whether natural or artificial persons, acting for themselves or through others. So that under this division we have the subjects: Domestic Relations, Personal Rights, Public Corporations, Private Corporations, Partnerships, Principal and Agent, and Principal and Surety.

Sec. 45. LAW PERTAINING TO PROPERTY.—Property according to Blackstone is either Real or Personal; and Personal property is either in possession or in action, the latter including all the various kinds of contracts. Hence under things real and things personal, including the modes of acquiring and transferring property, we have the subjects: Real Property, Personal Property, Contracts, Negotiable Instruments, Bailments, and Wills.

Sec. 46. LAW PERTAINING TO CRIMES. —Public wrongs or crimes give rise to the divis-

ion of Criminal Law; and the application of this law is called Criminal Procedure. The two will be treated together.

Sec. 47. THE LAW OF PROCEDURE.—It is not only necessary that laws be declared, but also that they be applied or carried into effect. Law confers rights, but these must be enforced or a remedy given when they are transgressed. The former is called the field of substantive law, while the latter is procedure or adjective law. Under the latter is called procedure or adjective law. Under the latter head we have the subjects of Pleading, Practice, and Evidence. Equity might also be put under this head since it is chiefly remarkable for its peculiar rules of procedure.

Sec. 48. LEGAL ETHICS.—The moral principles and rules applying to and governing the relation between the lawyer and his client, the courts and the community are now termed "Legal Ethics" and constitute a regular branch upon which law students are examined. This subject will be appropriately treated in the Cyclopedia of Law.

Sec. 49. THE INTERPRETATION OF LAWS.—"The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and con-

sequences, or the spirit and reason of the law." Intro. Bl. Com., p. 59. These he explains as follows:

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade and science.

2. The "context," or that which precedes or follows the part in question, may be of singular use whenever there is an ambiguous, equivocal or intricate sentence. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is.

In States where the object or subject of a statute must be stated in the title, the title is of more importance and may control the construction. And it is a general rule that statutes upon the same subject must be construed with reference to each other; that is, that what is clear in one statute shall be called in to explain what is obscure in another.

3. As to the "subject matter," words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

4. As to the "effects and consequences," the rule is that where words bear either none, or a very absurd signification, if literally understood, we must deviate a little from the received sense of them.

5. The last and most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the "reason and spirit" of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. * * * From this method of interpreting laws, by the reason of them, arises what we call equity, which is thus defined by Grotius: "The corrections of that wherein the law by reason of its universality is deficient." Intro. Bl. Com., pp. 59-61.

Sec. 50. LAW AND POPULAR INFLUENCE.—In the United States the people constitute the sovereign power. Delegates of the people make, construe and execute the laws. Popular influence thus decides largely both what the laws shall be, and how well they shall be observed. A law may be enacted and spread at large on the pages of the statute book, but if it does not appeal to the sense of right and justice

of the people it soon becomes a dead letter, and its enforcement is not even attempted. But, on the other hand, if there is any wrong which the people see, and which appeals to their natural sense of justice a law is soon demanded to cover and redress it. Thus the real binding law in America, as has been remarked by Professor Mechem, is armed and organized public sentiment. "It is the formal and manifest expression of the public sense of justice. Not the aroused and abnormal impulses of the people in their moments of agitated fervor; not the sense of justice of the few seers upon the mountain tops, to whom it is given to look with undimmed vision far over the distant boundaries into the promised land, but the moral sentiment, and the sense of justice of the great average masses of mankind at their normal periods. The truth is, law is written not alone upon tables of stone, or upon the printed pages of the statute book, but it has been inscribed in indelible characters by the finger of Almighty God upon the imperishable tablets of the human heart." From a lecture by Prof. Mechem to the graduating class at University of Michigan, 1896.

INFLUENCE OF THE AMERICAN LAWYER.—The potent and beneficial influence of the American lawyer is well expressed by these words of Prof. Mechem in the lecture above cited: "Who drafted our Declarations of Independence? Who framed our Constitutions? Who inter-

preted, defended and applied those Constitutions? Who has drawn our treaties? Who has led our nation in times of public peril? Who has issued our Proclamations of Emancipation? Who, in short, has been most prominent and most potent in securing and protecting our cherished institutions? I answer: More than any other class, it has been the lawyers of our country. Whether it was a Patrick Henry, rousing by his eloquence and patriotism his countrymen to resist oppression; or a Thomas Jefferson, drafting a Declaration of Independence; or a Madison, a Wilson, a Sherman and a score of others framing a Constitution; or a Hamilton, applying the new Constitution to the pressing needs of the young republic; or a Marshall, laying broad and deep the principles of its interpretation; or a Webster, defending it against the attacks of its enemies; or a Lincoln, laying down his life that the government established by that Constitution should not perish from the earth—there never has been wanting some brave, high-minded, patriotic lawyer to fight and win the people's battles for their public liberties."

Political liberties have been secured by the aid of law; there is a growing desire and demand for industrial liberty. Shall not the lawyer be the means and instrument by which this new ideal, the hope and prayer of the people, shall be realized and crystallized into laws? We believe that he will prove as true and as potent in fulfilling this

latter duty as he has been in the past. To the coming Henrys, Jeffersons, Lincolns, we bid a Godspeed and a welcome. We say, in the words of Adams, "At the bar is the scene of independence. Integrity and skill at the bar are better supporters of independence than any fortune, talents or eloquence elsewhere. * * * Presidents, governors, senators, judges, have not so much honest liberty; but it ought always to be regulated by prudence, and never abused." John Adams' Works, X., 21.

Subjects Treated in the Cyclopedia of Law.

Public International Law.

Private International Law, { Will be treated in connection with other subjects.

National or Municipal Law.

- Constitutional Law: { Federal. State,
- Persons:
  1. Domestic Relations.
  2. Personal Rights.
  3. Partnerships.
  4. Principal and Agent.
  5. Principal and Surety.
  6. Public Corporations.
  7. Private Corporations.
- Property:
  1. Real Property.
  2. Personal Property.
  3. Contracts.
  4. Negotiable Instruments.
  5. Bailments.
  6. Wills.
- Crimes: { Criminal Law and Criminal Procedure.
- Procedure: { 1. Pleadings & Practice. 2. Evidence.
- Chancery Law or Equity.
- Legal Ethics.

HELPS TO STUDENTS.

The Cyclopedia of Law is devoted entirely to the subject of law, but in these helps we desire to mention several subjects germane to law or necessary to its successful practice.

"It scarcely seems necessary," says Judge Cooley, "to remark that the student of American law ought to be well-grounded in English history, and to have studied the development of constitutional principles in the struggles and revolutions of the English people. It is idle to come to an examination of American constitutions without some familiarity with that from which they have sprung, and impossible to understand the full force and meaning of the maxims of personal liberty, which are so important a part of our law, without first learning how and why it was that they became incorporated in the legal system."

To those students who have not already had this grounding in English history we suggest that as a preliminary preparation to the study of the next number of this series—Constitutional Law—that some comprehensive English history be read carefully and notes made thereon. Nearly all libraries contain several standard English histories, any one of which will serve the student's purpose.

Again, the lawyer must, of necessity, use his

voice, and this like his intellect to be of the most service and benefit to him must be trained and developed. Skill in speaking has wrongly been supposed to be a natural talent; in some cases it may be so, but in the majority of instances the effective speaker has developed his powers of voice and action in the same manner as other capacities. Most lawyers in the course of years become good speakers, not to say orators, and this without being specially gifted in the beginning. Judge Cooley remarks that the learned man cannot well be dull when speaking of the science he has mastered, and Socrates exclaimed that all men are eloquent in that which they understand. Thus lawyers filled with the science they follow and earnest in their efforts to secure the rights of their clients unconsciously develop the three chief requisites of a good speaker, namely, clearness, force, and earnestness.

But if oratorical skill can be developed at the bar, it may also be developed to some extent while preparing for admission to the bar. We again quote from Judge Cooley who says in this regard, "Some experience in extempore speaking every young man ought to have before coming to the bar, and if he begin his practice without the discipline it would give, he cannot be certain that timidity and embarrassment will not overcome him at the outset of his career. Few men are Erskines and Patrick Henrys, gifted with powers that make their first essay a triumph; the

first efforts are, almost necessarily, mortifying failures." The eminent judge advocates that these maiden efforts of the student should be made in small societies and among friends rather than before a critical public audience, and concludes with the statement that, "Self-confidence the advocate must acquire; and, in order that he may possess it, he must have the necessary knowledge; and, secondly, he must have tried his powers until he is certain of them." Cooley's Intro. Bl. Com., p. xxviii.

Among the advertisements in this book will be found that of a Speaker and Manual of Oratory. This book was prepared chiefly for those students who have to forego the advantages of a teacher. It gives and explains the principles of elocution and oratory, including gesture and voice training. The Speaker contains the famous speeches and orations of the leading historical personages, which are adapted for study and practice. Some such a book the students should have, and, which is still more important, should follow its advice to practice speaking in public.

For the purpose of practice in speaking, as well as the advantages of association, we advise students, where possible, to form a club or society of such persons as are desirous of advancing themselves along this line. In almost every town or village a half dozen or more persons can be secured who will gladly embrace the opportunity

to learn law as given by the Home Law School Series. If care is taken in the selection of the persons forming these little groups they cannot help but be of great benefit to the individuals composing them. Roger North, the English historian, said: "A student of the law hath more than ordinary reason to be curious in his conversation, and to get such as are of his own pretension, that is, to study and improvement; and I will be bold to say, that they shall improve one another by discourse as much as all their other study without it could improve them."

A further suggestion seems to be demanded since many of the persons who make use of this series of books will do so in their spare hours. Care must be taken not to neglect one's health, or to lose track of current events while securing this special training. And further, "the law student must not forget that he is fitting himself to be a minister of justice; and that he owes it to himself, to those who will be his clients, to the courts he shall practice in, and to society at large, that he cultivate carefully his moral nature to fit it for the high and responsible trust he is to assume. The temptations of dishonest gain and the allurements of dissipation are all the time leading to shame and ruin, from the ranks of our profession, a long and melancholy train of men once hopeful, perhaps gifted; but the true lawyer is pure in life, courteous to his associates, faithful to his clients, just to all; and the student must

keep this true ideal before him, observe temperance, be master of his actions, and seek in all things the approval of his own conscience, if he would attain the highest possible benefit from the study of the law." Cooley's Intro. Bl. Com., p. xxxii.

QUESTIONS FOR STUDENTS.

(The questions are numbered to correspond with the sections in this book; the answers may be obtained by referring to the corresponding sections.)

CHAPTER I.

1. Mention the leading difficulties encountered by the law student.

2. How is the chief obstacle to the study of law removed by the Cyclopedia of Law? What was the purpose of Blackstone's Commentaries? (See Preface.) What has been said as to the merit of such a system?

3. Was there any system for the study of law prior to 1765? Is the law more voluminous now than in Blackstone's time?

4. When were Blackstone's lectures first published? What American authors have written commentaries on the law? Why should the student be directed in his studies?

5. What important assistance does the law student require?

6. Why is a knowledge of the law necessary to others than lawyers? Give the special reasons why an American citizen should be familiar with the laws of his country.

7. Is a knowledge of the law regarded as an accomplishment? State its practical benefits.

8. What may be said as to the law student's previous education? What requirement is mentioned by Blackstone? Is a knowledge of other languages important? What has been the language of the English law? What, in general, is a sufficient preparation for the study of law?

9. How may the time necessary to acquire a knowledge of the law be greatly reduced?

10. Should all other work and study be laid aside to master law? Have persons studied law while following their usual avocations? What was Franklin's definition of leisure? How much leisure time have you, and how do you employ it?

11. What may be said of the cost of a legal education? How may it be reduced to a minimum?

12. What may be said as to the proper age at which to begin the study of law?

13. Should women study law? Give reasons for your answer.

14. Is not your occupation such that you could study the Cyclopedia of Law with advantage?

15. Are you desirous of attaining a higher intellectual and social plane? Will not a knowledge of the law assist you?

16. Have you not friends and acquaintances who would gladly join with you in establishing a local club for the purpose of studying law?

CHAPTER II.

17. Give Blackstone's definition of law; Holland's.

18. Give fully the analysis of Blackstone's definition. What are the several parts of a law?

19. In what more comprehensive sense is the word law used? By what reasoning does Blackstone find a higher sanction for law than the state?

20. What other view of the origin of law can you give? How is the word law as used in the theoretical sciences distinguished from its use in the practical sciences? What is Ethic? Nomology? Give the divisions of Nomology. Which of the Nomological sciences is the jurist's concern?

21. What class of laws are we to consider? Explain what is meant by the "law of nature." Why are laws of indeterminate authority excluded by the jurist?

22. What influence has the law of nature on the positive law? What is International Law? Explain what is meant by mala in se, and mala prohibitum.

23. Why is political organization necessary to law?

24. What may be said as to the development of the law? How does a law differ from a moral rule? How would we go about to ascertain what the law is on a particular subject? What may be said as to changes in laws?

25. Explain the origin of political societies.

26. What is meant by a people?

27. Define a state. What two parts in a state? Define each.

28. Discuss the origin of States. What is Blackstone's opinion of the original contract of society?

29. Define government. What are the divisions of government in regard to the residence of sovereignty? Define Monarchy; Aristocracy; Democracy.

30. Define a republican government. Why is a republican government said to be a mixed government? What advantages did Blackstone claim for the English system of government? Are these advantages found in our system? After which government is ours modeled?

31. What is the best form of government? Discuss fully. What may be said as to the spread of democracy?

32. What is meant by sources of the law? Explain how custom may be said to be a source of law; religion; adjudication; science; equity.

33. What is meant by legislation? What is the result of legislation? Into what general classes are laws divided?

34. Of what does the written law of the United States consist? What is meant by a constitution? Explain the difference between the Federal Constitution and State Constitution. Define a treaty. What is meant by statutes? Into what two general classes are statutes divided? Define each.

35. Discuss the unwritten law. Of what does it consist?

36. Discuss the common law in regard to its origin and development. What is a precedent? What is meant by the doctrine of stare decisis? Is there a common law of the United States as a nation? Of the States?

37. What is meant by equity or chancery law? Of what does it consist?

38. What are the depositories of the written law? Of the unwritten law? What is meant by reports?

39. What is meant by codification of laws? Why was codification necessary and practical in the United States? What is meant by a code State? What was the purpose and object of codification? When and by which State was the first code adopted? Does the statutory code supersede within its scope all other laws? Is a knowledge of common law yet necessary to the student in the code States? What does Judge Cooley say as to the value of the common law rules of pleading?

40. What may be said as to separating the law into separate branches? In what way is such a division helpful?

41. Define public international law.

42. Define and discuss private international law.

43. Define a constitution. How do you account for dual constitutions in the United States?

44. Discuss laws pertaining to persons. What branches or subjects fall under this division?

45. Into what two general classes is property divided? What subjects are considered under property law?

46. What name is given to the law regulating crimes or public wrongs?

47. What is meant by substantive law? By adjective law or procedure? What subjects come under the head of procedure?

48. What is meant by legal ethics?

49. By what signs may the will of the legislature be interpreted? How are words to be generally understood? What is meant by the context? Subject matter? Effects and consequences? What branch of law arises from interpreting a law according to its reason and spirit?

50. Where does sovereignty reside in the United States? Is the law influenced by popular sentiment? Discuss fully. What influence has the lawyer had upon political liberty in America? What further service can the lawyer render to his country?

PART II.

IN WHICH THE STUDENT IS INTRODUCED TO SIR WILLIAM BLACKSTONE, AND GIVEN A TASTE OF HIS IMMORTAL COMMENTARIES ON THE LAWS OF ENGLAND.

INTRODUCTORY.

Sir William Blackstone was born at London, July 10th, 1723, and died February 14th, 1780. The plan of his great work was completed at the age of thirty, when he delivered in Oxford, a course of lectures which, in the year 1765, took the form of "Blackstone's Commentaries on the Laws of England." Eight editions of this monumental work appeared in the author's lifetime, and a great many more have been published since. Among the English editors and annotators of Blackstone's work are Coleridge, Chitty, Christian, and others. Sharswood and Cooley are American editors of the same work. The edition of Blackstone's Commentaries by the late Judge Thomas M. Cooley, of Michigan, the well-

known and respected jurist and author, is doubtless the best American edition, and is one of the first books to which the ambitious student of law is usually introduced.

William Blackstone not only made it his object to show that a knowledge of the laws of his country was of the first importance to every Englishman of rank and distinction, and especially to those who aspired to be justices or legislators, but also aimed to put in palatable and accessible form the laws of England, so that every one who wished might come to a fair and accurate knowledge of the laws of his country. For this laudable and painstaking work thousands of students in England and America have offered and will offer unstinted praise to the author of the "Commentaries."

While England and America are greatly indebted to Blackstone for collecting and presenting in compact and intelligible form the laws of his land, yet the student to-day must not lose sight of the fact that even so great a genius and writer as he, could use his reasoning powers, apt sentences, and ready logic to the bolstering up of laws and institutions which his own best judgment must have told him were not to be justified in law or reason.

Blackstone was not an ideal jurist, he was simply a practical codifier; he had no care for the future of the law, only for the past; it was his task to find out what the law was and set it down, not to speculate what it might or should be to best answer the purposes of mankind. It is true that he commends many things in the common law and finds the origin of certain precepts in reason and natural justice, but nevertheless his vision is confined to the customs and institutions which immediately surround him; he has no light to throw a shadow of the higher and truer State wherein all should be equal in the eye of the law, and the whole people constitute the sovereign power; he finds no inconsistency in trusting the administration of justice to the arbitrary instincts of a monarch; and utters not a word of protest against the grinding laws that the hereditary nobility enacted for the mulcting of a helpless people.

The student must bear in mind while perusing the first few chapters of the "Commentaries" that Blackstone was an Englishman, with all of the Englishman's sluggish hate towards new ideas in matters of law or custom, and that he became one of the King's justices

and a staunch supporter of royalty, then he may understand the different sentiments expressed by Blackstone in his eulogy of the British Constitution (Com. Sec. 2, Intro.), and his remarks upon the laws governing land tenure (Com. Book II., page 2), from which we quote the following:

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. *Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.* We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) *there is no foundation in nature or natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him;* or why the occupier of a particular

field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. *It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them.*"

NOTE.—The italics are the authors. What a commentary on class legislation do these few truthful utterances furnish.

These few lines from the second book of the "Commentaries" make it clear that Blackstone could see that there was no sound reason why a few should own the land and pass it on entailed to certain of their children while the rest should be denied the right to use the natural resources of the earth. But his philosophy was non-resisting; whatever is, is good, and it would make trouble to question it. He may have seen clearly that the laws pertaining to property were radically wrong, but it was not his purpose to raise a dissenting voice, or to advocate a needed reform; he was not of the class of the Roman Gracchi, or of Henry George. As a commentator then, Blackstone was but an apathetic reviewer, seeking simply to set forth the building as it was, and caring nothing for needful repairs or additions.

Like Blackstone, many law writers, and legislators, and judges, of to-day, seek simply to apply the old rules as they were applied by the forefathers, refusing to consider that laws being for the purpose of governing and regulating the affairs of mankind should keep pace with man's activities and adapt themselves to the circumstances and conditions which surround him. That the laws to-day are lax in the regulation of modern commercial industries and in the controlling of a new type of malefactors which infest and prey upon modern society is evident by a perusal of the following quotation from an excellent article by Prof. Frank Parsons, in the July, 1901, number of the Arena:

"Slavery and serfdom have been abolished. Piracy is dead. The press-gang has vanished and thievery is trying to hide itself. Our principal robbers do not club their victims on the highways, but carry them in street cars and railway trains, or capture their money politely with stocks and trusts. Nothing has improved more than robbery. Instead of a dangerous encounter with pistols, to get the goods and cash that two or three travelers might have with them, the modern highwayman builds a railroad system with other people's money, or a gas or electric plant, or a street railway, or secures a telegraph or telephone franchise, or waters some stock, or gets a rebate on oil,

beef, or wheat, or forms a giant trust and robs the population of a continent at a stroke. Then the robber buys a newspaper or caresses it with greenbacks, and has himself entitled a "Napoleon of Finance," while the rudimentary, undeveloped aggressor or peculative survival of more primitive times who steals a bag of flour instead of a grain crop, or takes a few hundred instead of a million, has to put up with the old-time, uncivilized name of "thief." Imprisonment for debt has been abolished, and also imprisonment for theft—if it is committed according to the law and by methods approved by the particular variety of "Napoleon" having control of the government."

Almost every citizen of this great Republic is palpably impressed with the truth of Professor Parson's caustic comments, but a vast number say with Blackstone that it is useless and troublesome to resist the "Napoleons" of finance and their unjust methods. It lies with the students of law, the statesmen and orators to come, to arouse the common people, and then the law will advance as it should.

C. E. C.

NATURE OF LAWS.

SECTION II.*

OF THE NATURE OF LAWS IN GENERAL.

Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform. And, to descend from

* Sections one and four of Blackstone's Introduction to his Commentaries have been left out as unimportant to the student to-day.

the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction,—as that the hand shall describe a given space in a given time, to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws, more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal *nutrition, digestion, [*39] secretion and all other branches of vital economy, are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This, then is the general signification of law, a rule of action dictated by some superior being, and in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human*

action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him on whom he depends as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points, conform to his Maker's will.

This will of his Maker is called the law of nature. For as God, when he created matter, endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to [*40] conduct himself in all parts of *life, he laid

down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian (*a*) has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have

(*a*) *Juris præcepta sunt hæc, honeste vivere, alterum non lædere suum cuique tribuere. Inst. 1. 1.* 3

wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As, therefore, the Creator is a being not only of infinite *power* and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human [*41] felicity, he *has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have mainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man's

real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, *hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, [*42]

both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws, that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and, from these prohibitions, arises the true unlawfulness of this crime. Those human laws that annex a punishment to it do not at all increase its moral guilt, or *superadd any fresh obligation, *in foro conscientiæ*, to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those

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superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, (*b*) is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual

(*b*) Puffendorf, *l.* 7, *c.* 1. compared with Barbeyrac's Commentary.

compacts, treaties, leagues, and agreements between these several communities; in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore the cival law (*c*) very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

[*44] *Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities or nations are governed; thus being defined by Justinian, (*d*) "*jus civile est quod quisque sibi populis constituit.*" I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Let us endeavour to explain its

(*c*) *Ff.* i. 1, 9. (*d*) *Inst.* i. 2. 1.

several properties, as they arise out of this definition. And, first, it is a *rule:* not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a *rule.* It is also called a *rule,* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation,* but upon the *maker's will.* Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

*It is also called a *rule* to distinguish it from a *compact* or *agreement*; for a [*45] compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do

it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "a rule *of civil conduct.*" This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion; duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "a rule *prescribed.*" Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the man-

ner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed* to be publicly read in churches and other assemblies. It [*46] may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must

of consequence be cruel and unjust. (*e*) All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state.*" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

[*47] *This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural

(*e*) Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero (*de leg.* 3, 19, and in his oration *pro domo*, 17,) thus speaks: "*Vetant leges sacratæ vetant duodecim tabulæ, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre, possit.*"

inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both of which were effected by the means of single families. These formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became

less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, *in the very act of associating together: namely, that the whole should [*48] protect all its parts, and that every part should pay obedience to the will of the whole or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society

in order. Unless some superior can be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy: but the application of it to particular cases has occasioned one-half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being; the three grand requisites, I mean of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned

infinite disputes. It is not my business or intention to enter into any of them. However they began, or by *what right soever they subsist, there is and must be in all of [*49] them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever

appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In *aristocracies there is [*50] more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince: but then

there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero (*f*) declares himself of opinion, "*esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure. (*g*)

But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a

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(*f*) In his fragments, *de rep. l.* 2.

(*g*) *Cunctas nationes et urbes populus aut primores, aut singuli regunt; delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.*" *Ann. l.* 4.

single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, *their birth, their wisdom, their valour, or their property; and, thirdly, [*51] the House of Commons, *freely chosen by the people from among themselves*, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristoc-

racy, or democracy; and so want two of the three principal ingredients of good polity; either virtue, wisdom or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view; if lodged in the king and commons we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would *soon be
[*52] an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed

to have been originally set up by the general consent and fundamental act of the society; and such a change, however affected is, according to Mr. Locke, (*h*) (who perhaps carries his theory too far,) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

Having thus cursorily considered the usual three species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and dis-

(*h*) On government, part 2. sec. 212.

posed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

[*53] Thus far as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. For since the *respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of its will.

But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what

he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition, is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several parts: one *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and *laid down: another, *directory;* whereby the subject is instructed and [*54]

enjoined to observe those rights and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction* or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children and the like) receive any stronger sanction from being also declared to be duties

by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong. *But, with regard to things in themselves indifferent, the case is entirely altered. These [*55] become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature, but are merely created by the law, for the purpose of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and

mode of doing it becomes right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen (*i*) that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or omit them.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect *without it. For in vain would rights be declared, in vain directed to be observed, if

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(*i*) See page 43.

there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner;" if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties, it is observed that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for

so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good.(*k*) For which reasons though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

[*57] *Of all the parts of a law the most effectual is the *vindicatory*. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige*: not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a pen-

(*k*) Locke, Hum. Und. b. 2. c. 21.

alty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.

It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se:* here we are bound in conscience; because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws, which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of

[*58] moral guilt,* annexing a penalty to non-compliance, (*l*) here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty if levied. It must however, be observed, that we are here speaking of laws that are simply and purely penal, where the

(*l*) See Book II, p. 420.

thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience. (*m*)

I have now gone through the definition laid down of a municipal law; and have shown that it is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong;" in the explication of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes is not only endless, but affords great room for partiality and oppression. The answers of the emperor

(*m*) *Lex pure pœnalis obligat tantum ad pœnam, non item ad culpam: lex pœnalis mixta et ad culpam obligat, et ad pœnam.* (Sanderson *de conscient. obligat. prael.* viii. §17. 24.)

were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished by every rational civilian from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to *abolish these re- [*59] scripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise, (*n*) and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all:

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law

(*n*) *Inst.* 1. 2. 6.

mentioned by Puffendorf (*o*) which forbad a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, "*heirs of her body*," which, in a legal sense, comprise only certain of her lineal descendants.

*2. If words happen to be still dubious, we may establish their meaning from the *context*, with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be a felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law cen- [*60]

(*o*) L. of N. and N. 5. 12. 3.

sures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the *subject matter*, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the *effects* and *consequences*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, (*p*) which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

[*61] *5. But, lastly, the most universal and effectual way of discovering the

(*p*) *l.* 5. *c.* 12. §8.

true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. (*q*) There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation.

From this method of interpreting laws, by the reason of them, arises what we call *equity*, which is thus defined by Grotius: (*r*) "the corrections of that wherein the law (by reason of its universality,) is deficient." For, since

(*q*) *l.* 1. *c.* 11. (*r*) *De Equitate*, §3.

in laws all cases cannot be forseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established *rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

[*62]

SECTION III.

OF THE LAWS OF ENGLAND.

The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: The *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs*, of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the

Gallic Druids committed all their laws as well as learning to memory; (*a*) and it is said of the primitive Saxons, here as well as their brethren on the continent, that *leges sola memoria et usu retinebant.* (*b*) But with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of *reports and judicial decisions, and in the treatises of learned sages of the profession, pre-
[*64]
served and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that, which is "*tacito et illiterato hominum consensu et moribus expressum.*"

Our ancient lawyers, and particularly Fortescue, (*c*) insist with abundance of warmth that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants to the present time, unchanged and unadulterated. This may be the case as to some;

(*a*) Caes., *de b. G. lib.* 6, *c.* 13. (*b*) Spelm. Gl. 362.
(*c*) C. 17.

but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless, by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon, (*d*) are mixed as our language; and, as our language is so much richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *Dome-Book*, or *Liber Judicialis*, for the general use of the whole kingdom. *This book is said to have been extant so late as the reign of King Edward the Fourth, but is now unfortunately lost. It contained, we may probably [*65]

(*d*) See his proposals for a digest.

suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of King Edward the elder, the son of Alfred. (*e*) "*Omnibus qui republicæ præsunt etiam atque etiam mano, ut omnibus æquos se præbeant judices, perinde ac in judicali libro* (*Saxonice*, dom-bec) *scriptum habetur: nec quicquam formident quin jus commune* (*Saxonice*, folcrihte) *audacter libereque dicant.*"

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse, or at least to be mixed and debased with other laws of a coarser alloy; so that, about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts: 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britains; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the

(*e*) C. 1.

same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government. (*f*)

*Out of these three laws, Roger Hoveden (*g*) and Ranulphus Cestrensis (*h*) informs us, King Edward the Confessor extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom; though Hovenden, and the author of an old manuscript chronicle (*i*) assure us likewise that this work was projected and begun by his grandfather King Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs, as in Portugal, under King Edward, about the beginning of [*66]

(*f*) Hal. Hist. 55. (*g*) *In Hen. II.*
(*h*) *In Edw. Confessor.*
(*i*) *In Seld. ad Eadmer*, 6.

the fifteenth century.(*k*) In Spain under Alonzo X., who, about the year 1250, executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *Las Partidas.*(*l*) And in Sweden, about the same era, when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England.(*m*)

Both these undertakings of King Edgar and Edward the Confessor seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested; for Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*. These, however, are the laws which our histories so often mention under the name of the laws of Edward the Confesser, which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are

(*k*) Mod. Un. Hist. xxii. 135. (*l*) *Ibid.* xx. 211.
(*m*) *Ibid.* xxxiii. 21, 58.

the laws that so vigorously withstood *the repeated attacks of the civil law; which [*67] established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs which is now known by the name of the common law; a name either given to it in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune*, or *folcright*, mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach, nothing being more difficult than to ascertain the precise beginning and the first spring of an ancient and long established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of

man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex nonscripta*, of this kingdom.

This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws; which, by custom, are adopted and used by some particular courts of pretty general and extensive jurisdiction.

[*68] *1. As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences; with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as exten-

sively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by

[*69] shewing that it hath been always the custom to observe it. *But here a very natural, and very material, question arises: how are these customs and maxims to be known and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue (*n*) mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even, so early as the conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief

(*n*) Cap. 8.

qualifications of those who were held to be "*legibus patriæ optime instituti.*" (*o*) For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; *much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make [*70] a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law;* but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is

(*o*) Seld. Review of Tith. c. 8.

that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. (*p*) And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined time out of mind, that a

(*p*) Herein agreeing with the civil law, *Ff.* 1. 3. 20. 21. "*Non omnium, quæ a majoribus nostris constituta sunt, ratio-reddi potest. Et ideo rationes eorum, quæ constituuntur, inquiri non oportet: alioquin multa ex his quæ certa sunt, subvertuntur.*"

brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and *the law. For herein there is [*71] nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to every body. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the

emperor had once determined was to serve as a guide for the future. (*q*)

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive; and, from his time, to that of Henry the *Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this bene- [*72]

(*q*) "*Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis sententian dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est, sed et in omnibus similibus.*" *C.* 1. 14. 12.

ficial custom had, under proper regulations, been continued to this day; for, though King James the First, at the instance of Lord Bacon, appointed two reporters (*r*) with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief-Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name. (*s*)

Besides these reporters, there are also other

(*r*) *Pat.* 15 *Jac. I. p.* 18. 17. Rym. 26.

(*s*) His reports, for instance, are styled κατ' εξοχην, *the reports;* and, in quoting them, we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of Judge Croke are also cited in a peculiar manner, by the names of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.:* Queen Elizabeth, King James, and King Charles the First: as well as by the number of each volume. For sometimes we call them 1, 2, and 3. Cro. but more commonly Cro. Eliz., Cro. Jac. and Cro. Car.

authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the *same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of insti-
[*73] tutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method. (*t*) The second volume is a comment upon many old acts of parliament, without any systematical

(*t*) It is usually cited either by the name of Co. Litt. or as 1 Inst.

order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts. (*u*)

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law; it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest (*v*) will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For, since (says Julianus,) the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people have approved without writing ought also to bind every body. For where is the difference, whether the people

(*u*) These are cited as 2, 3, or 4 Inst. without any author's name. An honary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

(*v*) *Ff.* 1. 3. 32.

declare their *assent to a law by suffrage, or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et protestatem comferat*," says Ulpian. (*w*) "*Imperator solus et conditor et interpres legis existimatur*," says the code. (*x*) And again, "*sacrilegii instar est rescripto principis obviari.*" (*y*) And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people. (*n*)

[*74]

(*w*) *Ff.* 1. 4. 1. (*x*) *C.* 1. 14. 12.

(*y*) *C.* 1. 23. 5.

(*n*) [Lord Chief-Justice Wilmot has said that "the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing. 2 Wils. 348. And statute law, and common law, both originally flowed from the same fountain." Ib. 350. And to the same effect Lord Hale declares, "that many of those things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record." Hist. Com. Law, 66. Though this is the probable origin of the greatest part of the common law, yet much of it certainly has been intro-

II. The second branch of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament. (*z*.)

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duced by usage, even of modern date, which general convenience has adopted. Of this nature is the law of the road, viz: that horses and carriages should pass each other on the whip hand. This law has not been enacted by statute, and is so modern, that perhaps this is the first time that it has been noticed in a book of law. But general convenience discovered the necessity of it, and our judges have so far confirmed it, as to declare frequent'y at nisi prius, that he who disregards this salutary rule is answerable in damages for all the consequences.] —*Cooley's Blackstone, page 73, n.*

(*z*) *Mag. Cart.* 9 Hen. III. c. 9. —1. Edw. III. St. 2. c. 9. —14 Edw. III. St. 1. c. 1. —and 2 Hen. IV. c. 1.

Such is the custom of gavelkind in Kent, and some other parts of the kingdom (though perhaps it was also general till the Norman conquest), which ordains, among other things, *that not the eldest son only of [*75] the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law, she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns, the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety other matters. All these are contrary

to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament. (*a*)

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the customs of merchants, or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; (*b*) being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est.*"

The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance.* And first we will consider the rules of *proof.*

*As to gavelkind, and borough-English, the law takes particular notice of them, (*c*) and there is no occasion to prove that [*76] such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, (*d*) and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The

(*a*) 8 Rep. 126. Cro. Car. 347. (*b*) Winch. 24.
(*c*) Co. Litt. 175. (*d*) Litt. §265.

trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to shew "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court. (*e*)

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder; (*f*) unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf. (*g*)

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used; *Malus usus abolendus est*, is an established maxim of the law. (*h*) To make a particular custom good, the following are necessary requisites.

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom. For which reason no

(*e*) Dr. and St. 1. 10.
(*f*) Cro. Car. 516.
(*g*) Hob. 85.
(*h*) Litt. §212. 4 Inst. 274.

custom can prevail against an express act of *parliament, since the statute itself is a proof of a time when such a custom did not exist. (*i*) [*77]

2. It must have been *continued.* Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. (*j*) As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. (*k*) For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable;* (*l*) or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, (*m*) to be understood of every un-

(*i*) Co. Litt. 114. (*j*) Co. Litt. 114.
(*k*) *Ibid.* (*l*) Litt. § 212. (*m*) 1 Inst. 62.

learned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits. (*n*)

[*78] *5. Customs ought to be *certain*. A custom, that lands shall descend to the must worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. (*o*) A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain:

(*n*) Co. Copyh. § 33. (*o*) 1 Roll. Abr. 565.

for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.*

6. Customs, though established by consent, must be (when established) *compulsory;* and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. (*p*)

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years

(*p*) 9 Rep. 58.

*may, by one species of conveyance, (called a deed of feoffment,) convey away his lands in fee simple, or forever. Yet this custom does not impower him to use any other conveyance, or even to lease them for seven years· for the custom must be strictly pursued. (*q*) And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone. (*r*) And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.

[*79]

III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws. (*s*)

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of Sir

(*q*) 9 Co. Cop. §33 (*r*) Co. Litt. 15.
(*s*) Hist. C. L. c. 2. (*t*) Hist. C. L. c. 2.

Matthew Hale, (*t*) because it is most plain, that it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here; for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the meanest, of its subjects. But all the *strength that either the papal or imperial laws have obtained in this realm, or indeed in [*80] any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws; or else because they are in some other cases introduced by consent of parliament, and they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in these remarkable words of the statute 25 Hen. VIII, c. 21, addressed to the king's royal majesty: "This your grace's

realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm, for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate

or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, *and lastly upon the imperial decrees, or constitutions of successive emperors,) had grown to so great a bulk, or, as Livy expresses it, (*u*) "*tam immensus aliarum super alias ascervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian. (*v*) This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled A. D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms; for Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533. [*81]

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law in four books. 2. The digest, or

(*u*) *l.* 3. *c.* 34. (*v*) Taylor's Elements of Civil Law, 17.

pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which, however, fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi, in Italy; which accident, concurring with the policy of the Roman ecclesiastics, (*w*) suddenly gave new vogue and authority to the civil law,

[*82] introduced it into several nations, and *occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and decretal epistles and bulls of the holy see; all which

(*w*) See §1, page 18.

lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of Pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII, about the year 1298, which is called *Sextus Decretalium*. The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317, by his successor John XXII, who also published twenty constitutions of his own, called the *Extravagantes Joannis*, all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes:* and all these together, Gratian's decree, Gregory's decretals, the sixth decretals, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church* and king-
[*83] dom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from Pope Gregory IX and Pope Clement IV, in the reign of King Henry III, about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry III, to Henry Chichelle, in the reign of Henry V; and adopted also by the province of York (*x*) in the reign of Henry VI. At the dawn of the reformation, in the reign of King Henry VIII, it was enacted in parliament (*y*) that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review

(*x*) Burn's Eccl. Law, pref. viii.

(*y*) Statute 25 Hen. VIII. c. 19, revived and confirmed by 1 Eliz. c. 1.

has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, (*z*) whatever regard the clergy may think proper to pay them.

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts Christian *curiæ Christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom, corroborated in the latter instance by act of *parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to [*84]

(*z*) Stra. 1057.

them all, which may serve to inculcate more strongly the doctrine laid down concerning them. (*a*)

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some

(*a*) Hale, Hist. c. 2.

courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new-modeled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

*Let us next proceed to the *leges scriptæ*, the written laws of the kingdom, which are statutes, acts or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled. (*b*) The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Hen. III, though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law. [*85]

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes, and of some general rules with regard to their construction. (*c*)

(*b*) 8 Rep. 20.

(*c*) The method of citing these acts of parliament is

First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A [*86] general or public act is an *universal rule, that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio;*

various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject, as the statutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa regis*. Some are distinguished by their initial words, a method of citing very ancient, being used by the Jews in denominating the books of the Pentateuch: by the Christian church in distinguishing their hymns and divine offices: by the Romanists in describing their papal bulls; and, in short, by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the Second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to its numeral order, as 9 Geo. II. c. 4, for all the acts of one session of Parliament taken together made properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the bill of rights is cited as 1 W. and M. St. 2. c. 2, signifying that it is the second chapter or act of the second statute, or the laws made in the second session of parliament, in the first year of King William and Queen Mary.

without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans entitled *senatus-decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community; (*d*) and of these (which are not promulgated with the same notoriety as the former,) the judges are not bound to take notice, unless they be formally shewn and pleaded. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation; but an act to enable the bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory where the old custom of the kingdom is almost fallen into disuse or become disputable; in which case the parliament has thought proper, *in perpetuum rei tetimonium*, and for avoiding all doubts and

(*d*) Gravin, *Orig.* i. §24.

difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III, cap. 2, doth not make any new species of treasons, but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) Judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by restraining it *where it was too lax and luxuriant hath occasioned another [*87] subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason: clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient, by statute 5 Eliz. c. 11, to make it high treason, which it was not at the common law: so that this was an *enlarging statute.* At common law also spiritual corporations might lease out their estates for any term of years till prevented by the statute 13 Eliz. before men-

tioned: this was therefore, a *restraining* statute.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. (*e*) Let us instance again in the same restraining statute of 13 Eliz. c. 10: By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives, or twenty-one years. Now in the construction of this statute, it is held that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see: or, if made by a dean and chapter, they are not void during the continuance of the dean, for the act was

(*e*) 3 Rep. 7 Co. Litt. 11. 42.

made for the benefit and protection of the successor. (*f*) The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the *grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy.

[*88]

2. A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, *and others having spiritual promotion*," is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order. (*g*)

3. Penal statutes must be construed strictly. Thus the statute 1 Edw, VI, c. 12, having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse*, and therefore procured a new act for that purpose in the following year. (*h*) And, to come nearer our own times, by the statute 14 Geo. II, c. 6, stealing sheep, *or other cattle*, was made felony, without benefit of clergy. But these general words, "or other cattle," being looked

(*f*) Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.
(*g*) 2 Rep. 46.
(*h*) 2 and 3 Edw. VI. c. 33. Bac. Elem c. 12.

upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II, c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves and lambs, by name.

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c., made to defraud creditors *and others*, was *held to extend by the general words to a gift made to defraud the queen of a forfeiture. (*i*) [*89]

One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A., and A. has at that time a lease of it for three years: here A. shall hold it for his term of three

(*i*) 3 Rep. 82.

years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.; in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king. (*k*)

7. Where the common law and the statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon a general principle of universal law, that "*leges posteriores, priores contrarias abrogant;*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts,

(*k*) 1 Rep. 47.

that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. (*l*) But, if both acts be merely [*90] affirmative, *and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere.* (*m*)

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Henry VIII, declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in Queen Elizabeth's statute, but

(*l*) Jenk. Cent. 2. 73. (*m*) 11 Rep. 63.

these acts of King Henry were impliedly and virtually revived. (*n*)

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII, c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecution for high treason; but will not restrain or clog any parliamentary attainder. (*o*) Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. "When you repeal the *law itself, (says he,) you [*91] at the same time repeal the prohibitory clause, which guards against such repeal." (*p*)

10. Lastly, acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to

(*n*) 4 Inst. 325. (*o*) 4 Inst. 43.

(*p*) *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l.* 3. *cp.* 23.

those collateral consequences void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, the acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.(*q*) But, if we could conceive it possible for the parliament to enact, that he should try as well his

(*q*) 8. Rep. 118.

own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

These are the several grounds of the laws of [*92] England; over and above which, equity is also freqently called in to *assist, to moderate and to explain them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject: to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of prop-

erty. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

BOOK THE FIRST

OF THE RIGHTS OF PERSONS

CHAPTER I

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS

The objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

*Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero, (*a*) and after him our Bracton, (*b*) have expressed it, *sanctio justa, jubens honesta et prohibens contraria*, it follows that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution, therefore, of these commentaries, I shall follow this very simple and obvious division; [*122]

(*a*) II *Philipp.* 12. (*b*) *l.* I. *c.* 3.

and shall, in the first place, consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden, by the laws of England.

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person; which are styled *jura rerum.*, or the *rights of things.* Wrongs also are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts. 1. *The rights of persons*, with the means whereby such rights may be either acquired or lost. 2. *The rights of things*, with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemeanors; with the means of prevention and punishment.

We are now first to consider the *rights of*

persons, with the means of acquiring and losing them.

*Now the rights of persons that are commanded to be observed by the municipal laws are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties;* and, secondly, such as belong *to* him, which is the more popular acceptance of *rights* or *jura*. Both may indeed be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people. [*123]

Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to [*124] the absolute *duties*, which man is bound *to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally

to affect himself, (as drunkenness, or the like,) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But, with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these is clearly a subsequent con-

sideration. And therefore the principal view of human law is, or ought always to be to explain, protect, and enforce such rights as are absolute, which in *themselves are few and simple: and then such rights as are relative, [*125] which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so

valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. (*c*) Hence we may collect that the law, which restrains a man from doing *mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our con- [*126]

(*c*) *Facultas ejus, quod cuique facere libet nisi quid vi aut jure prohibetur. Inst.* 1. 3. 1.

sent, if they regulate and constrain our conduct in matters of mere indifference without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of King Edward IV, (*d*) which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes on their shoes or boots of more than two inches in length, was law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles II, (*e*) which prescribes a thing seemingly indifferent, (a dress for the dead, who are all ordered to be buried in woollen) is a law consistent with public liberty: for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for, as Mr. Locke has well observed, (*f*) where there is

(*d*) 3 Edw. IV, c. 5. (*e*) 30 Car. II St.1. c. 3.
(*f*) On Gov. p. 2. §57.

no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms, where it falls *little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature and of course the laws of [*127] England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman; (*g*) though the master's right to his service may *possibly* still continue

The absolute rights of every Englishman,

(*g*) Salk. 666. See ch. 14.

which, (taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the great charter of liberties, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son. Which charter contained very few new grants; but, as Sir Edward Coke (*h*) observes, was for the most part declaratory of the principal grounds of the fundamental *laws of England. After-

[*128]

(*h*) 2 Inst. proem.

wards by the statute called *confirmatio cartarum*, (*i*) whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people, and sentence of excommunication is directed to be as constantly denounced against all those that, by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two,) (*k*) from the first Edward to Henry the Fourth. Then, after a long interval, by *the petition of right;* which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange, 13th of February, 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words: "and they do claim,

(*i*) 25 Edw. 1. (*k*) 2 Inst. proem.

demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself (*l*) recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement*, (*m*) whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion, laws and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law. (*n*)

[*129] *Thus much for the declaration of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so

(*l*) 1 W. and M. St. 2, c. 2.
(*m*) 12 and 13 W. III, c. 2.
(*n*) Plowd. 55.

given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty and the right of private property: because, as there is no other known method of compulsion or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child;

this, though not murder, was by the ancient law homicide or manslaughter. (*o*) But the modern law doth not look *upon this offence
[*130] in quite so atrocious a light but merely as a heinous misdemeanor. (*p*)

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; (*q*) and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born. (*r*) And in this point the civil law agrees with ours. (*s*)

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they

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(*o*) *Si aliquis mulierem pregnantum percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium.* Bracton, *l.* 3 *c.* 21.

(*p*) 3 Inst. 50. (*q*) Stat. 12 Car. II, c. 24.

(*r*) Stat. 10 and 11 W. III, c. 16.

(*s*) *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.* *Ff.* 1. 5. 26.

cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act: these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. (*t*) And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities* of which there are two *sorts: duress of imprisonment, where a man actually loses his liberty, of which we shall [*131] presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb.

(*t*) 2 Inst. 483.

And this fear must be upon sufficient reason; "*non*," as Bacton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadera in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum.*"(*u*) A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: (*w*) but no suitable atonement can be made for the loss of life or limb. And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter, qualiter redemptum voluit.*(*x*)

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor. A humane provision;

(*u*) *l.* 2. *c.* 5. (*w*) 2 Inst. 483.
(*x*) *Ff.* 48. 21. 1.

yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code, (*y*) were rejected in Justinian's collection.

*These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm (*z*) by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed; in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and [*132]

(*y*) *L.* 11. *t.* 27. (*z*) Co. Litt. 133.

refused to submit to its regulations. (*a*) A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased. (*b*) Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due. (*c*) In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have

(*a*) This was also a rule in the feudal law, *l.* 2. *t.* 21. "*desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.*

(*b*) Litt. §200. (*c*) Co. Litt. 133.

and to hold for the term of one's *natural* life. (*d*) But, *even in the time of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts; (*e*) and therefore, since the reformation, this disability is held to be abolished: (*f*) as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I, c. 28. [*133]

This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedients, and legality of which, we may hereafter more conveniently inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical;

(*d*) 2 Rep. 48. Co. Litt. 132.
(*e*) Co. Litt. 132. (*f*) 1 Salk. 162.

and that, whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*," says the great charter, (*g*) "*aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ.*" Which words, "*aliquo modo destruatur*," according to Sir Edward Coke, (*h*) include a prohibition, not only of *killing* and *maiming*, but also of *torturing*, (to which our laws are strangers,) and of every oppression by colour of an illegal authority. And it is enacted by the statute 5. Edw. III, c. 9, that no man shall be forejudged of life or limb contrary to the great charter and the *law of the land: and again, by statute 28 Edw. III, c. 3, that no man shall be put to death, without being brought to answer by due process of law.

[*134]

3. Besides those limbs and members that may be necessary to a man, in order to defend

(*g*) c. 29. (*h*) 2 Inst. 48.

himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come,) it will suffice to have barely mentioned among the rights of persons: referring the more minute discussion of their several branches to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint,

unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great *charter (*i*) is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes (*j*) expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16, Car. I, c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of

[*135]

(*i*) c. 29.

(*j*) 5 Edw. III, c. 9. 25 Edw. III, St. 5. c. 4. 28 Edw. III, c. 3.

king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II, c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. and M. St. 2, c. 2, that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown,) (*k*) there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, *are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of [*136]

(*k*) I have been assured, upon good authority that, during the mild administration of Cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bull *unigenitus*.

life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis.* In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation

parts with its liberty for awhile, in order to preserve it for ever.

The confinement of the person, in any wise, is an imprisonment; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. (*l*) And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, *and, either to procure his discharge, or on any other fair account, seals, a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. (*m*) To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner: (*n*) for the law judges, in this respect, saith Sir [*137]

(*l*) 2 Inst. 589.
(*m*) 2 Inst. 482.
(*n*) Ibid. 52. 53.

Edward Coke, like Festus the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without license. (*o*) This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter (*p*) declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II, c. 2, (that second *magna carta*, and stable bulwark of our liberties,) it is

(*o*) F. N. B. 85. (*p*) C. 29.

enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas, (where *they cannot have the full benefit and protection of the common law); but that all such imprisonments shall be [*138] illegal; that the person who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the King's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors; and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

The law in this respect is so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. (*q*) For this might, in reality, be no more than an honourable exile.

(*q*) 2 Inst. 46.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly, the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter (*r*) has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free *customs but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes (*s*) it is enacted that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited,

[*139]

(*r*) C. 29.

(*s*) 5 Edw. III, c. 9. 25 Edw. III, St. 5. c. 4. 28 Edw. III, c. 3.

nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary it shall be redressed and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sus-

tained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

[*140] *Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I, c. 5 and 6, it is provided that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I., St. 4. c. 1, which (*t*) enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops earls, barons, knights, burgesses, and other freemen of the land: and again by 14 Edw.

(*t*) See the introduction to the great charter (*edit. Oxon*) *sub anno* 1297; wherein it is shewn that this statute *de talliagio non concedendo*, supposed to have been made in 34 Edw. I, is in reality, nothing more than a sort of translation into Latin of the *confirmatio cartarum*, 25 Edw. I, which was originally published in the Norman language.

III, St. 2, c. 1, the prelates, earls, barons and commons, citizens, burgesses and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right, 3 Car. I, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. St. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence or prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted; is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the *constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, [*141]

of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament; of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this, also, I shall treat in its proper place. The former of these keeps the legislative power in due health and vigor, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta* (*u*) spoken in the person of the king, who in judgment of law (says Sir Edward Coke, (*w*) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli nega-*

(*u*) C. 29. (*w*) 2 Inst. 55.

bimus, aut differemus rectum vel justitiam: "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament, *wherein justice is directed to be done according to the law of the land; and what that law is [*142] every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall, however, just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta* (*x*) that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III, c. 8, and 11 Ric. II, c. 10, it is enacted that no commands or letters shall be sent under the great seal or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should

(*x*) c. 29.

come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III, St. 4. And by 1 W. and M. St. 2, c. 2, it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by legal authority, without consent of parliament, is illegal.

Not only the substantial part, or judicial decision, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared, in the statute 16 Car. I, c. 10, upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council have any jurisdiction, power, or authority, by English bill, petition, articles, libel, (which were the course of proceeding in the starchamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

4. *If there should happen any uncommon injury, or infringement of the [*143] rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told (*y*) that the Czar Peter established a law, that no subject might petition the throne till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong: the consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and, while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II, St. 1, c. 5, that no petition to the king, or

(*y*) Montesq. Sp. L. xii. 26.

either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But under these regulations it is declared by the statute 1 W. and M. St. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are [*144] *allowed by law. Which is also declared by the same statute, 1 W. and M. St. 2, c. 2, and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank and

property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints: restraints in themselves so gentle and moderate, as will appear, upon farther inquiry, that no man of

sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do; and are restrained from nothing but what would be pernicious either to ourselves or our fellow citizens. So that this review *of our situation may fully justify the observation of a [*145] learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom, (z) and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending, therefore, to the students in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous Father Paul to his country, "ESTO PERPETUA!"

(z) Montesq. Spir. of Laws xi, 5.